

THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

**LABOUR DISPUTE: CLAIM NO.002 OF 2014 ARISING FROM HCCS- 0226 OF
2008**

KALUNDI ROBERT SERUMAGACLAIMANT

VERSUS

1. PANO EASTERN AFRICA LIMITED

2. PANOS EASTERN AFRICA

3. PANOS RESPONDENT

BEFORE

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. MS. HARRIET MUGAMBWA

2. MR. HABYALEMYE DOMINIC

3. MR. EBYAU FIDEL

AWARD

BRIEF FACTS

The claimant was employed by the 3rd respondent on the 5/02/2003 and became executive director of PANOS EASTERN AFRICA LTD LIMITED a branch of the 2nd respondent. The 2nd respondent is a British Company registered in Uganda. His

contract was varied on the 26/10/2004 to introduce austerity measures due to a crisis. When the crisis was over the claimant asked to be restored to his original terms. There was disagreement and the claimant was asked to resign. He tendered in a notice to this effect although he asked for time to stay and organize a major meeting which would give autonomy to the 1st respondent from the 2nd respondent. The notice was to take effect from 30th September 2006.

His contract of 26/10/2004 had expired so in order to regularize the new arrangement, another contract was entered into on the 2/07/2006 with PANOS EASTERN AFRICA with a retrospective effect from 5/02/2006.

On the 07/09/2006 during the meeting he had been retained to organize, the claimant was summarily dismissed. The claimant contends that the dismissal was wrongful and hence this suit.

It's the respondent's case that the respondent lawfully dismissed the claimant owing to unwarranted conduct which brought the 1st respondent and its associates into disrepute. The claimant was greatly insubordinate during the Regional Advisory Committee Meeting. Besides the claimant misappropriated the funds of the 1st respondent. The claimant has no cause of action against the 3rd respondent.

ISSUES:

- 1. Whether the claimant grossly misconducted himself?**
- 2. Whether the dismissal of the claimant was wrong or justified?**
- 3. What remedies are available to either party?**

EVIDENCE

The claimant in his written and oral testimony stated that he had executed 3 contracts with three different entities. He was the Regional Director the 2nd Respondent.

His claim in the instant case was against the 2nd respondent PANOS EAST AFRICA. He testified that lawyer advised him to sue 3 parties. He said he had given 3 months' notice of termination in May 2006, although his effective date of departure was December 2006, to enable him complete some major assignments. He further testified that he had disagreed with 2nd respondent PANOS EAST AFRICA over the process the organization was taking to gain autonomy and because the board had refused to restore him to his former terms among others. In particular he had protested the continued oversight role of the London office which in his opinion would continue to deplete the organization's resources/funds and thus jeopardize their efforts for achieving autonomy. According to him this protestation led to the board sacking him on the 2/07/2006 for insubordination amongst other charges and he was denied a portion of his terminal benefits which was unlawful. He also challenged his dismissal on the grounds that he had already tendered in his notice to resign.

It was his testimony that he was responsible to the board of directors PANOS EAST AFRICA LTD, chaired by Mr. Wafula Oguttu. He said he walked out of the meeting because a one Mark Wilson a member of PANOS London was in attendance. He further told court that he had insisted on leaving the meeting and he had no apology for doing so. He said the board dismissed him because of this conduct.

According to him storming out of the wrong meeting was not misconduct. He said he objected to the new Board meeting as the RAC because it would allow London's continued oversight and jeopardize efforts to gain autonomy. He said:

“ ... the meeting had just began I noticed the presence of Mark Wilson and I queried it so I left. ... Amos Vilkazi is a lawyer by profession. Members of the board asked him to explain and he did, even then I defied. I remember Vilkazi advising that the meeting would be a Regional Advisory Committee meeting which would formerly hand over to the new Board but in spite of this I still defied.... I disagreed because lawyers are not always correct. I believed in my letter... I did not want him in the meeting because he was not invited ... I asked the chair person to determine whether it was RAC or BOARD I was advised it was a RAC meeting and I said that was not what I had organized ... yes I walked out of the meeting...”

He said as a result of his summary dismissal his terminal benefits were withheld.

