

THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE: CLAIM NO.101 OF 2014 ARISING FROM HCT-CS-908 OF 2005

RICHARD NDEMERWEKICLAIMANT

VERSUS

MTN (U) LTD.....RESPONDENT

BEFORE

- 1. The Hon. Chief Judge, Asaph Ruhinda Ntengye**
- 2. The Hon. Judge, Linda Lillian Tumusiime Mugisha**

PANELISTS

- 1. Mr. Frankie Xavier Mubuuke**
- 2. Mr. Anthony Wanyama**
- 3. Mr. Ebyau Fidel**

AWARD

SUMMARY OF THE FACTS

On the 24/07/2002 the claimant was employed by MTN Publicom as a Technical Assistant on a gross salary of Ugsh. 879,000/=. After an appraisal, the claimant's salary was increased to Ugsh. 993,228/=. His major responsibilities included among others collection of payphones from stores, installing them in various places and collection of the phone boxes that were full (Annex B) and delivery of the full boxes to the coin counting room for verification.

He received a suspension letter on May 27th 2005 (Annex "D") inviting him to attend a disciplinary meeting to answer charges of:

- I. Attempted theft of coins**
- II. Attempted fraud relating to unauthorized removal of coins from company payphones**
- III. Causing financial loss to the company relating to unauthorized removal of coins from payphones**

On 30th of May 2005 he filed a written defence to the allegations denying the charges and on the same day appeared before the disciplinary committee where he denied all the charges. He was found guilty of causing financial loss and he was dismissed and later arrested and detained on

charges of embezzlement. The claimant contended that the dismissal was illegal, wrongful and prayed for the both special and general damages.

MTN Publicom ceased operations on the 28th November 2007 and on 31st May 2008, its assets and liabilities were taken over by MTN (U) Ltd the respondents. MTN (U) Ltd denied liability and asserted that the claimant was lawfully dismissed on reasonable suspicion. They raised a Preliminary Objection on the grounds that the matter was time barred and the claimant had not raised a cause of action against MTN (U) Ltd. This Court heard made a decision on the Preliminary Objection. We decided that the case was not time barred and that MTN (U) Ltd, were the respondents in the instant case, having taken over MTN PubliCom on the 31st of May 2008.

Evidence in chief and in cross examination was adduced by the Claimant himself and Mr. Sempijja John Bosco, Legal & Regulatory Adviser of MTN(U) Ltd for the Respondents.

The issues that remained unresolved were as follows:

- 1. Whether the claimant was lawfully terminated from employment?**
- 2. What are the remedies of the parties if any?**

RESOLUTION OF ISSUES:

ISSUE 1. Whether the claimant was lawfully terminated from employment?

What is disputed in this case is the manner of dismissal, where the claimant contended that his dismissal was irregular, illegal and wrongful. The respondent contended that the dismissal was lawful.

From the Pleadings and evidence adduced the fact of the claimant's employment was not disputed, neither was his dismissal. From the Facts on record, the claimant entered into a contract of service with MTN PubliCom on the 24th July 2002, (exhibit A) to work as Technical Assistant. According to him he undertook his responsibilities diligently until the 27th of May 2005, when he received a letter signed by Mr. Thomas Lethmadment, suspending him from duty and inviting him for a disciplinary hearing. The charges therein were:

- I. Attempted theft of coins.
- II. Attempted fraud relating to unauthorized removal of coins from company payphones.
- III. Causing financial loss to the company relating to unauthorized removal of coins from payphones.

He denied these charges in writing and also appeared before the Disciplinary Committee on the 30th and 31st May 2005. At the disciplinary hearing, he stated that there was no way he could have removed any coins from the boxes, because he removed them in the presence of security guards

and they would not be accepted by the staff in the counting office if their seals had been unsealed or tampered with.

He also argued that no evidence had been adduced to prove the charges against him. Even then at the conclusion of the hearing on the 31st May 2005, he was declared guilty of **“causing financial loss to the company relating to unauthorized removal of coins from the company payphones”** and on the same day he was dismissed. His dismissal letter was signed by Mr. Benon Ntambi head of Finance and Administration and copied to the Head Operations, Technical Manager and Human resources.

