THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE APPEAL NO. 21/2020
(ARISING FROM KCCA/CEN/LC/564/2019)

BETWEEN

STANBIC BANK (U) LIMITED
……..…..APPELLANT

VERSUS

APOLLO TWINOMUHANGI TAYEBWA…….……..……RESPONDENT

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Ms. Mugambwa Harriet Nganzi
3. Mr. F. X. Mubuuke

AWARD

This is an appeal from the decision of a labour officer sitting at KCCA. From the submissions of both counsel, we gather the following facts:

The respondent was first employed by the appellant in the position of Head vehicle and asset finance. He was terminated on the ground of poor performance but after complaints from the respondent and after negotiations he was reinstated in employment in a different position of New Business Manager (Vehicle Assets & Finance). After an appraisal in 2018, he was enrolled on a performance improvement Plan for 3 months which according to the appellant did not improve his performance and he was put on another 3 months' improvement plan. According

to the respondent the second improvement plan was arranged illegally as it was not based on a documented performance review.

According to the appellant the extended 3 months did not improve performance and the respondent was called for a hearing after which he was found incompetent. He was dismissed upon which he filed a complaint to the labour officer who decided in his favor hence this appeal which raises the following grounds:

1. The Kampala Capital City Authority Labour Officer erred in law and fact when she failed to properly evaluate the evidence and arrived at the wrong finding that the Claimant was unfairly terminated.

2. The Kampala Capital City Authority Labour Officer erred in law and fact when she failed to properly evaluate the evidence and arrived at the wrong finding that the claimant was not afforded a fair hearing.

3. The Kampala Capital City Authority Labour Officer erred in law when she granted remedies that were neither pleaded nor proved by the claimant thereby arriving at the wrong finding.

4. The Kampala Capital City Authority Labour Officer erred in law when she exercised jurisdiction not vested in her and ordered reinstatement of the mortgage interest to 7.5% effective from the time of termination.

Counsel for the appellant argued ground I and 2 together while counsel for the respondent preferred to ague them separately.

Counsel Ferdinand Musimenta from Sebalu & Lule Advocates appeared for the appellant while Counsel Agaba Henry from M/s. Acquitas Advocates appeared for the respondent.

On the first and second ground counsel for the appellant argued strongly that evidence adduced showed that the respondent had confirmed his failure to meet targets that he had contracted to meet. According to counsel the respondent admitted this in cross examination. He relied on pages 3 and 4 of the record of proceedings. According to counsel the respondent in his letter dated 19/8/2019 in response to allegations of poor performance admitted failure to achieve targets which the labour

officer ignored. Counsel argued that the finding by the labour officer that there was no appraisal to justify a performance improvement plan (P.I.P) in light of the poor performance was baseless. Counsel invited court to consider the substance of the set performance goals and to ignore the form in which they should have been set since it was admitted by the respondent that it was his responsibility to initiate the goal setting in the system. Counsel submitted that having set his own goals for his own performance and having failed to meet them, the respondent fundamentally breached his employment contract. Counsel argued that all the tenets of a fair hearing as expressed in the case of **Caroline Karisa Vs Hima Cement HCCS 84/2012** were followed.

Under the third ground, counsel for the appellant argued that parties are bound by their pleadings and no court can award a relief that is not sought by a given party. Relying on the case of **Interfreight Forwarders (U) Ltd. Vs EADB SCCA 33/2014 and Nantayi Lois Vs Marie Stopes LDC 193/2014** counsel contended that the claimant having not pleaded severance, general damages and reinstatement of interest on the outstanding loan, the labour officer ought not to have awarded these remedies. He argued that even then the calculation of severance should have begun with the year 2016 when the respondent was hired afresh.

On the fourth ground, counsel for the appellant argued that the labour officer had no power to order reinstatement of the interest on the mortgage because this remedy was not in the first place pleaded by the respondent. Secondly, according to counsel, there was no proof of the mortgage on the evidence available and the property securing the mortgage was unknown to the labour officer. The labour officer according to counsel had jurisdiction only to grant remedies as provided under **Section 78 of the Employment Act.**

In response to the above submissions on ground one, the respondent argued strongly that in the absence of evidence of a performance contract as provided for in the respondent's performance management policy, there was no basis for the appellant to find poor performance in the respondent.

According to counsel for the respondent, the appellant failed to prove the reason of dismissal when before the labour officer counsel had to ask the labour officer during

cross-examination permission to produce the finding of 2018 appraisal and later on to admit the said appraisal as evidence in chief.

Counsel argued that the respondent having been appraised and rated **"Right on track",** and "**making progress"** in respect to goals for 2018, the average rating could not possibly be "**Time to step up"** since the rating "**right on track"** was thrice and "**making Progress"** was twice. According to counsel, although the respondent was dismissed on 26/8/2019, he was not appraised in 2019 in accordance with **clause 1.4 of the performance management policy** and there was no proof of any formal appraisal for the eighth month of 2019 that the respondent worked for the appellant.

