

**THE REPUBLIC OF UGANDA**  
**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**  
**LABOUR DISPUTE CLAIM.NO.034/2017**  
**ARISING FROM CB/01/159/15.**

**MARTIN IMAKIT** ..... **CLAIMANT**

**VERSUS**

**VIVO ENERGEY (U) LTD** ..... **RESPONDENT**

**BEFORE:**

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

**PANELISTS**

- 1.MR.EBYAU FIDEL**
- 2.MS. HARRIET MUGAMBWA NGANZI**
- 3. MR. FX. MUBUKE**

**AWARD**

**BRIEF FACTS**

The Claimant was employed by the Respondent Company from 12/06/2012 to July 2015 when he was terminated on allegations that he breached the Respondent's Staff Standing instructions, when he declined to sign a performance Improvement plan, absented himself from duty and declined to comply with his Supervisor's instructions. The Claimant contended that the infractions leveled against him by the Respondent were unfounded and a cover up, for her failure to reach consensus on a Mutual Separation Agreement which

the Respondent had adopted as a means to render some of her employees Redundant. It was his case that, his summary dismissal from employment, was unlawful and unfair.

### **ISSUES FOR RESOLUTION**

**1. Whether the Claimant's dismissal from employment was unlawful and unfair?**

**2. what are the remedies available to the parties?**

### **REPRESENTATION**

The Claimant was represented by Ms. Rebecca Nakiranda of Nakiranda & Co Advocates, Kampala and the Respondent were represented by Mr. Allan Waniala of Sebalu and Lule Advocates, Kampala.

### **SUBMISSIONS**

**1. Whether the Claimant's dismissal from employment was unlawful and unfair?**

Counsel for the Claimant submitted that, the performance issues which were leveled against him according to **R1, R2, R3, R4** and **R5**, were not directly attributed to him and although the Performance Improvement Plan was a tool for performance improvement as provided under the Staff Standing Instructions (SSI), it ought to have been preceded by a formal appraisal document. According to her, Ex 17 which referred to performance period of January- June 2015, was not subjected to appraisal, as provided under the SSI at p/1-page 2/6 clauses 1,2,1.1 and 1.4. She contended that no appraisal document was adduced as evidence of poor performance against the Claimant and his entire team had performed on and over target. She cited **Donna Kamuli vs DFCU LDC No. 002/2015**, to the effect that appraisals and discussions between employee and

their employers touching the employee's performance could only be used as evidence in support of good or bad performance and the records in the possession of the employer regarding such performance, had to be subjected to a disciplinary process before a decision could be made. Counsel insisted that the Respondent did not adduce any evidence to show that, the Claimant was subjected to any disciplinary procedure, therefore his refusal to sign a Performance Improvement plan, was not justification for dismissal.

She refuted the assertion that the Claimant absconded from duty because he was entitled to take annual leave, and he submitted his leave schedule at the beginning of the year, in accordance with the SSI. She argued that, the Claimant sent reminders about the said leave and no immediate objection was made. His leave was scheduled to commence on 29/06/2015 to end on 17/07/2015.

She further contended that whereas the Respondent received the Claimant's leave notes on 26/06/2015, she only sent the rejection notice to him via his work email on 28/06/2015, which was a Sunday when offices were closed and just a day before the Claimant commenced on his annual leave. Counsel argued that leave is a legal entitlement under section 54 of the Employment Act. She also relied on **Mbiika Dennis vs Centenary Bank LDC No. 023 of 2014**, in which this Court's interpretation of section 54 of the Employment Act is to the effect that, an employer is obliged to grant rest days to his or her employees during every calendar year, to enable the employees to rejuvenate and work better and an employee is entitled to take annual leave whether the employer has put in place a mechanism for applying for it or not. She also cited **Florence Mufumbo vs UDB LDC No. 138/2014**, in which this court emphasised that where an employee is entitled to take leave and the employer is made aware of the dates on which the employee intends to take the leave and the employer raises no objections

to the proposed dates, it would not be a fair reason for imposing a disciplinary penalty or dismissal, once the employee takes his or her leave. In this case the employer would be estopped from denying that such leave was authorised.

