THE REPUBLIC OF UGANDA

THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA

LABOUR DISPUTE CLAIM NO. 261/2015

(*Arising from H.C.T CS. NO.* 247/2015)

BETWEEN

PAUL BALABA.....**CLAIMANT**

VERSUS

REIME (U) LTD.....**RESPONDENT**

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. Michael Matovu
3. Ms. Nganzi Harriet Mugambwa

AWARD

The claimant by a memorandum of claim filed in this court 2/11/2015, claimed for special and general damages arising from unlawful termination of his employment by the respondent.

BRIEF FACTS

The facts as agreed by both parties in the joint scheduling memo are:
The claimant and respondent entered into an Employment contract wherein the claimant agreed to offer his services as a draftsman for the respondent. After several promotions, the claimant was on 3/1/2013 appointed as Project Manager of the respondent. On 16th/2/2015 the claimant received a letter of termination.

ISSUES AGREED

1) Whether the termination of the claimant was fair and lawful.
2) Whether the claimant is entitled to the remedies prayed for.

EVIDENCE ADDUCED

When the matter came up for hearing, the respondent did not appear and the court proceeded to hear the claimant's case. The claimant adduced only his evidence which was in a sworn written witness statement and closed his case.

In his evidence the claimant pointed out that he had advised management of the respondent that the contract between the respondent and Airtel was not cost effective as the actual cost of its performance was below the contract price. The respondent, according to the claimant, ought to have re negotiated the contract terms. As a result of this failure to renegotiate, both he and the site supervisor had to solicit guards from other sites to guard Airtel sites and owing to security lapses, 3 of the sites were vandalized between October 2014 and January 2015.

Although the respondent offered no evidence in court counsel for the respondent eventually filed submission in reply to submissions filed by the claimant and the claimant filed submission in rejoinder.

SUBMISSIONS

On issue No. 1, counsel for the claimant submitted that no step was taken by the respondent to adhere to the tenets of a fair hearing before termination of the claimant. He relied on **Article 44(c) of the Constitution, section 66 and, section 73 (1)(b) of the Employment Act.**

He also argued that apart from failing to comply with the Employment Act, the respondent had breached their own Internal Human Resource policies. He relied on **paragraph 2 clause 5.3 of the respondent's manual.**

He submitted that there was no warning letter on the record, and no evidence of any investigation conducted. He denied his client ever being served with any notice to show cause, which even then allowed the claimant only 24 hours to respond to the allegations therein. The dismissal, according to counsel, was not only in breach **of paragraph 8 of the claimants terms of employment** which gave 1 months' notice before termination but also in breach of section **52(2) of the employment Act.**

Counsel submitted that the dismissal could not have been within **section 69(3) of the Employment Act**, which provides for summary dismissal.

Counsel for the respondent in his submission relied heavily on an email dated 16/01/15 from the claimant apologizing for reporting the incident late and also on the notice to **"show cause"** which detailed infractions leveled against the claimant. He argued that the allegations amounted to gross misconduct, neglect of duty and insubordination. He submitted that the claimant's conduct resulted in huge losses by the respondent and therefore his dismissal was justified.

DECISION OF THE COURT

From the evidence on the record it is clear that the respondent relied on the fact that the Airtel site was vandalized and yet the claimant was in charge. The respondent also relied on the emails that were originating from the claimant. There is no hearing or investigation of any kind revealed on the record.

Section 66 of the Employment Act provides

"66 – Notification and hearing before termination.

1) **Notwithstanding any other provision of this part, an employer shall, before reaching a decision to dismiss an employee on the ground 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 choice present during this explanation.**
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 the ground of misconduct or poor performance, and the person, if any chosen by the employee under sub section (1) may make"**

Although Employers are not required to establish a mechanism in equal measure with the mechanism of the courts of Judicature, it is a cardinal principle of justice that nobody should ever be condemned before he is heard. To this extent, the employer before terminating an employee, ought to show the employee what wrongs he/she has committed and give him/her time to

respond to the alleged wrongs. It is after weighing the alleged wrongs against the response of the employee that the employer through an impartial arbiter may legally take a decision against the employee. These are in our view the very minimum standards as provided in the above section of the law that are required of an employer before terminating services of an employee.

In the matter before this court it is the respondent's case that a notice to show cause was issued. We have perused the said notice and it contains lots of infractions but there is no evidence on the record that the said notice was ever served on to the claimant, so that in fulfillment of **section 66 above mentioned**, the claimant could have an opportunity to respond to the same. On further scrutiny of both the said notice and the termination letter, it is discovered that the notice was issued on 10/02/2015 and the letter of termination was written on 16/02/2015. The letter of termination states:

"We regret to inform you that the company will no longer require your services with effect from 17th February 2015. You are requested to return all company belongings to the Human Resource department before EOD 16th February 2015. We wish you all the best in future assignments."

Given the definition of "**termination**" and "**dismissal**" under section 2 of the Employment act that
"termination of employment means the discharge of an employee from an employment at the initiative of the employer **for justifiable reasons** other than misconduct, such as expiry of contract, attainment of retirement age etc..... and
Dismissal from employment means the discharge of an employee from Employment at the initiative of his or her employer when the said employee has **committed verifiable misconduct**", we do not think it is tenable to terminate any employment without any reason whatsoever.

The common law position that an employee has a non derogable right to terminate an employment by merely giving notice to an employee without justification was overtaken by the employment Act 2006 .

The letter of termination in our view, ought to show the reason for termination of employment.

Even if the claimant had in fact received the notice to show cause, he would not have adequately responded to the infractions mentioned within 24 hours as the notice called upon him to do. We do find however that the said notice was not served onto the claimant.
Under section 69, of the Employment Act
"An employer is entitled to dismiss summarily and the dismissal shall be termed justified where the employee has by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service."

