

**STEPHEN KAGORO....** .....**CLAIMANT**

**VERSUS**

**BANKOM (U) LTD** ..... **RESPONDENT**

1. MR. EBYAU FIDEL
2. MS. HARRIET MUGAMBWA NGANZI
- 3.MS. JULIAN NYACHWO

## REPRESENTATION

The Claimant was represented by Dr. James Akampumuza of Akampumuza & Co. Advocates, Kampala and the Respondent by Mr. Ernest Sembatya of MMAKS Advocates, Kampala.

## ISSUES

1. Whether the Claimant's summary dismissal by the Respondent was justified?
2. Whether the Claimant was given a hearing prior to his summary dismissal?
3. Whether there were financial rewards not paid to the Claimant?
4. Whether the Respondent is liable for the Claimant's post dismissal situation?
5. Whether there are remedies available to the parties?

## SUBMISSIONS

Dr. Akampumuza Counsel for the Claimant, contended that there was a pending application for striking out the Respondent's defence on the grounds that it was filed out of time.

After carefully perusing the record, however, we found that the application was dismissed by Justice Benjamin Kabiito, in **Civil, suit No. 22 of 2010, Stephen Kagoro vs Bankom(U) Ltd**, when he held that:

*"... the default of non-service by just one day, is not such a fundamental omission, so as to warrant the dismissal of this suit and to lock out the Defendant from hearing of this case on its merits, on grounds of being contemptuous of an order of this Court..."*

We shall proceed to resolve the main claim.

## RESOLUTION OF ISSUES

We shall consider issue 1 and 2 together.

1. Whether the Claimant's summary dismissal by the Respondent was justified?
2. Whether the Claimant was given a hearing prior to his summary dismissal?

It was submitted for the Claimant that, on 3/9/2009 he was summoned by the Respondent's MD, and handed a letter terminating him. He had never been suspended or given a warning and he was not informed about the reasons for his termination. According to Counsel the Claimant did nothing wrong to justify treating him in total disregard of his hard work. He contended that the termination due to alleged "unavoidable circumstances", when none existed and without notice was wrongful and amounted to summary dismissal. He cited **AM Jabi vs Mbale Municipal Council [1975] HCB 191**, for the legal proposition that a dismissal is wrongful if it is effected, without justifiable cause. He argued that the termination of the Claimant was a breach of contract to which he had a right of action for damages.

He further contended that the Claimant acquired a salary loan of Ugx.6,000,000/- from DFCU Bank, secured through a letter of undertaking by the Respondent and whose repayment was to be by instalments deducted from his salary for 3 years. According to Counsel the Claimant had to borrow to pay back, until he failed to borrow anymore and the loan continues to accumulate compounded interest.

He further contended that the Claimant was denied a certificate of service, thus losing his right to secure another job under section 61(a)-(e) of the Employment

Act. He contested Annexure D3, the certificate which was issued to him dated 3/12/2009, because it did not bear a received stamp or signature showing that it was a certificate of service and because it was issued 3 months after the dismissal and not on the day of termination. He also contested the fact that it purported to offer unsolicited judgement and reasons for the Claimants termination. It was his submission that the Respondent failed to justify the wrongful termination of the Claimant, therefore court should find in his favour.

In reply Mr. Sembatya for the Respondent, citing section 69 which provide that: *"... summary dismissal 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 provisions or contracted term"*, stated that the Claimant's contract of Employment , provided for termination with notice and this was consistent with section 58 of the Employment Act. According to him the letter of termination states that he was "terminated" in accordance with both the law and his contract of employment and therefore he was not summarily dismissed as purported.

He cited section 2,65(1)(a) and 58, to support the argument that

According to him given the provisions of sections 2, which provides for the termination of employment for reasons other than poor performance and misconduct, 65, which provides for termination of among others by notice, and 58 which provides for the periods of notice before termination, a contract of employment could be terminated with notice, except for summary termination and the attainment of retirement age as provided under section 58 (v).

He quoted clause 3.1 of the said contract, which provides that;

*"this contract shall be for period of (3) years, unless otherwise terminated as provided under this contract and will be subject to renewal depending on the performance of the employee during that period and at the employer's discretion, upon such terms as the parties thereto may agree. Each party may terminate this contract in writing by giving one month's pay in lieu of notice."*

He insisted that the termination was done in accordance with the Employment Act 2006, because his contract provided for 1 months' notice of termination or payment of one month's salary in lieu of notice. He insisted that the Claimant was paid in lieu of notice as seen in R2 and R2(1).

