

**THE REPUBLIC OF UGANDA**  
**THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA**  
**LABOUR DISPUTE CLAIM. NO. 002 OF 2015**  
**(ARISING FROM MGLSD 274. OF 2015)**

**BETWEEN**

**DONNA KAMULI..... CLAIMANT**

**AND**

**DFCU BANK..... RESPONDENT**

**BEFORE**

1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2.Hon.Lady Justice Linda Tumusiime Mugisha

**PANELISTS**

- 1.Mr. Ebyau Fidel
2. Ms. Julian Nyachwo
- 3.Ms. Harriet Mugambwa

**AWARD**

**SUMMARY OF THE FACTS**

From the Memorandum of Claim as well as the reply to the same, and from the submission of both counsel the facts in this case are revealed as: -

By letter of appointment dated 11/10/2011, the claimant was employed by the respondent as a Banking Officer. She was subsequently promoted to the rank of customer services officer by letter dated 17/01/2013.

According to her, during the course of her work, the appraisals were good and rated "C" until she developed misunderstandings with one of her Line Managers and her appraisals were downgraded to "D" through a mechanism known as "a moderation committee". She was then placed under a Performance Improvement Plan (P.I.P) after which according to her, she scored "C" although she never got communication regarding particularly the P.I.P.

Having had a new Line Manager she scored "C", "B" and "D" for the months of July, August and September 2014 respectively. She was on 16/10/2014 terminated for non performance without being accorded a fair hearing. 2



According to the respondent, during the course of employment of the claimant, she was subjected to performance appraisals which fully involved her and when for the year 2013, she was rated "D" by the moderation committee, she was placed under a P.I.P which coincided with the midyear assessment and both were done concurrently giving the claimant a "D" which amounted to non performance.

Since appraisals involved the claimant by way of feedback and discussion on ways to improve, according to the respondent, the termination of the claimant's services was lawful and in accordance with the Human Resource Manual.

The following legal issues were framed and agreed upon by both parties.

- 1. Whether the dismissal of the claimant from the employment of the respondent was wrongful, unfair and /or unlawful.**
- 2. Whether the claimant is entitled to any damages?**

We now proceed to resolve the first issue. The reason for termination of the services of the claimant was poor performance. Section 66 of the Employment Act provides

**"(i) Notwithstanding any provision of this part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.**

**(ii) Notwithstanding any other provision of this part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representation which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (i) may make."**

Evidence was led to show that the claimant underwent a system of appraisals. The record shows that the claimant initially scored "C" which was awarded by her immediate supervisor. According to **the Human Resource Manual of the respondent (Staff Handbook 2011) page 15-16, this rating would be given to someone who has:**

**"Achieved all the set objectives and performed to the required standard including exceptional conduct in DFCU Bank core values.**

**Achieved the main objectives of the required standard.**

**80-99% met”.**

According to evidence adduced by one William Sekabembe on behalf of the respondent in examination in chief:

“ It is generally known that members of staff who get poor grading E – are terminated, those that get fair – D, are put on a performance improvement plan (P.I.P) for a period of three months and if at the next review such members get another D, those members are also treated as having obtained a poor – E rating and are immediately terminated.”

According to him, the “C” grading from her Line Manager, one Jackline Nakigudde was not justified so he ordered a re-appraisal. At a meeting of Consumer Management Committee the rating was maintained as “C” but this was downgraded by the executive committee to “D” thus placing the claimant under a performance improvement plan (P.I.P).

In our understanding, an “appraisal” is a method of assessing performance of an individual against numerous targets. This being the case, under normal circumstances the immediate supervisor is the one who assesses the day to day performance of the individual since he or she is presumed to be interacting with his junior during the course of work on a day to day basis. We therefore think that the other persons involved in the appraisal system ought to rely on the immediate supervisor unless there is strong reason not to do so.

Mr. Sekabembe, the then Head of Banking was not the immediate supervisor of the claimant. He did not believe that the rating of “C” by the immediate supervisor one Nakigudde was genuine. The basis of his doubt was because of the verbal complaints against the claimant relating to serious breakdown of communication, working relationship, insubordination, late coming and generally poor attitude towards work. The question in our mind is whether those verbal complaints had been truly communicated to Mr Sekabembe by the same Nakigudde who thereafter rated performance of the claimant “C”.

