THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM No.023/2015

ARISING FROM HCT 192/2013

AKENY ROBERT ……. CLAIMANT

VERSUS

UGANDA COMMUNICATIONS COMMISSION ……. RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. EBYAU FIDEL

2. MR.WANAYAMA

3. MS. JULIAN NYACHWO

AWARD

BACKGROUND

The claim against the Respondent is for a declaration that he was unlawfully terminated from the service of the Respondent, general and aggravated damages for unlawful termination of employment, and an order for reinstatement as an

employee, an order for the Respondent to unconditionally pay claimant's terminal benefits, interest and cost of the claim.

BRIEF FACTS

On the 29/03/2011 the Respondent employed the Claimant on a 3-year contract as its Manager, Strategic Business Planning. He was confirmed on 8/11/2011. By the time of his termination he was earning Ugx. 8,500,000/- per month.

According to the claimant his termination was wrongful and unlawful and contrary to Sections 14.2.2 and 14.2.7 of the Respondents Human Resources Policy Manual of 2010. He claims that he was entitled to 1-month salary in lieu of notice, accrued leave, provident fund contribution and 9 months' gratuity amounting to Ugx. 50,000,000/=.

ISSUES:

1. **Whether the Claimant was lawfully terminated?**
2. **Whether the Claimant is entitled to the remedies claimed?**

RESOLUTION OF ISSUES

1. **Whether the Claimant was lawfully terminated?**

The claimant adduced his evidence by himself and during cross examination contended that he was dismissed without notice, or a reason and without a hearing. He said he was asked to leave immediately. He admitted to receiving his provident fund contribution amounting to Ugx. 17,900,000/= and to having an outstanding balance on his loan with the Respondent.

The Respondents adduced evidence through 2 witnesses one Harriet Amoding the Director Human Resources and Administration and Irene Kaggwa Sewankambo,

Director Engineering and Communications Infrastructure, the immediate supervisor of the claimant at the time of his employment. Whereas the HR director admitted that the claimant's appraisal results were brilliant his former supervisor stated that his termination was because of poor performance and misconduct, attributed to his failure to complete work assignments and absenting himself without justifiable explanations. She stated that the claimant had been counseled by management and herself to no effect. She stated that the decision to terminate him was made by Top Management (TMT), after they discussed his conduct and performance.

SUBMISSIONS

In submission Counsel for the Claimant argued that the Claimant's termination was unlawful because his termination letter did not indicate the reason for which he was terminated contrary to what this Court decided in **FLORENCE MUFUMBO VS DFCU LDC NO 138 OF 2014**. Citing **BENON KANYANGOGA & OTHERS VS BANK OF UGANDA LDC N0. 80 OF 2014,** Counsel asserted that giving of notice or payment in lieu of notice as the Respondents had done in this case, was not sufficient ground to terminate the Claimant and even if the Respondents relied on Sections 14.2.2 of the Human Resources Policy manual, as a basis for the termination, the reasons that the Respondents witnesses advanced in court as misconduct did not amount to justifiable misconduct to warrant the claimants termination. He cited the meaning of justifiable misconduct as stated in **MUFUMBO** (supra) as ***"... includes but is not limited to abuse of office, negligence, insubordination and all those circumstances that impute fault on the part of the employee which include incompetence."***

Counsel further argued that RW2s allegations of poor performance were inconsistent with the Claimants annual appraisal report dated 10//07/2012, which indicated a score of 78/100. He argued further that the allegation that the Claimant

had misconducted himself while abroad was considered by TMT, 9 months before his appraisal and although RW2 alleged it was the reason for his delayed confirmation, when this conduct was reviewed the claimant was confirmed on the 8/11/2011. In any case Counsel was of the view that the alleged misconduct did not meet the criteria set out in the HR Policy Manual to be considered serious misconduct as provided and therefore to warrant a dismissal. He cited **DONNA KAMULI VS DFCU BANK LDC NO. 2 OF 2015,** in which this court stated that

> ***"In the absence of a written report about the supervision of the Claimant's PIP, there could not be any basis that she had failed the same and therefore liable to termination for non-performance…"***

in support his argument that in the absence of any documented allegations of the Claimant's misconduct, RW2s assertions that the claimant had failed to perform could not hold. He concluded therefore that in light of the Human Resources Policy Manual, the said allegations did not warrant a dismissal or termination therefore the Claimant's termination was unjustified.

