THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM NO. 085 OF 2014

(ARISING FROM HCT-CS-213/2014)

OWACHA STELLA .....CLAIMANT

VERSUS

CIVIL AVIATION AUTHROITY.....RESPONDENT

BEFORE

HON. JUSTICE RUHINDA ASAPH NTENGYE

HON. LADY JUSTICE LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. Mr. EBYAU FIDEL
2. Mr. Mavunwa Edson Han
3. Ms. JULIAN NYACHWO

AWARD

The claimant was first appointed by the respondent on 14/2/2005 as an Aviation Security Assistant. By the time of her termination on 25/2/2014 she had risen through the ranks to the post of Aviation Security Officer, whose main duty was Aviation Security Supervisor.

Briefly the facts of the case are:

The claimant was on duty on both the dates of 2nd august 2013 and 11th October 2013.

On 8/8/2013, customs department received communication from the Republic of Nigeria about Ivory intercepted on 3/8/2013 and this prompted the respondent to institute an investigation. Subsequently on 11/10/2013, some two passengers were arrested trying to Board Ethiopian Airlines with 116kg of ivory.

On 16/10/2013 the claimant was served with a suspension letter (**B4**) **claimant's trial bundle**). The suspension letter specifically referred to the incident of 11/10/213 and asked the claimant to file a defense and subsequently appear before the disciplinary committee on 23/11/2013.

In her written defense dated 11/11/2013 she stated that she was with others on duty including one Nalubwama who operated the X-ray machine. The CCTV footage on 2/08/2013 confirmed that the claimant screened the bags of one Souleymene Camara, suspected to have been the one arrested with ivory in Nigeria. On this basis the claimant was terminated.

The issues agreed upon were:

(a) Whether the dismissal of the claimant was unlawful, unfair and wrongful.

(b) What remedies are available to the parties

The claimant was represented by M/s. Racheal Mulindwa of M/s. Mulindwa Kasule & Co. Advocates while the respondent was represented by M/s. Maureen Agaba of Law Chambers, Uganda Civil Aviation Authority.

Evidence:

It was the evidence of the claimant that while on 2/08/2013 she was on duty, there was no incident of ivory smuggling at the airport.

According to her, the incident of ivory smuggling happened on 28/6/2013 when one Nantabirwe Tosha was on duty and she, the claimant was off duty.

One Dennis Paul Olung informed court that he was blamed for an incident that occurred on 28/6/2013 during which he, together with the claimant were dismissed for an incident on 2/08/2013 which never was. According to him though both he and the claimant were on duty on 2/08/2013, no incident happened and none of them was asked to defend himself or herself for the incident of 2/08/2013.

One Kenneth Nkurikiyimana testified that having been a member of the disciplinary committee, the claimant had been asked to defend herself on the incident of11/10/2013 to which she was exonerated. Whereas the claimant had provided written explanation about the 11/10/2013 incident, she only gave oral testimony on the incident of 2/08/2013.

According to one Enos Kajwengye and one Nsenga Allisen all staff on duty (Security passenger bags) were arrested and detained on 11/10/2013 for flouting security measures when ivory was not detected through the metal detector and later on they were released except one Nalubwama Phiona who was prosecuted. The others including the claimant were summoned for disciplinary proceedings.

In defence of the claim, the respondent adduced evidence from two witnesses.

The first respondent witness testified that the dismissal of the claimant arose from reports that Nigerian Customs officials had intercepted 104 kgs of ivory from a passenger who had commenced a journey from Entebbe on 2/8/2013 when the claimant was on duty at the X-ray machine. According to the witness on 11/10/2013, once again the claimant was on duty and ivory was intercepted leading

to her suspension on 4/11/2013 pending a hearing on 25/11/2013 at which the disciplinary committee found the claimant culpable and she was dismissed.

The second witness for the respondent was one Robinah Kabahukya who investigated the case.

SUBMISSIONS:

It was the submission of counsel for the claimant that although the investigation officer (RW2) told court that the passenger who travelled on 2/8/2013 was Souleymane Camara, her report (REX B4, page 2) clause 6.0., Item 2.5 stated that the passenger's name was Aboubaker Keba. She also submitted that, the same report showed that the intercepted luggage bore the names of Souleymane Camara on flight No. ET901, yet the passenger's travel history admitted by the respondent (CEXB 11), showed the passenger's flight on 2/8/2013 was ET820.