It seems to us that if Mr Sekabembe had not believed the competency of the claimant, neither should he have believed the competency of the Line Manager to assess the claimant or any other junior under her. In our view the inconsistency of the line manager creates doubt in the appraisal system . Even if there was no inconsistency in this regard, we think the moderation committee system left a lot to be desired.

The moderation committee had two levels. The departmental moderation committee which had the

Line Managers as members could not take a final decision in the appraisal system. At this committee the appraisee was not allowed to be present on the ground that he/she was represented by the Line Manager. 4

The final moderation committee to finally upgrade or downgrade an employee and thus impact on his/her job evaluation was the executive

Moderation committee which according to Mr. Sekabembe (in cross examination) constituted Regional Managers.

It is our considered opinion that the fact that this executive moderation committee could easily overturn the grading of an employee to his or her prejudice without hearing from his/her Line Manager who initially gave her the grade or the employee himself/herself to defend the initial grade is to say the least very unfair. We take the position that any appraisal system that is not constituted of principles of fairness and natural justice is but a sham.

It was asserted on behalf of the respondent that the claimant was placed under a performance improvement plan(P.I.P) after she had scored “D”. The record does not show the assessment of the P.I.P. It is our considered opinion that after the P.I.P period, there should have been an assessment to determine whether the claimant had passed the P.I.P or not. It is not acceptable to us that ( according to one Kasemeire Scovia, claimant’s supervisor for the P.I.P) her assessments were missing.

In his submission, counsel for the respondent argued that there was no requirement that supervision had to be written. We do not agree. In the absence of a written report about the supervision of the claimant’s P.I.P, there could not be any basis that she had failed the same and therefore liable to termination for non-performance. We do not accept the contention of the respondent that because the P.I.P coincided with the mid-year assessment for 2014, both midyear and P.I.P assessments were done concurrently. The respondent having deemed it fit to place the claimant under P.I.P was under an obligation to independently assess the claimant for this particular improvement plan to determine if she had in fact improved especially when the consequences of failure were known by all and sundry to be prejudicial to the claimant.

Throughout the evidence of the respondent and in submission of counsel for the respondent, the question whether appraisals amounted to a hearing kept lingering in the air. Counsel submitted thus:

**“The appraisal process entails a discussion between the employee and his or her manager. It is a process that is fully involving the employee. The employee gives feedback on her performance and is heard. After the employee makes his or her representations, the**

**moderation committee sits and considers the performance and gives a final rating.....”**

As already pointed out earlier in this award, the employee or the Line Manager do not participate in the final grading that affects the employee. 5



The claimant had scored “C” which was downgraded to “D” by the moderation committee in the absence of the Line Manager and the claimant herself. This cannot be called a fair hearing by any stretch of imagination. The process in our view does not include any iota of principles of natural justice contemplated under section 66 of the Employment Act, cited at the beginning of this Award .

The respondent was not helped either by not calling the evidence of one Jackline Nakigudde who had given the claimant a “C”. She would have thrown more light on her basis of the good grade which was overturned by the moderation committee.

We are persuaded by a Kenyan decision quoted by the claimant – **QUEENVELLE ATIENO OWALA VS CENTRE FOR CORPORATE GOVERNANCE (Industrial Court of Kenya, cause 81/2012)** in which the court held that:

**“It was insufficient that the respondent had various discussions with the claimant. It was immaterial that the claimant was even at one time appraised and found wanting by Dr. Okumbe. Appraisals and discussions held between employees and their employers touching on employees work performance, do not add up to a disciplinary hearing, and can only be evidence in support of good or poor performance at a disciplinary hearing. Whatever records the respondent held against the claimant were to be subjected to the rigours of a disciplinary process before a decision could be made. Termination was lacking in both substantive validity and procedural fairness....”**

In the instant case, the respondent had various emails about late coming of the claimant, about complaints of customers and about the rudeness of the claimant. These , together with the appraisals , in our view, would have been adduced at the disciplinary hearing to which the claimant would have had opportunity to respond. Only this way, would this court be satisfied that the tenets of fairness and natural justice were complied with.

The claimants evidence that she scored “C”, “B” and “A” for the period of July, August and September 2014 respectively by assessment of her new Line Manager one Mawejje Andrew was not controverted.

