

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 270 of 2011 & 281 OF 2013

1. MWERU MICHAEL
2. WALTER OJARA:.....PLAINTIFFS

VERSUS

UGANDA ELECTRICITY DISTRIBUTION CO. LTD :..... DEFENDANT
BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiffs filed this suit claiming that they were wrongfully terminated from their employment by the defendant. They stated that the defendant subjected them to a trumped up disciplinary hearing process held contrary to the principles of natural justice, constitutional rights to a fair and just treatment and hearing, the Employment Act, and in breach of the Defendant's Employment Manual.

The plaintiffs were both employed by the defendant in their respective positions. The 1st plaintiff was employed as a Principal Technical Services Officer (PTSO) whereas the 2nd plaintiff was employed as Billing and Revenue Assistant (BRA).

The plaintiffs were summoned to attend a board meeting wherein the chairman noted that he had an internal auditor's report regarding an internal audit implicating the plaintiffs in alleged fraud sending both for leave to allow for external auditors to carry out an IT audit. An independent audit firm was engaged by the defendant who made a report dated January 2011 thereto. The plaintiffs' were again summoned to attend a disciplinary committee hearing on 8th February 2011 and their services were terminated in March 2011.

The plaintiffs sought grant of special, general damages, interest and costs of the suit. The 2nd plaintiff additionally seeks compensation for an injury he sustained whilst in the employment of the defendant.

The defendant filed a written statement of defence denying the plaintiffs' claim and stated that the plaintiffs were not entitled to the reliefs sought and prayed that the suit be dismissed with costs.

The defendant stated that an internal audit was progressed basing on the fact that although there had been some procurement of IT software and licenses, there had remained poor network performance, users were failing to open or access files drives during working time, the whole connectivity was slow, freezing of gadgets and yet all this was expected to have improved the defendant having procured and installed Anti viruses, licences and the general improvement in the quality of IT functionality that the Defendant had paid for.

The internal audit showed that whereas there was a purported purchase, delivery and installation of the IT licences and software which were duly paid for, nothing had been delivered and installed as claimed by the plaintiffs who were the persons charged with the said exercise and had been directly involved in identifying what was required, had purportedly received the said licences and software from the supplier and even recommended that the supplier be paid.

The defendant further stated that above findings were confirmed by an independent audit firm with bias in information technology (IT) that was hired by the defendant upon special request by the plaintiffs made to the defendant's board that such firm be hired since they claimed the internal auditor was biased and had less knowledge of IT issues.

The defendant stated that it was upon the findings of the external auditors that the plaintiffs were asked to appear before the Disciplinary Committee hearing that was arranged to hear their defence. The plaintiffs duly appeared before the said committee, presented both their oral and written responses to the audit discoveries, the committee duly considered their responses as against the findings in the two separate reports and recommended that their services be terminated for having failed to play their role as per their terms of services.

It was upon the receipt of the disciplinary committee report that the person empowered to terminate the employees at the plaintiffs level directed that their services be terminated which was done by letters dated 1st March 2011.

The parties conducted a scheduling conference and filed a joint scheduling memorandum where the following issues were agreed upon for determination by this court.

Whether the termination of the plaintiffs was wrongful and unlawful

What remedies are available to either of the parties

At the hearing, the parties proceeded by way of witness statements. The plaintiffs did not call any other witnesses other than themselves. The defendant presented two witnesses to wit;

Mr. Emmanuel Ssekyewa from Deloitte (Uganda) Limited that carried out the external audit

Ms. Harriet Oyul Ekude, who was the then Principal Human Resource Officer and also as a member of the Disciplinary Committee that heard the plaintiff's case.

The parties filed final written submissions which have been duly considered by this court.

COURT'S DETERMINATION

Issue 1: Whether the termination of the plaintiffs was wrongful and unlawful

The plaintiffs submitted that the defendant breached the rules of natural justice throughout their entire process of terminating their employment.

According to the plaintiffs the following breaches of the principles of natural justice were committed by the defendant;

The plaintiffs were availed with only a summary of the allegations against them at the hearing.

- There was no investigation carried out by the defendant.
- The plaintiffs were availed with a copy of the audit report after they had been suspended.
- They were never given a chance to prepare a defence/ response.
- No prior notification of the meeting was given to the plaintiffs.
- Bias of the Disciplinary committee.

- Baseless allegations
- Deliberate ignoring of the facts in the audit report.
- Failing to hear and determine the plaintiffs appeal.