In cross examination the claimant stated that he had protested the decision and requested for the record of the proceedings and guidelines on how to appeal to enable him appeal. He said he was advised to go downstairs for the guidelines but was instead arrested and detained at Kira Road Police on charges of embezzlement. He was detained on the 31st May 2005 and released on bond on the 6th of June 2005. He kept reporting until the 26th of August when the bond was cancelled.

The claimant contended that, his dismissal was unlawful, unfair and contrary to the rules of natural justice. He argued that his letter of appointment had clearly stipulated that:

“the company had a right to summarily terminate the agreement... if the Board was satisfied that the employee had been found guilty of misconduct, criminal activity and or been grossly negligent in the exercise of his duties...resulting in financial loss of the company.”

He argued that his dismissal letter was not written by the Board nor was it copied to them.

RW1 in cross examination said that the letter of dismissal,

“... does not show it was signed on behalf of the Board.”

The claimant further stated that he was denied the opportunity to exercise his right of appeal when he was arrested and detained and only released after the time for appeal had lapsed, thus rendering the dismissal *ultra vires* and therefore unlawful.

The respondents did not challenge this evidence.

Counsel for the respondent contended that the claimant had departed from his pleadings and was not entitled to claim that the dismissal was unlawful, unfair and contrary to the rules of natural justice when this was not in his pleadings.

The record shows that the claimant pleaded that his dismissal was irregular, illegal and wrongful.

The concern of Counsel as we see it is that the claimant pleaded the wrongfulness of the termination yet he submitted on the unlawfulness of the same termination. We agree that pleadings are intended to ensure that both parties are aware of the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or meet the opponent. See **GANDY Vs CASPAR AIR CHARTER LIMITED quoted in BAKALUBA PETER MUKASA V NAMBOOZE BETTY BAKIREKE ELECTION PETITION APPEAL NO. 04 OF 2009.**

The question is whether a prayer for wrongful dismissal is different from a prayer for unlawful dismissal and whether therefore the remedies in each are different? The Black's Law dictionary defines these terms as follows:

- **Wrongful:** *as “characterized by unfairness or injustice, contrary to the law,*
- **Unlawful:** *“not authorized by the law, illegal; criminally punishable.*

From these definitions it is clear that there is no difference between unlawful and wrongful, both mean “*contrary to the law*”. The claimant claimed for a declaration inter alia that the dismissal was wrongful and in our opinion this prayer neither contradicts his pleadings nor the issue framed under the joint scheduling memorandum as stated above.

We now proceed to resolve issue 1. That is, ***Whether, the Claimant was lawfully terminated?***

Counsel for the respondent contended that the law applicable to this case was the repealed Employment Act Cap 219, because the relationship between the claimant and MTN Publicom was terminated before the enactment of the Employment Act 2006 and accordingly Section 13 of the Interpretation Act applied to this case. Section 13 stipulates that:

“where any Act repeals any other enactment, then unless the contrary intention appears , the repeal shall ... not affect any investigation, legal proceeding or remedy in respect of any such right privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal remedy, may be instituted , continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.”

The catch phrase in Section 13 of the Interpretation Act is

“... unless the contrary intention appears ,”

It is our position that Section 66 of the Employment Act constitutes a contrary intention to the general rule that was established in the case of **MUKEMBO VS ECOLAB EAST AFRICA (U) LTD, CS NO. 54 OF 2007** cited by Counsel for the respondent to the effect that an employer could

terminate the contract of the servant any time for any reason or for non at all, although the employee would be entitled to receive reasons for his or her dismissal in writing.

Section 66 (1) and (2) of the Employment Act stipulate that:

“ (1) Notwithstanding any other 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....”

2) Notwithstanding any other provision of this part, an employer shall before reaching any decision to dismiss an employee, hear and consider any representations which the employee on grounds of misconduct or poor performance and the person, if any chosen by the employee under subsection (1) may make. ...”

It is our decision that the current Employment Act 2006 applies to this case.