It is therefore very hard for this court to reconcile this latest grading with the contents in the termination letter dated October 15th 2014 which had performance assessment of the year 2013 and midyear 2014 as reason for the termination of employment. The question is : Why would a rating of the previous year be preferred to a rating of the current period to determine whether an

employee is a performer or a non performer? Even if this court was to believe that the moderation committee had rightly graded the claimant “D”, wouldn’t it be fair that before her termination in October 2014, her scores of July, August, and September be put under consideration ? Our answer is in the affirmative. Consequently, since there was no evidence that this was the case, we think there was a degree of dishonesty in the 6

overall assessment of the claimant's performance. This is especially so, considering that evidence was not clear as to whether the respondent complied with her own Human Resource Manual ratings (staff handbook 2011) page 15-16(supra).

We think that the whole appraisal system of the respondent needs overhaul to reflect fairness to both the employee and the employer.

For the above reasons we hold that the termination of the claimant was unlawful.

The next and last issue relates to damages.

### **GENERAL DAMAGES**

Whereas the claimant in her submission prayed for 100,000,000/=, the respondent submitted that 5,000,000/= would be sufficient. Of course both of these are miles apart. The award of general damages is a discretion of the court and this discretion is always exercised with due regard to the circumstances in each case. The claimant had been working with Bank of Baroda and she probably changed to the respondent expecting better rewards for her performance. She had worked for the respondent for 3 years and she had her career cut short. In the premises 60,000,000/= general damages would be sufficient.

### **PUNITIVE/AGGRAVATED DAMAGES**

In the respondent's submission punitive damages are distinguished from aggravated damages. Counsel was not helpful in the actual distinction. In our understanding, aggravated damages are punitive in nature and are intended to give relief to the claimant or the aggrieved party for the embarrassment that he or she may have suffered at the instance of the other party. Thus in **OBONYO AND OMOR VS MUNICIPAL COUNCIL OF KISUMU 1971 EA 91 at 96** the Judge said “ **It is well established that when damages are at large and the court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff as, for example, causing him/her humiliation or distress.**”

In the instant case we are of the opinion that the fact that the grading of the claimant could by a stroke of a pen be reversed without her being heard and consequently causing her termination distressed her and humiliated her. The fact that her grades of July, August and September 2014 were not even considered before her termination, in our view, compounded the already bad situation. Accordingly we consider 80,000,000/= as aggravated punitive damages sufficient.

### **SEVERANCE**

The submission of counsel for the respondent that the prayer for severance allowance does not arise since the termination was not unfair has already been defeated by our holding that the termination was unlawful. We therefore agree 7

with the submission of counsel for the claimant that she is entitled to this allowance. However, section 89 of the Employment Act provides:

**“The calculation of severance pay shall be negotiable between the employer and the workers or the labour union that represents them”.**

We do not think that the legislature in the above provision intended that each employee in a given organisation was to individually discuss/negotiate a specific severance allowance every time that it was due. In our view, the intention of the legislature was to allow the workers and the employers in a given organisation to employ a method of calculation across the board applicable to each and every employee. To this extent, this court expects that the respondent and indeed every other employer in compliance with this provision already has a system of calculation in place.

It is our decision therefore that should such a method be in existence by the time of this award, the same should be applied to reach at the allowance payable to the claimant.

In the event that there is no negotiated method of calculation by the time of the award, we think the respondent would have been in breach of section 89 of the Employment Act. In that case the discretion of the court would come into play in accordance with Article 126(2)(C) of the constitution.

The claimant claimed severance pay of one month for every year worked. We think this would be reasonable. Subject to verification of the years the claimant worked for the respondent, we grant this value of severance allowance.

### **COMPENSATORY ORDER**

The claimant argued that she was entitled to salary from October 12th 2014 to the date of judgement which according to her was a total of 21,829,000. She relied on the case of **RIDGE vs BALDWIN & OTHERS (1964)AC 40** and other authorities as reflected on the court record.

The respondent on the other hand argued that the claimant could only claim for damages and not salary termination. He relied on the authority of **TWINOMUGISHA VS RIFT VALLEY RAILWAYS (U) LTD HCCS 212 OF 2009** and **BATULI GEORGE WILLIAMS VS NAKASONGOLA DISTRICT LOCAL GOVERNMENT – HCCS 372/2002**.