According to counsel, whereas the passenger's history showed his destination as Addis Ababa, RW2, the investigator concluded that the passenger travelled with Ivory from Entebbe to Addis Ababa and subsequently to Murtala airport in Nigeria "without regard to the fact that he made a stop-over, anything could have happened".

It was his submission that whereas the claimant was dismissed for an incident of 2/08/2013, she was never given an opportunity to prepare for defense contrary to **Article 28(1) and 44(C) of the Constitution** and **Section 66(1) of the Employment Act.**

Counsel for the respondent on the other hand strongly submitted that the claimant was on duty on both occasions and was dismissed following an investigation and a

to her suspension on 4/11/2013 pending a hearing on 25/11/2013 at which the disciplinary committee found the claimant culpable and she was dismissed.

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Counsel for the respondent on the other hand strongly submitted that the claimant was on duty on both occasions and was dismissed following an investigation and a

disciplinary hearing. He argued that **Section 68(1) of the Employment Act** and the principles set out in the **Okullo Nymlord Vs Rift Valley (U) Ltd. C.S. 195/209 and Florence Mufumba Vs Uganda Development Bank L.D.C. 138/2014** were followed. It was her submission that the person whose baggage was intercepted was screened by the claimant. According to counsel only one man, on the 2/8/2013 travelled to Nigeria on Air flight ET821 from Entebbe and this man was screened by the claimant. Counsel argued that the claimant was given opportunity to view the footage of 2/8/2013 which was viewed also by this court confirming that Souleymane Camara positioned four bags on the x-ray machine which screened them in the presence of the claimant and she gave her defense before a competent disciplinary committee which informed her of both incidents. Both her oral and written defenses were considered by a competent disciplinary committee which informed her of both incidents. In his submission, and relying on **Carolina Karisa Gumisiriza Vs Hima Cement Limited C.S. 84/20145** disciplinary hearings by their nature are not of a strict proof/liability nature but evidence is handled on a balance of probability and the balance was in favor of the respondent.

Decision of court:

We will begin with issue No. 1: **Whether the dismissal was unlawful, unfair and wrongful.**

The position of the law is that no person should be condemned unless he/she has been heard by a competent tribunal after being given an opportunity to defend the allegations.

This basic principle is embedded in **Article 28(1) of the Constitution** of the Republic of Uganda which provides:

"In the determination of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law".

And **Article 44(c)** which provides

"Notwithstanding anything in the Constitution there shall be no derogation from the enjoyment of the following rights and freedoms

a) ...

b) ...

c) Right to a fair hearing.

Section 66(1) of the Employment Act also clearly provides for a right to be heard. It provides

"Notwithstanding any other provision of this part an employer shall, before 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 and the employee is entitled to have another person of his or her choice present during this explanation."

The authorities of **Carolina Karisa Gumisiriza Vs Hima Cement Limited C.S. 84/2015** and this court's decision in **Grace Matron Vs Umeme Ltd, LDC 004/2014** are for the legal proposition that disciplinary hearings need not apply procedures as strictly as they are applied in courts of law.

In **Okour R. Constant Vs Stanbic Bank L.D.C 171/2014** while this court relied on the case of **Hilda Musinguzi Vs Stanbic Bank, SCCA 05/2016** stated that

> **"Although the employer is entitled to terminate the contract as provided for in the contract of employment, such termination has to conform to Sections 66 and 68 of the Employment Act..... It is not for the proposition that an employer can unreasonably and without justification terminate a contract of an employee just because there is a clause in the employment contract that allows for payment in lieu of notice."**

The sum total of all the above cited legal principles is that before termination or dismissal of an employee, due legal process must be exercised by the employer.

In the instant case it is clear on the evidence adduced that the claimant was initially suspended for the incident that happened on 11/10/2013. The claimant was asked to defend herself and indeed she filed her written defense to the incident that happened on 11/10/2013. The evidence filed by the claimant in the claimants trial bundle shows disciplinary proceedings as "**B6**" but the proceedings are only for the cases of one TOSHA Nantabire and one Dennis Olung both of whom were exonerated because the committee found that during the journey of 28/6/2013,**"there was no proof beyond reasonable doubt that there was ivory in the bags of the one Souleymane Camara/Aboubacar Kaba."**

However the same disciplinary proceedings do not show anything to do with hearing of the case of Stella Owacha, the claimant.