The Respondents on the other hand adduced their evidence through Hon. Philip Wafula Oguttu, the chairperson of the Executive Committee of the Board of directors of PANOS EASTERN AFRICA LTD.

In his oral and written evidence Hon. Oguttu testified that the claimant had been recruited to the position of Regional Director for PANOS INSTITUTE EASTERN AFRICA and one of his roles as regional director was to fundraise for the organization which the claimant failed to do hence the institution of the austerity measures. These measures involved cutting staff salaries by up to 40%.

Hon. Oguttu further testified that the claimant was difficult to work with and many times he defied policy. He said the claimant had failed to perform as a manager, as a fund raiser for the organization.

It was his testimony that the meeting from which the claimant had stormed out of was an ordinary RAC meeting and it was at this meeting that the autonomy of the 2nd respondent was to be declared. He said acquiring autonomy was a process which involved registering an organization and the London office making

a resolution to grant the autonomy. The meeting of 7/09/2006 was therefore meant to confirm the new board but the claimant walked out of the meeting. It was his evidence that the claimant had been dismissed 3 months earlier but he had opted to resign so when he walked out, the Board decided to dismiss him and actually dismissed him. He said the Human Resources Manual did not provide benefits for persons who have been dismissed. He said Mr. Mark Wilson was a representative of the London Board and his role was to oversee the completion of the process of getting autonomy.

He said the claimant was responsible for the organization but he was defiant and this led to his dismissal.

SUBMISSIONS

The parties filed written submissions. The Respondents filed their written submissions in time for which court is very grateful. The claimants made their submissions rather late. The claimant was represented by learned Counsel Harriet Cynthia Musoke and the Respondents by Senior Counsel James Nangwala.

1. Whether the claimant grossly misconducted himself.

Counsel for the claimant submitted that for an act to amount to misconduct that may result in summary dismissal, the act should have been done repeatedly and the one alleging it ought to have documented the separate acts of misconduct to warrant summary dismissal. Counsel relied on sections 69 (1) and 69(3) of the employment Act.

Section 69(1) provides that:

“... Summary termination shall take place when an employer terminates the services of an employee without notice or less notice than that to

which the employee is entitled by any statutory Provision or contractual term. ...”

She argued that the case of **WD VUMENDLINI VS DEPARTMENT OF EDUCATION(FREE STATE PROVINC) PSES 157-13/14 FS** that was cited by the respondents was distinguishable from the instant case because whereas the applicant in the above matter had been charged with a number of counts of misconduct and poor performance in the instant case the claimant was not a poor performer considering that the assignments he was supposed to complete during his resignation notice period had been completed and he had raised funds for the organization and progressed in the acquisition of its autonomy.

Counsel refuted the assertion by the RW1 that the claimant was always defiant, because he had not produced any evidence to that effect. Counsel also insisted that the respondents had not proved that the claimant had brought disrepute to the organization and thus the reason that the claimant had defied the RAC was speculative and contrary to the Employment Act and the organisations Human Resources Manual. She relied on sections 69(3).

Section 69(3) provides that

“... an employer is entitled to dismiss an employee summarily and the dismissal shall be termed justified where the employee has, by his conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service.”

Counsel contended that the respondents should have formerly informed the claimant of the infraction and given him an opportunity to explain himself, but this was not done. She insisted that the claimant had only objected to attending a meeting which was different from the one he had been planning since July 2006 and had an investigation been instituted on the matter the claimants actions

would have been found justifiable. In her opinion the respondents had not proved that the claimant had fundamentally breached his contract of employment and therefore the issue should be resolved in the claimants favour.

Learned Senior Counsel for the respondents on the other hand submitted that the claimant executed a contract of employment with the 2nd respondent on the 2/07/2006 and during cross examination he had established that his employer was the 2nd respondent and it was the 2nd respondent that had dismissed him.

Before delving into the resolution of the issues Counsel highlighted some legal principles governing dismissal under statutory and case law.

Counsel highlighted section 69(3) of the Employment Act 6 (Supra) and Section 2 of the Act;

“... dismissal from employment is defined to mean the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct...”