Counsel insisted that it was not an act of insubordination for the Claimant to go for his annual leave before concluding the Performance Improvement Plan agreement, because the plan was unreasonable in light of his performance in 2014 and 2015 and given that it was not based on any appraisal. She further contended that, the Respondent did not prove that, the rejection notice which was sent to the Claimant via email on a Sunday was received by him before he commenced his annual leave. Citing **Chandia Christopher vs ABACUS PHARMA (Africa) Ltd, LDR No. 237/2016**, in which this court held that;

*“Although the claimant admitted having refused to acknowledge the warning letter, we do not subscribe to the contention that such refusal constituted insubordination. Insubordination in our view depicts acts of defiance of authority or refusal to obey instructions. It involves acts of disobedience. It is a direct or indirect refusal of an employee to perform a reasonable directive from his employer or a mockery, insult or disrespect of an employer by an employee. Refusing to acknowledge the warning letter, in our view is short of this description and therefore not an act of insubordination.”*

It was her submission that the Claimant’s dismissal was not justified to warrant his summary dismissal. In any case, the disciplinary process was inadequate because notice was served on the Claimant, on the same day of the hearing and the offences with which he was charged were not stated in the notice, contrary to the principles of a fair hearing. She relied on **Ogwiko Deogratitious vs Britania Allied industries Ltd LDC No. 018 of 2016** which stipulated the

requirement for the employee in issue to be informed about the infractions leveled against him or her, to be given time to respond to the infractions and an opportunity to physically appear before an impartial tribunal to present his /her response and time to adduce any other evidence where necessary, before the tribunal makes a decision. She contended that in this case, the process was a sham because there were no minutes of the hearing on Appeal and the Claimant's defence was disregarded. According to her, the Respondent was simply malicious following a failed negotiation of a mutual separation, hence the sudden declaration that the Claimant was a poor performer, therefore, this issue should be answered in the affirmative.

In reply, Counsel cited section 69 of the Employment Act which empowers the employer to summarily dismiss an employee provided, the dismissal can be justified by showing that the employee fundamentally breached his or her obligations under the contract of service. He also relied on **Lubwama Henry vs Umeme Ltd HCCS No. 0101 of 2011**, in which **Elizabeth Musoke J**, as she then was held that:

*"... conduct which fundamentally breaks or disregards the essential conditions of the contract of service would be regarded under the Act as one that has fundamentally broken the contract of service and therefore justifying summary dismissal"*

It was the submission of Counsel that, the Claimant fundamentally breached his contract, when he absconded, declined to sign a performance improvement plan and was insubordinate.

According to Counsel, it was mandatory for the employee to ensure that his line Manager signed his or her leave Card before the employee could proceed on leave in accordance with Clause 1.3 of the SSI which provides that, an

employee's leave card has to be mandatorily authorised by the line manager before the employee can proceed on leave. According to him, it was not disputed that the Claimant proceeded to take leave without his line managers authorization and before completing the Performance Improvement plan, which paralysed Respondent's business. He contended that the assertion that the Line manager sent the rejection notification marked "R10", on Sunday was of no consequence because, the Claimant was aware that he could not proceed to take leave without authorization. In any case, in his defence before management, he did not state that he did not receive the rejection notice. He only stated that, his leave was approved, therefore the assertion that, the notification was sent on Sunday cannot hold and it was a fundamental omission in his pleadings which Court should not note. He relied on **Inter freight Forwarders(U)Ltd vs East African Development Bank SCCA No.33/1992**, to support the legal principle that, a party will not be allowed to benefit from a case he or she has not set up. In any case, the Claimant admitted that he was warned about the PIP review by email marked (R10). According to him **Florence Mufumbo vs UDB** is distinguishable in that whereas, Florence was directed to take leave to avoid a carry forward, the Claimant in the instant case, was directed not to proceed on leave before concluding a PIP process. Counsel insisted that the Claimant admitted that his conduct would cause paralysis in the organisation and he absconded from duty as a way of escaping the Respondent's internal Performance Improvement Mechanisms. It was Counsel's submission that this was done in bad faith and Court should not condone such behavior. It He further submitted that, the Respondent's Staff Standing Instructions (SSI) provide that, absconding from duty is an offence punishable by dismissal. He cited **Nyakahuma Allan Paul vs Umeme Paul Ltd LDC No. 22/2014**, in which the Claimant did not produce evidence of sickness as was required by the employee,

and this Court's holding in the matter is to the effect that, the employee's failure to abide by the employers' regulations amounted to a fundamental breach of his employment contract warranting a summary dismissal. According to Counsel, this case was on all fours with the instant case. Counsel insisted that whereas, an employee was entitled to take leave, it could not be taken in disregard of the requirement for the employee to do certain fundamental acts such as completing the PIP review exercise before commencing his or her leave.