The plaintiffs' further submitted that the defendant acted contrary to ***Regulation 43 of the Defendant's Employee Manual*** that required the defendant to satisfy itself that investigations have been carried out in strict compliance with the principles of natural justice including a right to be heard as well as an investigating officer not being biased. Furthermore the plaintiff submitted that the defendant acted contrary to ***section 66 of the Employment Act 2006 and item 2 of the Disciplinary Code Schedule 1 of the Employment Act.***

Counsel for the plaintiffs in their submissions cited the case of **Mondo Kagonyera vs Attorney General & Anor HCT-00-CC-MC-010-2010 Media Neutral Citation: [2012] UGCOMMC 147 Judgment Date: 25 June 2012** wherein Justice Geoffrey Kiryabwire held;

"The law and rules relating to natural justice are well settled principles are well settled. The authors, DE SMITH, WOOLF AND JOWELL, 'JUDICIAL REVIEW OF ADMINISTRATIVE ACTION' pg 377-378; note that the expression 'natural justice' has become identified with two constituents of a fair hearing.

That the parties should be given a proper opportunity to be heard and to this end should be given notice of the hearing and that a person adjudicating should be disinterested and unbiased.

DE SMITH, WOOLF AND JOWELL at page 437 further note that a fair hearing does not necessarily mean that there must be an opportunity to be heard orally. In some situations, it is sufficient if written representations are considered.

At the heart of the principles relating to a fair hearing is a constitutional right to just and fair treatment and Art 42 of the Constitution of the Republic of Uganda 1995 provides that

'Right to just and fair treatment in administrative decisions. Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her'

Counsel also cited *Mpungu & Sons Ltd vs Attorney General & Anor Civil Appeal 17 of 2001 UGSC 15* where the Supreme Court held that;

“... The *Audi Alteram Partem* rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that the principle of natural justice that no man should be condemned unheard. (See Black’s Law Dictionary 6th Edition). However, one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits.”

The plaintiffs’ counsel cited **Onyango v Attorney General [1986-1989] 1 EA 456-457 (CAK)** where it was held that the principles of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act just and fairly. It was further held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at. (*DE SOUZA v TANGA TOWN COUNCIL* [1961] EA 377 followed)

Counsel concluded that the defendant’s failure to comply with the provisions of the law as well as failure to adhere to the principles of natural justice in the process leading to the plaintiffs’ termination made their dismissal unlawful.

In response to the plaintiffs’ submissions, counsel for the defendant submitted that in terminating the plaintiffs’ employment, not only did the defendant follow the disciplinary procedure as set down in the defendant’s employment manual of April 2004 but also did so as by law.

Counsel submitted that the defendant offered the plaintiffs the opportunity to make responses to the internal audit findings before the final report was issued. Counsel submitted that since the revelations and findings of the audit were directly pointing to a likely misconduct by the plaintiffs, the internal auditor felt

that there was a need to explain all the discoveries of misconduct that the audit report was bringing onto the surface before a final report could be made.

With regard to the call and opportunity to meet the defendant's board, counsel submitted that the meeting with the defendant's board of directors was not a disciplinary hearing but rather was a meeting to inform the plaintiffs of the audit exercise which the plaintiffs were certainly aware of. Counsel further submitted that the said meeting guaranteed the plaintiffs' right to be heard as well as ensured that the findings of the internal audit were scrutinized by an independent audit firm to rule out any element of bias or doubts.

Counsel also submitted that the plaintiffs' allegation that the chairperson of the disciplinary committee was biased was purely an afterthought. Counsel submitted that the plaintiffs were well aware that it was purely in order for a head of department chairing such a disciplinary committee as such a person would clearly know the challenges facing the department.

On failure to determine the plaintiffs' appeal, counsel for the defendant submitted that the plaintiffs never filed any appeal. The defendant submitted that under the defendant's employment policy, the right forum for lodging an appeal was to the defendant's managing director and not the chairman of the board since the defendant's board was simply an advisory board and not a management board.

Counsel for the defendant submitted that the defendant demonstrated a high level of attention in the process that led up to the termination of the plaintiffs' employment which he summarized as follows;

Their views were considered even as the internal auditor was carrying out her audit.

The board was equally concerned and invited them for a meeting and informed them about what the audit had unearthed.

The board went ahead and honoured their request and hired an independent external audit firm to verify and give a second opinion.

The defendant's managing director wrote to the plaintiffs' way before they could be called for a disciplinary hearing and gave them a detailed account of the accusations against them and asked them to respond thereto in writing.

The plaintiffs were requested to provide their responses in writing for consideration which they did and were considered.

The plaintiffs were then summoned and they appeared and defended themselves before a disciplinary hearing.

Not only did the committee share the reports with the plaintiffs, but it also went on to consider their written and oral responses.

