

**THE REPUBLIC OF UGANDA**  
**THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA**  
**LABOUR DISPUTE APPEAL NO. 028/ 2016**  
**(Arising from KCCA C.B. NO. 109 OF 2014)**

**BETWEEN**

**ACTION AID UGANDA ..... APPELLANT**

**VERSUS**

**DAVID MBAREKYE TIBEKINGA ..... RESPONDENT**

**BEFORE**

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

**PANELISTS**

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Mr. Anthony Wanyama

**AWARD**

**Brief Background**

The appellant was an employer of the respondent. There were allegations that the respondent indulged in gross misconduct activities. A select committee was set up to follow up the allegations and make findings that would help the Country Director to resolve the same.

The respondent was not content with the committee and alleged bias. From the reading of the minutes of this committee, the committee proceeded in the absence of the respondent and certain employees gave their impressions about the allegations against the respondent. The committee recommended the Country Director to pursue further action.

On 5<sup>th</sup> May 2014 the respondent was invited to a disciplinary hearing to take place on 9/5/2014. According to the minutes, the legal representative of the respondent objected to the committee and proposed establishment of another committee which was rejected and both lawyer and client walked out. After hearing one Bakunda, the committee decided to summarily terminate the services of the respondent. The respondent felt aggrieved with the

termination and lodged an appeal to the Board which dismissed the same. The respondent then lodged a complaint to the Labour Officer who found that the respondent was not accorded a fair hearing and therefore the dismissal was unlawful, hence this appeal.

The memorandum of Appeal stipulated 8 grounds:

1. The Labour Officer erred in law and fact when he held that the termination of the respondent was unfair and granted him 4 weeks wages equivalent to Ugx. 5,914,631/- (Five million nine hundred fourteen thousand six hundred thirty one shillings only) for failure to give the respondent a fair hearing when a fair hearing was accorded to the respondent.
2. The Labour Officer erred in law and fact when he awarded the respondent **Ugx. 5,914,631/-** (Five million nine hundred fourteen thousand six hundred thirty one shillings only) and **Ugx. 11,829,262/=** (Eleven million eight hundred twenty nine thousand two hundred sixty two shillings only) as basic and additional compensatory Order for unfair termination yet his termination was fair.
3. The Labour Officer erred in law and fact when he held that the responded is entitled to compensatory damages and forwarding the file to this court to determine the issue of general damages and costs.
4. The Labour Officer erred in law and fact when he awarded the respondent **Ugx. 29,573,115/=** (Twenty nine million five hundred seventy three thousand one hundred fifteen shillings only) as five months' salary as severance pay yet he was not entitled to the same.
5. The Labour Officer erred in law and fact when he awarded the respondent **Ugx. 2,365,852.4/=** (Two million three hundred sixty five thousand eight hundred fifty two shillings four cents only) as accumulated and unpaid for leave days of half a month yet he was not entitled to the same.
6. The Labour Officer erred in law and fact when he awarded the respondent **Ugx. 2,957,315.5/=** (Two million nine hundred fifty seven thousand three hundred fifteen shillings five cents only) half a month's salary as gratuity for 2014 where he worked for half a year yet the respondent didn't complete his contract.
7. The Labour Officer erred in law and fact by awarding excessive compensatory amounts.

8. The Labour Officer erred in law and fact when he failed to evaluate the evidence on record thereby reaching a wrong decision.

Before arguing the appeal, the appellant raised a number of issues which we intend to deal with first. He argued that there were documents on the appeal record which were not part of the lower court and he prayed they be allowed. According to him the court on 21<sup>st</sup> May 2018 allowed preparation of the record which had been delayed because of the same documents. The documents having been procured, the record of appeal was prepared including the documents and was forwarded to the respondent.

The second issue raised was about questions of fact. He argued on 21<sup>st</sup> May 2018 he would have sought leave to argue points of fact but for counsel who became “**more zealous to raise the same**” and so he prayed court to allow him argue the points of fact since such leave would prejudice the respondent.