Counsel for the respondent argued that the Claimants dismissal was lawful on the basis of the said case of **MUKEMBO VS ECOLAB EAST AFRICA (U) LTD, CS NO. 54 OF 2007**, because:

- a) “The claimant was given an opportunity to address the allegations made,***
- b) He was informed of his rights***
- c) He filed a written statement of defence refuting allegations 1 and 2***
- d) He thanked the hearing panel/committee for having afforded him a forum for fair hearing***
- e) He was NOT found guilty on allegations 1 and 2 but only on 3 which we submit he did not lodge a defence as indicated above and***
- f) He was informed of his right of appeal***

We have carefully examined both Counsels submissions on this issue and found that the claimant was informed of the charges against him; he was invited for a hearing which he attended and he was given a right to appeal. However we did not see any evidence to indicate that the committee heard and considered any representations which the claimant on the charges levied against him had made. There is no record of either oral or written testimonies in support of the allegations levied against him during the disciplinary hearing. There is no evidence to support a waiver of his right to appeal.

The claimant in his evidence in chief and in cross examination stated that he requested for guidelines for appeal and instead he was arrested and detained at kira road police. This evidence was not controverted by the respondents in this court. It was not disputed therefore that at the time he was supposed to commence his appeal he had been arrested and detained at Kira Road Police

and was thus not able to actually appeal. Therefore the argument by the respondent that the claimant had waived his right to appeal is untenable. The respondent's witness also testified to the effect that it would be unfair for one not to be heard on appeal and that an appeal was part of a disciplinary process.

It is clear that the disciplinary committee did not exhaustively hear and consider the claimant in line with section 66(1) and (2) of the Employment Act 2006, because the hearing process was rendered incomplete when the claimant was arrested and detained by Police.

Since the employer undertook to give the employee a hearing, the hearing ought to have given the employee an opportunity to exhaust all available options for redress. The disciplinary hearing needn't meet the standards of a court hearing. What was important was that the employee is given an opportunity to defend him/herself in line with the company's established disciplinary procedures. Although a hearing was held, the claimant was not given an opportunity to exhaust all avenues of redress because he was arrested and detained. The established disciplinary procedure was therefore not exhausted or completed. It is therefore our decision that the dismissal lacked procedural fairness.

What remains now is to establish, ***whether the dismissal was lawful***. The contract of employment stipulated that:

“The company shall have a right to summarily terminate the agreement if the Board was satisfied that the employee had been guilty of misconduct, criminal activity and or been grossly negligent in the exercise of his duties resulting in financial loss to the company.”

It is clear from this provision of the contract that the Board had to be satisfied that the employee was guilty. This implied that the Board had to be satisfied that the charges levied against the employee had been proved. The respondent's witness Mr. Sempijja, in his evidence in chief and in cross examination stated that the claimant's dismissal had been based on ***“reasonable suspicion.”*** He said that;

“He was only found guilty of causing financial loss, which presupposes that there was no evidence on the other charges.”

There is no evidence on the record showing that the respondents had adduced evidence to prove that the claimant had actually committed this offence neither is there any mention of the amount of loss caused.

We find it difficult to accept that an offence such as that of causing financial loss to a company could be decided on the basis of a mere suspicion notwithstanding the law pertaining then. It was

the respondent's argument that ***"...the employer had only to show the he entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time..."***

This is not acceptable to us. As already seen section 66 makes it mandatory for the employer to give reasons why, he had made a decision to dismiss an employee. We are therefore inclined to agree with the decision in the case of ***UGANDA VS ATUSASIRE & ANOTHER C.C 009/2004 AND JIM MUHWEZ& OTHERS ACD-CSC 97 OF 2010*** cited by Counsel for the claimant, that he who makes an allegation must prove the allegation and ***MUKEMBO VS ECOLAB EAST AFRICA (U) LTD, CS NO. 54 OF 2007***(Supra) where Justice Bamwine stated that:

"whatever the complaint, once one alleges unfair dismissal , it becomes incumbent upon the employer to show that the dismissal was fair and in accordance with the terms and conditions of service binding the parties" our emphasis.

As already seen the contract of employment stipulated that the Board had to be satisfied that the:

"... the employee had been guilty of misconduct, criminal activity and or been grossly negligent in the exercise of his duties resulting in financial loss of the company."