The disciplinary hearing report clearly shows that the committee seriously deliberated upon the plaintiffs' responses before coming with their recommendation.

And also by letters dated 2nd May 2011, the defendant even calculated their terminal benefits which the plaintiffs however refused to pick up till today.

Counsel concluded this issue by submitting that in terminating the plaintiffs' employment, the defendant applied every rule of natural justice as well as fairly and justly heard the plaintiffs. Counsel prayed that this court find no merit in this issue.

The case of **Taylor LJ in R v Army Board of the Defence Council, ex parte Anderson [1991] 3 W.L.R 42** held that a body required to consider and adjudicate upon an alleged breach of statutory rights and to grant redress when necessary seems to be exercising an essentially judicial function and as such is required to follow the rules of natural justice.

The principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done. These rules seek to ensure that justice shall not only be done, but also be seen to be done. There are two principles of natural justice that is; *Nemo Judex In Causa Sua* (Rule against bias) as well as *Audi-Alteram Partem* (Hear the other side).

Analysis

In this case the plaintiffs' allege that the defendant breached the principles of natural justice in the process of terminating their employment. To determine this issue I will first resolve whether the plaintiffs were given the opportunity to be heard. This right is so fundamental that it is given in *Article 44 of the Constitution* as one of those rights that are non-derogable.

The effect of reaching an administrative decision without observance of the principles of natural justice is that the decision becomes void. It may lead to the quashing of a decision and award of damages as was stated in the ruling of **Katutsi, J in Annebrit Aslund v Attorney General HC Miscellaneous Cause No. 441 of 2004.**

According to the plaintiffs; they were availed with only a summary of the allegations against them at the hearing, were availed with a copy of the audit report after they had been suspended and they were never given a chance to prepare a defence/ response.

The rule of fair hearing demands that there must be full disclosure of all evidential facts and of all documents proposed to be used against the party. It is done in order to provide an opportunity to the person concerned, to correct and contradict anything prejudicial to him. It requires the adjudicatory authority to afford reasonable opportunity to the party to present his case.

PW1 in his witness statement testified that the Board Chairman Mr. Gad Gasaatura verbally summarized for him the findings of the IT section Investigation that were carried out by Ms. Kakai Elizabeth. There is no evidence on record disputing this allegation by the plaintiffs.

In administrative matters, it happens that the inquiry is entrusted to someone else and on the report of the enquiry the action is taken by the competent authority. In these cases it is essential to supply the copy of report to the charged employee, before final decision is taken by the competent authority. If it is not done, it is held as the violation of principles of natural justice. In *Union of India v. E. Bashyan AIR 1988 2 SCC 196*, a two judge Bench of the Supreme Court held that failure to supply the inquiry report to the delinquent before the disciplinary

authority took a final decision would constitute a violation of the principle of natural justice.

In the present case the decision making authority-defendant formally initiated proceedings against the plaintiffs and as result a preliminary enquiry was conducted. It was upon the report made that a decision was taken to have the plaintiffs' employment to be terminated. It was important that there should have been a full disclosure of the pre-hearing report to the plaintiffs. The contents of the report ought to have been disclosed to the plaintiffs as this report was to be taken into consideration by the decision making authority.

By so doing, the defendant breached the principle of fair hearing. The plaintiffs' ought to have been availed with detailed copies of all the evidence of the purported allegations before the hearing to enable them prepare sufficient evidence to defend themselves.

Furthermore, no prior notification of the meeting was given to the plaintiffs. Hearing starts with the issuance of notice to the affected party. It is the minimum essential requirement. Adequate notice ought to be given that is mentioning time, place and name of authority taking action, grounds of action among others.

The plaintiffs further submitted that there was no investigation carried out by the defendant and that the allegations against them were baseless. The plaintiffs also submitted that the defendant deliberately ignored of the facts in the audit report.

According to the evidence on record, an internal audit was conducted by the defendant implicating the plaintiffs in alleged fraud which resulted into subsequent termination of the plaintiffs' employment. There's no evidence showing that the defendant conducted an investigation to verify whether the plaintiffs were the actual perpetrators of the alleged fraud. DW2 in her cross examination agreed that an audit was not an investigation. She stated this with authority given her academic proficiency as a holder of Bachelor of Commerce and CIPS (Chartered Institute of Purchasing and Supply) qualification.

I find that indeed besides the audit carried out by the defendant, no investigations were conducted. The defendant ought to have conducted internal investigations to satisfy herself on whether the plaintiffs were indeed the culprits

of the alleged fraud. The fact that the person who carried out investigations did so in the absence of the plaintiffs, it would amount to violation of natural justice if the evidence is taken behind their backs and was not disclosed to them.