He argued that although this court has held in several decisions that the reasons for termination ought to be stated in the letter of termination however, it is not provided anywhere in the Act, that the non-inclusion of reasons in the termination letter would render the termination itself wrongful or unlawful and although the Court based on section 68(1) which provided for justifiable reasons as the only basis of termination, the section only requires an employer to prove the reasons for a dismissal only in a claim arising out of termination. Therefore, the termination must exist before the employer can prove the reason. A termination letter in his view cannot be construed as a claim and a claim can only arise if the employee makes a complaint with the labour officer or with the Court of law, and only then could an employer be compelled to prove the reason for dismissal or termination. Therefore given the definition of dismissal as provided under the Act to mean:

*"... dismissal from employment means the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct."*

He insisted that in the instant case, *"the claimant was terminated with notice (and was paid in lieu of notice) and not for any misconduct*, therefore he was not summarily dismissed. He also relied on **Hilda Musinguzi vs Stanbic Bank (U) Ltd SCCA No. 005 of 2016**, and **Barclays Bank of Uganda Vs Godfrey Mubiru (SCCA No. 1 of 1998)** whose holdings are to the effect that a party to contract of employment may terminate it by giving notice of a specified period, therefore Court should find that the Claimant was terminated on notice and upon payment in lieu of notice, therefore it was lawful.

In rejoinder Dr. Akampumuza insisted that the Claimant was summarily dismissed in accordance with section 69 of the Employment Act 2006, because the Respondent failed to prove that he was paid him in lieu of notice. According to Counsel the termination letter made the payment conditional on him handing over his office effected, therefore, the Claimant was summarily dismissed.

## **DECISION OF COURT**

The contention in this matter as we understand it is that, the Claimant was unlawfully summarily dismissed, because he was not issued notice, he was not given a reason for the dismissal and he was not accorded a hearing before the dismissal. On the other hand, the Respondent asserts that the Claimant was not dismissed but terminated with notice and he was paid in lieu of notice.

Although the terms dismissal and termination are used interchangeably in the Employment Act, they are defined as follows:

Section 2 of the Employment Act defines termination to mean *"... the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as, expiry of contract, attainment*

of retirement age etc "termination" has the meaning given by section 65 which provides as follows:

- 1) *Termination shall be deemed to take place in the following circumstances-*
  - (a) *Where a contract of service is ended by the employer with notice;*
  - (b) *Where the contract of service, being a contract for a fixed term or task, ends with the expiry of the specified task and is not renewed within a period of one week from the date of expiry on the same terms or the terms not less favourably to the employee*
  - (c) *Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee and*
  - (d) *Where the contract of service is ended by the employee, in circumstances where the employee has received notice of termination of the contract of service from the employer, but before the expiry of the notice..."*

Dismissal on the other hand is defined to mean:

*"... the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct..."*

This Court has held in many cases, that the definition of termination and dismissal as provided under Section 2, termination under Section 65, must be construed and read together with sections 66(1) and (2) and 68(1) and (2) of the same Act. The sections provide as follows:

***"66. Notification and hearing before termination***

*(1) 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,*

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

Section 68 provides that:

**68. Proof of reason for termination**

*(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal*

These provision of the law read and construed together clearly provide that an employer must communicate the reasons he or she is contemplating the termination or dismissal of an employee "before" reaching the decision to dismiss or terminate the employee. Section 66(2) specifically requires that, the employee shall be given an opportunity to respond to the reasons leveled against him or her by the employer before the employer reaches the decision to dismiss or terminate him or her. Section 66 of the Employment Act is premised on the principles of natural justice and therefore forms the basis of



the administrative disciplinary and grievance mechanism between employers and employees. In our considered view it was intended, to ensure that employers do not terminate or dismiss their employees at will. (see **Akeny Robert vs UCC LDC 023/2015**).

We therefore, do not subscribe to the argument by Mr. Sembatya that, Section 68 of the Act(supra) does not make it a requirement for the employer to include the reasons for termination in the letter of termination because section 66(supra) explicitly provides that the reason for termination must be given to the employee in issue before the decision to terminate is made by the employer. Section 66 of the same section further makes it a requirement for the employer to give the employee in issue reasonable time to respond to the reasons he or she is contemplating the dismissal or termination and by doing so, the employer is ensuring that the reason given is a justified reason.