In reply counsel for the respondent argued that since the duty of an appellant court was to re-evaluate the evidence before the lower court and form its own decision on the same evidence, it was not acceptable to allow the documents that did not form part of the evidence as it was not tested and no reason was given for the failure of the appellant to avail it before the lower court. He argued that it was not true that on 7/3/2018 the appellant applied for leave to rely on the same documents. He prayed that the documents be struck off the record.

He argued that the appellant filed a new memorandum of appeal without leave and the said new memorandum contained matters of fact contrary to the law. He prayed that the appeal on matters of fact should be disallowed and the new memorandum of appeal should be struck off.

On perusal of the record of this court on 07/3/2018 Mr. Seninde who appeared for the appellant informed court that he had just taken over the file and that he intended to file an amended memorandum of appeal as well as seek leave to include facts. On 21/05/2018, Mr. Okecho for the appellant seemed ready to proceed but Mr. Mujurizi for the respondent complained that he had not received the costs payable by appellant as ordered by court on 7/3/2018 and that he had received a new memorandum of Appeal that included new evidence.

We will deal with new evidence on appeal first. Ordinarily as counsel for the respondent has pointed out, an appellate court re-evaluates the evidence as adduced before the lower court and forms its own decision on the same evidence. New evidence can only be adduced on appeal if the party intending to adduce it proves to court not only that it is necessary for the determination of the appeal but that there was good reason why it was not available in the lower court. And this is done via a formal application.

Having said this, **Section 18 of the Labour Disputes (Arbitration & Settlement) Act 2006 provides:**

**“18 Industrial court not to be bound by rules of evidence.**

**(1). For the purposes of determining any matter before it, the Industrial court shall not be bound by the rules of evidence in any civil proceedings and may, on its own motion or on the application of any of the parties to the dispute, require any person:-**

**(a) To provide in writing, or in any other way, evidence in relation to any matter as the court may require".**

On perusal of the lower court record, we infer that the labour officer referred to certain Section of the Human Resource Manual of the Appellant and even the appellant as well as the respondent referred to it even though it was not on the record. Consequently we form the opinion that it is necessary that this document be allowed for the proper determination of the appeal as provided for under Section 18 of the law above quoted.

The Award of the labour officer at page 81 of the record of proceedings refers to copies of emails submitted.

In the submission of counsel for the respondent the emails at page 95, 96, 109 and 111 of the record of appeal were not part of the proceedings in the lower court.

It is our considered opinion that this court may only refer to the emails if in our opinion the emails without creating a controversy only helps the court to clear an aspect of the facts leading to evidence in the lower court that led to a controversial conclusion by the Labour Officer. Otherwise it will not be necessary to refer to the emails.

**The next preliminary question relates to arguing points of fact on appeal.**

**Section 94 all of the Employment Act** provides

**“94 Appeals**

**(1) A party who is dissatisfied with the decision of a labour officer on a complaint made under this Act may appeal to the Industrial court in accordance with this Section.**

**(2) An appeal under this Section shall lie on a question of law, and with leave of the Industrial court on a question of fact forming part of the decision of the labour officer”.**

The record of this court on 07/3/2015 shows that the appellant intended to seek leave of the court to argue points of law. Mr. Seninde who appeared for the appellant said:

**“The matter is not ready to hearing. We just took over the case. We will need to amend the memorandum of appeal. We will also seek leave to include facts. There is no record of appeal. Previous counsel did not file the record. We will file the record...”**

Although Mr. Mujurizi applied to dismiss the appeal for the appellant’s failure to process the appeal, this court granted an adjournment to the appellant up to 21/5/2018. On this date counsel for the respondent complained that he had just received an amended memorandum of appeal with points of fact and new evidence. Up to this point there was no application for leave to include questions of fact in the memorandum of appeal. We do not accept the contention of counsel for the appellant that it was the zealouslyness of counsel for the respondent to raise the same points that prohibited him from making the application. Counsel for the appellant had time from 7/3/2018 to 7/05/2018 to lodge an application for leave to include points of fact in the grounds of appeal.