We must emphasize that under this section the employer is only entitled to dismiss the employee without notice or with less notice than the employee is entitled. The section does not exclude the fact that the claimant is entitled to a hearing.

Therefore even if the respondent had felt that the claimant had fundamentally breached the contract of service, this by itself did not erode the requirement of a hearing.

We do not consider the emails between the claimant and the respondent, and the report of the site after vandalisation as sufficient ground for termination.
In the case of **Queenvelle Atieno Owala Vs Centre forCorporate Governance Industrial Court of Kenya, cause 81/2012**
Court (Inter alia) held:
"Whatever records the respondent held against the claimant were to be subjected to the rigors of a disciplinary process before a decision could be made."

We have perused the respondent's disciplinary procedure as contained in **clause 5.3 of the Human Resource manual.** This is an elaborate procedure to be taken in disciplining employees which procedure is not shown to have been

followed and the record does not show any reason as to why such internal mechanism was flouted.

For the above reasons we are of the strong view, that the claimant was terminated without justification and without any hearing contrary to Article **44(c) of the constitution, section 66, 68, and 58 of the Employment Act** and the submission of the respondent that the claimant's conduct resulted in huge losses by the respondent and that therefore his dismissal was justified is hereby rejected. It is declared that the dismissal was not only unfair but unlawful as well.

The last issue is whether the claimant is entitled to the remedies prayed for.
The claimant prayed for special damages totaling to 46,746,000/=. Among this was payment in lieu of notice. It was not disputed that the claimant by the time of termination earned 4,200,000/= per month. The contract of employment was effective 1/01/2008 and was terminated on 16/2/2015, after 7 years of work. A clause relating to termination in the agreement grants the claimant 1 months' notice in the event of the respondent terminating the contract of employment. However **section 58(3)(c) of the employment Act** provides
"not less than two months where the employee has been employed for a period of five but less than ten years".

The above provision of the Act being superior to the contract between the parties and the said Act providing for a minimum of 2 months, we think the contract was void to the extent that it conflicted with statute law. Consequently, having found that no notice of termination was issued to the claimant, we hereby a ward 2 months payment in lieu of such notice.

Another prayer was for gratuity. A clause in the Human Resource Manual of the respondent about gratuity provides
"if your services are terminated under notice, you shall be paid gratuity as under: -

1 month's pay for every completed year of service for 3 years and above. This applies to the number of years from the date of your first employment with the company on a permanent basis.
The company reserves the right to amend, alter or vary the above policy anytime".

The claimant had worked for the respondent for 7 years and his termination has been declared unlawful for (among other reasons), failure on the part of the respondent to issue notice of termination. We do not envisage any reason that may exclude the claimant from taking benefit of this gratuity clause. According to his contract signed on 1/1/2008, he had 3 months of probation. This means that he became permanent on 1/4/2008 and according to his evidence he was earning 1,700,000 until March 2011 when he started earning 2,500,000/=. In January 2013 his salary was again increased to 4,000,000/=till April 2013 when it was lifted to 4,200,000/=.

It is our considered opinion that gratuity of the claimant will reflect not only the years worked but also the salary per month in each of the separate years.

Accordingly we award 1st April 2008 – 1/4/2011

1,700,000/= per year			=	5,100,000/=	
1/4/2011	-	1/4/2012	=	2,500,000/= per year -	2,500,000=
1/4/2012	-	1/4/2013	=	4,000,000/= per year -	4,000,000=
1/4/2013	-	1/4/2015	=	4,200,000/= per year -	8,400,000=
Total					**20,000,000/=**

The next claim on special damages relates to severance pay and the claimant seeks payment of 4,200,000/=. Since there appears no objection from the respondent and the figure is not excessive we grant it.

Another prayer was for 6 unutilized leave. Whereas a person is entitled to take leave under **section 54 of the Employment Act,** such leave is taken only when convenient for both employee and employer. The employee is expected to apply for it and the employer is expected either to grant it during the period

applied for, or re-adjust the period of leave as convenient, or reject the leave altogether and opt to pay the employee in lieu thereof. Consequently it is only when the employee expresses interest in taking leave and the employer rejects the same that the employee is entitled to claim payment in lieu thereof. In the instant case, there was no evidence to show expression of interest nor was there evidence to show the employer's denial of the same. Accordingly, compensation for unutilized leave is **not** granted.

The last prayer relates to general damages.

Considering that the claimant had worked for the respondent for over 7 years and considering that the contract was unlawfully terminated, we are mindful that the livelihood of the claimant and his family was put at cross roads and for this we grant the claimant 30,000,000/= general damages.

Payment in lieu of notice, payment of severance pay as well as of gratuity shall attract interest at the rate of 20% from the date of dismissal till payment in full while payment for general damages shall attract interest at the rate of 20% from the date of this award till payment in full. No order as to costs is made.

In conclusion, an award is hereby entered in favor of the claimant in the following terms.

1) A declaration that the termination of the claimant was both unfair and unlawful.
2) The claimant is entitled to 8,400,000/= being payment in lieu of notice.
3) The claimant is entitled to 20,000,000/= being payment for gratuity.
4) The claimant is entitled to 4,200,000/= being payment for severance.
5) The claimant is entitled to 30,000,000/= being general damages for unlawful termination.
6) Amounts in 2,3,4 shall carry interest at 20% for date of termination whereas amounts in 5 shall carry interest from the date of this award till payment in full.
7) No order as to costs is made.

SIGNED BY:

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

2. Hon. Lady Justice Linda Tumusiime Mugisha .....

PANELISTS

1. Mr. Ebyau Fidel .....
2. Mr. Michael Matovu .....
3. Ms. Nganzi Harriet Mugambwa .....

Dated: ...15/Sept/2017