Section 66 and 68 are premised on Articles 4 and 7 of the ILO Convention No. 158 of 1982 on Termination of Employment, which was ratified, by the Government of Uganda. The Article 4 and 7 of the Convention, respectively provide as follows:

*“...Article 4. The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. ...*

*Article 7 provides that, the employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot be reasonably expected to provide this opportunity.”*

In light of the the provisions of Section 66 and 68 of the Employment Act(supra), even if the reasons for which an employer is contemplating the termination or dismissal of an employee are not related to misconduct or poor performance, the reasons must be communicated to the employee and he or she must also be given reasonable time within which to respond to the reasons **before** the termination is effected.

Therefore, the argument that the reason can only be justified after the dismissed employee has lodged the complaint with the labour officer or with Court of law as Counsel would want this Court to believe, cannot hold.

The termination letter stated in part that;

*"... Unfortunately, due to unavoidable circumstances, (emphasis ours) I have to inform you that the company is unable to retain your services as the ATM operations officer and hereby terminates your employment...."*

The "*unavoidable circumstances*" were not spelt out or explained to the Claimant as is required under the law. There was no evidence adduced to show that they were explained to him and that he was given an opportunity to respond to them, before the termination was effected. He was just terminated with notice.

We do not subscribe to the Respondent's argument that, the termination was lawful simply because the Claimant was given notice and paid in lieu of notice. Notice in our considered opinion is not a reason for termination, it is a warning to the employee or a calling of the attention of the employee or making the employee aware of the fact that the employer is contemplating his or her termination, before the reason why the termination or dismissal is stated. It does not the reason for termination or dismissal as it is envisaged under section

66 of the Employment Act(supra). Therefore even if Counsel for the Respondent insisted that the Claimant was paid in lieu of notice, that was not sufficient as a reason for termination. In any case, we found nothing on the record to show that he was actually paid in lieu of notice. The Letter of termination made it conditional upon the Claimant to handover first before he is paid. It was the Claimant's testimony that he handed over via mail. This testimony was not controverted. RW1 Musoke Allan testified that, the payment in lieu of notice was done through DFCU Account as shown under R2, on the Respondent's trial bundle. A perusal of R2 indicated that, on 6/08/2009, the Claimant was paid Ugx. 685,000/- in lieu of notice. However, we could not discern the authenticity of R2 because it was an extract of a document whose source was not clear, it was neither signed nor certified by DFCU Bank, therefore we did not consider it authentic. In the premises, we are inclined to believe that the claimant was not paid in lieu of notice and he is entitled to be paid.

It was also the Claimant's case that he was summarily dismissed in accordance with Section 69 of the Employment Act. Section 69 provides as follows:

*"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) ...*

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

We have already established that the Claimant was terminated for “unavoidable circumstances” which were not explained or described to him, and therefore in violation of sections 66(1) and (2) and 68(supra). The reason of termination having not been established; it would be farfetched to state that it was because of the Claimant fundamentally breaching his contract of Employment. Therefore, Section 69 does not apply to this case.

In conclusion, given the lack of evidence to show that the Claimant was given a reason why his termination was contemplated and in the absence of evidence to show that he was an opportunity to respond to any reason, we find that the Respondent violated the law and proper procedure as provided under Sections 66(1) and (2) and 68(supra), when terminating the Claimant. Therefore, the termination was unlawful. Issues 1 and 2 are resolved in the affirmative.

**3. Whether there were financial rewards not paid to the Claimant?**

**4. Whether the Respondent is liable for the Claimant’s post dismissal situation?**

Although Dr.Akampumuza insisted on addressing issue 2 and 3 separately, we believe that since the two are addressing the remedies available to the Claimant, they can be resolved together. We shall therefore consolidate them into one issue as follows:

**3.What remedies are available to the parties?**

According to the plaint which was filed in High Court in 2010, and adopted in the Industrial Court in 2014, the Claimant prayed for the following remedies:

“...

