THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 193 OF 2014
(ARISING FROM HCT-CS 376/2013)

NANTAYI LOIS ……..CLAIMANT

VERSUS

MARIE STOPES UGANDA…….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

By memorandum of claim filed in court on 05/01/2015 it was stated that the claimant was an employee of the respondent as an Assistant Research Monitoring and Evaluation Officer who was later on promoted to a full Research Monitoring and Evaluation Manager on 26/3/2013. However on 16/9/2013 at 12.36 p.m. she was summoned to a disciplinary hearing for 4.00pm on the same day where she was accused of financial misconduct and offered a consensual termination agreement which she refused to sign and on 18/9/2019 she was terminated.

By memorandum in reply to the above, filed on 12/2/2015, the respondent claimed that the claimant was summarily dismissed on account of fundamental breach following **sections 66 and 69 of the Employment Act.** It was stated that the claimant having been given funds to facilitate a workshop she paid out less to some of the participants and paid some who were not expected to be paid.

According to the respondent the claimant was offered an opportunity to be heard before she was terminated.

REPRESENTATION:

The claimant was represented by Mr. Lubega Juma of Baale, Lubega& Co. Advocates while the respondent was represented by Mr. Ferdinand Musimenta of Sebalu &Lule Advocates.

ISSUES

1. **Whether the claimant was lawfully dismissed by the respondent company.**
2. **What remedies are available to the parties?**

EVIDENCE

Whereas the claimant adduced evidence from herself only, the respondent brought to court two witnesses.

In her evidence the claimant confirmed what was stated in her memorandum of claim as above mentioned. She further stated that her termination was contrary to the contract as well as the Human Resource Manual and that at the hearing she was not availed with relevant documents like the audit report.

The 1st respondent's witness was one Ritah Natukunda, Head of Internal Audit of the respondent. She testified that whistle blowers who were Research Assistants in the respondent organisation filed complaints to the effect that while in a workshop there were discrepancies in the process of payments to them. An investigation carried out discovered that there were discrepancies between the amounts paid out to all research assistants and the amounts accounted for. According to the witness, the claimant being a research, monitoring and evaluation Manager should have disbursed reasonable amounts of money and made a truthful account of the expenditures since in some cases there was double payment to certain participants. In her evidence, the witness reiterated that by spending exorbitant amounts of money on particular items and by making

untrue statements of accounts, the claimant's conduct breached her fundamental terms of employment.

SUBMISSIONS

The claimant through her lawyer strongly submitted that he was not accorded a fair opportunity to prepare for defense having received an email at 12.36p.m. that called her for a hearing at 4 p.m. the same day. According to counsel this was contrary to **paragraphs 8.5.3 of the Human Resource Manual** which provided for 5 working days preparation of defense. It was further submitted by counsel for the claimant that it was contrary to **section 66(1) of the Employment Act** and paragraph 8.5.3 of the Human Resource Manual when the claimant was called to a hearing without being provided with the necessary documents indicating the alleged infraction.

It was submitted that the exhibited minutes of the hearing were contrary to **paragraph 8.5.4 of the Human Resource Manual** since they did not show that the claimant attended the hearing and so they cannot be relied upon. Counsel strongly argued that **Exhibit R3-9**, **whistle blowers statements** did not prove any financial misconduct and that even then they were not put to her during the hearing. According to counsel **R16, the investigation report** did not in any way hold the claimant liable. It was his submission that the claimant having not been given opportunity to respond to the allegations made against her, the decision to dismiss her was biased and preconceived in contravention of **Article 42 and 44(c) of the constitution.** Counsel had issue with the evidence of the two respondent witnesses arguing that it was hearsay since none of them was in the employment of the respondent at the time the claimant worked and was dismissed. According to counsel, RW1 testified on the claimant's misconduct during the period she was not at the respondent company and testified to the Audit report that she did not author herself. He dismissed her evidence as unreliable.

In reply to the above submissions, counsel for the respondent submitted strongly that the claimant was dismissed for gross misconduct arising from misappropriation of funds and making untrue statements in accounting for the funds disbursed to her. According to counsel this was proved by evidence of the

Audit tendered by RW1. In his submission, the claimant was found to have made untrue statements having disbursed less sums than had been planned for training and having reported different figures. This amounted to high levels of dishonesty, thus fundamentally breaching the contract.