Counsel also contended that the claimant was not accorded a fair hearing in accordance with Section 66 of the Employment Act 2006, clause 8 of the Company's Human Resources Policies and Procedures Manual and the cases of **MOSES OBONYO VS MTN (U) NO. 45 OF 2015, EBIJU JAMES VS UMEME LTD (HCCS. NO. 133 OF 2012)** whose decisions are to the effect that an employer is obligated to accord a hearing to an employee who he or she wishes to terminate from employment on grounds of poor performance and /or misconduct. According to him, the testimonies of RW1 and RW2 did not show that the termination had been done in accordance with the Respondent's, Human Resources Policy and Procedure Manual as claimed. He insisted that RW2's evidence in chief only showed that the

Claimant's performance had been discussed at the 45th Top Management meeting, which was preceded by discussions with the claimant but was silent on whether a hearing had been accorded to the Claimant. Counsel contended that these discussions by TMT and the claimant about his performance fell short of the tenets of a fair hearing in light of **QUEENVELLE ATIENO OWALA VS CENTRE FOR CORPORATE GOVERNANCE (INDUSTRIAL COURT OF KENYA, CAUSE 81 OF 2012)** in which it was held that:

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

Counsel concluded that the procedure followed by the respondents violated section 66 of the Employment Act and Clause 8 of their Company's Human Resources Policy and Procedures Manual rendering the termination of the claimant unlawful.

In reply, Counsel for the Respondent submitted that the Claimant was terminated in accordance with clause 14.2.2mof the Uganda Communications Human Resource Manual and paragraph 6 of the employment contract dated 29/03/2011. He asserted that the Claimant was paid his Provident Fund contribution, gratuity and payment in lieu of notice amounting to Ugx. 39,029,059/= but he had a loan with the respondent amounting to Ugx. 33,639,426/- that was approved on the

10/04/2012 payable over 1 year's period at a rate of Ugx. 2,803,286/- per month. He contends that at the time of his termination, the claimant still had an outstanding balance on his loan amounting to Ugx. 28,032,854/-.

Counsel asserts that he was lawfully terminated for gross misconduct and poor performance. He argued that it was not a requirement for the termination letter to state the reasons for termination and the interpretation of Section 68 of the Employment Act which provides for proof of a reason is that; there has to be a claim arising out of termination, the employer has to prove the reason for dismissal and the reasons should be matters that the employer genuinely believed to exist at the time.

Counsel insisted that proof of the reasons for dismissal is done at the trial by leading evidence then Court can make its decision. He argued that the Respondent through its witnesses RW1 (Harriet Omoding) and RW2 Irene Kaggwa Sewankambo proved that the reasons for dismissal were misconduct and poor performance on the part of the claimant. He stated that RW1 testified that the claimant had misconducted himself while on a trip in Gambia where he took alcohol and borrowed money from foreign delegates and RW2 corroborated this testimony when she stated that the Respondents had a record of the claimant's improper conduct while in Gambia and it was on the basis of his termination.

He further submitted that RW2 testified that the Claimant was not performing to the standards of the Commission and that the claimant came to work late, absented himself without justification and was drunk while on assignments. She also said he did not complete his assignments on time. He cited the attendance sheet on page 96 as evidence of the Claimant's unexplained absences from work. He further submitted that according to RW2, the good appraisal that was done by a one David

Ogong was challenged by TMT because the claimant was actually not delivering on his duties. In view of these testimonies Counsel asserted that the reasons for the Claimant's dismissal existed at the time he was terminated, as provide under the law, therefore Court should hold that there was no requirement for the Claimant to be given a reason at the time of his termination.

Counsel disagreed with this Court's interpretation of Section 68 of the Employment Act in **FLORENCE MUFUMBO VS UGANDA DEVELOPMENT BANK,** where Court stated that

> ***"... the event of a dismissal or termination, the employer is obliged to give reasons at the time of dismissal or termination not later."***

Citing **PROF GILBERT BALISEKA BUKENYA VS ATTORNEY GENERAL CONSITUTIONAL PETITION NO. 30 OF 2011**, he contended that Court should apply the literal rule of statutory interpretation to Section 68 and should divert from the reasoning in **FLORENCE MUFUMBO** because it was not a requirement to give reasons before termination**.** He argued that in any case Section 58 of the Employment Act does not provide for the advancement of reasons before dismissal. Accordingly he was of the opinion that both Sections 58 and 68 of the Employment Act, did not oblige the Respondent to give reasons for termination, at the time of terminating the Claimant.