*(a) Payment of salary arrears of Ugx. 1,700,000/=*

*(b) Payment of salary arrears of compensation of Ushs.850,000/- as penalty for Defendant’s breach of S.66 of the employment act.*

- (c) Payment Refund of UGX 5,280,000 that was wrongly deducted from his salary per month over a period of two years plus interest of 14% paid by NSSF.*
- (d) Order that the plaintiff be paid compensation for loss of prospective employment income of Ugshs. 255,000,000/=*
- (e) Declaration that the plaintiff is still an employee of the defendant.*
- (f) An order declaring that the plaintiff's dismissal illegal and therefore null and void.*
- (g) An order reinstating the plaintiff to office*
- (h) Alternatively, and without prejudice to (e) above, an order of payment of terminal benefits to the plaintiff*
- (i) General Damages*
- (j) Exemplary and aggravated damages*
- (k) Interest on a) above at bank rate of 25% p.a from 07.08.2007 taking into account inflation rate of 10.9% on a-j till payment in full*
- (l) Cost of the suit and,*
- (m) Any other relief court deems fit to grant.*

#### **i) Notice**

It was submitted for the Claimant that he was entitled to notice before the purported termination pursuant to Section 58 of the Employment Act. Counsel insisted that the Claimant was dismissed from service without payment in lieu of notice or terminal benefits and there was no evidence to prove it.

We have already established that he was not paid. The Respondent is ordered to pay the Claimant 1 month's salary in lieu of notice.

#### **ii) Leave not taken**

Counsel argued that the according to RW1, the Claimant was entitled to leave ifor the period 2007-2009 and that leave is mandatory under the Employment Act. He argued that the witness did not tell the Court the truth when he testified that, the Claimant had no pending leave yet he later admitted that the claimant had a balance of 22 days every financial year.

In reply, Counsel for the Respondent refuted the claimant's assertion that he did not take leave during the time he was employed by the Respondent because exhibit R7, his leave application forms, clearly showed that, not only did he apply for, but he also took leave and at the time of his dismissal he only had outstanding leave days of 9.5 days.

Section 54(1) (a) provides that:

1) Subject to the provisions of this section-

***"An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months' service to be taken at such time during such calendar year as may be agreed between the parties. (emphasis ours).***

The employer is therefore obliged to grant his or her employee rest days every calendar year. However the rest days cannot be taken at will, they can only be taken at such time as may be agreed between the employer and employee. The employee is therefore expected to notify the employer about the period he or she intends to take leave or to apply for leave, to enable the employer plan for his or her absence before granting it. The leave will therefore be granted on a date agreed between the employee and the employer.

In the instant case the Claimant admitted that he had not taken leave for the year in which he was terminated. He said:

*“... for that year I did not. I took leave before only once...”* He also said that he did not demand for the accumulated and unpaid leave. This Court in **EDACE MICHEAL VS WATOTO CHILD CARE MINISTRIES L.D APPEAL No. 21 OF 2015(CONSOLIDATED WITH L.D APPEAL No. 16/2015)**, held that; *“... an employer can only defer an annual leave to the following calendar year with the consent of the employee and in such a case the employee will take leave for both the previous calendar year and current calendar year.”*

We did not find any application by the Claimant for the accumulated leave days claimed nor was there any evidence that he protested its deference. There is no evidence that he applied and was denied leave. Therefore, we have no basis to grant this claim, it is denied.

### **iii) NSSF and PAYEE**

He also argued that the Respondent never made any NSSF and PAYEE remittances. He argued that the Claimant was statutorily paying 5% and the employer 10% to NSSF, but the total benefits amounting to 15% of his salary were never remitted to NSSF to the Claimant's disadvantage. He contended that an erroneous deduction of Ugx. 220,000 was made and the claimant was paid Ugx. 685,000/- instead of 850,000/= . According to counsel he was forced to service his loan from other sources yet it was guaranteed by the Respondent.

In Reply Mr. Ssemabtya, for the Respondent argued that the Respondent remitted the Claimant's NSSF contribution to the Fund and evidence of the same was exhibited in Court marked in ink as NSSF 1-6. According to Counsel the evidence was neither rebutted nor controverted by the Claimant, therefore the claim is without basis. He cited section 12(b) of National Social Security Fund Act, to the effect that employers shall hold any deductions pursuant to the section in trust for the fund. Therefore, even if the Respondent had not remitted

the NSSF contributions to the Fund, it would be held by the Respondent in trust for the Fund and not for the Claimant. He also cited **James Kayongo vs SDV Transami CS No 1586/2000** in which Mr. Justice Herbert Ntabgoba's (RIP) holding was to the effect that section 10(1) of the Act, which required an employer to pay the benefits into the Fund rather than be claimed directly by the employee, was "*to provide for a smooth, orderly and sure method of collecting contributions and centralise them into the Fund and provide an orderly system of withdrawals by the beneficiaries...*" his Lordship also stated that given Section 45 which mandated the Inspector or other Public officer to institute all criminal and civil proceedings under the Act, on behalf of the Fund, the Claimant had no locus standi, to claim remittance of his contributions, therefore the prayer should be disallowed.

