

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO.023 OF 2014
ARISING FROM HCT-CS-260 OF 2012

MBIIKA DENNIS.....CLAIMANT
VERSUS
CENTENARY BANK RESPONDENT

BEFORE

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

Panelists

1. Mr. Bwire John Abraham
2. Ms. Rose Gidongo
3. Ms. Susan Nabirye

AWARD

The claimant was an employee of the respondent until 6/2/2012 when he resigned from employment. According to the respondent, on a date that is not clear from the facts but in the year 2012, one Peter Muyanja at the claimant's station of employment raised complaints relating to breach of the respondent's Human Resource Policies by (among others) the claimant. Earlier on, again according to the respondent, there had been dishonest dealings and various complaints against loan officers including the claimant. Once the claimant tendered his resignation, one Galimaka the Branch Manager, is said to have advised him to wait for the human Resource Department to respond (to his resignation) but according to the respondent the claimant went ahead to take his leave which was not authorized.

By letter dated 22/2/2012 the respondent through the General Manager, Human Resource, declined to accept the claimant's resignation and advised him to report to the Chief Manager. By a letter of the same date by the same officer the claimant was suspended for absconding

and loan malpractices. The respondent finally on 21/06/2012 issued a letter of dismissal, through the same officer.

According to the respondent, investigations revealed that the claimant had mishandled his docket of a Loans Officer and in the process was fraudulent thus his resignation was because he got wind of this investigation.

According to the claimant at the time of his resignation he was not aware of any investigation into his methods of work though he had secretly revealed to management the impropriety of his supervisor one Muyanja. His resignation was therefore precipitated by the animosity between him and his supervisor who had denied him his annual leave and generally **“tortured, tormented, harassed and frustrated”** him.

The issues agreed by both parties are :

- 1) **Whether the resignation of the claimant was voluntary or a constructive dismissal from employment.**
- 2) **Whether the claimant’s suspension and dismissal from service were valid or lawful.**
- 3) **What remedies are available to the parties?**

In an attempt to resolve the above issues, the claimant adduced only his own evidence and the respondent adduced evidence from 4 witnesses. In his evidence in chief, the claimant testified that his resignation was not voluntary and that he at the same time took his leave which had been unreasonably withheld. He was not aware of any disciplinary proceedings against him by the time he resigned and an attempt by the respondent to reject his resignation, and eventually dismiss him was an afterthought. It was his evidence that one of the reasons of his resignation was his unpalatable relationship with his supervisor whom he had secretly reported to management for fraudulent practices which had been uncovered thus causing hatred.

The gist of the evidence for the respondent is that there were complaints against the claimant and others in relation to his work schedule and as such investigations were instituted. At the time the claimant resigned these investigations were going on and so his resignation was rejected and on being found culpable he was dismissed. It was also the evidence of the respondent that the claimant was not forced to resign but voluntarily resigned although the

resignation was denied on grounds that he was in breach of the Human Resource Policies and contract.

Submissions

Counsel for the claimant submitted that once a resignation is envisaged under **section 65(c) of the Employment Act** such a resignation is termination and the employee has a right to lodge a claim for unlawful termination. He relied on the Kenyan case of **Cocacola East & Central Africa Ltd Vs Maria Kagai Ligaga C.A 2012** to the effect that such a termination is referred to as constructive dismissal. He argued that the denial of leave to the claimant was a fundamental breach of the contract and therefore the claimant was right to invoke **section 65 (1) (c) of the Employment Act**.

It was the submission of the claimant that because of the failure of the respondent to grant paternity leave to him when it was due, he was justified to resign. Counsel also argued that the respondents breached the whistle blowers rights when they revealed the claimant's accusations against his supervisor causing a vengeful reaction which entitled him to resign. He relied on **sections 2(1), 3(1)(b) and 4(1) of the Whistle Blowers Act** which according to him protected the claimant and entitled him to internally whistle blow on the professional improprieties of his superior. The other involuntary aspects of resignation according to counsel for the claimant included **suspicious non-performing loan assignments, constant torture and verbal abuse at the work place, deliberate refusal to appraise the claimant's job performance, failure to effect a transfer to Ibanda branch and allegations of fraud** against the claimant.

It was the claimant's submission that the rejection of his resignation was unlawful having not been served on him, and that the right of an employee to end employment in the face of an employer's unreasonable conduct was sacrosanct and non-derogatory as stipulated in **section 65(1)(c) of the Employment Act**.