This court in the recent case of **FLORENCE MUFUMBA VS UGANDA DEVELOPMENT BANK LABOUR DISPUTE CLAIM 138/2014** after distinguishing the supreme court case of **BANK OF UGANDA VS BETTY TINKAMANYIRE S.C.C.A 12/2007** and

**OMONYOKOL AKOL JOHNSON VS ATTORNEY GENERAL S.C.C.A 06/2012** held that the claimant was entitled to her salary arrears from the date of the unlawful 8

termination to the date of the award. We have no reason whatsoever to depart from this position.

#### **ACCRUED AND UNTAKEN LEAVE**

The claimant in her evidence in chief said that the Line Manager did not give her sick leave. However her line manager, one Scovia Kasemerire denied receiving any application for such leave on grounds of pregnancy. But in cross examination the claimant said she got leave post the time she needed it. Scovia herself said that she advised the claimant to change the dates of her sick leave so that it would not affect her annual leave. In the circumstances we are of the view that the evidence of the denial of sick leave was not sufficient . We decline to grant this prayer.

#### **OVERTIME**

We agree with the respondent that the claimant never proved how many hours of overtime she was entitled to and how such hours arose. She only stated that generally she would work till late in the evening and we think this generalisation did not amount to proof of the hours of overtime.

#### **OUTSTANDING LOAN**

The respondent argued strongly that the terms of the loan agreement between the bank and the claimant were not known to the court and that therefore the claim was not proved. Counsel relied on the authority of **TWINOMUGISHA VS RIFT VALLEY RAILWAYS (U) LTD HCCS 212 OF 2009**. He also argued that since the claim had not been pleaded, it was an afterthought and offended the principles of not taking a party to the proceedings by surprise. He relied on the case of **GANDY VS GASPAIR (1956) EACA 139**. In his submission, unlike the case of **OKELLO NYMLORO VS RIFT VALLEY RAILWAYS, C.S. 195/2009**, the claimant in this case did not adduce evidence of the loan terms and bank account and neither did she plead them. On the other hand, counsel for the claimant in rejoinder argued strongly that the claim for payment of this loan was pleaded in the claimants witness statement but the respondent chose not to cross examine her on the same and as such left the evidence uncontroverted. He relied on the authority of **HABRE INTERNATIONAL CO LTD VS EBRAHIM AZAKARIA KASSAM & OTHERS S.C.C.A 4/1999**. Relying on **FOREST AUTHORITY VS SAM KIWANUKA C.A. NO. 005/2009** and **OKELLO NYMLORO VS RIFT VALLEY RAILWAUS (SUPRA)** Counsel claimed for “Special damages of an amount equivalent to the outstanding bank loan as at today owing to the unlawful termination of employment”.

We appreciate the contention of counsel for the respondent that parties are bound by their pleadings and indeed on perusal of the claim, pleadings relating to acquisition of the loan and terms of payment of the same do not exist in the claim. 9



We notice however that in the claimants witness statement under clause 48(a) she states:

**“I had never had any financial issues and my credit reference Bureau Card was good until this experience. Right now because of the way of my exit was handled by the respondent, my credit rating has been tarnished and I cannot obtain a loan from any bank because I have defaulted in paying the salary loan I had secured from the bank .....For this I pray for general damages.**

**The respondents recoveries department harassed me with calls demanding I pay the loan or they would post my picture in the news papers..... I expected that owing to special circumstances surrounding my loss of a job they would take on a softer approach .....that in the circumstances the respondent be ordered to clear the loan itself having taken away from me abruptly and unconstitutionally my source of livelihood."**

This was evidence in chief of the claimant. As counsel of the claimant rightly submitted, the claimant was not cross examined on those assertions and hence the evidence was not challenged or controverted. The question in our mind is: Would the unchallenged evidence be legally swept off the record merely because it concerned a matter that was not pleaded? In our considered view, the answer is in the negative. It is the duty of the appropriate party to cross examine every witness that brings evidence against such party with a purpose to discredit the said evidence. As was ably put by the Supreme Court in **HABRE INTERNATIONAL CO LTD VS EBRAHIM AZAKARIA KASSAM & OTHERS S.C.C.A 4/1999** which was relied upon by Hon. Lady Justice Percy Night Tuhaise in **DIVORCE CAUSE No. 63/2013 – NIGEL SUTTON VS SLOWEY SHAUNA SUTTON**