Consequently we are in no doubt that the claimant was given a hearing. The only question is whether the hearing afforded to her was compliant with the principles of a fair hearing that could by law result into a termination.

We are in no doubt that the claimant was summoned for a disciplinary hearing for an incident for which she was not condemned by the committee. Evidence is sufficient on the record to suggest that she was exonerated from the incident for which she was suspended, and against which she was asked to defend herself . This is because according to the investigation officer the claimant was given opportunity to defend herself on both incidents for which she was not suspended and against which she offered a written defense.

The position of the law is that in order to constitute a fair hearing the employee must be given sufficient time to prepare for defense against the charges. Sufficient time in our view must be such time within which the employee receives the allegations, digests and ponders about the same, gets consultative advice which he/she digests and ponders over, and eventually decides to put in writing a defense to the allegations. If the time allowed between receipt of the allegations and appearance before the disciplinary committee is reasonably not enough to do the above, then such time must inevitably be declared to be part of the aspects that do not constitute a fair hearing.

In the instant case, there is no doubt that the claimant was only asked to defend herself on the incident of 2/8/2013 **during the proceedings**. We feel strongly that this could not have been sufficient time for the claimant to offer a defense. She had sufficiently prepared for the incident of 11/10/2013 but the proceedings and even the witnesses hardly mentioned anything to do with this incident. The

committee concentrated on the incident of 2/8/2013 and pinned down the claimant because she was on duty on that day. Reliance was exclusively put on the CCTV footage that placed the claimant at the x-ray machine that screened the bags suspected to have contained the ivory. According to the respondent, the claimant fundamentally breached her contract by failure to detect the ivory on the 2/8/2013.

Section 69 of the Employment Act provides

> **"69 summary termination**
>
> **(1) Summary termination shall take place when an employer terminates the services of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.**
>
> **(2) ...**
>
> **(3) An employee is entitled to dismiss summarily, and the dismissal shall be termed justified where the employee has, by his or her conduct indicated that the he or she has fundamentally broken his or her obligations arising under the contract of service."**

Section 66(1) of the Employment Act (supra) provides for notification and hearing before termination. **Section 66(4)** particularly provides

> **"Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this Section is liable to pay the employee a sum equivalent to four weeks net pay."**

It follows therefore even if the claimant was found to have committed a fundamental breach of the contract as counsel for the respondent seems to suggest in his submissions, she was entitled to a hearing in accordance with the above section of the law. As already intimated earlier in this Award, there was no sufficient time given to her to prepare for hearing on the incident of 2/8/2013 which was not fair. In our interpretation, where a fundamental breach is proved to have been committed by an employee and such employee was dismissed without a hearing in accordance with **section 66 of the Employment Act,** such an employee would be entitled to **4 weeks net pay** unlike in the cases where the employer dismisses the employee for **gross misconduct** without a hearing in accordance with **Section 66** and without a reason in accordance with **Section 68** which entitles such employee to general damages.

The question therefore is:

Did the claimant commit a fundamental breach of her contract?

There is no doubt she was a person in charge of security and her main job description was to detect unauthorized items by use of the x-ray machine. Failure to do this would in our view constitute a fundamental breach. In her own evidence she admitted to this fact; that if she failed to do this, she would be held liable. She denied having failed to detect the ivory on the 2/8/2013. According to her the ivory that was intercepted in Nigeria did not pass at Entebbe airport while she was on duty, yet the respondent relied heavily on the CCTV footage that showed the claimant on duty and screening the suspected bags belonging to one **Souleymane Camara** which were allegedly intercepted in Nigeria carrying ivory. The evidence on the record from the

respondent's witness, Kabahukya Penelope is that the ivory was found in the bags of a passenger who arrived in Nigeria aboard Ethiopian Airlines flight **ET901 from Addis Ababa** but whose journey had started at Entebbe and which bags had been screened by the claimant.