Counsel contended that the Claimant's conduct which was characterized by his refusal to comply with the line Managers instructions to complete the PIP agreement and absconding from duty, amounted to insubordination.

Counsel insisted that the Claimant was aware that appraisals were an integral part of his employment and where an employee returned a poor appraisal, he or she was placed on a PIP, but he declined to complete his PIP, yet he knew that it was time bound and his failure to undertake it, would cause paralysis in the Respondent's business. He cited a number of correspondences between the Claimant and the Respondent marked C14, C15, C16, R10, C21, C24, C30, R22 and R25 among others regarding the impugned appraisal and PIP and stated that, by refusing to complete the PIP, having been appraised and his performance found to be below target, the Claimant committed an act of gross misconduct. He argued that although the Claimant challenged the outcome of his appraisal the subsequent PIP, when the Managing Director upheld it on 20/4/2015, he should have gone ahead to complete it. By refusing to do so despite receiving several emails from his line manager inviting to discuss the PIP and his continuous defiance, amounted to insubordination.

Counsel refuted the assertion by the Claimant that, he could not sign the PIP after challenging the result of the appraisal and the allegation that the

Respondent was witch hunting him following his refusal to accept the exit package, because the appraisal was upheld by the Managing Director and consensual termination required both management and the employee to agree. Given that, they failed to agree, the Respondent rightfully closed the discussion. In the circumstances, the claimant was expected to continue working diligently. He further submitted that, the Claimant was obliged to comply with the Respondent's policies and directives and not hold the employer at ransom for his shortcomings. He argued that the Claimant sabotaged his employment in the hope that he would be paid the exit package he desired.

He insisted that, the Claimant was accorded a fair hearing in accordance with section 66 of the Employment Act and **Carol Gumisiriza vs Hima Cement Ltd HCCS No. 84 of 2015**. It was his submission that he appealed on 24/07/2013 (C18), challenging his summary dismissal on 21/07/2015(C27), According to Counsel, the Appeal was heard and decided on 28/07/2015, leading to another hearing being conducted. He argued that, before the second hearing took place the Claimant was informed about his right to representation and he was requested to submit a written explanation about all the infractions made against him. He submitted a written explanation on 5/08/2015, on the day he attended a fresh hearing and he was accompanied by his lawyer Ms. Shiela Namutumba and according to Counsel, he defended himself. It was further his submission that, he was terminated after the fresh hearing and the reason for the termination was communicated to him on 24/08/2015. Therefore, the dismissal was not stage managed as claimed. He was terminated for refusing to comply with the Respondent's policies and the dismissal was lawful.

#### **DECISION OF COURT**

It is well settled 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, are followed. The law makes it mandatory for the employer to explain to an employee the reason he and she is considering the his or her 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. He or she is also expected to prove the reason for the dismissal/termination. However, proof of the reason need not be beyond reasonable doubt. 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 Section 66 of the Employment Act, 2006).

Therefore, in cases of dismissal or termination on grounds of poor performance or misconduct, the employer is expected to have undertaken an appraisal or investigation into the alleged poor performance or misconduct. The results of the investigation or appraisal must be put to the employee and he or she must be given an opportunity to respond to the findings before he or she can be terminated.

Termination by mutual agreement is another form of lawful termination of employment. It involves an agreement in which parties waive their rights under the contract of employment. It is not necessarily based on any reason and therefore it must be entered into voluntarily. The terms of the employee's termination are set out in the mutual separation agreement as a means of ensuring that, there is fairness. Once entered into however, the Separation agreement supersedes all other contracts entered into between the parties.

It was not disputed that the Claimant and the Respondent in the instant case, attempted to terminate their employment relationship by Mutual agreement. It is also not in dispute that the Claimant refused to agree to the proposed terms of the separation agreement and following his refusal, the mutual separation negotiations were terminated.