**“Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all”.**

The undisputed evidence is that the claimant entered into a salary loan agreement with the respondent and that because of loss of her job she defaulted to pay the loan and therefore the respondent started a process of recovering the loan by consistently harassing her to pay up. It is our view therefore that the case of **OKELLO NYMLORO VS RIFT VALLEY RAILWAYS C.S.195/2009** is applicable. In this case, the court held that the defendant was liable to pay the loans because

**“the loan was being repaid at approximately Ug. 5,224,484 per month both principal and interest. The loan was premised on the understanding that the plaintiff would continue to be employed by the Rift Valley Railways Ltd. And pay off the loan eventually which was frustrated by the unlawful act of the defendant.**

In the recent case of **FLORENCE MUFUMBA VS UGANDA DEVELOPMENT BANK (SUPRA)** this court held that the claimant was entitled to be relieved of the loans that were intended to be wholly settled by salary deduction but for the unlawful 10

termination of employment. We have no reason to depart from this decision. In the result, the claimant is entitled to be relieved of the loan obligations if the salary in terms of the loan agreement was meant to secure the whole loan.

### **PROVIDENT FUND**

In our understanding, the provident fund is a retirement benefits scheme into which the personal savings of the employee are paid. By submitting to this court that no evidence was adduced by the claimant to show that she contributed to the scheme, counsel for the respondent seems to suggest that in fact the claimant never contributed to the scheme and therefore she was not entitled to any benefits there under.

In the termination letter addressed to the claimant, the respondent admitted 6,518,231/= being both the claimant's and respondent's contribution to the provident fund.

Moreover, the claimant was not cross examined on the evidence adduced that she was a beneficiary to the said provident fund. The only question in our view is whether the fund could be used by the respondent to settle the loan obligation of the claimant.

We have already stated that the claimant is entitled to relief of the loan if the salary deductions were originally meant to secure the whole loan. Since the provident fund is the personal savings of the claimant, it would be not only grossly unfair but contradictory to at the same time use it to pay for the said loan. In our view this fund would be available to settle loan obligations of an employee in the event that such employee loses her job in the circumstances other than unlawful termination by the employer who at the same time would have granted the loan on the basis of the salary. The claimant is therefore entitled to recover all her dues under the provident fund.

### **SPECIAL DAMAGES**

We agree with the submission of counsel for the respondent that none of the items under special damages was proved in court. There was no connection whatsoever between the expenses and the terms of Employment. Neither were the said special damages pleaded. We therefore reject them.

### **REPATRIATION**

We agree with counsel of the respondent that there was no evidence to suggest that the claimant was recruited from over 100Kms from Kampala, her workplace. No evidence was adduced to suggest that after losing the job she would be travelling this distance. Accordingly this claim is rejected. 11



In the final analysis, we allow the claim with the following orders:

- (1) The termination of the claimant from her employment was unlawful.
- (2) The claimant is entitled to 60,000,000/= as general damages
- (3) The claimant is entitled to 80,000,000/= aggravated/punitive damages.
- (4) The claimant will be entitled to severance allowance calculated under a negotiated system between the workers and the respondent or between the respondent and a union representing the workers of the respondent. In the absence of such a system the claimant is entitled to the equivalent of 1 months pay per year worked.
- (5) The claimant will be entitled to salary arrears (in compensation) from the date of the unlawful termination to the date of this award.
- (6) The salary loan granted to the claimant by virtue of her employment and wholly secured by such employment shall not be recoverable.
- (7) The claimant will be entitled to 6,518,231/= being the provident fund contribution admitted by the respondent in the termination letter.
- (8) The claimant will be entitled to costs incurred in this matter.

## **JUDGES**

1. Hon. Chief Judge Ruhinda Asaph Ntengye .....
- 2.Hon.Lady Justice Linda Tumusiime Mugisha .....

## **PANELISTS**

- 1.Mr. Ebyau Fidel .....
2. Ms. Julian Nyachwo .....
- 3.Ms. Harriet Mugambwa .....

**Delivered on 15th of December 2015**