Looking at the travel history of the passenger exhibited by the claimant in her trial bundle, it is clear that the destination of the passenger was not **Murtala Mohammed International Airport in Nigeria**. His destination was **Addis Ababa**. Whereas on 2/8/2013 he boarded **Flight 820 to Addis Ababa**, the passenger arrived in Nigeria on 3/8/2018 aboard **flight No. ET901**. The question for the court is: **Why would a passenger travelling to Nigeria check in at Entebbe Airport and give his destination as Addis Ababa??**

Before we find an answer to this question another scenario plays in our hands. According to the baggage tag exhibited by the respondent in the respondent's trial bundle, exhibited **as RW2**, the tag is on a baggage on **flight No. 901** yet the flight from Entebbe was **802**. **Why would the baggage loaded at Entebbe not reflect the flight that took the baggage?**

The investigating officer, Kabahukya seemed to have the answers in cross examination when she said

> **"The case involved the airline staff. They forged the tags . C.A.A does baggage reconciliation and not police. The airline loads baggage onto the plane. The main question with Aracha is screening and not tagging."**

Given the evidence of the investigating officer, we take the position that whoever forged the tags must have had a link or connection with the passenger who was eventually arrested with the ivory.

We draw the conclusion that tagging the bags as if they were on **Flight No. 901 from Entebbe to Lagos** as shown in the Exhibit RW2 of the respondent's trial bundle when in fact the bags were on **Flight 802 to Addis Ababa,** was a ploy to confuse the investigators as to where the ivory could have been loaded into the bags. The culprit passenger having not been checked in at Entebbe for a Lagos destination but for an Addis Ababa destination, we agree with counsel for the claimant that it was possible that the bags could have been tampered with at Addis Ababa and Ivory sneaked in the bags. It is possible that the baggage tags could have changed at Addis Ababa and the only plausible reason to change the tags could only be for the purposes of putting holes in tracking the origin of the ivory.

Whereas as a general rule it is agreeable as M/s. Kabahuchya, the investigator told court, that in transit the passenger does not come in touch with the bags, this is only the case when the passenger is checked in to his/her destination.

In the instant scenario, however, the culprit passenger was checked in from Entebbe to Addis Ababa as his destination. He changed to a different flight at Addis Ababa. This being the case, this court does not rule out the possibility that the culprit passenger or his agent came in touch with his bags at Addis Ababa, his pretended destination. In the circumstances the fact that the claimant was on duty on 2/8/2013 and that she screened the bags of the culprit passenger, did not conclusively establish that there was ivory in the bags so screened by the claimant.

Accordingly it is our finding that there was no evidence that she fundamentally breach her own obligations necessitating the respondent to dismiss her. Neither was she afforded sufficient time to explain herself as provided for within the law. We therefore find that her termination was not only unlawful but wrongful and the first issue is resolved in the affirmative.

The second issue is **what remedies are available to the parties**.

In an amended memorandum of claim the claimant asked this Court to grant her five orders while in her submissions she asked Court to grant her Terminal Benefits tabulated under 5 sub headings. She also prayed for General, Exemplary and aggravated damages. We will combine both her prayers in the memorandum and her request in the submissions as best as possible.

a) **Grant of an order that the termination of employment was unlawful, unjust and unfair.**
   As already discussed in the Award, it is hereby declared that indeed the termination of employment was unlawful.
b) **Terminal benefits**
   i. Counsel for the claimant submitted that the claimant should have been paid an overtime rate of 348,000/=per month at termination which was not done and according to her, she was entitled to 2,787,840 for the 8 months.

      In reply to the submission on all the five subheadings the respondent argued strongly that the claimant having been dismissed on account of misconduct, she would not be entitled to any terminal benefits as provided for in the collective bargaining agreement.
      However, since this Court has already made a declaration that the dismissal was unlawful, the submission of counsel for the respondent is not applicable.

By letter dated 20/2/2014 from the Human Resource Department, there were negotiations between management and the Union prompting increase of salary by 10% effective 1/7/2013 and although the claimant was paid this increment, according to her she was not paid overtime. We have not been availed evidence of the origin of a flat rate of 348,480/= per month as over time. The appointment letter of the claimant does not reveal entitlement to a flat rate overtime. The claimant having failed to avail this Court this evidence the Claim of overtime is denied.

ii. The claimant claimed 1,037,656 for 7 months arrears before increase of salary, totaling 7,263,392. On perusal of the letter dated 2012/2014 about salary increment, we found that the claimant's salary was increased from 1,482,366 to 1,630,602 and the letter provided that the claimant would be paid 7 months arrears of 1,037,656. Indeed our calculation of arrears for 7 months comes to 1,037,657. We are at a loss how the claimant gets a total of 7,263,392. The claimant according to the submissions of her counsel received her new salary as at dismissal together with arrears. Counsel submitted