He also stated that contrary to what the Claimant asserted, the conduct that formed the basis of his termination as categorized in the Human Resources Policies and Procedure Manual was major and therefore the termination was justified. He concluded therefore that the claimant was lawfully terminated.

Counsel asserted that in accordance with the requirements under Section 66 of the Employment Act, 2006 and clause 8.2 and 8.3 of the Human Resources Policies and

Procedures Manual, before his termination the Claimant was given several warnings by his immediate supervisor RW2, and the Executive Director held a number of discussions with him, but he did not heed his advice. Counsel stated that RW2 testified that she had undertaken a number of performance discussions with the Claimant using the standard form, following which the Human Resources Department intervened. She also said that the Respondent's Executive Director also counseled and advised the Claimant in vain. Counsel was therefore of the strong view that view that the Claimant was accorded a hearing which he ignored.

DECISION OF COURT

After carefully considering the evidence on the record and the submissions of both Counsel we find as follows:

It is not in dispute that the Claimant was an employee of the Respondent and that he was terminated. What is in dispute is whether the termination was lawful.

Section 66 of the Employment Act 2006 provides that before an employer can dismiss an employee on the grounds of misconduct and poor performance, he or she must give the employee a reason and an opportunity to respond to the reason. Section 68 of the same Act provides that in a claim arising out of termination the employer must prove the reason for the termination and the reason must be in existence at the time the decision is made.

From the submissions of Counsel for the Respondent, Section 68 of the Employment Act does not make it a requirement for an employer to give an employee a reason in the notice of termination and the Court in interpreting this section in the case of **MUFUMBO** (supra) should have applied the Literal rule of interpretation as stated in

Although we agree with the argument that in interpreting statutes, one must apply the literal rule of statutory interpretation, in **PK SEMWOGERERE &ANOR VS ATTORNEY GENERAL(CONSTITUTIONAL APPEAL NO.1 OF 2002,** Mulenga JSC as he then was, citing **SMITH DAKOTA VS NORTH CAROLINA 192, US 268** stated that

> ***"It is a cardinal rule in Constitutional interpretation, that provisions of a Constitution concerned with the same subject should as much as possible, be construed as complementing and not contradicting one another. The Constitution must be read as an integrated and cohesive whole."***

We agree with Counsel for the Claimant that in the same spirit, the interpretation of provisions of a Statute concerned with the same subject should be construed as a whole. Sections 66 and 68 are concerned with the procedures to be adopted when considering termination or dismissal of employees, therefore they should be construed together.

Section 66 of the Employment Act provides that:

> ***"66. Notification and hearing before termination***
>
> ***(1) Notwithstanding any other provision of this part, an employer shall before (***our emphasis) ***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 (****emphasis ours****) and the employee is entitled to have another person of his or her choice present during this explanation,***

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

It is clear from the reading of Sub- Section (1) of Section 66, that the employer must communicate the reason for dismissing an employee **"before"** the employer reaches a decision to dismiss the employee. Sub section (2) of the same Section further provides that the employee shall be given an opportunity to respond to the reasons leveled against him or her by the employer **before** the employer **reaches** the decision to dismiss the employee. The section makes it a requirement for the employer to notify the employee of the reason or reasons for which he or she is contemplating the termination or dismissal of an employee **before** making the actual decision to terminate the employee. We believe that the drafters of this law were cognizant of the fact that under the new legal dispensation, it was important to consider alternative dispute resolution as a priority that emphasizes the principles of a right to be heard, hence the requirement that an employer who was contemplating termination or dismissal of an employee to give the employee a reason and an opportunity to respond to the reason or reasons **"before"** the dismissal or termination takes effect and not after.