Neither do we accept the oral application made in submission. An application for leave to include questions of fact in the appeal process, in our view, must include reasons why one is seeking to argue points of fact and not only of law as required by **Section 94 of the Employment Act**. This court cannot grant leave merely because someone has said “I apply for leave to argue points of fact”.

While considering the question whether a memorandum of appeal couched in the same manner as the one in the instant case should be struck out, this court in the case of **NETIS UGANDA VS WALAKIRA L.D.APPEAL 22/2010** while relying on the Court of Appeal decision of **BAINGANA VS UGANDA crim. appeal 68/2010** held

**" Section 94(2) of the Employment Act is explicit in affirming the requirement of leave of this court if matters of fact are to be appealable. The Legislature in our view did not intend that appeals on matters of fact be automatic. Therefore when an appellant feels aggrieved by the manner in which the labour officer handled the facts such appellant is required to seek leave of this court to appeal against the same".**( See also **Equity Bank Mugisha L.D.A 26/2017**). While considering the same issue in the Baingana case the court of appeal decided that although the appellant had no right of appeal in respect of issues of mixed law and fact, ground 1 and 2(which contained issues to do with evaluation of evidence) were issues of law and went ahead to consider them. the court of Appeal said;

**" We were inclined to strike out all the grounds of appeal  
however we find that ground 1 and 2 raise the same issue  
of law, the poor drafting notwithstanding, we shall therefore  
proceed to determine them"**

Consequently we hold that ground 1-7 for offending **Section 94 of the Employment Act** are struck out and we shall only consider ground 8 of the amended memorandum of appeal which reads:

**“The Labour Officer erred in law and fact when he failed to evaluate the evidence on record thereby reaching a wrong decision”.**

It was argued for the appellant that the Labour Officer was not backed by any law to refer to the award of damages to the court for determination since according to him the law under **Section 78 of the Employment Act** envisaged all that was needed to compensate the claimant and there was no need for referring the claimant for further compensation.

Relying on **Rule 3 of the Labour Disputes (Arbitration and settlement)(Industrial Court Procedure) Rules 2012**, the respondent argued that the Labour Officer could refer a dispute to the Industrial court.

Rule 3 of the law above quoted provides

### **“3. Reference of a Labour Dispute**

- (1) Where a Labour Officer is requested by a party to a dispute to refer the dispute to the court under Section 5 of the Act, the Labour Officer shall refer the dispute in the form specified in the first schedule”.**

On perusal of **Section 5 of the Labour Disputes (Arbitration & Settlement Act)** referred to in rule 3 above quoted and the 1<sup>st</sup> schedule of the rules quoted above, we form the opinion that reference of a dispute to this court relates to the dispute as a whole. The labour officer having determined the question whether or not the claimant was unfairly terminated, in our view, determined the dispute and therefore he could not refer the dispute to this court under **Section 5 of the Labour Dispute (Arbitration and Settlement Act) or rule 3** of the rules of this court.

Having said that, however, if the labour officer considers that the claimant deserved more than he or she is empowered to grant as compensation under **Section 78 of the Employment Act**, such labour officer may refer the question of damages to the court. There is nothing illegal or improper for the labour officer to refer the question of damages for determination by the court. However the case of **IRENE KHARONA VS ACTION AID INTERNATIONAL L.D.C. 196/2014**, relied upon by the respondent did not grant general damages to the claimant after a reference on the same from a labour officer. In the case of **BONNY BINEKA OCHWA VS KYAMBOGO UNIVERSITY LDR 302/2015** this court considered a reference of the Labour officer on damages and allowed the same.