He submitted that the respondent imposed a disciplinary penalty of suspension without pay on the claimant for taking his annual leave for 2011 to which he was both legally and contractually entitled in accordance with **section 54 of the Employment Act** making the suspension **IPSO facto** illegal, null and void.

He asserted that under the Human Resources Procedure Manual of the respondent, the claimant was entitled to a hearing before dismissal and if absconding was a reason for dismissal it had to have occurred for more than five working days, which was not the case.

Counsel strongly argued that the entire process of disciplinary action was a sham and malicious since the offences that were alleged to have been a cause of suspension and dismissal as contained in these two documents were different from those specifically pleaded under paragraph 5(c) of the respondent's written reply to the claim.

According to counsel, in accordance with **section 68(1) of the Employment Act**, this court should hold that the claimant's termination was unfair and unlawful within the meaning of **section 71** of the same Act.

In reply to the above submission, counsel for the respondent submitted that the claimant voluntarily resigned and he could not benefit from consequences of constructive dismissal. According to him, in order to succeed in constructive dismissal one must show that he resigned because of coercion, duress or under the influence of the employer. He relied on a South African case – No P 380/08 **Eastern Cape Tourism Board Vs Commission for Conciliation, Mediation and Arbitration & 2 others**. It was his contention that the supervisor of the claimant against whom unreasonable conduct was attributed was not an employer of the claimant. Counsel argued that the dispute between the claimant and his supervisor was a dispute between two employees of the respondent which only came to the notice of the respondent by way of the resignation letter.

Relying on the above South African authority, counsel argued that failure by the claimant to use internal grievance procedures threw him in bad light in considering whether or not he was left with no option but to resign. For the same principal counsel also relied on **Murray Vs Rockavill Shelfish Ltd (2002) 23 ELR 331** to the effect that an employee must pursue his grievances through the procedure laid down before the drastic step of resigning. He also relied on **Brian Butler Vs Rynair VD 1222/2011** and **Barry Vs Quinn Insurance Ltd VD 1775/2010**.

He cited the authority of **Nyakabwa J. Abwooki Vs Security – 2000 Ltd** to the effect that for an employee to justify termination under **section 65 (1) (c)** such employee must show that

the employer was guilty of conduct that went to the root of the contract of employment which the claimant in this case did not show.

According to counsel the case of **Cocacola East & Central Africa Ltd. Vs Kagai**(supra) was distinguishable in that in the cocacola case unlike in the instant case, the claimant expressly stated in the letter of resignation that she was forced to terminate the contract.

Counsel dismissed failure of the respondent to grant paternal leave, failed transfer to Ibanda, and the respondent's knowledge about the claimant's suffering, as justification for invoking resignation.

Counsel submitted that the claimant in contravention of the Human Resource Policies after his leave did not report to handover as he had intimated and that this was because he was aware of the impending investigations and disciplinary proceedings.

Relying on **Mtati Vs KPMG Services (Pty) Ltd (2017) JO:37427 (CC)** Counsel argued that notice by the employee of the termination of contract did not take away the power of an employer to discipline him or her during the said period since such employee was still subject to the authority of his employer. He also submitted that in the event the employer took disciplinary action and dismissed the employee during such period, the termination would not be due to resignation of the employee but rather the dismissal for misconduct. It was his contention that when the claimant resigned and took leave without approval from his immediate supervisor and without handing over his portfolio, he in effect absconded from duty and hence justification for suspension. According to counsel the claimant was given an opportunity to appear and explain himself but he opted not to appear and subsequently he was dismissed.

EVALUATION OF EVIDENCE AND DECISION OF COURT

It is clear from the evidence that the claimant gave notice of his resignation to the respondent. This notification was received by the Human Resource Officer of the respondent on 6/2/2012.

Under **section 65 1(c) of the Employment Act**, termination of employment occurs:

“Where the contract of service is ended by the employee with or without notice as a consequence of unreasonable conduct on the part of the employer towards the employee”.

Once the provisions of this section are satisfied, the claimant is said to have been constructively dismissed. This kind of dismissal ordinarily occurs when an employee resigns as a result of the employer creating a hostile work environment, making the resignation not truly voluntary. The employer will have committed a serious breach of contract entitling the employee to resign in response to the conduct of the employer.

As correctly pointed out by counsel for the respondent this court in Nyakabwa J. Abwooli Vs security 2000 Limited L. C 108/2014 held that in order for the conduct of the employer to be deemed unreasonable within the meaning of **section 65 (1) (c) of the Employment Act**, such conduct must be illegal, injurious to the employee and make it impossible for the employee to continue working. The court also held that the conduct of the employer must amount to a serious breach and not a minor or trivial incident.