We reiterate that we see no evidence that the disciplinary committee's adduced evidence to prove that the claimant was guilty of causing financial loss neither did the respondent do so in this court. It was a requirement for the Board to be satisfied that the claimant was guilty but there in nothing to show that the board was either notified of the claimant's guilt or that it was satisfied that the claimant was indeed guilty of causing financial loss to the Company.

Counsel for the claimant argued that the respondents Disciplinary Committee ought to have considered the offence of causing financial loss as provided for under Section 269 of the Penal Code Cap 150 of 1950 and proved it accordingly. We do not agree because Section 269 provides the offence of causing financial loss in Public Bodies, yet the respondent is a private Company. All the same the respondents should have provided the basis upon which the claimant had been found guilty of causing Financial Loss to them and declared the amount of loss he had caused. We are not satisfied that this was done.

We therefore resolve that the claimant's dismissal was in breach of the contract of employment and was therefore unlawful.

Issue 2: *Whether the Claimant was entitled to any remedies*

Whereas the respondents contended that it would be a miscarriage of justice to award damages to the claimant under the current legal regime, it is trite that damages are discretionary and are intended to return a claimant to a position so far as money can do it, as if the wrong done him or her

had not occurred. Counsel for the claimant misled Court when he stated that Article 50 of the Constitution provided for the compensation of wronged citizens. The correct Article is Article 126(2) (c) of the Constitution of the Republic of Uganda 1995 as Amended, and it empowers Courts in adjudicating cases of both a civil and a criminal nature, to among others award adequate compensation to victims of wrongs. We have already decided that the claimant's dismissal was unlawful and therefore he is entitled to adequate compensation. We therefore award the following remedies.

1. PERIOD OF NOTICE

Section 58 of the Employment Act makes it mandatory for the employer to give notice and pay in lieu of notice. Section 58(5) specifically states that:

5) "... any agreement between the parties to exclude the operation of this section shall be of no effect but this shall not prevent an employee accepting payment in lieu of notice..."

The claimant's contract provided for the granting of notice though it did not make payment in lieu of notice mandatory. This provision is contrary to section 58 of the Employment Act and is therefore null and void. In the premises the claimant is entitled to notice of one month's salary of UGX 993, 338/= at an interest of 25% per annum from the date of dismissal till date of Judgment.

2. GENERAL DAMAGES

We have already seen that damages are intended to return the claimant to as good a position so far as money can do it, as if the wrong done him or her had not occurred. Damages are compensatory not punishment. The claimant as a result of his unlawful dismissal suffered loss of income and had to resort to driving a taxi and depending on his wife which was humiliating to him. In the circumstances we think Ugx. 60,000,000/= is sufficient at in interest at the court rate of 8 % per annum from the date of judgment till full and final payment.

3. EXEMPLARY DAMAGES/PUNITIVE DAMAGES

The claimant had no record of misconduct or any form of reprimand against him on the record. We find that the manner in which the claimant's case was handled was callous, inhumane and devoid of compassion. He was arrested and detained and publicized as a dishonest person and later the charges against him dropped but his name had already been tarnished. In light of the humiliation he suffered we see no reason why he should not be granted exemplary damages and hereby award him Ugx.80,000,000/= as exemplary damages.

Although the claimant also claimed for other under remedies the Employment Act 2006 he did not plead the same and so they cannot be granted.

In the final, we allow the claim with the following Orders:

1. **That the claimants dismissal was unfair and unlawful**
2. **That the claimant is entitled to 1 month's notice of Ugx. 933, 338/- at an interest rate of 25% per annum from the date of dismissal till the date of Judgment.**
3. **That the claimant is entitled to General Damages of UGX 60,000,000/= at an interest of 8% per annum till full and final payment.**
4. **That the claimant is entitled to Exemplary Damages of UGX. 80,000,000/=**
5. **That the claimant is entitled to costs of this suit.**

1. **The Hon.Chief Judge Asaph Ruhinda Ntengye**

2. **The Hon. Judge Linda Lillian Tumusiime Mugisha**

PANELISTS

3. **Mr. Frankie Xavier Mubuuke**

4. **Mr. Anthony Wanyama**

5. **Mr. Ebyau Fidel**

Delivered at, Kampala on the 17th December 2015.