

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO.16/2017
ARISING FROM HCCS NO. 59/2011

KWIKIRIZA CHARLES **CLAIMANTS**

BESHUMBUSA FRED

VERSUS

UMEME (U) LIMITED **RESPONDENT**

BEFORE:

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

PANELISTS

- 1.MS. HARRIET MUGAMBWA NGANZI**
- 2.MS. JULIAN NYACHWO**
- 3. MR. ABRAHAM BWIRE**

AWARD

BRIEF FACTS

The Claimants were employees of the Respondent's Company from 2005. On 3/01/2011, the Claimants were summarily dismissed by the Respondent for allegedly breaching section 5(k) of the Disciplinary Code of conduct by tampering with company installations.

The 1st Claimant, Kwikiriza Charles was holding the position of District Technical Officer, by the time of his termination and the 2nd Claimant Beshumbusha Fred was the Assistant Technical officer.

ISSUES

- 1. Whether termination of the Claimant's employment was unlawful?**
- 2. Whether the Claimants are entitled to the remedies as prayed for in the claim?**

REPRESENTATION

The Claimants were represented by Mr. Ekirapa Obiro Isaac of Ekirapa and Company Advocates, Kampala and the Respondent by Mr. James Zeere of Sebalu and Lule Advocates, Kampala.

EVIDENCE

Mr. Kwikiriza testified that, his duties as the Respondent's District Technical officer for Rukungiri District, included inspecting line networks and transformers and line clearances, inspection of new connections, creating safety awareness in the community, identifying faults in lines and rectifying them and costing customer applications and materials required for installations. On 3/1/2011, he was terminated on allegations that, in November 2010, one Kawuki's service/metering point and network were relocated without costing and approval. According to him costing and approval was only done for new connections and not for services already installed. He admitted that he moved Kawukis metering point without costing it and without approval, in order to secure it from power theft. He said he did not need authorization to do this work and he moved the metering point from the coffee factory to a maize mill. He admitted that he did not tell his supervisor about the movement because it was not necessary, but the area management was informed. He said he was summoned to the disciplinary committee and he knew why he was summoned.

CW2 Beshumbusha Fred testified that CW1 Kwikiriza was his supervisor. He was invited to a disciplinary meeting and accused of not reporting, Kwikiriza's actions. He was subsequently dismissed. He said CW1 only moved a meter from the building to the pole and he did not move a network, because moving a network involved moving transformers poles and switch gears. He said the Respondent had directed them to move meters from premises to poles and it was an exercise which was carried out countrywide.

RW1 David Birungi testified that, he was part of the disciplinary committee and Kwikiriza's file indicated that he had shifted a network. According to him this included a meter, and every other accessory between the premises and substation and this required authorization and costing by the engineering department. According to him the Claimant's had moved the network supplying a one Jafari Kawuki from a building which was previously a maize factory to a Coffee factory without accruing any money for the Respondent. According to Birungi ,CW1 did not do secure a meter because he shifted an nonoperational customer from a maize mill to a coffee mill which was not operational. He shifted power from 1 pole to another pole and the distance between the 2 mills was about 20 meters and any part of the network had to be costed. In this case it was shifting of a meter and a cable.

He also stated that, he had no recollection of sending a one Semwema Joseph to conduct a field investigation on 16/12/2010, after the disciplinary committee sat. According to him, the committee only relied on the reports from the Claimants supervisor to make its decision. Semwema conducted field visit on 16/12/2010 after the hearing. He insisted that it was wrong for the Claimant's to secure the new premises without costing and approval.

SUBMISSIONS

It was submitted for the Claimants that they were unlawfully terminated because the Respondent did not prove the reason for their termination.

According to Counsel whereas the suspension letters indicated that, the Claimants were terminated for shifting a customer's service network, when they appeared before the disciplinary committee they were asked to answer to charges of relocating a network without costing and approvals at Nyamunuka TC. for a one Jaffari Kawuki.

He contended that, their explanation about the service having been shifted and paid for earlier, as indicated under exhibit "D10" was not considered by the disciplinary committee nor was the explanation about the fact that the customer had only changed business and not the premises, considered.

