

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO.159/2015
ARISING FROM MGLSD 306/2015

SEMBERA NORMAN **CLAIMANT**

VERSUS

UMEME LIMITED **RESPONDENT**

BEFORE:

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

PANELISTS

- 1. MR. EBYAU FIDEL.**
- 2. MS. FX MUBUUKE.**
- 3. MS.HARRIET NGANZI MUGAMBWA**

AWARD

BRIEF FACTS

This claim was brought against the Respondent for wrongful, unfair and or unlawful termination. The claimant prays for special damages, terminal benefits, gratuity, costs and General damages.

The Claimant was an employee of the Respondent as a power line assistant until he was summarily dismissed from employment by the Respondent on allegations that he solicited for Ugx.150,000/- as a bribe, in exchange for offering a service to a customer yet the customer had already paid for it.

The Respondent on the other hand asserted that while in employment the claimant engaged himself in soliciting for money from the Respondent's client, an act considered to be contrary to the terms of his employment, hence his summary dismissal from employment.

ISSUES

- 1. Whether the claimant was unlawfully dismissed from employment by the Respondent?**
- 2. What remedies are available?**

REPRESENTATIONS

The Claimant was represented by Mr. Mwembe Samuel of ... and the Respondents by Mr. Andrew Mausio of Sebalu and Lule Advocates.

SUBMISSIONS

- 1. Whether the Claimant was unlawfully dismissed from employment by the Respondent?**

It was submitted for the Claimant that his termination was unlawful because it was done without justifiable cause. Counsel contended that the Respondent did not abide by its disciplinary & Performance at work policy marked "O" on the Joint trial bundle and specifically Regulation 49, which makes it a requirement for the Respondent to

investigate a complaint in accordance with the principles of natural Justice. According to him he was not availed any investigation report to enable him prepare his defence. It was his submission that the District manager did not produce the report he received from the regional manager that purportedly verified the allegation that the Claimant solicited for Ugx. 150,000/= for replacing a pole for a one Wakabi. He cited **Kagimu Christopher Vs UEDCL Ldc No.007/2014**, in which this court faulted the Respondent for not availing the Claimant with the investigation report to enable him prepare his defence and for not giving him an opportunity to face his accusers at the hearing. According to Counsel the hearing report was wrought with contradictions. He stated that whereas Mr. Mwesigye the regional manager said he received a complaint about solicitation from the foreman, he also claims that he also spoke to the Claimant but he did not prove that he did. Counsel was certain that Mwesigye's call to the Jinja Manager was only intended to seek guidance on how to fabricate a story against the claimant, since the claimant established that the foreman made the complaint as a mere joke.

In his View the claimant was not granted his right to a fair hearing as provided under Section 42 of the Constitution of the Republic of Uganda as amended and section 66 of the employment Act, 2006. It was his submission that the complaint was made on the 27/01/2010, his invitation to the hearing was dated 1/2/2010 and the hearing actually took place on 2/2/2010. Therefore, the hearing was not impartial and was marred with malice therefore the process was unlawful.

In reply counsel contended that the Claim was barred by limitation of time as provided under Section 66(6) of the Act. He submitted that this sub section enjoins an employee who was unlawfully or summarily dismissed, to lodge his complaint within 3 months of such a dismissal. He contended that in the instant case the claimant was dismissed in

February 2010 and he filed Labour Claim 306 out of which this claim was born in 2015, 5 years later. Therefore, it should be dismissed.

With regard to the resolution of the issues 1, raised, he cited Section 68(2) which provides that an employer could dismiss an employee for a reason or reasons which the employer believed genuinely existed at the time of the dismissal and section 69(3) which provides that the employer could summarily dismiss an employee, if the employee by his or her conduct indicated that, he or she had fundamentally broken his or her obligation arising under the contract. He submitted that the Respondent could summarily dismiss an employee in accordance with clause 9 of the ***Discipline at work Policy & Procedure and Regulation 48 under Chapter7 of the (Code of Ethics) Regulations for Employers of UMEME Limited, Regulation 48.*** The Claimant was therefore summarily dismissed on the above terms for soliciting a bribe of Ugx. 150,000/=.

It was further his submission that whereas Counsel for the Claimant argued that it was erroneous for the Respondent to dismiss him without an investigation report, he was actually dismissed based on a complaint from a customer made both orally to the district manager and reduced in writing under Exhibit "I" on page 11 of the trial bundle and by e-mail marked Exhibit "J" to RW1, therefore the committee had enough information before it made its finding.