He also highlighted the principle governing summary dismissal, as laid down in the cases of **MUTAKA V UGANDA POST LTD (CIVI SUIT NO. 690 OF 2002), LAWS VS LONDON CHRONICLE [1959] 1 WLR 698, JUUKO VS OPPORTUNITY UGANDA LTD (CIVIL SUIT NO. 327 OF 2012) CWIU AND ANOTHER – VS SA POLYMER HOLDINGS PTY (LTD) t/a Mega pack (1996) cited with approval in WD VUMENDLINI VS DEPARTMENT OF EDUCATION) FREE STATE PROVINCE) PSES 157-13/14 FS and SCOTT WILSON VS LEGHTON CONTRACTORS PTY LIMITED [2014] FWC 5503;**

“ ...that summary dismissal is dismissal without notice and at common law, to justify such dismissal the breach of duty must be a serious one, a

breach amounting in effect to a repudiation by the servant of his obligation under the contract of employment such as disobedience of lawful orders, misconduct, drunkenness, immorality assaulting of fellow workers incompetence and neglect..."

It was his submission that the claimant was employed as the regional Director of the 2nd respondent , a highly reputable top notch executive spot in the organization thus a degree of professional and respectable behavior was implied and expected of such a status. He was expected to represent the organization well and dully perform his duties and obligations and mirror the organizations repute both internally and externally. Counsel argued that the contract clearly indicated that the respondent reserved the right to dismiss an employee without notice or (pay in lieu thereof) if :

" an employee is guilty of dishonesty or misconduct or commits any act which in the opinion of the employer is likely to bring the employer or any of the officials or associates into disrepute whether or not such dishonesty, misconduct or act is directly related to the affairs of the employer."

According to Counsel the letter of termination seemed to suggest that the reason for the claimant's dismissal was his conduct during the Regional Advisory Committee (RAC) meeting which he had organized, but walked out of thereby frustrating or potentially frustrating the activities of the Committee.

He further submitted that this meeting had been attended by high ranking officials from various countries and they were the claimant's bosses a fact the claimant did not dispute. Counsel asserted that the claimant in utmost insubordination and great disrespect objected to the ongoing discussions and stormed out of the meeting in protest. According to the testimony of RW 1 the

claimant objected particularly to the presence of the Executive Director of PANOS LONDON which was the parent company of the 2nd respondent. According to RW1 the Director had come to handover autonomy to PANOS EASTERN AFRICA and Wilson was also member of the RAC. In his testimony RW1 said the claimant stormed out of the meeting because he disagreed with the procedure policy making body had adopted. He defied pleas from him as the chairman and the other members to come to order and return to the meeting.

Counsel was of the opinion that the claimant could have politely made his objections to the changes in the Agenda known and put on record, without storming out angrily, an act which according to counsel brought disrepute to the Respondents and moreover the claimant had testified that he was not apologetic for his conduct

It was his submission that the conduct of the claimant was verifiable evidence in terms of the employment Act to warrant summary dismissal for gross misconduct because the claimant had greatly undermined the authority of his bosses in that meeting and thus fundamentally breached his contract. In the premises the claimant was lawfully dismissed in accordance with section 69(1) and (3)(supra).

2. On whether the claimant's dismissal was wrong or justified

Counsel for the claimant argued that the claimant's termination was unlawful, unfair and illegal because the respondents had not followed the procedure of formally informing the claimant about the allegation of misconduct and had not been given a hearing. Counsel also argued that the respondents had violated section 66(i) of the employment Act which required the respondents to inform the employee of the allegations against him or her and give him or her opportunity to give an explanation. Counsel also relied on the case of **ALEX**

METHODIUS BWAYO V DFCU BANK HCCS NO. 98 OF 2012. She further submitted that each case should be considered on its own merits and therefore Counsels reliance on the case of **MOSES OBONYO VS MTN (U) LTD LABOUR DISPUTE NO. 045 OF 2015** which stated that it may not be necessary to conduct a hearing was untenable. She further relied on the case of **JABI V MBALE MUNICIPAL COUNCI CIVIL SUIT NO. 16 OF 1973.**

She argued that the respondent had used insubordination as a basis for dismissing the claimant when in actual fact they wanted to deny him his salary arrears and terminal benefits. Counsel equated this with the situation in the case of **ISAAC NSEREKO VS MTN (U) LTD HCCS NO. 156 OF 2012.** It was her opinion that the respondents had not proved a reason to terminate the claimant and therefore their arguments should fail.