Counsel invited court to examine the statements made by 5 research assistants claiming that they did not personally fill in the figures in the payment slips.

According to counsel the claimant was given the option of entering into a consensual discharge and it is when she declined it that she was terminated. He contended that the claimant had been informed of the allegations via a trail of emails by one Judith Nsamba who had even sat with her and discussed the same.

Whereas counsel conceded that RW1 and RW2 were not present at the time of dismissal, he argued that this court is not bound by rules of evidence and that the witnesses were testifying to the facts as they were in the records and that their evidence was as it appeared on the record.

DECISION OF COURT:

Section 69 of the Employment Act provides

"69 Summary termination

(1) Summary termination shall take place when an employer terminates the service 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) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual terms.

(3) **An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, when the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service.**

Section 66(4)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."

From the reading of the above Section of the law the position is clear that whereas the employer may get away with the requirement of giving notice to the claimant in case of summary dismissal, such employer cannot get away with the requirement of giving the claimant an opportunity to be heard in the same circumstances under **Section 69.** The right to be heard in every case is mandatory, the reason the respondent has to pay for breach in the event of a summery dismissal. It was the case for the respondent that the claimant fundamentally breached the contract of service by tendering of false statements relating to disbursement of funds meant for training which amounted to dishonesty. The evidence relied upon to conclude that the claimant had tendered false statements was evidence of Research Assistants who acted as whistle blowers. The said research assistants wrote in ink to the effect that they signed for more money than they in fact were paid by leaving blank spaces where figures of the amounts paid out were later on inserted by someone else.

The **Whistle Blowers Protection Act 2010** under **Section 8** provides

> **"Where a disclosure of impropriety is made to a person specified under Section 4, the authorized person shall investigate or cause an investigation into the matter and take appropriate action."**

The position of the law in our view is that a person accused by a whistle blower appears before a disciplinary committee after an investigation has been completed and the results of the investigation are put to the claimant/accused during the hearing for him or her to be able to defend himself or herself. He or She would need sufficient time to be able to prepare for his/her defense.

In the instant case although there is an investigation report, there is no evidence that the results of the investigation were put to the claimant. Although the disciplinary minutes **Exhibit RII, respondent's trial bundle** suggest that there was

an interaction between the claimant and a disciplinary committee, we do not think this was sufficient. Although the whistle blowers in their statements suggest that they signed and left blank spaces for someone later on to fill in the figures, it is hard for this court to believe that the said statements were made by those alleged to have made them. This is because the witness who seemed to tender in the same statements was not the one who took the statements from the said whistle blowers. The witness confirmed that one Majorie was the one who interviewed the Research Assistants. In the absence of the Research Assistants themselves to testify to their own statements, it was important that the said Majorie be available to tender in the said statements.

The Audit report that was relied upon contained allegations which the claimant should have been given opportunity to read before the hearing. We agree with counsel for the claimant that for the reason that the claimant was not given this opportunity, reliance on the same report prejudiced the interest of the claimant and was against the rules of natural justice. It is also noted that the Chairperson of the disciplinary hearing was the same Majorie who had authored the implicating Audit Report and this fact did not go well with the rules of natural justice. In the case of **Engineer John Senfuma vs The Engineers Registration Board HCCS 026/2009** it was held that

> **"a person who previously chaired an investigation in which the appellant was condemned would be perceived as biased in a hearing of the same victim to justify the result of the investigation"**

In addition to the failure of the research assistants to testify to their statements, there was lack of evidence of the pay slip themselves to suggest that the claimant filled in the blank spaces and by doing so inflated the payment to the said research assistants. We tend to agree with the submission of the claimant that this court cannot rely on the statements which cannot be verified as having been made by the persons hired by the claimant on behalf of the respondent. The fact that the chair of the disciplinary committee was the author of the only incriminating report gave a way the proceedings. As a consequence we find that the evidence was short of proving that the claimant fundamentally breached her

contract of employment so as to deserve being summarily dismissed under **Section 69 of the Employment Act.**

On perusal of the **Human Resource Manual** we find that there is an elaborate procedure of a disciplinary process before an employee is terminated. This begins with **paragraph 8.5.1** which places the employee on investigative suspension, which if it satisfies the existence of a case to answer, places the employee before a disciplinary committee after the employee has been issued with summons 5 days before the hearing date. In the instant case, the claimant was summoned by email at 12.36p.m. to appear before the disciplinary committee at 4.00p.m. on the same date. By no means of any measure can this be called sufficient time to prepare for a defense of any allegations. It was obviously in contravention of **paragraph 8.5.1 of the Human Resource Manual policy** of the respondent. We have not found anything on the record to support the submission of counsel for the respondent that there were a trail of emails informing the claimant about the infractions before she was formally informed to appear at 4.00 p.m on Monday September 2013.