In consideration of the issue as to whether the claimant was accorded a fair hearing, the labour stated **“all allegations brought against the complainant remained as allegations and no proof was ever adduced to prove them in substance..It is clear that the country**

**Director and the Human Resource Director who were part of top management and were the representatives of the organization were not independent minded to pass a fair decision in their deliberations in accordance with Section 13 and 18 of the Action Aid Human Resource policy because they were interested parties and would be perceived as biased in favour of the organization.”**

It appears on the record (and in the evidence) that the Country Director having heard certain allegations of misconduct against the claimant constituted a certain committee to follow up the allegations but the respondent did not assist the committee as he believed it would be biased and the committee went ahead to get information from other employees and eventually recommended further action against the respondent. The Country Director then appointed a disciplinary committee to which the respondent objected but he was overruled and the committee went ahead in his absence because he marched out of the proceedings. After hearing one witness, the committee decided to hold the respondent culpable and eventually he was dismissed.

We will first address the issue of bias. It is a cardinal principle in our justice system that a person alleged to have committed any offence or breach of any rule or regulation appears before an impartial tribunal to determine his/her fate. It is therefore proper and perfect for any party appearing before such a tribunal to express his/her reservations about the impartiality of the tribunal and his/her feelings about the prospective outcome of the proceedings. . It is not acceptable, in our considered view, that a person appearing before such a tribunal after raising his/her concerns about the impartiality of the tribunal, that he/she marches in protest out of the proceedings because he/she believes the outcome will be biased. The proper course of action to take is for the party alleging bias to proceed after being overruled, and provide a defense to the allegation for the **“biased”** committee to consider and thereafter use the appeal process to overturn the decision of the tribunal on grounds that it was biased. We strongly believe that if the justice system was to allow allegations of bias and impartiality to prevail over the insistence of the tribunal that it was not biased or impartial, the justice system would open a Pandora box of such allegations and some parties would take advantage to delay or derail the justice of the case. This is not to exonerate a person on the tribunal who is likely to be biased. Such a person should not in the first place, be on the tribunal. The impartiality or biasness of a tribunal or a given member of the tribunal will always depend on the peculiar circumstances of a given situation.

In the instant case, the Country Director received reports of misconduct against the respondent and appointed an adhoc grievances committee. From what we gather on the record, at this stage there were rumors and bitterness expressed about the methods of work of the respond among his colleagues culminating into a list of grievances addressed to the Country Director who preferred that the same grievances be revealed to the respondent by a committee he was to appoint to investigate the same. The grievances were revealed to him on 9/4/2014 via an email by one Harriet who invited him to a discussion with a committee appointed by the Country Director. According to the respondent (as stated in his appeal to the Board after dismissal):-

**“the selection of this grievance handling committee was purely based on royalty to the Country Director but not based on their independence and competence since none of them had ever conducted any investigation anywhere..”**

Consequently when the respondent appeared before the committee his view was that the panel was not properly constituted according to that Resource Policy and he there refused to participate in its proceedings. Was the committee right to proceed in the absence of the respondent? Our answer is YES. This is because as already pointed out; the respondent should have shared his side of the allegations before the committee after his misgivings being put on the record. By asking the Country Director to appoint another committee he wanted them to do the work according to what he personally considered independent and right. We do not see anything wrong with any employee being loyal to his employer in the absence of anything adverse to such loyalty.

Looking at the composition of the committee members, the Chairperson was Director Programs, one member was the Policy and Compliance Manager and the other was Finance Manager. The **Human Resource Manual** of the appellant **Section 19.1** provides for the grievance process and one reason the respondent did not participate in the proceedings was that the committee constituted two members who were part of the grievance process. The record does not reveal who these members could be and which particular item of **Section 19.1 of the Human Resource Policy** was breached. It is clear to us that a grievance was brought to the attention of the Country Director who in accordance with the **Section 19.1 of the Human Resource Policy** appointed a grievance committee. As this Court has held in the cases of **Matovu versus Umeme Ltd L,D.C 004/2014** and **Caroline Kariisa Gumisiriza versus Hima Cement HCCS 84/2015** disciplinary committees (or any committees set up to resolve issues arising in Labour Relations) do not have to be at the equal footing with the courts of law in procedure). We do not therefore find any fault in the Country Director’s appointment of the grievance committee.