It is the Claimant's case that, his termination was orchestrated by his refusal to accept the terms of the separation agreement and on the basis of trumped-up charges of poor performance and refusal to undertake a PIP, therefore, his termination was unlawful and unfair. **The claim as we understand it is whether by refusing to undertake the PIP the Claimant committed a fundamental breach which warranted summary dismissal?**

On 19/03/2015, the Human Resources Manager a one Juliet Mpiima, informed the Claimant that his appraisal for the year 2014, was below target, his salary was however revised to Ugx. 9,185,891, based on the findings of a survey in the Uganda external remuneration market. He was encouraged to improve and also advised that he would be guided by his line manager through a PIP aimed at supporting him to deliver his goals for 2015.

The Respondent's staff Standing Instructions (SSI), under P/1, 1.6.2, provide for regular reviews of performance throughout the year, with regular feedback between a staff member and his or her supervisor. Clause 2.0 of P/1(supra) provides that, where there is continuous under performance, the line supervisor and class of business (CoB/S) Manager is expected to hold discussions with the relevant employee and show him or her the areas of underperformance. The supervisor is also supposed to explain the consequences of continuous underperformance and coach him or her on what to do to address the underperformance. This is supposed to be specified in a PIP and it amounts to

the final warning notice under SSI D/1 disciplinary procedures. The PIP is undertaken within 1- 3 months.

Our understanding of this procedure is that, an employee's performance is reviewed regularly based on prior set targets. The employee is therefore given regular feedback about his or her performance, by his supervisor. The feedback includes, holding special discussions with the employee, to applaud areas of good or to show him or her areas of underperformance. Once areas of underperformance are identified, the employee is given advice on how to improve performance and it is only where there is continuous underperformance that, the employee will be placed on a PIP. The PIP clearly documents the areas which require improvement and the expected outcomes of the PIP are also stipulated. In our considered opinion the performance management process as set out under the SSI requires that the employee and the Supervisor agree on the PIP, because it emphasizes discussions between the employee and his or her supervisor, about the areas of underperformance. The employee must therefore, avail him or herself to his or her supervisor to discuss that status of his or her performance as provided under P/1, 1.6.2. The supervisor in turn, must acknowledge areas of good performance and clearly identify areas of poor or underperformance. The Supervisor is also expected to render support to the employee to enable him or her improve his or her performance where there is poor or underperformance.

The evidence on the record in the instant case, shows that on 12/01/2015, the Managing Director wrote to the Claimant expressing his appreciation for the contributions the Claimant had made to the Respondent in the year 2014, he also granted him the 21/01/2015, as the date on which he should set directions and align his team towards key contributions for the performance of the year

2015. On 10/02/2015 he received the appraisal results for his team for the year 2014, which showed that the team performances were on target, above target and one of them was outstanding. However, his own appraisal was not submitted to him. On 13/02/2015, he was issued with a letter which indicating that his input into a proposed mutual separation agreement was discussed on 6/02/2015 and 13/02/2015. Although he did not object to separating from the Respondent by mutual agreement, he did not agree with the terms of the proposed by the Respondent in the Separation agreement which led to the termination of negotiations under the agreement. The Claimant was therefore, directed to continue serving under the same terms of employment.

The record further shows that between March and May 2015, there were several email exchanges between the Claimant, his supervisor a one Mabweijano George and some of his team members, marked R1-R10, about some performance issues, particularly about mistakes regarding reconciliation and posting of invoices of transport logistics by the Claimant's team. The supervisor subsequently invited the Claimant for a discussion about his performance regarding the same via email dated 13/4/2015, which escalated to his being placed on a PIP.

The Claimant contested the Respondent's assertions that he his performance was poor. He also contested the PIP resulting therefrom (see C15-C30).

As already discussed, the Respondent's Performance Management Tool, marked R25(ii) on the record, is to the effect that in addition to email communications between the Claimant and his supervisor, the 2 were required to have face to face meetings to discuss performance issues.