With regard to PAYEE Mr. Sembatya, argued that this was neither pleaded nor was any evidence led on it. In any event Payee is a tax to Uganda Revenue Authority (URA) and not to the Claimant and therefore only URA could claim it. Therefore, the claim of Ugx.6,000,000/- paid to DFCU bank by the Respondent is not available to the Claimant and it should be disallowed.

It is true that Section 11 and 12 of the NSSF Act, oblige an employer to deduct 5% from the wages of an employee and to contribute 10% and remit it to NSSF as social security for the employee. It is also true that Section 46 makes it the preserve of the Fund through its Inspectors or other public officers of the fund to institute any criminal or civil proceedings on its behalf. However, this Court in **Aijukye Stanley vs Barclays Bank LDC No.243/2014**, stated that,

*"...the 5% deducted from an employee as money earned by himself or herself constitutes personal property of the employee and this being the case, the employee has a legal right to protect it from any party who may*



*have an interest in snatching it from him or her. ... we agree that such a right is enforceable by the claimant. ..."*

The Court also disagreed with the contention that section 46(supra) barred an employee from enforcing his right because the provision "*without prejudice to any other power in that behalf,*" includes the employee who owns the property. The same also applies to the 10% contribution because it is transferred to the fund pursuant to section 11 of the NSSF Act, which provides for payment of standard contributions by employers. However, Court emphasized that the right could only be exercised where the deductions were made from wages and they were not remitted to the Fund. The claimant therefore had to prove that the money was deducted from his wages and that it was not remitted to the Fund.

It was not disputed that the Claimant received gross pay of Ug.850,000/-, in his testimony he stated that the following deductions were made off his salary; Ugx. 42,500/- as 5% contribution towards NSSF and Ugx. 177, 500/ as PAYE, amounting to Ugx.220,000/=. It was his testimony that the deductions were statutory deductions and they were lawful. In the circumstances the claim for deduction of the Ugx. 220,000/- was not an erroneous deduction as claimed.

A perusal of the record regarding the NSSF remittances, showed that, Exhibit "I", attached to the Claimant's plaint showed that it covered the period 31/01/2005 to 31/07/2007. It was not in dispute that the Claimant commenced his employment with the Respondent on 15/08/2007. He however did not attach any statement covering 15/08/2007 to the date of his termination as proof that the Respondent deducted 5% from his salary and it did not remit it to NSSF. On the other hand, the Respondent as already stated, furnished Court with a record of remittances Marked in ink as NSSF 1-6 and they were not controverted by the Claimant. In the absence of evidence that the Respondent

did not remit 5% deductions off his salary as his NSSF contribution and did not remit them to the Fund, the Claimant failed to prove the alleged unremitted NSSF, therefore we have no basis to order its remittance to the Fund. Therefore, his claim for the refund of UGX 5,280,000 that was wrongly deducted from his salary per month over a period of two years plus interest of 14% paid by NSSF cannot stand.

### **Legal fees and Loan repayment**

Counsel argued that the Claimant incurred Ugx. 60 million in legal fees expenses and court fees and according to Counsel, this was not challenged by the Respondent.

In reply Counsel for the respondent argued that the Claimant did not adduce any document relating to the said loan, that is a loan agreement or alleged letter of undertaking by the Respondent or a demand note from DFCU to support this claim. He argued that it was unbelievable that having failed to pay a loan of Ugx.6,000,000/=on which interest continues to accrue the claimant could incur Ugx. 60,000,000/= in legal and Court expenses. He also argued that although the claimant stated that he sold land to pay these fees, no agreement for sale of land was tendered into court as evidence of the sale. He asserted that it is trite that special damages must be pleaded and proved.

Mr.Sembatya also stated that legal fees are not claimable as legal fees and a party would only be entitled to costs if the Court made such an award. These costs would be taxed by a taxing officer; therefore, the claim should be disallowed.