It was submitted for the respondent that he was placed on a performance improvement plan on 1/2/2019 without a performance review contrary to **clause 3.4** and the said P. I. P. was extended for a further 3 months without a performance review contrary to the same clause. It was contended for the respondent that the appellant at the hearing did not evaluate his representations before making a decision to terminate him.

On ground 2. Counsel only pointed out that dismissal of the respondent was not for fundamental breach of his obligations under **Section 69 of the Employment Act.** Counsel took exception to the labour officer's Award of **7,985,000/=** as compensation for failing to afford him a fair hearing under **Section 66(4) of the Employment Act.**

On ground 3, it was submitted for the respondent and relying on **Umeme Limited Vs Harriet Negesa L.D. Appeal 072/2020** that in accordance with **Section 87 of the Employment Act,** an employee if unlawfully terminated is entitled to severance allowance whether it is pleaded or not.

According to counsel since the labour officer had no jurisdiction to award general damages, he in accordance with **NETIS Vs Charles Walakira, LDA 022/2016,** he could refer the same to this court for determination.

On ground 4, the respondent argued that the interest on the loan having been raised from 7.5% to 18% after his dismissal, it was only logical since the appellant did not refute the existence of the mortgage that the interest rate would be brought back to 7.5% after a finding that the dismissal was unlawful.

Resolution of the appeal

We shall tackle the first and 2nd grounds together since both of them are about the question whether in deciding the way she did, the labour officer evaluated properly evidence on the record.

The exact question that will be addressed is **whether the finding of the labour officer that the respondent was unfairly terminated and that he was not afforded a fair hearing was based on the proper evaluation of evidence as adduced**.

In disposing off the above question the labour officer found that there was no performance contract as is envisaged under **Clause 1.3 and 3.1 of the Performance Management Policy** and that therefore the respondent could not be properly assessed as a non-performer.

In his submission counsel for the respondent argued that for poor performance to constitute a reason of dismissal there must exist a threshold of where the desirable performance begins and/or where poor performance begins (hence the significance of the performance management policy).

Clause 1.3 of the Performance Management Policy stated

"At the beginning of every year the Bank will set annual objectives after Strategic Integrated Business planning, using the prevailing Performance Management Tool. These will be translated into departmental objectives and further into team objections. Every employee will set their objectives in alignment to these overall objectives, discuss with their supervisor and sign off the approved annual performance contracts."

Clause 3.1 provides

"Every employee should have a performance contract for the specific performance period, even when an employee's role has changed due to structural changes, promotion, re-designation and the like. These changes should be reflected/updated in his performance contract."

Clause 3.4 provides

"Every employee whose performance does not meet expectations shall be placed on the performance improvement plan for a specified period not exceeding three Months. Performance Improvement plans (PIPs); these are intended to enable employees to improve performance rather than a step in exiting an employee. The Performance Improvement plans should be supported by a documented performance review for the period immediately preceding the commencement of Performance Improvement plans."

Although there was no evidence of a performance contract before appraisal of 2018, the appraisal in fact occurred. This is evidenced in the submission of counsel for the respondent that the performance appraisal of 2018 was admitted on the record by the Labour officer later during the proceeding. We have looked the said performance appraisal of the period 01/01/2018 up to 31/12/2018. The Supervisor of the respondent at page 5/6 and 6/6 in a performance review summary rated the respondent **"Time to step up"** and clearly showed the reasons why this was the rating. This was despite the fact that the respondent's own rating was **"right on track"** with reasons also advanced. The respondent disputed the overall summary grading by his Supervisor mainly because on average his rating should have been **"right on truck"** since according to him a rating of "**right on truck"** thrice and **"making progress"** twice could not by any means translate into **"Time to step up",** the lowest mark. The respondent did not agree with the reason as to why his supervisor rated him the way she did.

We do not think that this court should be involved in the decision as to whether the overall self-rating by the respondent was more justified than that of his supervisor. An employee's supervisor is better placed than anybody else to know which gaps the employee needs to patch up. Consequently, where in an appraisal an employer gives reasons for the kind of appraisal done and such reasons relate to what the employer calls gaps or weaknesses of the employee, the court may not go into the nitty-gritty of whether or not such reasons justify the appraisal.

In the instant case the respondent was rated a number of times **"right on track"** and **"making progress"** but on the whole and for the whole year the employer rated the employee **"Time to step up"** with reasons that for example

> ***"whilst I believe that indeed he has made a contribution to the team performance he has not met the asset targets that we committed to despite several commitments and engagements. There is need to be more proactive."***

More of the reasons are at page 6/6 of the appraisal and as noted above the rating of the employee is always against the expectation of the employer which is within the exclusive power and authority of the Employer. The Court may only interfere if in its opinion the rating is fundamentally opposed to the performance of the employee and the reasons advanced for such rating/ appraisal. We have no reason to rate the Respondent differently from his own employer. It is our considered opinion that the non-existence of a formal performance contract during the period 01/01/2018 – 31/12/2018 did not occasion any miscarriage of Justice since the appraisal was a two way system giving opportunity to the respondent to rate himself as against the rating of his supervisor and since there were targets apparently agreed to be the gauge of the appraisal.