Counsel stated further that based on the work operation schedule for 18-22 January (Exhibit "L", the committee was able to form the opinion that the claimant was always untruthful. Whereas he stated that he was not able to fix the pole on the 21/01/2010, because of an emergency at Magamaga, on the same day the work operation schedule indicated that the work at Magamaga was pre-scheduled work for 21/1/2010 and the work at Walukuba Tabingwa was scheduled for 20/1/2010. According to Counsel the

replacement of the rotten pole as claimed by the Claimant in his evidence in chief, was also pre-scheduled work. Counsel refuted the Claimant's assertion that he had to go back to pick a HV(High Voltage) pole because he was carrying an LV(Low Voltage) pole yet at the same time he stated that he did not fix the pole because he was called to attend to an emergency at Magamaga. He did not believe that the claimant could have moved to work without the necessary materials. According to Counsel the Claimant contradicted himself given that he stated that he did not do the Customers work because of an emergency at Magamaga, yet he had carried an HV pole which he used at Magamaga, yet the assignment was purportedly an emergency? He submitted that the Magamaga assignment was never an emergency but pre-scheduled work, therefore the reasons advanced by the Claimant for abandoning the Customers work were not true. It was his submission that based on these facts the disciplinary committee found the Claimant culpable. It was further his submission that given the Respondent's elaborate procedures for reporting emergencies through SMS, the circumstances in the claimant did not involve the set procedure therefore the emergency that was alleged did not occur. In his view therefore this case was not a complicated case that warranted the commissioning of an investigation report. In addition neither the "gang-group" nor his immediate Supervisor Bwesigye Leopold whom he referred to, testified in Court, to corroborate his testimony.

According to him the claimant was given a fair hearing, because RW1 wrote to him about the complaint by the customer and requested him to make a written explanation which he did. He denied the allegations leveled against him, he was invited for a disciplinary hearing and the invitation letter indicated that he should attend the hearing with a person of his choice. He attended the hearing although he came unaccompanied. It was his submission that the committee concluded that there was enough evidence to hold the claimant culpable of attempted extortion of money for a service already paid for by the

customer and recommended that he is summarily dismissed. The Respondent then dismissed him for violating ***paragraph 5 of the Discipline & performance at Work Policy & Procedure and Regulation 48(3&9) of chapter 7(Code of Ethics) Regulations for Employers of UMEME Limited*** which forbids employees from demanding for money from customers and provides for the relevant punishment. The Claimant was informed about his right of Appeal to the Managing Director and indeed he appealed the decision of the committee as advised. According to Counsel the appeal was considered based on the proceedings of the disciplinary committee and the dismissal was upheld. He refuted the claimants claim that the hearing was *ex parte* because he attended the meeting and personally denied ever extorting such sum of money from Mr. Peter Wakabi.

He contended that the fact that the claimant did not cross examine the customer could not be raised at this time because he had opportunity to raise it at the hearing or on appeal but he did not.

It was further his submission that the claim that the claimant was not given sufficient time to prepare himself for the hearing, was an afterthought because it was not raised during the hearing or in the appeal to the Managing Director.

He argued that although the Disciplinary and Performance at work Policy provides that before disciplinary action is taken, the case has to be investigated in order to establish the facts, according to him an investigation did not have to lead to a formality of an investigation report. He asserted that an investigation means inquiry aimed at establishing facts and once the facts are established, there should be no need for a report as long as the Claimant is made aware of the infraction against him. He argued that to put undue regard on a physical report even where the claimant is aware of the infractions against him would be placing form over substance.

Counsel distinguished **Kagimu Christopher vs UEDCL LDC No. 007/2014** from the instant case. Whereas in Kagimu the employer was in possession of the investigation report in the instant case there was no report. He also sighted ***Caroline Kariisa Vs Hima Cement HCCS No. 84 of 2012***, for the legal proposition that disciplinary proceedings need not comply to the strict standards of a Court of law.

He also refuted the claim that the Customer got to know about the bribe through his foreman because in his written complaint the Customer stated that he had spoken to the claimant and when he asked what it would take to have his electricity supply restored, the claimant asked “ what don’t you Know.” According to Counsel the customer also stated that the Claimant asked for Ugx. 150,000/=, given that the customer talked to the Claimant directly section 59 did not apply to disciplinary hearings as provided by the decision in Kariisa (supra).

DECISION OF COURT

Before resolving the issues, we shall consider the point of law raised by Counsel for the Respondent, that the suit was time barred by section 66(6).

Indeed, a point of law can be raised at any time, especially if it has the effect of disposing off the suit, completely. Section 66(6) provides that;

“ ...

(6) A complaint under subsection (5) shall be made within 3 months after the date of dismissal.”

This this Court’s holding in **Sure Telecom vs Brain Azem Champ LDA No. 008/2015**, was to the effect that under Section 71(2) labour officer had discretion to entertain a matter filed before him or her outside the limitation period set thereunder, if he or she is

convinced by the Complainants reasons for exemption. Therefore the fact that the instant case was entertained by the Labour officer Ministry of gender, Labour and Social Development, in 2015, 5 years after dismissal, in our considered view is a clear indication that the Labour officer exercised his discretion to handle it outside the limitation set under section 71(2). In any case the Court of Appeal in the recent case of **Eric Mugenyi vs Uganda Electricity Generation Company Ltd CA No. 167/2015**, resolved that there is no time limitation to a claim filed at the Industrial Court. In the circumstances the claim is properly before this Court.