It is trite that special damages must specifically be pleaded and proved as having been suffered by the person claiming them. The claimant did show how the legal

and court expenses were incurred or any form of evidence that they were actually incurred. In any case we do not think that such expenses should be categorized as special damages, but rather as costs. In the circumstances we have no basis to grant them as special damages they are denied.

With regard to the claim for a loan of Ugx. 6,000,000/-, the plaint does not show that it was pleaded. But even if it were, we found nothing to show that the loan was a salary loan endorsed by the Respondent, to be paid from deductions on the Claimant's salary. In the circumstances it is denied.

### **Severance Pay**

He argued that the Respondent's witness testified that the Claimant was entitled to severance pay as provided for under section 89 of the Employment Act, but this was not paid to the Claimant.

In reply Counsel Sembatya contended that it severance pay was neither pleaded nor was any evidence adduced on it, therefore it should be disallowed.

The Supreme Court's holding in **Ms. Fang Min vs Belex Tours and Travel Limited SCCA No. 6 of 2013 consolidated with Civil Appeal No. 1 of 2014, Crane Bank Limited vs Belex Tours and Travel Limited** was to the effect that Court cannot grant a party a relief which was not pleaded in a claim/plaint. Therefore, a party is bound by his or her pleadings.

It is clear from the plaint that severance pay was not pleaded and proved therefore it is denied.

### **Repatriation**

The Claimant claimed repatriation as provided under Section 39 of the employment Act, amounting to Ugx. 20,000,000/=.

In reply Counsel for the respondent argued that this claim was neither pleaded nor proved by evidence. Therefore, there was no basis for its award and it should not be granted.

As discussed above, a party is bound by his or her pleadings and special damages must be specifically pleaded and proved. The Claimant did not plead repatriation; therefore, it is denied.

### **Reinstatement**

It was Dr. Akampumuza's submission that the Court is empowered under section 71(5)(a) of the Employment Act, to order that the claimant was still an employee of the Respondent and therefore it should reinstate him to his job from which he was illegally and wrongfully removed. He cited the holding of Kisaakye JSC, in **Omunyokol Akol Johnson v AG SCCA No.06/2012**, in support of his assertion.

Although this Court is empowered to order for the reinstatement of an employee, it is settled that an employer cannot be forced to keep an employee whom the employer no longer wa (see *Kiyimba Mutale vs....*). This order can only be made if Court established that there was subsisting trust and confidence between the employer and employee and the employee had not been terminated for a long time.

In the instant case the claimant alleged that the Managing Director had written a report that tainted him and caused his dismissal from Diamond Trust Bank, he was terminated without following the proper procedures and without a reason, therefore, we have no doubt in our minds that the trust and confidence between the Claimant and the Respondent is irretrievably broken and cannot sustain a reinstatement. In any case having been terminated in 2009, 11 years to date, is

too long for this Court to order reinstatement. In any case the Respondent has since changed. This claim is therefore denied.

### **Loss of prospective employment**

It was Dr. Akampumuza's submission that the Claimant lost prospective income of 3 years from 2007 -2009 at Ugx. 850,000 per month which translates to Ugx. 255,000,000/- which should be granted. Counsel argued that the Employment Act and the contract both provide for the right of eligibility for renewal of the contract. He also argued that at the time of termination the Claimant was only 30years old, but for the unlawful termination, he would have retired at the age of 60 years, at a salary of Ugx.850,000/=, per month for the remaining 30 years amounting to 306,000,000/- which should be granted.

In reply Mr. Sembatya's for the Respondent's argued that this was a baseless claim given that the claimant did not adduce any evidence to prove his assertion that he struggled to get a job with Diamond trust bank and he lost it on account of a Malicious report that was sent against him by the Respondent's Managing Director nor did he tender in any evidence to prove that he lost his job at Diamond Trust on account of the Respondent, therefore this claim should be disallowed.

The basis of an employment relationship is a contract of employment which sets out the terms and conditions of service and the work to be performed and the attendant remuneration. (see Section 40 and 41 of the Employment Act, 2006. There is nothing in the law which compels Court to grant a Claimant an award for the loss of prospective employment. Once the contract is terminated, the employee ceases to render any services to the employee and in turn ceases to receive any remuneration from the employer. Therefore, a claim for prospective earnings in our considered view is speculative. There is no guarantee that the

employee will serve until the expiry of the contract or that it will be automatically renewed, especially where it is a fixed term contract.