We agree entirely with the submission of counsel for the respondent that the conduct referred to is of the employer and not of a fellow employee. This begs the question **whether the conduct complained of and alleged to have caused the resignation of the claimant was of an employer or a fellow employee.**

It was the submission of counsel for the respondent that the person alleged to have **“tortured, tormented, harassed and frustrated”** the claimant was not his employer but a fellow employee.

There is no doubt that the claimant in his resignation referred to his supervisor as the person who was harsh and made conditions of work unbearable. Counsel for the respondent seems to suggest that a supervisor is not an employer for purposes of **section 65(1)(c)** but a mere colleague at work to which we respectfully disagree.

A supervisor, in our opinion is a person identified by senior management to direct and oversee or co-ordinate operations at a low level management position with authority over those he/she is mandated to supervise. A supervisor sets performance standards for tasks and

roles of employees he supervises and is generally a link between those he supervises and senior management and therefore makes recommendations to senior management relating to the work of those he/she supervises.

In our view, given that a supervisor draws authority from Senior Management, his or her conduct towards employees in his official capacity, is necessarily the conduct of the employer although such supervisor may abuse the authority.

We therefore reject the submission of counsel for the respondent that the conduct of the claimant's supervisor was that of a mere colleague and not of an employer.

The next question is **whether the conduct complained of against the claimant's supervisor existed and if so whether it satisfied the provisions under section 65 (1)(c) of the Employment Act.**

In the resignation, the claimant clearly pointed out the reasons for resignation and both counsel opted to reply on the same in their differing submissions. We shall follow the same trend in deciding the above question. It was the submission of counsel for the respondent that in cases of constructive dismissal the claimant was obliged to inform the employer of the complaints and give chance to the employer to exhaust all avenues for dealing with the complaint before resigning. According to him, the claimant denied the employer this opportunity by declining to attend disciplinary Proceedings when instead he sent his lawyer who was not part and parcel of the contract of employment.

We entirely agree to the notion that all internal mechanisms to resolve complaints between employees and employers ought to be exhausted before a drastic action like resigning is effected by an employee. This is a good practice and promotes good Industrial Relations.

In the instant case, the evidence on the record suggests that before the claimant filed his resignation, there were allegations of impropriety against not only the claimant but some other staff at the Hoima branch of the respondent. This is evidence from one Alot Geoffrey and one Florence Mawejje, both from the respondent. Evidence also reveals (from the claimant in cross examination) that before his resignation he had under confidential cover complained against his supervisor, one Peter Muyanja and as a result an audit team was

dispatched to the branch. One Galimaka, a witness for the respondent also corroborated the fact that there were complaints at the Hoima Branch and according to him, he was sent to the branch as a Relief Manager the substantive manager having been interdicted as a result of these complaints.

The evidence is short of information as to whether by the time the claimant tendered in his resignation, he was aware that he, himself, was being investigated or any disciplinary proceedings were pending against him. The assertion that the claimant resigned to avoid disciplinary action therefore is not supported by evidence. The relief manager in his testimony informed court that he advised the claimant to wait till the Human Resource responded (to the notice of resignation). The whole evidence of this witness does not show that there were any pending investigations against the claimant or that there were any reasons to deny him to proceed on leave.

In cross examination one Alot Geoffrey who investigated the complaints at the branch testified that he received instruction to investigate claims or complaints on 20/2/2012. This was 14 days after the claimant had filed his resignation!!

The evidence is not clear on which date Florence Mawejje, received complaints from one Peter Muyanja who did not testify in court. But the testimony of the claimant is that he raised a complaint in confidence against Peter Muyanja who had been dispatched to the branch in Mid-2011.

From the evidence of Galimaka, (RW3) it is evident that the branch manager he replaced (one Emmanuel Kimbowa) who according to him had dishonest dealings at the bank, was manager while Peter Muyanja was a supervisor sent to assess the extent of the dishonest dealings. Although RW4 (M/s. Florence Mawejje) told court that the claimant had not lodged any complaint against the said Muyanja, we believe that in fact he did raise a complaint in confidence against the said Muyanja. We form this opinion because whereas RW4 started work with the respondent in Jan 2012 (she said so in cross-examination) hardly a month before the claimant resigned, the claimant had been at the station with Muyanja since Mid-2011 and Muyanja had come , according to RW2, to **“assess and determine why the branch had many non-performing assets”**.The claimant having been working in loans department, we believe that there arose bad blood between the two especially so when Peter

Muyanja did not testify before court. It may not be too farfetched for this court to conclude that the same Muyanja was dismissed by the Bank as a result of the dishonest dealings referred to by RW3, Galimaka.