He contended further that the Respondent conducted investigations into the matter after the hearing had taken place but even then, Semwema who conducted the said field visit established that, there was no shift of network.

Counsel also submitted that, the Claimants were not given a fair hearing, because they were not served with the charges prior to the hearing and the charges were not clear. He contended that, on 12/10/2010, the Claimants received letters requesting them to give an explanation about "*customer service relocation*"; on 26/11/2010 the charge was stated as "*shifting customer's service and network*" and the dismissal letter stated the charge as "*tampering with Company installations*". He argued that they were not given the charges in writing and the 2 days' notice given to them was not sufficient for them to prepare their defence.

In reply, Counsel for the Respondent disputed the joint explanation of the Claimants that, they moved the meter without moving the cable. He contended that, the Claimants could not have moved the meter without its attendant cable and besides, the customer was not incurring any costs for utilization of the service because the

coffee mill on which it was installed was non-operational. In his view, moving the meter from the dormant coffee factory, which had not consumed power from April 2010 to December 2010, to the maize mill, had nothing to do with securing power theft and the Respondent was supposed to be paid for this service. According to him it was no coincidence that the customer only started using the meter when it was moved to the maize mill and he incurred electricity charges of Ugx. 573,138/- as at 6/01/2011, which was a clear indication that the CW1 moved both the cable and the meter, but the Respondent was not paid for the service. He added that, CW2 was complicit in the movement of the cable and meter which was done without costing and approval. He concluded that, the two Claimants conspired to move the meter and service cable from the coffee mill to the maize mill at the instance of the customer without costing and approval and this was justifiable reason for the disciplinary committee to find them culpable of tampering with the Respondents installations.

It was further his submission that, on 11/11/2010, the Claimants were requested to render an explanation about the shifting of the network and subsequently suspended on 26/11/2010. The charges were clearly read out to them during the disciplinary hearing and in cross examination, both admitted that they were aware of the allegations leveled against them.

Counsel refuted the assertion that, the charges against the Claimants were not clear simply because the dismissal letter stated that they were dismissed for *“tampering with Company installations”*, contrary to section 5(k) of the disciplinary Code of conduct and yet this provision was not brought to their attention prior to the disciplinary hearing. Although he admitted that the provision should have been brought to the Claimants attention before the hearing, he insisted that they had both exceeded their authority when they moved a metering point and the service cable without costing and approval. According to him, this amounted to unlawfully accessing

the Respondent's installations which was categorized as "*tampering with Company installations.*" It was his submission that this was a mere descriptive title of the category of misconduct, but the Claimants were always aware of the allegations against them and they elaborately explained themselves in regard to the said allegations at the disciplinary hearing. He relied on **Dr. Barnabas Kiiza vs Makerere University Kampala, LDC No.019/2015**, in which this Court's holding is to the effect that once an employee has responded to allegations against him or her prior to a disciplinary hearing the employee is deemed to be aware of the allegations against him or her. Therefore, having responded to the allegations, the argument that the charges which they responded to were inconsistent cannot stand.

Counsel also refuted the argument that, the Claimants right to a fair hearing was violated when a site visit was carried out by Joseph Semwema on 16/12/2010, after the hearing took place, because this site visit was only intended to verify the information the Claimants had already provided at the hearing, in regard to the allegations, therefore they were not prejudiced in any way. He argued that no new allegations were raised nor was the report rebutted by the Claimants. In any case, they relied on the same report in their defence as stated under paragraph 3 of their submissions. He also relied on **Ekemu Jimmy vs StanbicBank Uganda, LDC No.308/2014**, for the legal proposition that failure to avail a report does not in itself prejudice the rights of the employee, if the facts implicating the employee have already been put to the employee. Therefore, the Claimants were given a fair hearing.