It was argued for the respondent that in the absence of a documented performance review and a performance contract in accordance with Clause 3.4 of the performance management policy, the Performance Improvement Plans onto which the respondent was enlisted had no basis and it was therefore unlawfully instituted. According to counsel the Performance Improvement Plan was a concerted move orchestrated to exit the respondent from employment since there was no appraisal/ review that warranted it.

While addressing herself to this point the Labour Officer stated at the bottom of page 8 of the Award

> ***"Under clause 3.4 the PIPS should be supported by a documented performance review for the period immediately preceding the commencement of the PIP. This implies that an employee is put on a performance Improvement Plan (PIP) where there are well documented performance reviews for the preceding period. Again there is no such documented review on record to justify why the respondent was put on PIP."***

As pointed out earlier on in this Award, although a performance contract was a necessary tool in evaluating the performance of the respondent, the appraisal that

was done with the participation of the respondent against agreed targets was sufficient. Accordingly, where the respondent was seen lacking by his supervisor with reasons related to lapse in performance, the absence of a documented performance review would not be an impediment to institution of a Performance Improvement Plan in the areas identified as a weakness in the employee. The wording in clause 3.4of the performance management policy that ***"Performance Improvement Plan should be supported by a documented performance review"*** in our opinion is not a command. It is permissive of other means which may include appraisal or email correspondence as a precursor to institution of Performance Improvement Plan. We find therefore, that the Labour Officer erred in her finding that without a documented Performance review, the Performance Improvement Plan was unjustified. Even if the emails referred to were to be strictly interpreted as "regular, deliberate feedback conversations" as the labour officer did, we strongly form the opinion that if the same revealed a weakness in the performance of an employee, they would be sufficient reason to engage an employee in a Performance Improvement Plan. Such conversations cannot be wished away as if they have no impact in the whole some analysis of an employee's performance.

The Next question is **whether or not the respondent was accorded a fair hearing**.

While commenting on the question of fair hearing the labour officer stated

> ***"To begin with I commend the respondent for affording the claimant a performance hearing. However, as indicated above a fair hearing would not arise in the ordinary sense of it in the absence of a performance contract agreed upon and signed by the parties which would act as a yard stick in assessing his performance. In any case there can't be fairness where the claimant was dismissed in total disregard of his defense dated 19th August 2019"***

We gather from the above statement that the labour officer did not examine the process from the time the respondent was informed of the non-performance to the time decision was made to dismiss him. In the labour officer's view the fact that there was no performance contract signed off by the respondent necessarily meant that the hearing was not fair. As we noted earlier, our position is that the appraisals and the targets agreed upon by the respondent were sufficient to gauge the

performance of the claimant. The letter of defense referred to by the Labour Officer was only giving reasons as to why performance was not as expected. It was not a denial of poor performance.

He stated in the letter (inter alia) that:

> ***"I therefore submit that I met my voluntary target of 5 Billion in sales for the months of February, April and June and was below my target with Justification for the months of March, May and July. I have therefore averagely achieved sales of 19,499,414,694/= out of the would be biannual target of 30 billion and thus a deficit of Ugx. 10,500,585,306/= is due to justification (reasons afore mentioned)***
>
> ***In respect to behavioral values, I submit that I have all material times engaged all stakeholders including the segment Head Commercial and respective relationship managers and business bankers and in any case failure on the above would not reflect in my achieved sales and those I have in the pipeline. "***

We have looked at and internalized the minutes of the performance hearing. The ruling arising therefrom encompasses a summary of what the respondent in his defense called behavioral values in a tabulated form which according to the appellant were not met by the respondent. The respondent was given sufficient time to prepare and make presentation to the committee. In the ruling reference was made to his defense when the committee pointed out the target of sales of 5 billion per month as compared to what was achieved by the respondent. We do not fault the hearing process and we find that it was a fair hearing process.

In the final analysis it is our finding that the labour officer misdirected herself when she held that in the absence of a written and signed off performance contract and in the absence of a documented performance review no fair hearing could ensue for the respondent. Had she appreciated the relevance of the set and agreed targets and the appraisal method used by the appellant her decision would have been different. Accordingly, both grounds one and ground 2 succeed.

Ground 3 and ground 4 relate to the remedies arising from an unlawful termination. Since the effect of the decision in ground one is that the dismissal of the respondent

was not unlawful, it follows that No remedies arise therefrom. Both grounds therefore succeed.

As a consequences of the success of all the grounds, the decision of the Labour Officer together with all orders arising therefrom is hereby set aside.

No order as to costs is made.

Delivered & Signed:

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

PANELISTS

1. Mr. Ebyau Fidel …….
2. Ms. Mugambwa Harriet Nganzi …….
3. Mr. F. X. Mubuuke …….

Dated: 28/04/2021