Section 66 of the Employment Act therefore forms the basis for alternative disciplinary and grievance mechanisms between employers and employees. It is premised on the principles of natural justice to ensure that employers do not terminate or dismiss their employees at will. The principles of natural justice that is,

of the right to be heard in an employment dispute were well laid down in **EBIJU JAMES VS UMEME LTD HCCS NO. 0133 OF 2012**, that:

> ***"... 1) Notice of allegations against the plaintiff was served on him and sufficient time allowed for the plaintiff to prepare a defence.***
>
> ***2) The notice should set out clearly what the allegations against the plaintiff and his rights at the oral hearing were. Such rights would include the right to respond to the allegations against him orally and or in writing, the right to be accompanied at the hearing and the right to cross examine the defendant's witnesses or call witnesses of his own.***
>
> ***3) The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant..."***

In the same vain Section 68 of the Employment Act lays emphasis on the employer proving the reason for the termination hence making the abiding with the principles of natural Justice mentioned above mandatory.

Section 68 provides that:

68. Proof of reason for termination

(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71

(2) The reason or reasons for dismissal shall be matters, which the employer, at the tie of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee

(3) In deciding whether an employer has satisfied this section the contents of a certificate such as is referred to in section 61 informing the employee of the reasons for termination of employment shall be taken into account."

In light of this analysis we do not accept the assertion by Counsel for the Respondent that proof of the reason or reasons is done by adducing evidence in Court and Court making a decision. It is not the role of Court to supervise the disciplinary/grievance process between the employer and employee as Counsel would like us to believe. The role of the Court is to ensure that the disciplinary process is undertaken before the termination or dismissal and it is done in accordance with the law. The fact that Section 66(supra) makes it a requirement that the employee is given a reason for the termination or dismissal and is also given an opportunity to respond to the reason "**before"** the employer makes a decision to dismiss or terminate him or her, supposes that the employer must substantiate the reason or reasons he or she is contemplating the termination or dismissal hence the provision of Section 68(supra). In any case it is trite that he who alleges must prove. Therefore, the burden shifts to the employer to prove the reasons although, we hasten to state that the standard of proof in such cases is not the same standard in as envisaged in Criminal cases. The standard is premised on the preponderance of evidence.

A further reading of Section 68 (3) indicates that the reasons for termination or dismissal must be stated in the certificate of employment which is issued at the time of and not after the termination or dismissal. This subsection buttresses the decision

in **MUFUMBO**(Supra) that before terminating or dismissing an employee the employer must give the employee a reason or reasons why he or she is contemplating the termination or dismissal and the reason or reasons must be proved before the termination takes effect and not after.

Therefore in light of Section 66(1) and (2) (supra), proof of the reason or reasons for the dismissal or termination as provided under Section 68 must be done "**before"** reaching the decision to terminate or dismiss the employee and not later, as Counsel for the Respondent would like this Court to believe.

The Respondent does not deny that the reasons for terminating the Claimant were not communicated to him before he was terminated. In fact, Counsel's argument is that it was not a requirement to do so until the matter comes to court and even then the Claimant was accorded a hearing because his immediate supervisor, the Executive Director and Director Human Resources and Administration had several discussions with him regarding his alleged poor performance and misconduct.

The evidence adduced by RW1 and RW2 shows that the Respondent did not abide by the requirements provided under Section 66 (1) and (2) (supra) and Section 68 (supra) when it terminated the Claimant because he was not given a reason or reasons for terminating him and an opportunity to respond to the reason or reasons. The reasons of poor performance and misconduct adduced by that RW1 and RW2 during the hearing, should have been put to the claimant in a disciplinary hearing before the termination took effect and not in Court. It is at the disciplinary hearing that the parties would have established whether the alleged misconduct and poor performance warranted a termination of the Claimant or not.

We also find that given the provisions under Section 66 of the Employment Act already discussed above, the Respondent's argument that the discussions held between RW1 the Claimant's supervisor, RW2 the Human Resources Director and the Respondent's Executive Director and warnings issued to the claimant, amounted to a disciplinary hearing as do not hold. It was also RW1 and 2s testimonies that the TMT made the decision to dismiss the Claimant in his absence.