It is not disputed that the Claimant was employed under a 3 year fixed term contract. Clause 3 of the contract of employment provides that:

*"3.1.This contract shall be for a period of 3 years, unless otherwise terminated as provided for under this contract, and will be subject to renewal, depending on the performance of the employee during that period and the employers discretion upon such terms and conditions as the parties hereto may agree.*

Given this wording, the contract's subsistence was premised on it not being terminated and its renewal was subject to the performance of the Claimant during its duration and the discretion of the employer. The claimant agreed to these terms, therefore he cannot turn round now to claim for prospective earnings.

Even if the termination was unlawful, as we have already established, compensation for the wrong must be reasonable and commensurate to the economic injury suffered by the Claimant. It should not be aimed at punishing the employer or unjustly enriching the claimant. Further the Claimant did not prove the allegation that the MD of the Respondent caused his termination at Diamond Trust Bank. Therefore, the claim for loss prospective employment cannot stand. It is denied.

### **Salary arrears**

The Counsel for the Claimant contended that, the claimant having been wrongfully dismissed was entitled to salary arrears from 3/08/2009 to the date of filing at Ugx. 850,000 x 42 months amounting to Ugx. 35,700,000/-.

The Respondent in reply refuted this prayer on the ground that the Claimant in his plaint pleaded for an award of Ugx. 1,700,000/- in salary arrears and he is bound by his pleadings. Accordingly, he cannot seek for a different award in his submissions or his witness statement as he did. In any case no evidence was tendered to court to prove that at the time of his dismissal the Respondent owed him any money in unpaid salary. Counsel asserted that the Claimant in cross examination stated that he secured a job with Diamond Trust Bank after his termination with the Respondent, therefore there is no basis for his claim for "salary arrears" for a period after his termination from the Respondent and it should be disallowed.

The Oxford Languages Dictionary on line, defines arrears as, "*money owed and should have been paid earlier.*" We have already established that an employee once engaged under a contract of employment, is entitled to be paid wages or a salary for the work /services performed. The Claimants claim is for salary accrued after the termination occurred from 3/08/2009 until the filing of the matter in 2010. As Counsel for the Respondent argued, given that the claim is for salary which accrued after he was terminated, it cannot be categorized as arrears, it was not owed. In any case the quantum prayed for in submissions is different from what was pleaded. It cannot be overemphasized that a party is bound by his or her pleadings. In the circumstances the prayer is denied.

### **Terminal benefits**

It was submitted for the Claimant that at the time of his unlawful dismissal he was only 30 years old and save for the dismissal he would have worked up to 60 years at a salary of Ugx.850,000/- per month for the remaining 30 years work life, which translates in 30years x 12 x 850,000/- amounting to Ugx. 306,000,000/=, which should be paid to him.

In reply Counsel for the Respondent contested the Claimant claim of Ugx, 306,000,000/= being monies he would have earned until the retirement age of 60 years, because the Claimants contract of employment was for 3 years with no provision for retirement. According to Counsel it was speculative of the Claimant to imagine that his contract would be renewed until his retirement age or that he would be employed by the Respondent up to the age of 60. Counsel insisted that the Claimant during cross examination stated that the contract was for 3 years, therefore there was no basis for an award of Ugx. 306,000,000/= and it should be disallowed.

Terminal benefits are the final entitlements of an employee upon termination of an employment contract. They should be provided for under the contract of employment. The Claimant's contract in the instant case, was a 3 year fixed term contract, and it did not provide for the payment of terminal benefits. It was his testimony in reexamination that, "... *Bankhom had no general policy on retirement benefits*" and contrary to the assertion by Dr. Akampumuza, the Employment Act does not make any provision for the mandatory payment of terminal benefits We therefore have no basis to award them. They are denied.

### **General Damages**

According to Dr.Akampumuza, these are damages to compensate for the inconvenience, loss of use of money, trauma , anguish, psychological torture, suffering loss of livelihood, stress and emotional pain the Claimant suffered as a result of the Respondent's actions. He argued that the Claimant is a father and family bread winner with numerous responsibilities. He cited **BOU vs Tinkamanyire SCCA No. 12 of 2007** in which the Supreme Court held that it was trite tht n employee who is unlawfully dismissed should be compensated adequately. He also cited **Omunyokol(supra)** it awarded the plaintiff substantial



general damages of Ugx. 150,000,000/=. According to Counsel Court considered periodic increases in salary and allowance of public servants at the rate of 25% over the years. He prayed the Claimant is awarded Ugx. 200,000,000/= as general damages.