Consequently we do not fault the grievance committee for having proceeded on 15/04/2014 with their investigation by interviewing the five people who gave them the basis of their observations and recommendation without any input by the respondent.

It is gathered from the committee report that the respondent’s methods of work did not rhyme with his colleagues methods including the methods of the Country Director. Thus the committee observed at page 15 of the record of proceeding in (III) that

**“While the Audit Manager could have good intention in executing his mandate based on his assessed risk, our interaction with the various interviewees we noted that his confrontational and unstructured approach creates an environment of suspension among the auditees which creates barriers to obtaining objective responses, actions and support needed....”**



The committee recommended further action by the Country Director and in his wisdom and discretion the Country Director preferred disciplinary charges against the respondent who on 5/5/2014 was invited to a disciplinary hearing to take place on 9/5/2014. The respondent appeared with his legal representative who raised issues of impartiality and bias of the panel (as he did previously to the grievances committee) and after being overruled both the respondent and his legal representative marched out of the proceedings in protest. The record of the disciplinary proceedings show that one witness, Bakunda Davis was called and that he corroborated to adhoc committee report that the respondent had not been provided with a vehicle because he had not followed procedure. We gather from the record that in the absence of any defense to the allegations, the disciplinary committee based on the report of the Grievances committee decided that the respondent be summarily dismissed.

In his written submissions and relying on the authority of **Charles Harry Twagira Vs Uganda SCCA No.3/2007** counsel for the respondent criticized the committee for not giving an opportunity to the respondent to hear the witnesses and thereafter to cross-examine them. As already noted the respondent refused to participate in the proceedings of both the Adhoc grievance committee and of the disciplinary committee. It is fallacious in our view to have expected either of the committees to invite the respondent for the purposes of cross-examining the said witnesses. The respondent willingly opted not to be part of the proceedings and he is therefore estopped at this time from claiming that he was denied such opportunity.

The gist of the complaint of the respondent was that the grievances committee and the disciplinary committee were constituted by members of the CMT (we believe this refers to the central management committee) yet according to him is the same committee that was aggrieved. This is not reflected in the proceedings. Although one Davis Bakunda and one Edward Iruura were the originators of the complaint and were part of the CMT, they did not sit in judgment on either of the committees.

The record in our view reveals that the respondent, despite not having been availed a written complaint from a named complainant, was aware of the charges and he was given sufficient time to reply or defend himself against the charges but he opted not to appear and defend himself. The only question therefore is whether the evidence available was sufficient to occasion the disciplinary action by the appellant.

In the words of the labour officer

**“all allegations brought against the complainant remained as allegations and no proof was ever adduced to prove them in substance as required by section 68 of the Employment Act and section 18.10.1, 10.2 and section 19 of the Action Aid’s Human Resource Policy.”**

In the submission of the appellant, the respondent requested for a vehicle without an approved transport request and this was gross misconduct as per **clause IV of the Human Resource Policy** and contravened **clause 10.1.7 of the Financial Procedures and Policies Manual**.