We appreciate that the claimant himself having raised a complaint against his supervisor, and he himself having not been aware of any disciplinary proceedings against him or any complaint against him, he may have concluded that there were no internal mechanisms left to him before he could tender his resignation since he believed his supervisor got wind that he had raised a red flag against him. This was not necessarily true since he could have still raised his issues to other superiors including the Managing Director. It is, however, clear from the evidence that he was informed of the rejection of his resignation long after he had left and even then he was not personally served with the same. We do not accept the submission of counsel for the respondent that when the claimant became aware of the on-going investigations he opted to resign in order to avoid disciplinary hearing.

As already mentioned above, the investigation was launched long after the claimant had resigned giving credence to the assertion of the claimant that the investigation was an afterthought. **Were the reasons in the resignation letter compliant to section 65(1) (c) of the Employment Act?**

Among the reasons for resignation was denial of leave to the claimant. According to the claimant he was denied his annual leave for 2011 and he was about to be denied the annual leave of 2012 when he tendered his resignation. He also claimed to have been denied paternity leave.

The claimant relied on **section 54 of the Employment Act 2000** for the submission that an employer has no right to defer an employee's annual leave beyond its year of accrual.

In his evidence (which was not challenged in cross-examination) the claimant, under Paragraph 12, testified that he was entitled to 22 paid leave days for 2011 which was denied to him for reasons that there were insufficient staff at the station and when he requested to take the same in December 2011 or Jan 2012, he received no approval for the same.

Section 54 of the Employment Act provides:

Annual leave and public holidays

- 1) **Subject to the provisions of this section:-**
 - (a) **An employee shall, once in every calendar year, be entitled to a holiday with full pay at the rate of seven days in respect of each period of a continuous four months' service, to be taken at such time during such calendar year as may be agreed between the parties; and**
 - (b) **An employee shall be entitled to a day's holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day's holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work.**

- 2) **Where an employee who works on a public holiday receives, in respect of such work, pay at not less than double the rate payable for work on a day that is not a public holiday, that employee shall not be entitled to a day's holiday with full pay in lieu of the public holiday.**

- 3) **Subject to subsection (2), any agreement to relinquish the right to the minimum annual holiday as prescribed in this section, or to forego such a holiday, for compensation or otherwise, shall be null and void.**

- 4) **This section shall apply only to employees:-**
 - (a) **Who have performed continuous service for their employer for a minimum period of six months;**
 - (b) **Who normally work under a contract of service for sixteen hours a week or more.**

- 5) **An employee is entitled to receive, upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.**

In our interpretation of the above section of the law, we are of the opinion that the section obliges employers to grant rest days during a calendar year for purposes of making

employees rejuvenate and work better. The rest days are an entitlement and not a privilege to be granted by the employer to the employee.

However this court has held in **EDACE MICHAEL VS WATOTO CHILD CARE MINISTRIES L.D.APPEAL 21/2015(CONSOLIDATED WITH L.D.APPEAL 16 /2015)** that the question when in a calendar year an employee is to take leave is determined by the employer upon the request of the employee and that once the employee does not request for such rest days, it is assumed that he/she has forfeited such rest days. Upon the employee requesting for his rest days the employer is required under **section 54** to fix the dates for rest in the calendar year and if in the employers view the employee cannot be released because of pressure of work or otherwise the employer is obliged to pay the employee a certain sum of money in lieu of leave and it is upon the employee to accept it or refuse and take his/her leave days. It is our position that an employer can only defer an employee's annual leave to the following calendar year with the consent of the employee and in such a case the employee will take leave for both the previous calendar year and the current calendar year.

It was the submission of counsel for the respondent that the claimant did not follow the procedure in the Personnel Manual to be able to officially get leave and therefore the claimant absconded from duty.

Section 14.2 (d) and (e) of the Respondent's manual provided:

“(d) Approval for leave for all staff lies with their immediate supervisors in accordance with approved annual leave plan.

(e) All employees should hand over portfolio and (or offices to the satisfaction of their immediate supervisor before departing for leave and provide addresses and telephone where they can be contacted if need arises”.

It seems to us that according to counsel for the respondent, the Personnel Manual of the respondent in the above clause, gave the discretion of granting leave to the employer, through the supervisor, in such a way that for as long as the employee's handover was not to the satisfaction of his supervisor and for as long as the leave was not within the approved plan no such leave could be granted.