The Respondent did not reply to this submission.

It is trite that the only remedy for an employee who was unlawfully dismissed is damages. In **Vires vs National Dock Labour Board (1958) 1 QB 658** cited with approval in **Stanbic Bank VS Kakooza Mutale C.A No. 2 of 2010**, It was held that; *"It has long been settled that if a man employed under a contract of personal services is wrongfully dismissed he has no claim under the contract after repudiation. His only claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them."*

General Damages are intended to bring an aggrieved party to as near as possible in monetary terms to a position the Claimant was in before the injury occasioned to him or her by the Respondent occurred. The Claimant in the instant case, was employed on a 3-year contract which commenced on 15/08/2007. He was earning gross salary of Ugx.850,000/- per month and his was terminates on 3/9/2009 after 2 years of employment. We appreciate the inconvenience and suffering that are occasioned by the loss of employment especially when the loss is a result of unlawful termination. We have already established that the claimant in the instant case was unlawfully terminated therefore, he is entitled to an award of general damages. We think an award of Ugx. 9,000,000/- as General Damages is sufficient.

**Punitive damages and Aggravated Damages**

It was submitted for the Claimant, that the Respondent acted unconstitutionally, arbitrarily, highhandedly, illegally and oppressively and denied the claimant a source of livelihood which he continues to suffer due to the negative reports that were written to the prospective employers, contrary to sections 61 and 78(2) of the Act. Citing **Prof.Elsam Magara vs Makerere University &Ors MA No. 497 of 2015**, he prayed that this court awards the Claimant Ugx. 100,000,000/= as Punitive damages and Ugx.100,000,000/= as exemplary damages and to award a 25% interest rate per annum on all the pecuniary awards claimed from the date of the summary dismissal on 3/8/2009 reckoning a 10.9% inflation rate until payment in full.

In reply Mr. Sembatya argued that the Claimant had no basis of claiming an award of punitive and aggravated damages. He cited **Butterworth vs Butterworth** in which McCardie J defined exemplary damages as

*"Simply put, the expression exemplary damages mean damages for examples sake. These kinds of damages are clearly punitive or exemplary in nature. They represent a sum of money of a penal nature in addition to the compensatory damages given for pecuniary or physical mental suffering."*

He also cited **Rookes vs Bernard**, for the same legal proposition.

He argued that the claimant did not lead any evidence to prove that the Respondent's behaviour was oppressive, arbitrary or unconstitutional or that the respondent is a servant of the Government or that the Respondent's alleged conduct was calculated to make profit. Therefore, there is no basis for the award of exemplary damages.

**Uganda Revenue Authority vs Wanume David Kitamirike CACA No. 43 of 2010**  
cited with approval in **DFCU vs Donna Kamuli** ...distinguished punitive and aggravated damages as follows:

*"Aggravated damages are like general damages, compensatory in nature, but they are enhanced as damages because of the aggravating conduct of the defendant. They reflect the exceptional harm to the plaintiff by reason of the defendant's actions /omissions.*

*Both general and aggravated damages focus on the conduct of the defendant in causing the injury to the plaintiff that is being compensated for.*

*Punitive or exemplary damages are an exception to the rule, that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendants egregious highhanded, malicious, vindictive, oppressive and or Malicious conduct. They are awardable for the improper interference by public officials with the rights of ordinary subjects.*

*Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society's and also the court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awarded with restraint and in exceptional cases, because punishment ought as much as possible, to be confined to criminal law and not civil law of tort and contract."*

We did not find any aggravating circumstances in this case, to warrant the award of aggravated damages, they are therefore disallowed.

In conclusion this claim succeeds in the following terms:

1. Declaration that the Claimant was unlawfully terminated.
2. An award of 1 month's salary as payment in lieu of notice.
3. An order that the Claimant is issued a certificate of service.
4. An award of Ugx.9,000,000/- as general damages.
5. Interest of 15% on all the pecuniary awards from the date of the judgment until payment in full.
6. No order as to costs is made.

Delivered and signed by:

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

PANELISTS

3. 1. MR. EBYAU FIDEL
4. 2. MS. HARRIET MUGAMBWA NGANZI
5. 3. MS. JULIAN NYACHWO

DATE.....17/07/2020