In the submission of the respondent there was no evidence at all adduced proving the allegations raised against the claimant. The disciplinary committee, in making its decision largely relied on the report of the grievances committee although one witness, Bakunda Davis was called. According to the record, the witness confirmed the substance in the Adhoc committee's report concerning inability to provide the respondent with a vehicle on private mileage unless he followed the stipulated procedure upon which the respondent retaliated by showing him a whistle blow against management. One of the charges brought against the respondent (to which he did not offer a defense) was **"breach of vehicle operations and maintenance policy."** **Section 18.2.2 of the appellant's Human Resource Manual** provides for areas of gross misconduct and one them is under (VI) and it is **"Breach of the vehicle operations and maintenance Policy as contained in the FPPM** (we believe this means Financial Procedures and Policies Manual). Although the respondent originally objected to reference of this manual in this appeal on the ground that it was not adduced before the labour officer, it is our opinion that since the provision under which the respondent was charged referred to the manual, the justice of the case can only be met by referring to the same on appeal. Note also that the Human resource Manual was referred to by both parties before the labour officer.

#### **Section 16.1.7.of the FPPM provided**

**"All requests to use a vehicle should be made on the transport request form at all times before a vehicle is allocated, this should be only approved" ...."**and **section 16.1.8 of the FPPM provided "approval to use a vehicle shall be the responsibility of the Administration Coordinator or head of department/Director at head office and the coordinator at the DI"**.

There is no doubt in our mind that the request for a vehicle by the respondent was not done according to the procedures. The evidence before the grievances committee suggested that the respondent became upset at the refusal of the concerned officer to give him the vehicle and in the process the respondent threatened the management with whistle blowing about the way management was handling certain aspects related to land acquisition.

From the emails at pages 95, 96 and 97 of the record of appeal it appears that the respondent had earlier on raised issues concerning the purchase of land which were resolved in favour of management by officials from **Internal Audit, International**. It is our considered opinion that in the absence of evidence to the contrary, it was proved on the required standard before a disciplinary committee that the respondent breached the rule in **Section 16.1.7 of the FPPM**. The labour officer failed to appreciate that the respondent having been able to attend both the grievances and disciplinary committees, should have participated in the proceedings and that having failed to do so, he left all the evidence adduced not tested by cross examination and therefore was to be taken as the truth. The evidence as a whole suggested

that the respondent was at logger heads with the Senior Management to which he was party and in the circumstances it was only fair that the members of the senior management who were not the originators of the complaint, be able to constitute the two committees. The respondent's assertion of bias and impartiality in the circumstances did not hold water and we form the opinion that the appellant followed both procedure and law in the disciplinary process and reached a correct decision. Consequently, ground No. 8 succeeds. Thus the labour officer reached a wrong decision that the respondent was not accorded a fair hearing and that therefore he was unfairly and unlawfully terminated and such a decision is hereby set aside.

The disciplinary hearing having been fair, the labour officer was wrong to have awarded one month's salary in lieu of notice and such a decision is hereby set aside. As for the accumulated and unpaid leave, we have not found evidence that the respondent applied for and was denied such leave. The order related to accumulated leave days is therefore set aside.

The respondent having been lawfully terminated we agree with the appellant that under **section 11.3 of the Human Resource Policy** that provides for gratuity, the respondent would not be entitled to the same. The order of the labour officer in this respect is hereby set aside. The same applies to the order relating to severance pay as well as to compensation. The respondent will not be entitled to any form of compensation or general damages.

The respondent received a dismissal letter on 13/05/2014 and lodged an appeal. The appellate Authority decided to terminate him with payment in lieu of notice with effect from 26<sup>th</sup> May 2014. This being the case, the respondent would be entitled to the salary of May 2014 and therefore the order of the Labour officer relating to the respondent's entitlement to this salary is hereby sustained. We must emphasize however, that payment in lieu of notice will only arise once the process of disciplinary hearing is faulted as having been unfair/ illegal or having not existed at all. In the instant case it does not arise at all.

All in all the appeal succeeds and all orders of the labour officer are set aside with the exception of the order for payment of salary of May 2014. The respondent will be entitled to 20% interest per annum till payment in full. 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. Rwomushana Reuben Jack .....
2. Ms. Rose Gidongo .....
3. Mr. Anthony Wanyama .....

Date: 11/01/2019