As already intimated above, leave within a calendar year is an entitlement to an employee. This means whether any organization has a leave roster or leave plan or not, an employee will have his leave during a calendar year.

It is the duty of the employer to put a system in place that ensures that each employee takes leave in a given calendar year and the absence or weakness of such a system does not at all affect the entitlement of the employee to his leave. We agree with the submission of counsel for the claimant that the respondent unlawfully alienated the claimant's annual leave for the year 2011 and this in our view was in breach of **section 54 of the Employment Act**.

The claimant in our view rightly took his 2011 leave days in early 2012 since the respondent had breached the obligation to grant leave in 2011 as provided for under **section 54 of the Employment Act**. Grant of leave is not only an entrenched term of the contract of service but a fundamental term in such a contract. It follows therefore that for this reason alone the claimant was entitled to file a resignation given that he had applied for leave which he was denied in the course of the 2011 calendar year. Any procedures stipulated by the Personnel Manual relating to leave applications became irrelevant at the end of 2011 and therefore the claimant was not obliged to follow them. This is because such procedures are meant to effect **section 54 of the Employment Act** and not to derail from it. Consequently the submission that the claimant did not follow procedures and therefore he absconded from work is not acceptable to us. He, in our view, took leave within the law.

Following our decision in **Nyakabwa J. Abwooli Vs Security 2000 Limited** (supra) we form the opinion that failure to grant leave to the applicant within the 2011 calendar year made the respondent guilty of conduct that went to the root of the contract and therefore entitled the claimant to terminate the contract under **section 65 (1)(c) of the Employment Act** by resignation which necessarily was not voluntary and therefore constituted constructive dismissal. Since this alone has resolved the first issue, we shall not go into other reasons for resignation which included **unlawful alienation of annual and paternity leave, unlawful breach of whistle blowers rights, suspicious non-performing loan file assignments, constant torture and verbal abuse at the workplace, deliberate refusal to appraise the claimant and others**.

The second issue is whether the claimant's suspension and dismissal from services were respectively valid and/or lawful.

The suspension of the claimant according to a letter dated 22/02/2012 and marked RE6 at page 10 of the respondent's trial bundle was because the claimant had absconded from duty from 8th February 2012, for proceeding on un-authorized leave without proper handover and for loan malpractices. This suspension was effected 16 days after the resignation of the claimant.

It was the claimant's contention through his advocate that the right of the claimant to resign under **section 65(1)(c) and section 27(1)** was Sacrosanct and non derogable and an employer had no jurisdiction to reject an employee's resignation.

He argued that suspension without pay constituted a disciplinary penalty for the claimant taking leave to which he was both legally and contractually entitled under **section 54 of the Employment Act** making the said suspension Ipso facto illegal, null and void. He also relied on **section 75(b) of the same Act**.

Counsel for the claimant further submitted that the claimant failed to prove the reason for dismissal as provided for under **section 68(1) of the Employment Act** since the offences as contained in the suspension and dismissal letters were different from those pleaded under **paragraph 5(c) of the respondent's as well as the Human Resource policies and procedure manual 2010 particularly clause 19.4.12**.

In answer to the second issue, it was the submission of the respondent that since the letter of suspension was never received by the claimant, there was no suspension in effect.

Counsel argued that the dismissal letter and the suspension letter were "**moot as the claimant had already resigned and refused to take part in any disciplinary proceedings**".

Counsel contended that the reading of the resignation letter suggested that the claimant would cease being an employee of the bank on 16/3/2012 which meant that by this time being an employee of the respondent the respondent was entitled to take disciplinary action against him. He relied on the authority of **MTATI Vs KPMG (Pty) Ltd (2017) JOL 37427**. He

argued that since the claimant had taken leave without approval contrary to **section 14.2 (a) of the Respondent’s Human Resource Policies and Procedure manual** and he had been asked to offer an explanation which he did not, he was guilty of absconding which justified suspension and subsequent dismissal.

Section 27 of the Employment Act relied upon by the claimant provides:

“27. Variation or exclusion of provisions of the Act.

- (i) **Except where expressly permitted by this act, an agreement between an employer and an employee which excludes any provision of this Act shall be void and of no effect.**

Section 75 of the Employment Act provides:

“75. Reasons for termination or discipline.