DECISION OF COURT

It is trite that, an employer's right to dismiss/terminate an employee cannot be fettered by the courts, provided that the procedure for termination/dismissal as provided under Sections 66, 68 and 70(6) of the Employment Act, 2006, is followed. The law makes it mandatory for the employer to explain to an employee the reason he

and she is considering the dismissal/termination, before the termination occurs. The employer must also give the employee in issue, an opportunity to respond to the reason/s in the presence of a person of the employee's choice, in writing or before an independent and impartial disciplinary tribunal or committee. The employer is further, expected to prove the reason for the dismissal/termination, although proof of the reason need not be beyond reasonable doubt. However, the reasons must be based on facts known to the employer and must exist at the time the decision to dismiss /terminate is made. (see Sections 66 and 68 of the Employment Act, 2006).

The Claimants in the instant case, were accused of moving a metering point and service cable, thus moving a network without costing and approval. By doing so they were alleged to have committed misconduct categorized as "*tampering with Company installations*", contrary to clause 5(k) of the Respondent's Disciplinary Code of Conduct.

The contention of the Respondent as we understand it, is that whereas CW1 Kwikiriza had the mandate to secure metering points, by moving the service cable, he had changed a network which he should not have done without seeking authorization and without costing. Mr. Kwikiriza CW1, admitted that he moved the metering point to the pole but it was within his mandate to do so and therefore he did not have to seek any authorization to do so, therefore his termination was unjustified.

After carefully evaluating the evidence on the record, we established that indeed CW1 Kwikiriza Charles, moved a metering point from a non-operational coffee factory to a maize mill which was 20 meters away. We also established from the statements on the record that, the Coffee factory/mill was non-operational and the customer Kawuki was only paying service fees for the service. Therefore, the Respondent was not earning income from its metering point, save for service fees. It was only after the metering point and its attendant service cable, were moved to the maize mill that, the

Respondent started earning from the consumption of electricity consumed from the service.

It was the evidence of the Respondent's witness RW1 Birungi David that;

"... the distance between the coffee mill and the maize mill was about 20 meters, any movement of the network is supposed to be costed ...

Mr. Birungi also testified that the poles which initially supplied the customer were affected by the road construction which took place in 2005. Indeed Exhibit "C5" indicated that there was line diversion at Nyamunuka trading Centre due to road works and the said diversion was paid for by Reynolds Construction company which was undertaking road works.

It was not disputed however that, CW1 Kwikiiriza, moved the metering point from the nonoperational coffee mill to an operational maize mill, whose source of power before this was not clear and the 2 mills were 20 metres apart. CW 1 did not deny that a meter and its attendant cable were moved from the coffee mill to the Maize mill. Both mills belonged to the same customer a one Kawuki, and the meter and cable at the coffee mill were installed earlier, although the mill was non-operational. The customer changed business to a maize mill but there was no evidence to show that he either applied for a new electricity installation or that he requested for the installation at the coffee mil to be installed at the maize mill, none was adduced by the Respondent. Therefore, the allegation that he moved the metering point at the instance of the customer was not substantiated.

We further established that, the CW1's performance targets for 2010, at page 115 on the documents filed in High Court on 10/02/2012, included among others, securing metering points. He was expected to secure 30 TOU (3 phase) and 120(single phase). Therefore, he was operating within his mandate when he moved an existing/already

installed metering point and its attendant cable from a non-operational coffee mill to an operational maize mill. The statement of consumption adduced by the Respondent marked "D16" on the additional trial bundle indicated that prior to its movement to the maize mill, the meter was not earning any income for the Respondent, save for service fees which accrued from April 2010 to December 2010 and it only starting earning income for the Respondent when the Claimant moved it to the maize mill in December 2010 when the Respondent registered consumption worth of Ugx.573,138/- by the customer. As already discussed, the movement of the metering point, was within his mandate of securing metering points as stated in his terms of reference and targets for 2010. It was not disputed that Kawuki, the customer in issue was customer number 26 out of the 30 TOU 3 phase customers CW1 was supposed to secure in 2010. It was also not disputed that the movement of a network involved moving transformers, poles and switch gears. In the instant case, it was an existing meter and its attendant cable which were moved from a non-operational coffee mill which was not earning any income for the Respondent to a maize mill 20 meters away which according to the Respondent started earning income for the Respondent after its installation.