This Court still stands by the holding in the Kenyan case of **QUEENVELLE ATIENO OWALA VS CENTRE FOR CORPORATE GOVERNANCE, INDUSTRIAL CAUSE NUMBER 81 OF 2012,** cited with approval in **DONNA KAMULI VS DFCU BANK LDC No.2 OF 2015;**

> ***"That it is insufficient that the employer had various discussions with the employee. It is immaterial that the employee was at one time appraised and found wanting. Appraisal and discussions held between employees and their employers touching on the employees work performance do not add up to a disciplinary hearing and can only be evidence in support of good or poor performance at a disciplinary hearing."***

Accordingly, in the absence of evidence that the Claimant was notified of any reasons for terminating him before his termination took effect, or that he was accorded an opportunity to respond to the reasons in a disciplinary hearing, the contention by Counsel for the Respondent that the evidence of RW1 and RW2 at the trial proved verifiable misconduct and poor performance on the part of the claimant as justification for the dismissal is untenable in law and therefore the Claimant was unlawfully terminated.

Issue 2: Whether the Claimant is entitled to the remedies claimed.

Having found that the Claimant was unlawfully terminated, he is entitled to some remedies. The Claimant prays for declaratory orders that his termination by the Respondent was unlawful, an order for reinstatement as an employee, general and aggravated damages for unlawful termination an order for the respondent to unconditionally pay his terminal benefits, interest and costs of the claim.

DECLARATION

We have already established that the Claimant was unlawfully dismissed.

REINSTATEMENT

The claimant submitted that although his dismissal was not justified, because the Respondent did not give him a reason for dismissing him it did not severe the relationship between him and the respondents therefore he should be reinstated in accordance section 71(6). Section 71(6) provides that:

> ***(6) The court shall require the employer to reinstate the employee unless –***
>
> ***(a) The employee does not wish to be reinstate or re-employed***
>
> ***(b) The circumstances surrounding the employment are such that a continued employment relationship would be intolerable(c) it is not reasonably practical for the employer to reinstate or re- employ;***
>
> ***(d) the dismissal is unfair only because the employer did not follow a proper procedure.***

The respondents on the other hand argue that it would be unreasonable for Court to reinstate the claimant. Counsel for the respondents cited **BANK OF UGANDA VS BETTY TINKAMANYIRE SCCA No.12 OF 2007.**

We are inclined to agree with the respondent's because we think it would not be prudent to reinstate an employee simply because the employee's dismissal was not justified. We believe that by the time the dispute has escalated to Court for adjudication the trust and confidence between the employer and employee is so badly damaged that reinstatement would not be practicable. A court cannot impose an employee on to an employer and this was settled by Kanyeihamba JSC as he then was, in **BANK OF UGANDA VS BETTY TINKAMANYIRE SCCA No.12 OF 2007** when he stated that:

> ***"...it is trite that a court of law should not use its powers to force an employer to retake an employee it no longer wishes to engage."***

The fact that the Respondent adduced evidence about the Claimants misconduct and poor performance was a clear indication that it had lost trust and confidence in the Claimant. It would therefore be unreasonable for him to be reinstated. This prayer is therefore denied.

GENERAL DAMAGES

The claimant citing section 71(5) and **MOSES SSALI aka BEBE COOL &OTHERS VS ATTORNEY GENERAL HCCS 86/2010**, prays for General damages. It is his submission that the measurement of the quantum of damages though a matter for the discretion of an individual judge, it should be exercised judiciously in light of the general conditions prevailing in the country. He contended that his career was cut short because he only worked 21 months when he was dismissed and this caused him to suffer mentally financially, and he felt unappreciated yet he worked so hard.

He prayed that court follows **BANK OF UGANDA VS BETTY TINKAMANYIRE SCCA No.12 OF 2007, EBIJU JAMES VS UMEME LTDHCCS No.133 OF 2012, MOSES**

OBONYO VS MTN (U) LTD LDC No. 45 OF 2015, DONNA KAMULI VS DFCU BANK LDCNo.20F 2015 AND FLORENCE MUFUMBO VS UDB LDCNo.138 0F 2014, to award him general damages.

The respondents in reply, contends that if any losses were incurred by the Claimant, they should not be attributed to them. However, if court finds otherwise, the claimant is not entitled to more than the notice period. Counsel cited **TUSHABOMWE VS EQUITY BANK LTD LDC No.146.** In this case Counsel prays that in line with **STANBIC BANK VS KIYIMBA MUTAALE SCCA No.02 OF 2010**, that award for damages should not exceed 1 months' salary.