The submission is therefore unacceptable to us. The evidence on the record does not tally with the testimony of RW2 that the claimant was initially given an option to consider a consensual termination and that she had been informed by one Judith Nsamba about the allegations. On the contrary the consensual termination agreement, marked as "**E**" **at page 9 of the claimant's trial bundle** shows that it was to be entered on 16/9/2013 and the email inviting her for hearing was dated the same date at 12.30p.m inviting her at 4.00p.m. By email dated Monday 23/09/2013, the claimant declined to sign the consensual termination agreement. In the circumstances common sense tells us that the consensual agreement was given to the claimant at the same time as she was attending a hearing. This version tallies with the claimant's own testimony that she was given the consensual agreement during the hearing with an option to either sign it or get summarily dismissed.

Consequently it is not possible for this court to believe the respondent's story that the claimant was only called for a hearing after she had been given

opportunity to consider the consensual agreement. The hearing was on 16/09/2013, and the termination of employment was on 18/09/2013 before she formerly declined to sign the consensual agreement. This gives credence to the submission of counsel for the claimant that a decision had been made before hearing that the claimant would be dismissed on refusal to sign the consensual agreement.

Whereas we agree with the submission of counsel of the respondent that the employer need not prove the case against the employee beyond reasonable doubt, it is also true that basic tenets of a fair hearing must be complied with. The case of **MAGALA OLIVE Vs UMEME LIMITED (HCCS 39/2010 (CIVIL DIVISION) and the case of Ebina James Vs Umeme H.C.C S 0133/2012 (Civil Division)** are authority for the legal proposition that in order to amount to a fair hearing the following steps have to be complied with.

1. **Notice of allegations against the plaintiff (or claimant) having been served and the plaintiff having been given sufficient time to prepare for defense.**
2. **The notice above having set out clearly what the allegations were and the plaintiff's (or claimant's) rights which include the right to respond to the allegations, the right to be accompanied at the hearing and the right to cross examine witnesses and to call own witnesses.**
3. **The claimant/plaintiff having been given chance to present his/her case before an impartial committee in charge of disciplinary issues.**

As already discussed above, it is our considered opinion that the process of hearing did not comply to the above tenets and fell short of a fair hearing envisaged under **section 66(1) of the Employment Act.** This being the case, and the dismissal having not qualified under **section 69 of the Employment Act** as a summary dismissal, we find that the said dismissal was unfair and unlawful. The first issue is therefore in the negative.

The second issue **is what remedies are available?**

(a) General Damages

This court having decided that the claimant was unfairly and unlawfully terminated she will be entitled to general damages since the act of unlawful dismissal put her at a loss of earnings for the period she would have been able to continue in employment. By the time she was unlawfully terminated she had been promoted and her salary revised to 5,500,000/=. We agree with the submission that she suffered great inconvenience, mental pain and suffering. We accordingly award her 35,000,000 as general damages. We reject the claim of payment of salary till end of the contract in the same way we rejected it in the cases of **KAPIYO SIMON Vs. CENTENARY BANK, LDC 300/2015 and EQUITY BANK Vs MUGISHA MUSIMENTA ROGERS – Labour Dispute appeal No. 26/2017**.

(b) **Medical Insurance**: This claim has not been proved to our satisfaction. It is hereby denied.

(c) **Interest:** The above award of general damages will attract interest at 20% per annum till payment in full.

(d) **Any other relief**: We do not think it is proper for court to award a relief not sought for by a party to the proceedings. It is the duty of the claimant to pray for remedies that she/he may justify. It is not the duty of court to imaging remedies for the aggrieved party. Accordingly there is no offer for any other reliefs from this court. The claim succeeds in the above terms with no order as to costs.

DELIVERED AND 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 …….

Dated: 09/08/2019