However this court will not indulge in the merits or demerits of the particulars of the allegations against the plaintiffs but will limit itself to determining whether the process of termination was unlawful. I therefore will make no findings as to whether the allegations against the plaintiffs were baseless as well as whether the defendant deliberately ignored the facts in the audit report.

I will now turn to the plaintiffs' allegation that the disciplinary committee was biased. Bias is a condition of mind which sways judgments and renders a judge unable to exercise impartially in a particular case. In this case, the chairman of the disciplinary committee Oidu Franklin was also the Manager Technical Services for the defendant and the plaintiffs were below him as principals. The plaintiffs took orders from the Manager Technical Services. The defendant led evidence and also submitted that it was purely in order for a Head of Department to chair such a disciplinary committee as such a person would clearly know the challenges facing the department. The defendant further submitted that the chairman Franklin Oidu was not at all the complainant against the plaintiffs as to be biased and their issues only rose upon findings unearthed by an internal audit confirmed by the external auditors.

A good system of administration of justice is based on the maxim that one who decides must hear, meaning thereby that one and the same person must hear and decide, and that hearing and deciding functions should not be bifurcated. That a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing, is too fundamental a proposition to be doubted.

If one person hears and another decides, then personal hearing becomes an empty formality. Any decision made under such circumstances is likely to run into challenges due to circumstances under which the evidence is collected. The persons directly involved are the best persons to hear the disciplinary proceedings in order to make an informed decision.

I am inclined to concur with the defendant's submission that the chairperson of the committee was not biased. The plaintiffs led no evidence to satisfy this court that there was a likelihood of bias by the chairperson against them.

The plaintiffs were familiar with the defendant's policy as to having heads of department chairing such committees and cannot therefore plead bias in this matter. In this case the allegation of bias against the disciplinary committee was not maintainable and it was the duty of the plaintiffs who made the allegation of bias or favouritism, that were required to prove the same.

As for the plaintiffs' appeal; the plaintiffs filed appeals to the Board Chairman Gad Gasaatura. According to the defendant's evidence, the right forum to lodge the appeal was to the defendant's managing director and not the chairperson board of directors. The plaintiffs cannot therefore fault the defendant for failure to hear their appeal.

On that note, issue 1 succeeds. The process of termination of the plaintiffs' employment was tainted with breach of the principles of natural justice. The effect of reaching an administrative decision without observance of the principles of natural justice is that the decision becomes void. It may lead to the quashing of a decision and award of damages as was stated in the ruling of **Katutsi, J in Annebrit Aslund v Attorney General HC Miscellaneous Cause No. 441 of 2004.**

Issue2: What remedies are available to either of the parties.

The plaintiffs sought the following remedies from this court;

Special damages; General and punitive damages; Interest per annum on damages from March 2010 until payment in full; Costs and interest thereon at court rate; Any other relief that the court would deem fit.

Both parties extensively submitted on this issue and their submissions were duly considered.

According to the plaintiffs' employment contracts, they were entitled to one month notice in writing and on termination of such notice, or on the Board of Directors paying to the person engaged one month salary and such other sums as may be entitled to hereunder in lieu of such notice.

The 1st plaintiff is therefore awarded **UGX 6,067,723** and the 2nd plaintiff **UGX 962,932** being one month's salary in lieu of notice.

The 1st plaintiff is awarded **UGX 21,223,031** and the 2nd plaintiff **UGX 3,370,262** being payment of gratuity.

The plaintiffs' prayer for payment in lieu of leave is denied as they did not sufficiently prove to this court why and how this prayer arose.

The 2nd plaintiff's prayer for risk allowance was also not sufficiently proved hence denied.

The 2nd plaintiff's prayer for compensation under the Workman Compensation Act, Cap 225 is also denied. The 2nd plaintiff failed to prove to this court that he was permanently incapacitated as a result of his work for the defendant. He did not lead any medical evidence whatsoever to prove that he damaged his eyes due to the long hours with computers. This prayer therefore fails.

Based on the circumstances surrounding this case, the plaintiffs are awarded general damages. It is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Respondent. I therefore find the award **UGX 25,000,000** to the 1st plaintiff and **UGX 15,000,000** to the 2nd plaintiff sufficient general damages.

I decline to award any punitive damages since no evidence was led to justify the same.

The plaintiffs are awarded 15% **interest** on the sums awarded from the date of Judgment till payment in full.

The plaintiffs are awarded costs of the suit.

I so order.

Dated, signed and delivered be email at Kampala this 23rd day of April 2020

SSEKAANA MUSA
JUDGE