It is trite that the only remedy for an employee who was unlawfully dismissed is damages. In **VIRES VS NATIONAL DOCK LABOUR BOARD (1958) 1 QB 658** cited with approval in **STANBIC BANK VS KAKOOZA MUTALE C.A No. 2 OF 2010,** It was held that;

> ***"It has long been settled that if a man employed under a contract of personal services is wrongfully dismissed, he has no claim under the contract after repudiation. His only claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them."***

We have already established that the claimant was unlawfully dismissed, therefore he is entitled to damages. We do not agree that the damages should be limited by the notice period. It is trite that their measurement is at the discretion of Court and General Damages are intended to bring an aggrieved party to as near as possible in monetary terms to a position a Claimant was in before the injury occasioned to him or her by the respondent occurred. Given that the claimant was earning Ugx.8,

500,000/- per month and his employment was interrupted by his unlawful termination, we think that the award of Ugx. 90,000,000/- as General Damages is sufficient.

AGGRAVATED DAMAGES

The claimant prays for aggravated damages on the ground that the Respondent treated him arrogantly, callously and with malice when he was terminated for reasons for which he was already cleared and even after termination the Respondent only paid his provident fund contribution 15 months after his termination.

The Respondent in reply disputed the award of aggravated damages on the ground that aggravated damages are entirely punitive and the factors such as arrogance and malice can be considered in making such an award. According to Counsel none of the facts pleaded nor the evidence meets the test in **ROOKES VS BARNARD [1964] ALLER** to warrant the award of aggravated damages. In ROOKES it was established that:

"… there are only three categories in which exemplary damages are awarded:

a. ***Where there has been oppressive, arbitrary or unconstitutional action by the servants of government.***
b. ***Where the defendant's conduct has been calculated by him to make profit which may well exceed the compensation payable to the plaintiff and***
c. ***Where some law for the time being in force authorizes that award of exemplary damages.***

We do not find this a case in which aggravated damages should be awarded. The Respondent as an employer has a right to terminate its employees, but the

termination should be done in accordance with the law. Although the Claimant was terminated without notice or payment in lieu of notice and he received his provident fund contribution 15 months after termination, he did not prove callousness, malice or arrogance. The prayer for aggravated damages is therefore denied. However the award of 1 months' salary in lieu of notice and the general damages already awarded is sufficient as a remedy.

UNCONDITIONAL PAYMENT OF TERMINAL BENEFITS

The claimant prays for the refund of his terminal benefits that were used to offset his outstanding loan with the respondents. He contends that having been unlawfully terminated his outstanding loan with the Respondent should be wholly settled by the Respondent because its acquisition was premised on the understanding that he would continue to be employed by the Respondent and he would pay the loan by the deduction of Ugx. 2,803,286 /- from his salary per month. This was however frustrated by his unlawful termination. He prays for that the Respondent is directed to refund his terminal benefits amounting to Ugx, 41,437,500/=. He cited **MOSES OBONYO VS MTN (U) LTD LDC No. 45 OF 2015, DONNA KAMULI VS DFCU BANK LDCNo.20F 2015 AND FLORENCE MUFUMBO VS UDB LDCNo.138 0F 2014** whose decisions are to the effect that a claimant who was unlawfully terminated from employment is entitled to be relieved of the loans that were intended to be wholly settled by salary deduction. Also cited **OKELLO NYMLOD VS RIFT VALLEY RAILWAYS HCCS No.195 OF 2009** which was the rational for this position.

In reply Counsel for the Respondents submitted that the claimant had not pleaded Special Damages in accordance with Order 6 rule 7 of the CPR which provides that parties are bound by their pleadings and cannot depart therefrom except upon amendment. He also cited **INTERFRIEGT FORWARDERS (U) LTD VS EAST AFRICA**

DEVELOPMENT BANK SCCA No.33 1992, MS FANGMIN V BELEXTOURS AND TRAVEL LIMITED SCCA No. 06 OF 2013 and CONSOLIDATED WITH CRANE BANK V BELEX TOURS AND TRAVEL, SCCA No.01 OF 2014. According to him the claimant did not plead or prove special damages and therefore he cannot submit on issues that were not pleaded in the memorandum of claim.