1. Whether the Claimant was unlawfully dismissed from employment?

It is trite law that before an employer can dismiss/terminate an employee, he or she must inform the employee about the reason or reasons he or she is considering for the dismissal/termination of the employee. The employee must be given reasonable time to respond to the reason or reasons. The employer must prove the reason or reasons and they must be justifiable. (see section 66(1) and (2) and section 68 of the Employment Act, 2006).

After carefully considering the record and both Counsels submissions, we found that the Claimant's letter of summary dismissal alleged that he demanded Ugx. 150,000/= from a customer for replacing a pole at his residence, yet the customer had already paid for the service. According to the letter this act amounted to gross misconduct. The Claimant was asked to respond to the allegations which he did and he denied ever soliciting the alleged Ugx. 150,000/=. He admits that he was invited for a hearing, which he attended although he claimed he was not given an opportunity to cross examine the customer and to explain himself. According to him he was gagged and therefore the hearing was *exparte* because he was denied the opportunity to defend himself. However the report of the disciplinary

hearing indicates that the Claimant explained himself, when he denied that he solicited money and explained that it was the customer who wanted him to do more than he was sent to do, that is by fully connecting his power. We are satisfied that the Claimant was given opportunity to respond to the allegations both in writing and orally.

However, the question that remains to be answered is **whether the committee proved the allegations leveled against him?**

According to RW1 Andrew Mwesigye's evidence in chief, he investigated the customer's complaint and established that the Claimant solicited for a bribe of Ugx. 150,000/= from the said customer. RW1 was the District manager of the Respondent and the overall supervisor of the team under which Claimant worked. However in our view the investigation carried out by RW 1 fell short of establishing the facts in the instant case because, he did not adduce any evidence to refute the Claimant's assertions relating to his schedule of duty on the 20/01/2010 when the work at the customer's house was scheduled to be completed and the circumstances that led to the work being carried out on 22/01/2010 instead of 20/01/2010. Although he emphasized the contradiction between the customers complaint and the Claimants explanation about the incident he did not verify the Customers complaint at all. It seems to us that RW1 simply believed the customer without verifying his allegations. RW1 testified that:

"I rang the customer. ...To an extent it was an investigation by phone call... that is why I said it was informal ... yes we are allowed to do it in the company

... It was informal there was no report... yes because the customer's complaint existed as a statement in his response.... ... the evidence against the claimant was inconsistent with the claimant's events of the day as

stated in his response. ... It is written that the complainant was informed by his foreman.

The Claimant in his evidence in chief stated that the emergency was called on the 20/01/2010 and not the 21/01/2010 as claimed by the Customer. It was also his testimony that he worked with a group of people known as the “ganga group” whom he headed but none of these persons were interrogated by RW1.

According to the work programme for 18-22 Jan 2010, Marked “C”, Tibingwa, the customers area was scheduled for 20/1/2010, and Magamaga for 21/1/2010. In our considered view, it would not be farfetched for the Claimant to be called for an emergency on a date on which there was pre scheduled work and in any case magamaga was scheduled for 21/01/2010, therefore it had priority on that day.

We are not convinced by the assertion by the respondent, that the inconsistency between the Customers complaint and the Claimants work schedule that day was proof that he solicited for a bribe. The absence of a formal record of investigation rendered it difficult for us to create the linkage between the Customers complaint and the Claimants response to impute solicitation of a bribe. The respondent’s in our view did not prove that the Claimant solicited a bribe from Peter Wakabi.

The Respondent’s Disciplinary and Performance at work Policy provides that before disciplinary action is taken, the case has to be investigated in order to establish the facts and they should be specifically stated and explained to the employee. We therefore do not accept Counsel for the Respondent’s assertion that, the investigation need not necessarily result in a physical report and all that was required was for the Claimant to be aware of the infractions against him. For avoidance of doubt Section 68 provides that:

“(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 time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee....”

The Respondent had the responsibility of substantiating the allegation that the Claimant solicited and demanded for a bribe. We found it peculiar that the Customer who lodged the complaint declined to appear before the Disciplinary Committee when he was invited to do so. And that RW1 as the person in charge of the district did not go to great lengths to establish the facts in the case and simply made phone calls. On a preponderance of evidence adduced in this case, and in the informal investigation by RW1 there is nothing to show that the Claimant actually made any solicitation for the said Ugx. 150,000/-. Therefore his dismissal based on this allegation was unlawful. This issue is answered in the negative.