> ***"The claimant's salary as at dismissal was Ug. Shs. 1,630,602 as per Civil Aviation Authority salary pay Grade SCL6b (see CEXB.3) and Eight months were due on that scale i.e. from 1st July 2013 (date of effect of salary increment) to February 2014 ... but despite receiving the said payment, the respondent did not pay for overtime..."***

We gather from the above submission that the claimant at her dismissal in February 2014, was paid as per new salary of 1,630,602 for the month of February and whatever was due for the rest of the previous 7 months i.e. July 2013- Feb 2014. We find it very difficult to find the source of the claim of salary arrears, counsel having submitted that her client received the same. This claim is denied.

iii. **Gratuity**

The claimant relied on **Article 73, 1, 62(c) and (e) of the collective Bargaining Agreementas Revised December 2013** to claim gratuity of 25,530,157.

Although the respondent's trial bundle indicated that this agreement would be relied upon, it was never filed on the record and the claimant did not file it either.

According to the respondent, the Collective Bargaining Agreement provided that terminal benefits were not payable once the claimant was dismissed on account of gross misconduct and therefore the claimant having fallen in this category she was not entitled.

However this Court having declared that the dismissal was unlawful implying therefore that there was no gross misconduct, the claimant will be entitled to terminal benefits as provided for in the collective Bargaining Agreement.

According to the Bargaining Agreement attached to the submissions of counsel for the **claimant Article 62**, upon termination an employee is entitled to (among others) **"service gratuity as provided for under Article 73".**

Article 73.1 provides for **"one and a half month's pay for each year of completed service and any part thereof"**

The claimant was appointed in the service of the respondent effective 1/8/2005 (see annexture "A" to the memorandum of claim). She was terminated effectively on 17/2/2014. This was a period of 8½ years. By the time of termination she was earning 1,630,602 per

month. Accordingly she will be entitled to 1,630,602 X 8½ = 13.860,117/=.

In the calculation by counsel for the claimant as per her submissions, she seemed to factor in a figure of 348,840 which we do not understand where it came from, although earlier on she seemed to suggest that the claimant was entitled to 348,480/= as overtime per time per month. But even then, we do not see this figure dsclosed to us as an entitlement either in the appointment letter or any other document on the file. Accordingly we disregard the submission of counsel that the claimant is entitled to more than the above terminal benefits as service benefit provided for in the collective Bargaining Agreement.

The claimant will also be entitled to two months' notice of termination if it was not paid to her at 1,630,620 per month. We must emphasize however, that this payment is not a terminal benefit. It is, unlike terminal benefits which are determined by the employee through negotiation, provided for in the law, specifically **Section 58 of the employment Act.**

We have not been availed any evidence to suggest that the claimant is entitled to the respondent's worker's union. This remedy is therefore denied.

General Damages

The claimant was earning 1,630,620 per month by the time of her termination. She depended on this salary and any other benefits for her sustenance and sustenance of her family. The termination definitely cost her an income and as counsel submitted mental anguish. We award the claimant 12,000,000/= as general damages.

No evidence was adduced to warrant award of aggregated or exemplary damages since the claimant passed thought a disciplinary committee process which was

discredited by the Court only and only for insufficiency of evidence to connect her on the charges of gross misconduct. No order as to costs is made.

In the result this claim is allowed with the following declarations/orders;

1. **The claimant's dismissal was unlawful.**
2. **The claimant shall be entitled to 13,860,117/= as terminal benefits.**
3. **The claimant shall be entitled (if not already paid) to 3,261,204 as payment in lieu of notice.**
4. **The claimant shall be entitled to 12,000,000 as general damages.**
5. **The above sum shall attract interest of 20% from the date of this Award till payment in full.**
6. **No order as to costs is made.**

DELIVERED & SIGNED BY:

HON. JUSTICE RUHINDA ASAPH NTENGYE .....

HON. LADY JUSTICE LINDA LILLIAN TUMUSIIME MUGISHA .....

PANELISTS

1. EBYAU FIDEL .....
2. Mr. Mavunwa Edson HAN.....
3. Ms. JULIAN NYACHWO .....

Dated: 18/10/2019