Learned Counsel for the respondent on the other had argued that a hearing was not necessary in this case, because of the claimant's misconduct. He relied on the case of **MOSES OBONYO VS MTN (U) LTD LABOUR DISPUTE NO. 045 OF 2015**, in which this court stated that *"... Section 69(3) provides that in cases of summary dismissal, where the employee by his or her conduct has fundamentally breached his/her contract of employment it may not be necessary to conduct a hearing..."* he also relied on the case of **MUTAKA VS UGANDA POST LTD (SUPRA)** in which Justice Eldad Mwangusha as he then was held that; *"summary dismissal is dismissal without the right to be heard."*

Counsel asserted that the circumstances that led to the claimant's dismissal spoke for themselves. The decision to dismiss the claimant was made to him in a letter dated 7th September 2006 and the reasons for the dismissal were stated therein. He stated that the claimant was a very difficult employee with propensity to disobey lawful orders.

COUNTERCLAIM

Counsel for the respondents submitted that the claimant had misappropriated the respondent's funds and they had counter claimed for the refund of Ugx. 16,461,035.50/= which the claimant had refused to pay. He stated that in exhibit R exh P2 the claimant had made out a cheque of USD. 9932 equivalent to Ugx 17,877,660/- and withdrawn the money of which he handed the recipient only Ugx 15,000,000/- and misappropriated the balance of Ugx. 2000, 000/=. Also by the time of his dismissal the claimant had not accounted for Ugx.13, 583,435.50. Counsel reminded court that the claimant had testified that he did not have the money. Counsel therefore prayed court to find in favour of the respondent in respect of the counterclaim.

Counsel for the claimant refuted the counterclaim and argued that the respondents had not adduced evidence to prove that the claimant owed the respondents Ugx. 16,461,035.50/= that is Ugx. 2,000,000/= which the respondent alleged that the claimant had not passed on to the rightful beneficiary and Ugx. 13, 583, 435.5 which the claimant had not accounted for. Counsel argued that the beneficiary of the 2m was on Banoba Paul who was not brought to testify and the Ugx. 13m could not be accounted for because the claimant was not given an opportunity to account. In the absence of proof the respondents could not succeed. He relied on the case of **OLINDE DE SOUZA VS KASSAMALI NANJI (1962) E.A 756.**

RESOLUTION

We carefully listened to the testimonies of each party, perused the record and considered both Learned Counsels submission. We came to the conclusion that the resolution of issue 1. **On whether the claimant had grossly misconducted**

himself, would resolve issue 2. On whether the dismissal of claimant was wrong or justified? We shall therefore consider them together.

It was not disputed that the claimant was the Regional Director of the 2nd respondent at the time of his dismissal. Neither was it disputed that the claimant had already given 3 months' notice to resign and was in the process of completing urgent assignments including the meeting that led to his dismissal.

It is also not disputed that the claimant walked out of the meeting protesting the procedure his superiors had adopted which in his opinion was not what he had planned and what they had agreed to do.

Section 2 of the Employment Act 2006, defines a contract of service to mean

“ ... any contract , whether oral or in writing , whether express or implied , where person agrees in return for remuneration , to work for an employer” Our emphasis. Section 2 is to the effect that the employee accepts to perform duties assigned to him by the employer for the employer and therefore the employee is subject to the employer within the ambit of the law. The employee is therefore expected to obey his or her employer's lawful orders.

In the instant case the claimant was the Regional Executive Director of the 2nd respondent was therefore the administrative head of the organisation. As head of the organisation he was indeed expected to lead by example and in accordance with his contract of service and clause 2.2 of the human resources manual of the organisation which provides for the obligations of the employees. Bullet 6 of clause 2.2 states that:

“... All PEA staff members are responsible for maintaining professional standards of conduct with their working environment relationship.