2. What are the remedies

Counsel cited Section 71 and **Bank of Uganda vs Betty Tinkamanyire SCCA No. 12 Of 2007**, for the legal proposition that a court of law should not force an employer to retake an employee it no longer wishes to continue to engage, but where the employee is unfairly or unlawfully terminated the employee should be adequately compensated.

Having established that the Claimant was unlawfully dismissed he is entitled to remedies.

Counsel prayed for the following remedies

Special damages

According to Counsel for the Claimant was entitled to Ugx, 12, 319, 996/ as terminal benefits. However when he was summarily dismissed the same was denied. According to the memorandum of claim they were particularized as follows:

Particulars of Special Damages

- a) 1 months' salary =778,333/=
- b) 3 months'
- c) pay in lieu of notice=2,334,999/=
- d) 1 month for not conducting a fair hearing= 778,333/=
- e) Accumulated leave days(120) = 3,11332/=
- f) Repatriation allowance= 1,500,000/=
- g) Severance pay =1,000,000/=
- h) Death assurance refund=480,000/=
- i) Retirement benefits (3 months salary)

It is trite that special damages must be pleaded and proved. Save for the statutory requirement for the employer to give notice before dismissal and severance pay, the rest of the claims for special damages pleaded were not proved by the claimant. In the circumstances we shall only consider the claim for payment in lieu of notice and Severance pay. Section 58 1 (a) and (3) (c) provides that;

"58. Notice periods

(1) ...

- a) A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-**

...

(3) The notice required to be given by an employer or employee under this section shall be-

(a)

(c) not less than two months, where the employee has been employed for period of five, but less than ten years; ...”

The Claimant was employed for 5 years and is therefore entitled to 2 months salary in lieu of notice. The Claimant did not show how he arrived at a salary of Ugx. 778,470/= therefore we cannot consider it as the salary. We therefore award him 2 months’ salary in lieu of notice at a salary of Ugx. 589, 470/- per month amounting to Ugx. 1,178,940/=

Severance Pay

Counsel cited Section 87 which entitles a person who was serving for a continuous period of 6 months to severance pay. According to him the Claimant served the respondent for more than 7 years therefore he is entitled to severance pay. He cited **Donna Kamuli Vs DFCU LDC No, 002/2015**, in which this court’s holding was to the effect that where there was no formula for calculating severance pay as provided for under section 89 of the Employment Act, severance shall be calculated at 1 month per year worked. Counsel contended that the claimant was not paid any severance as evidenced by Exhibit “E” and therefore the Respondent should be fined for not paying severance for more than 7 years.

The Respondent cannot be fined for not paying severance because according to section 88 of the Employment Act where an employee is summarily terminated he or she would not be entitled to severance pay.

However having found that the Claimant was unlawfully terminated he is entitled to payment as severance as provided under section 87(supra). There is no evidence to show that there was an agreed formula between the parties for payment of severance pay,

therefore we shall adopt the formula established in **Donna Kamuli**(supra), of 1 month's salary for every year served. According to his letter of appointment dated 10/02/2005 his services were transferred to the respondent on 1/03/2005 at a salary of 589,470/- per month. In accordance with section 87 of the Employment Act therefore he is entitled to 1 month salary for each of the 5 years served. Therefore he is entitled to Ugx. 2,947,350/= as severance allowance.

General damages

Counsel submitted that the Claimant had suffered humiliation, mental anguish and psychological torture, stress and inconvenience which entitled him to general damages. He cited **Bank of Uganda Vs Betty Tinkamanyire** (supra) to support his prayer for general damages. Given that the Claimant had served the Respondent for over 30 years, he prayed for an award of Ugx.60,000,000/= as general damages.

It is not disputed that the claimant transferred his services to the Respondent on 1/03/2005. There was no submission regarding his employment prior to this date, therefore we shall not dwell on it.

It is already settled that the only remedy available to an employee who was unlawfully dismissed in addition to the remedies provided for under the Employment Act is damages and he or she must do everything reasonably possible to mitigate them. Damages are awarded at the discretion of Court and are intended to return an aggrieved party to the position he was in before the injury caused by the Respondent. Therefore given that the claimant worked for the respondent with a clean track record, earning Ugx. 589,470/= per month of Ugx, 15,000,000/= is sufficient as General Damages.

Costs

Counsel asserted that the claimant incurred costs in the process of following up his claim, including payment to his lawyers and during the failed mediation.

This Court considers that the award of costs is discretionary. We think that the award of general damages is sufficient.

In conclusion an award is entered for the Claimant in the terms set above with interest on all the pecuniary awards at 20% per annum from the date of award 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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PANELISTS

1. MR. EBYAU FIDEL.

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2. MS. FX MUBUKE.

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3. MS.HARRIET NGANZI MUGAMBWA

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DATE: 30TH AUGUST 2019