The following shall not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty

- (a)
- (b) **The fact that an employee took or proposed to take any leave to which he or she was entitled under the law or a contract.**
- (c)
- (d)
- (e)
- (f)
- (g)

On perusal of the reply to the memorandum of claim, particularly clause 5(e) it is apparent that the reasons for dismissing the claimant were fraudulent activities causing financial loss of over shs 95,000,000 and that the said dismissal was in accordance with the **Human Resource Manual Clause 19.4.b IV** which provides for **“acts likely to endanger the safety or life of or which may result in injury to another person including gross negligence or misconduct, violence or fighting”**.

The reasons in the suspension letter are for **“abscondment and loan malpractices”** whereas the dismissal letter provides for

“in accordance with the Human Resource Policies Procedure Manual 2010.

“(H.R.P.P. 19.4.b.vi)” which says **"abscondment for a period of more than five (5) working days without permission or reasonable cause"**.

We note the contradiction about the reasons for dismissal especially relating to the different provisions of the Human Resource Policies and Procedure Manual. But we do not accept the submission of counsel for the claimant that the contradictions are so grave that by themselves prove that the entire disciplinary process was a sham. This is because under paragraph 5(e) of the reply to the memorandum of claim mention is made of fraudulent activities which is the same, in our view, with **“loan malpractices”** mentioned in the suspension letter.

We feel that reference to **clause 19.4.b IV of the Human Resource Policies and Procedure Manual** in paragraph 5(e) of the reply to the memorandum of claim as opposed to **clause 19.4.b VI** was by genuine typographical error in the mix up of the roman numerals. This is because throughout the submissions of counsel for the respondent and even the evidence of the respondent, the reason mentioned was abscondment which is reflected in **clause 19.4.b VI** and nothing either in the evidence or in the submissions referred to **clause 19.4.b IV**.

However, the question remains whether the respondent in accordance with **section 68(1) of the Employment Act** proved the reason or reasons for dismissal.

Assuming that the suspension and dismissal were rendered ineffective by the resignation of the claimant as counsel for the respondent submitted, and assuming therefore that the respondent was entitled to institute disciplinary proceedings against the claimant, did these proceedings constitute a fair hearing?

In cross-examination one Florence Mawejje RW4, told court that she wrote the suspension letter and served the same through the branch of the claimant but she confirmed that there was no evidence to show that the claimant received the same. It was argued that the claimant was called to make a written explanation regarding issues in the suspension letter but he refused.

The evidence on the record suggests that the claimant was called on phone by someone who refused to identify himself and who told him to come to the Boardroom but the claimant said

he was far away and his lawyer would come. It is not clear on the evidence from the respondent whether the advocate for the claimant attended any session with the respondent over the matter. But the claimant in his evidence in chief, paragraph 8, states that

“.....I courteously instructed my advocates to represent me in those meetings but the respondent disgraced them by sending them away unceremoniously.....”

Without any evidence to suggest that the claimant or his lawyer received the suspension letter or any other document detailing the charges against the claimant, this court cannot be in position to hold that the claimant refused to offer a written explanation to the charges in the suspension letter. It was incumbent on the respondent to clearly make known to the claimant the details of the indictment and give him sufficient time to study the same and offer a reply. This aspect of a fair hearing is contained in **section 66 of the Employment Act**. The respondent having breached this aspect, the subsequent dismissal cannot be legally justified.

As we have noted earlier in this award the claimant having been denied leave during the 2011 calendar year, he was not obliged to follow the Human Resource Procedures in attaining his leave since such denial constituted a fundamental breach by the respondent who could not in law suspend or dismiss the claimant for breach of the said procedure manual relating to application for the said leave.

Section 75(b) of the Employment Act (supra) provides that an employee cannot be terminated for proposing or taking leave to which such employee is entitled. In **FLORENCE MUFUMBA VS U.D.C LDC 138/2014**, this court held:

"Where an employee is entitled to take leave and his or her employer is made aware of the dates of the intention of the said employee to take the leave, and the employer raises no objection as to the proposed dates, once such employee takes his or her leave, the employer is estopped from denying that such leave was authorized."

In the current scenario, it is not denied that during 2011 the claimant was entitled to leave days.

By a letter of resignation the claimant informed the respondent of his intention to take his leave. There is nothing on the record to show that the proposed dates were objectionable by the respondent. Therefore the respondent just like in the **Florence Mufumba** case is estopped from denying that the leave was authorized. Accordingly both the suspension and the subsequent dismissal were not valid and the claimant did not abscond from duty. The second issue is answered in the negative.

The third issue is: **What remedies are available to the parties?**

a) Accrued leave for 2011

It was the submission of the claimant that the claimant having proved that he asked for his annual leave in 2011 but he was denied to take it, he be paid in lieu 2,300,000/= on the other hand the respondent conceded to paying for 20 days at 1,769,140.