We therefore, do not associate ourselves with the assertion by Counsel for the Respondent that moving the metering point from the dormant coffee mill which was not consuming power from April 2010 to December 2010, to the maize mill which consumed power, had nothing to do with securing power theft. We also do not agree, with the assertion that, the Respondent should have been paid for the service because, the metering point and attendant cable were already installed on the coffee mill which was dormant and was only moved 20 meters away from it to a maize mill which was operational . Given that the metering point was already in existence having been installed earlier, in our view, meant that it had already been paid for.

We are convinced that by moving the meter to a functioning facility, CW1 was acting within his mandate to secure meters as directed by the Respondent and his actions led to the Respondent earning income from it, which was hitherto not the case. We are fortified by the finding in the verification report by Semwema that, there seemed to be no change of network as alleged and the buildings in issue were situated where the old coffee factory/mill was.

In the circumstances, there was nothing to indicate that CW1 tampered with the respondents' installations as alleged. On the contrary, he acted within his mandate when he moved the metering point to an operational facility which as shown by the electricity statement attached by the Respondent, started earning income for her after it was installed at the maize mill. The Claimant in our considered view, saved the Respondent from losing power through an unsecured metering point.

Section 68(1) of the Employment Act(supra) requires that, before an employer terminates an employee, he or she must prove the reason or reasons for termination, even if it need not be beyond reasonable doubt, this was not the case in the instant case. The Respondent did not prove that the Claimant tampered with her installations. The Respondent's did not prove the infractions leveled against the Claimants and mere belief that a reason for termination/dismissal exists at the time of dismissal, is not sufficient cause for dismissal or termination of an employee. The reason/s must be proved or justified. In the circumstances, having not proved the reason for terminating the Claimants, the termination was substantively unlawful.

Were they accorded a fair hearing?

The Claimant's in their testimonies in Court admitted that they were aware of the charges against them and they responded to the allegations both in writing and orally. They had also served the Respondent for a reasonable period of time both having assumed their employment in 2005. The various contracts they held clearly stated that,

that the contracts would be governed by Umeme's various Business principles, Umeme terms and conditions of service where applicable and the Respondent's Disciplinary and Performance at work policy, therefore, they were aware of the policies that govern their employment. In addition, both of them testified that they were aware of the charges leveled against them and they rendered an explanation to the said charges. In the circumstances, the assertion that the charges were not clear simply because they were not categorized under the disciplinary code prior to the hearing cannot hold. As stated in **Dr. Banabas vs Makerere University**(supra), having made the allegations known to them prior to the hearing and having responded to them as provided under Section 66 of the Employment Act, they cannot turn around now to claim that the charges to which they responded, were not clear and the notice given to them to respond was insufficient.

Although it is not good practice, for a verification investigation to be carried out after a hearing has taken place, we do not subscribe to the assertion by Counsel for the Claimants that, they were prejudiced by the field investigation because it was not the basis of the disciplinary process. In any case, the report exonerated them.

In our considered opinion, availing the employee with an investigation report would only be mandatory if it the report is the basis of the allegations against the employee and he or she is not aware of the allegations at all. As stated in **Ekemu**(supra), cited by Counsel for the Respondent, where the employee has been made aware of the infractions leveled against him or her, prior to the hearing and he or she has been given an opportunity to respond to the infractions, failure to avail the investigation report would not render the disciplinary process unfair. Therefore, given that the Claimants, were made aware of the infractions leveled against them prior to the hearing and they responded to the infractions, we have no reason to fault the Respondent. It is our finding that the Respondent complied with the procedure for termination.

This notwithstanding however, we already established that the Respondent did not to prove the reason for terminating the Claimants, as provided under the law, therefore, the termination was substantively unlawful.

2. Whether the Claimants are entitled to the remedies as prayed for in the claim?

Having found that, the Claimants termination was unlawful they are entitled to some remedies.