With regard to the payment of terminal benefits Counsel contended that the claimant was entitled to following;

a. Leave days payment and payment in lieu of notice less 5% NSSF and PAYE amounting to Ugx, 9,863,625/=
b. Gratuity at 25% of gross annual salary less NSSF (15%) and PAYE amounting to Ugx. 11,213,948/-
c. Provident fund contribution of Ugx.17,951,486/- all totaling to Ugx. 30,029,059/=

Counsel further stated that the time of his dismissal the claimant had an outstanding loan of Ugx, 28,032,854/- the respondent set of the claimant's terminal benefits from the loan amount leaving a balance of Ugx. 6,955,280 owed to the Respondent.

In the circumstances counsel was of the view that the claimant having received all his terminal benefits he was not entitled to any further payment.

Counsel also argued that the facts in the instant case are different from the ones in **OKELLO NYMLOD** (Supra) therefore it should not be applied to this case because at the time the claimant was advanced a salary loan, the Claimant was aware that in case of termination the outstanding loan had to be offset pursuant to clause 14.2.8 of the Human Resources Policy Manual which the claimant signed. The clause states that;

14.2.8 Liabilities

(i) Employees leaving employment with the Commission shall ensure that their liabilities to the Commission including loans and advances are settled in full.

(ii) Where the liabilities have not been settled, the outstanding amounts shall be recovered in full from employee's terminal due/gratuity…"

We agree with Counsel for the Respondent that the Claimant did not plead special damages in his amended Memorandum of claim. He only pleaded the payment of his terminal benefits. He claimed Ugx. 50,000,000/- as terminal benefits but did not particularize the Benefits. In submission Counsel for the claimant prayed for terminal benefits amounting to Ugx, 41,437,500/=. It is trite that Special Damages must be pleaded and proved. Since none were pleaded we shall not dwell on them. We shall only consider the prayer for payment of terminal benefits as particularized in the claim.

Our understanding of section 14.2.8 of the Respondents Human Resources and Policy manual is that the employee in question would be leaving lawfully. In this case the Claimant was unlawfully terminated therefore this section does not apply to him. In **MOSES OBONYO VS MTN (U) LTD LDC No. 45 OF 2015, DONNA KAMULI VS DFCU BANK LDCNo.20F 2015 AND FLORENCE MUFUMBO VS UDB LDCNo.138 0F 2014** and many other cases this Courts holdings in line with **OKELLO NYMLOD** (supra) are to the effect that where an employee was unlawfully terminated, the employer would be liable to pay the employee's outstanding loan balances if it recovery was solely pegged on the employee's salary. We think this case is on fours with these authorities in as far as the payment of outstanding loans for unlawfully

dismissed employees is concerned, given that its recovery was premised on the deduction of Ugx.2,803,286 /- from his salary per month. In the circumstances therefore the deduction of the outstanding loan balances from the Claimants terminal benefits was not correct. However he did not itemize/ particularize the benefits to show court how he arrived at Ugx, 41,437,500/=. He also did not dispute the Respondent's itemization of his benefits. We shall therefore use the Respondent's particularization as a basis to make an award for terminal benefits as follows:

(a) We order that the claimant is paid Ugx. 12,077,573/= out of ***Ugx. 30,029,059/- admitted by the respondents***, as balance of his terminal benefits, since the claimant testified that by the trial he had received Ug***x. 17, 951,486/= provident fund contribution.***

(b) An order for the payment of Ugx.28, 032,854/- as the outstanding loan balances owing to the respondent and deducted from the claimant's terminal benefits on termination.

(c) INTEREST

An interest of 20% per annum shall be paid on all the awards from the date of judgment until full and final payment.

In conclusion an award is entered in favour of the Claimant in the following terms:

1. A declaration that the Claimant was unlawfully terminated.
2. An award of Ugx. 90,000,000/- as General Damages.
3. An award of Ugx 12,077,573/= as outstanding terminal benefits.
4. Payment of outstanding loan balances of Ugx. 28, 032,854/=
5. Interest at 20% per annum on 2, 3 and4 above until full and final payment.

No order as to costs is made.

Delivered and signed by:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

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2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

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<u>PANELISTS</u>

1. MR. EBYAU FIDEL

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2. MR. WANYAMA ANTHONY

……

3. MS. JULIAN NYACHWO

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DATE: 21ST DECEMBER 2018