It was the evidence of the claimant under paragraphs 20 and 23 of his written statement that by the time the employment was terminated he was earning 2,300,000/= per month. This evidence was not challenged by the respondent. There is no reason given by the respondent to justify payment of 20 days instead of the full entitlement. Accordingly we grant the claimant 2,300,000/= as leave entitlement for the year 2011.

b) Payment in lieu of notice

The claimant submitted through counsel that under **section 58 (3) of the Employment Act**, he was entitled to two months in lieu leave. Relying on various authorities in his submission, counsel for the respondent argued that the claimant was not entitled to remuneration since there was no evidence that he had mitigated his loss.

On internalizing **Section 58 of the Employment Act**, we do not see any relevance of the submissions of the respondent to the notice period or as to whether or not the notice period was applicable to the claimant. Under this Section of the law an employee is entitled to not less than 2 months' notice if such employee has been employed for a period of 5 years but less than 10 years.

As earlier discussed in this Award, the claimant was constructively dismissed when he resigned as a result of the respondent's breach of **Section 54 of the Employment Act**. As

a result no notice was issued to the claimant and that being the case he is entitled to his 2 months' salary in lieu of notice.

c) Loan balance

Relying on **Florence Mutumba Vs U.D.C Labour Dispute Claim No. 138 of 2014** and two other authorities, the claimant submitted that the respondent was obliged to pay back 15,500,000/= which had been recovered from him.

In response to this claim, the respondent relying on **Interfreight Forwarders (U) Ltd Vs East Africa Development Bank, S.C.C.A 33/199** and other authorities argued that the loan balance having not been pleaded cannot be granted to the claimant as a relief. He submitted that it was not tenable and inadmissible for the claimant to submit on issues that were not pleaded in the memorandum of claim.

True, on perusal of the memorandum of claim nothing is attributed to the reimbursement or payment of the salary loan acquired by the claimant. But in his evidence, the claimant testified that he was offered a salary loan which was payable by deductions from his salary but which on his termination was converted into a loan at commercial interest rate and he was then forced to pay.

In cross examination on the loan the claimant stated that he was aware that on termination of employment the loan would attract commercial rates.

We have no doubt that the loan acquired by the claimant was a salary loan with interest lower than commercial interest. We are also of no doubt that the intention of both parties was to see the loan paid through deductions from the claimants' salary until it was discharged. The question is: **this Court having held that the dismissal was unlawful, who is liable to pay the loan?**

The ruling of this Court in **FLORENCE MUFUMBA VS UGANDA DEVELOPMENT BANK LDC 138**, relying on **Okello Nymlord Vs Rift Valley Railways (U) Ltd, Civil Suit 195/2009**, was that where a salary loan is by agreement of both employee and employer recoverable only by a guarantee of instalment deductions from the employee's salary and the employee is unlawfully terminated, the employer is liable to pay the loan since such loan was premised on the understanding that the employee would continue to be employed by the employer and pay off the loan eventually.

In JAMES SOWABIRI & ANOTHER VS UGANDA S.C Criminal Appeal No. 5/1990.

It was held that evidence not controverted in cross examination is taken as the truth. In the instant case the evidence of the claimant that his loan portfolio was solely based on his salary and it was to be discharged solely through instalment salary deductions was not challenged in cross examination making it a truthful assertion.

We have had the benefit of reading the full authority of **Interfreight Forwarders** referred to by counsel for the respondent. The Court in the above case emphasized the significance of the system of pleadings in litigation as a method of delivering with clarity and precision matters in controversy between the parties in order for them to prepare and present their respective cases to Court. The Court stated that a party is expected and bound to prove the case as alleged by him and as covered in the issues framed and therefore he is not allowed at the trial to change his case. However, It is our finding that the facts in this case are different from those in the above cited authority.

In the **Interfreight case** the question was whether the defendant had been pleaded as a **common carrier** so as to be bound by the strict liability principle which had not been the case. The Court found in the **Interfreight case** that there was no evidence adduced to suggest that the defendant was in fact a common carrier.

Thus the Court stated:

“For the above reasons, if the plaintiff did not plead that the defendant was a common carrier, I think that he cannot be permitted to depart from what clearly appears to have been his case as stated in the plaint and claim that the Defendant was a common carrier. As already found above no evidence in fact supported that contention”.

In the instant case, one of the issues agreed upon was **“what remedies are available to the parties”** The remedies available are normally consequent upon the substantive issues having been resolved. The issues in the instant case rested on whether or not there was a dismissal of the claimant and if so whether such dismissal was unlawful, and pleadings in respect of these issues were well articulated in the memorandum of claim.