As a Regional Director the claimant was expected to exhibit the highest standard of professionalism and good conduct especially before his superiors. He was expected to obey the lawful orders of his superiors. As counsel for the respondent had stated if he did not agree with his superiors the prudent thing for him to have done would have been to politely let his objection known to them and have it put on the record without angrily storming out of the meeting as he had done. In the Kenyan case of **JANE FRANCIS MUNYAKOH VS IMAGING SOLUTIONS LTD INDUSTRIAL CAUSE NO.1491 OF 2011; [2011] LLR 257 ICR , Mbaru, J held that;**

“as a general principle , a breach of rules laid down by an employer or refusal to obey an employer’s lawful and reasonable order is to be viewed in serious light and may in given circumstances even justify summary dismissal...”

The gravity of insubordination depends on a number factors, including the prior action of the employer, willfulness of the employees defiance and the reasonableness or otherwise of the order that was defied. Hence refusal to do work which was legal and within their duty description is insubordination.”

Certain prerequisites are required for an act of insubordination to justify summary dismissal. In the first place it should be evident that an order, which may be in the form of a warning must in fact have been given. In the second place it is required that the order must be lawful, an employee is therefore not expected to obey an unlawful order such as to work illegal overtime. Thirdly the reasonableness of an order should be beyond and well enquired into. In addition it is required that the refusal to obey must have been serious enough to warrant a dismissal.

In the instant case the claimant was responsible for organizing a meeting in which high ranking officials of the organization from various countries were to

attend. The meeting had a strong bearing on the 2nd respondent organization because among other items it was to complete the process of acquiring its autonomy. The record shows that the claimant as the Regional Director was to play the secretariat role to the meeting.

It seems the Agenda had been set prior to the meeting sometime in July, but on the actual day of the meeting the members changed the agenda which annoyed the claimant who then stormed out of the meeting. The claimant in his evidence said the chairperson of the meeting RW1 tried to persuade him to return but he refused and he did not have any apology for his decision.

As the Regional Director and administrative head of the organization, his refusal to obey a lawful order of his superiors amounted to gross insubordination and therefore gross misconduct that warranted summary dismissal.

The order for him to abide by the new agenda was in our view a reasonable and lawful order, the claimant was willfully defiant even after the chairperson the most senior person tried to persuade him to return to the meeting and he refused.

It is therefore our considered opinion that the claimant fundamentally breached clause 11(i) of his contract of service which provides that;

“... the employee is guilty of dishonesty or misconduct or commits any act which in the opinion of the employer is likely to bring the employer or any officials or associates of the employer into disrepute whether or not such dishonesty, misconduct or act is directly related to the affairs of the employer.”

The claimant also breached clause 2 of the respondents Human Resources Manual and therefore deserved to be summarily dismissed. According to section 69(1) and section 69(3) (supra) and the case of **MUTAKA VS UGANDA POST LTD (SUPRA)** summary dismissal is dismissal without a right to be heard. In this case

the claimant had admitted that he had stormed out of the meeting and he had no apology for doing so and that he knew it was because of this behavior that he was dismissed. It is our considered opinion therefore that he did not require another hearing. In the premises issue 1 and 2 are decided in the affirmative.

REMEDIES

We have already found that the claimant's summary dismissal was lawful and therefore his prayer for remedies fails.

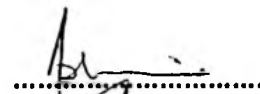
The respondents did not prove their counterclaim for the sum of Ugx. 16,461,035.50/=. The claimant denied having this money because he was not given opportunity to properly hand over. The respondents on the other hand did not adduce any evidence to prove that the claimant owed this money. In the premises the counterclaim is denied.

CONCLUSION

The claimant grossly misconducted himself and was therefore lawfully dismissed. The claimant's prayers are therefore denied. The respondents counterclaim is denied. No order as to costs are made.

SIGNED:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE



2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA



PANELISTS

4. MS. HARRIET MUGAMBWA

5. MR. HABIYALEMYE DOMINIC

6. MR. EBYAU FIDEL



DATE... 19th / OCT / 2016