General Damages

Citing **Margaret Kagendo Vs Civil Aviation Authority LD No.)16/2014**, in which this Court award the Claimant Ugx. 100,000,000/-, for being terminated without justifiable reason and **Charles Abigaba Lwanga vs Bank of Uganda LDC No. 142/2014**, in which this court awarded the Claimant Ugx. 25,000,000/- for unlawful dismissal. He argued that that given that the value of money has since fallen, CW1 who started working for the Respondent from 2005 to 2011 and was earning Ugx. 1,050,000/- per month, should be awarded Ugx. 80,000,000/-, as general damages and CW2 who started on 1/3/2005 to 2011 when he was unlawfully dismissed earning Ugx. 595,518/- per month should be paid Ugx. 50,000,000/- as general damages.

It has long been settled that the remedy for an employee who has been unlawfully terminated is damages and any other remedies pleaded under the Employment Act. (See **Stanbic Bank vs Kakooza Mutale CA No. 2 of 2010**). We have already established that the Claimants were unlawfully terminated, therefore they are entitled to an award of general damages. It is trite that determination of the quantum of damages to be awarded is at the discretion of Court and depends on the circumstances of each case. We think that CW1 Kwikiriz Charles, having worked for the Respondent from May 2005 and he was unlawfully terminated on 3/01/2011, earning Ugx. 1,050,000/- per month an award of **Ugx. 25,000,000/=** is sufficient as general damages.

CW2 Fred Beshymbusha, having worked for the Respondent for 5 years earning Ugx. 595,518/- per month is awarded **Ugx 12,000,000/=** as general damages.

3. Severance Pay

The Claimants prayed for an award of severance pay in accordance with section 87(a) of the Employment Act, which entitles an employee who was 6 continuous or more service of an employer but was unfairly dismissed to an award of severance pay. Having established that they were unlawfully dismissed Section 87 of the Employment Act, entitles both of them to severance pay, which according to section 89 should be agreed between the employee and the employer. Their contracts however, do not make any provision for the calculation of severance pay therefore, we shall award it in accordance with the in **Donna Kamuli vs DFCU Bank LDC LDC No. 002/2015**, to the effect that where there is no agreed formula for calculating severance pay it shall be paid at 1 months' salary per year served. The Claimants served the Respondents for 5 years each therefore, CW1 is awarded **Ugx. 5,250,000/-**, as severance pay and CW2 is **Ugx. 2,977,590/-** as severance pay.

4. Outstanding Loan obligation

Although CW1, claimed he had acquired an unsecured loan which was guaranteed by the Respondent, he did not adduce any evidence to prove it.

In **Irene Rebecca Nassuna vs Equity Bank Uganda Limited LDC No. 06/2014**, held that;

“... that, where an employee has applied for and been granted an unsecured loan whose repayment is solely by salary and the employee is unlawfully dismissed, the liability of paying the loan shifts to the employer who unlawfully terminated the said employee. However, the employee has the onus to prove that the loan was approved/quaranteed by the

employer, as a salary loan and that the loan is purely unsecured and solely premised on salary for its repayment.”

In the circumstances, we have no basis to make this award. It is denied.

5.Compensation for violating section 66(4) and Notice periods

It is well established that a party cannot be granted a relief that it has not claimed in the pleadings. In **Interfrieght Forwarders (U) Ltd vs East African Development Bank, SCCA No.33/1999**, the Court held that;

“... the system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what the case of the opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial...”

For emphasis, a Party is therefore bound by his or her pleadings and cannot succeed on a case not set up in the pleadings. The prayers for 1 months pay for failure to accord a fair hearing and for payment in lieu of notice, were not pleaded by the Claimants therefore, they are denied.

7. Interest

Relying on **Ebiju james vs Umeme Ltd HCCS No. 133 of 2012**, the Claimants prayed for interest on severance pay and payment in lieu of notice and compensation for failing to hold a fair hearing at 25% per annum from January 2011 until payment in full and 25%per annum on general damages from date of judgement until payment in full.

As already discussed the claimants are not entitled to payment in lieu of notice and compensation for failing to hold a fair hearing because they were not pleaded.

Interest is granted on all pecuniary awards at a rate of 12% per annum from 16/08/2017 when the matter was filed in this Court until payment in full.

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

1.MS. HARRIET MUGAMBWA NGANZI

2.MS. JULIAN NYACHWO

3. MR. ABRAHAM BWIRE

DATE: 19TH MAY 2021