Evidence which was not challenged was adduced to the effect that the loan was a salary loan guaranteed by the respondent to be discharged by instalment deductions, which the claimant did not fulfil because of the unlawful termination.

As was stated in the case of **JAMES SOWABIRI & ANOTHER VS UGANDA S.C Criminal Appeal No. 5/1990:**

“an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted, subject to its being inherently incredible or possibly untrue.”

We take the position that the instant case is on all fours with the authority of **MUFUMBA VS UDB and Okello Nymlord Vs Rift Valley Railway (Supra)** and we have no reason to depart from them. Accordingly we grant that 15,500,000/= recovered from the claimant as salary loan be reimbursed to him.

d) Severance

There was no submission about this remedy from the respondent. For the claimant, counsel submitted that under **section 87(a) of the employment Act** his client was entitled to severance allowance and we are in total agreement with this submission. In tandem with the Authority of **Donna Kamuli Vs DFCU Bank LDC 002/2015** we hereby order that the respondent pays the claimant severance allowance at the rate of 2,300,000/= per year for the years that he worked for the respondent.

e) Salary arrears

Relying on **Donna Kamuli Vs DFCU Bank (supra)** and other authorities of this court, the claimant argued that he was entitled to salary arrears from the date of the unlawful termination until the date of the award.

However this court has since departed from that position and instead held that in deserving cases an employee would be entitled to general damages only and not to both damages and salary arrears up to time of Award or end of contract since the claimant would not have performed any duties for the respondent.

According to the claimant's notice of resignation he was to take his leave of 2011 and come to hand over on 16/03/2012 but effectively leave office on 31/03/2012. Going by this notice, it seems to us that he took leave of 2011 as well as leave of 2012. Assuming 6th Feb. to 6th Mar. 2012 would be leave for 2011 then up to 31st Mar. would only be interpreted to be leave for 2012.

We form the opinion that the only salary entitlement would be for the month of March which qualified as his leave entitlement. We have already awarded payment in lieu of leave and therefore the prayer for salary arrears is denied.

f) General damages

According to the claimant he deserved general and aggravated damages to the tune of 1,000,000,000/= (1bn) for the failure of the respondent to pay terminal benefits in time rendering him destitute and for harassment over payment of salary loan.

Counsel for the respondent, relying on **Uganda Revenue Authority Vs Wanume Kitamirike CA 43/20110, (Court of Appeal)** argued that the claimant could only be entitled to damages equivalent to the notice period in the contract.

However, this court in **MUFUMBA Vs UDC and Donna Kamuli (Supra)** held that in deserving cases an employee was entitled to general damages. In the instant case we appreciate the fact that the respondent breached the mandatory rule of granting rest days to the claimant in the whole of 2011 calendar year forcing him to resign as a result of which he lost his job that catered for his family and personal needs.

To this extent he was hurt by the action of the respondent for which he deserves general damages and we think, 40,000,000/= will be sufficient.

Aggravated/punitive/exemplary damages

We do not find any justification in the circumstances before us to justify these damages. Although the respondent denied leave to the claimant precipitating his resignation, there was no proof of any malice or callousness on the part of the respondent calling for these damages. This prayer is denied.

In conclusion an award is entered in favour of the claimant in the following terms/declarations:

- 1) The resignation of the claimant was not voluntary and it amounted to constructive dismissal by the respondent.
- 2) The claimant's suspension and dismissal from service on 16/2/2012 and 19/3/2012 respectively were invalid and unlawful.
- 3) The claimant is entitled to payment of 2,300,000/= as in lieu of his accrued leave for the year 2011.
- 4) The claimant is entitled to 4,600,000/= as payment for two months in lieu of notice arising from his unlawful dismissal.
- 5) The claimant is entitled to reimbursement of 15,500,000/= as salary loan that ought to have been forfeited by the respondent as a result of the unlawful termination.
- 6) The claimant is entitled to severance allowance at the rate of 2,300,000/= per year for the years he worked for the respondent.
- 7) The claimant is entitled to general damages for unlawful dismissal to the tune of 40,000,000/=.
- 8) The total amount of money in the above orders shall attract an interest rate of 15% per annum till payment in full.
- 9) No order as to costs is made.

BEFORE

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

Panelists

1. Mr. Bwire John Abraham
2. Ms. Rose Gidongo
3. Ms. Susan Nabirye

Dated: 20TH JULY 2018