It is not disputed that George Mabweijano the Claimant's supervisor invited him to discuss some performance related issues regarding some reconciliations of

transport logistics. We found no evidence to show that, the Claimant met with him to discuss the same. The Claimant in his testimony admitted that he refused to avail himself for the discussions relating to the PIP because he contested the outcome of his appraisal on which it was based. He stated as follows:

*"... yes when I learnt of my ranking I appealed. I was aggrieved. When I appealed the appeal was considered ... yes the ranking was maintained. Staff Standing Instructions provide for what happens next... required to get on PIP ... yes by 4/06/2015, I was aware of the PIP decision and the document was sent to me. Yes, I declined to avail myself for the PIP of 10/6/2015. Yes I took 6 days to decide yes I refused to avail myself ...yes R10 at page 19... I confirm it was calling me for PIP discussion ...yes I was invited for PIP discussions .. yes I was invited again... yes this time I was told I would be in breach of SSI ... I went ahead to inform colleagues including my boss that I would be going on leave... 28/6/2015, yes that is when the boss put a condition on my leave... until I discuss PIP..."*

He also acknowledged that by 20/04/2015, he was aware of the deficiencies in his performance. He said that: *"... from April 20<sup>th</sup> 2015, yes I was aware of the deficiencies in my performance ... yes by 30/06/2015 I was aware of the places I needed to improve...yes there is evidence that I queried objectives before 30/06/2015... yes leave began on 29/06/2015,...yes PIP was still pending..."*

Clearly the Claimant was aware that his supervisor had raised some queries had about his performance and that he was subjected to a PIP, as a result of his below target performance based on the appraisal for 2014. He appealed against the appraisal, but the ranking was upheld by the Managing Director. He however, refused to avail himself for the PIP. He also admitted that, his

supervisor invited him to discuss the PIP but he refused to avail himself for the discussions.

Section 40 of the Employment Act provides that the employer shall provide his or her employee with work, section 59 of the same Act is to the effect that, in the terms and conditions and remuneration for the work are provided by the employer in a written contract. The contract of service includes, the Policies and procedures which govern employment in a given Organisation. Such policies and procedures include, Human Resources Manuals and in the instant case, the Staff Standing Instructions and once the contract is executed by both parties, they have both submitted to abide by the terms including the attendant Policies and Procedures. The Claimant, in the instant case admitted that the Respondent's SSI provided for a Performance Management Mechanism and Performance appraisal formed an integral part of the contract of service. It was also his testimony that, where underperformance is identified, the employee and his supervisor must come to an agreement on how the employee can improve. However, where under performance is continuous, the employee must be subjected to a PIP. It was his testimony that he was aware, that the respondent had subjected him to a PIP, but he refused to avail himself to it because, he contested the ranking on which it was based. He did not deny that he was invited to discuss it but he refused to do so.

P/1 of the SSI, on Performance Management, entitles the Respondent to invite an employee to discuss his performance, where underperformance has been identified. The Respondent through the Claimant's supervisor, invited him to discuss his performance issues, but the Claimant chose to squander this opportunity when he refused to avail himself for the discussion.

In our considered opinion by refusing to avail himself for the discussion, he denied himself the opportunity to make formal rebuttals about the PIP and particularly areas which he contested. He denied himself the opportunity to exonerate himself by tendering the evidence which he filed in Court as proof that underperformance attributed to him should have been attributed to his colleague David Balaka.

As already stated, it is the employer who sets the terms and conditions of service and the goals and targets to be met by the employees, therefore when the employer identifies underperformance on the part of an employee, the employer has the right to put it to the attention of the employee. Although the terms of a PIP are agreed between the employer and employee, it is the employer who decides whether to place his or her employee on a PIP or not.

In the circumstances, having found that the Claimant had underperformed after he was appraised for 2014, and his appeal against the appraisal ranking having been upheld by the Managing Director, he was expected to obey the employer and subject himself to the PIP. In any case, he had the opportunity to make his input in determining the targets of the PIP, had he availed himself for the discussion.

Even if we were to accept the contention that the PIP process could have been orchestrated by his refusal to negotiate a separation agreement, by declining to comply with the requirement, to discuss the PIP, as provided under the Respondent's SSI, the Claimant had not only breached his contract of service but had done so in bad faith. We however, do not subscribe to the assertion by Counsel for the Claimant that, the PIP in this case was used as a tool of oppression because he declined to subject himself to it, even after his appraisal ranking was upheld by the Managing Director. As already stated, he had the

opportunity to make his rebuttals to the terms of the PIP, but by refusing to meet with the supervisor to discuss it, he missed that opportunity. It is not the role of the Court to descend into the internal management mechanisms of organizations, but to ensure that the mechanisms are implemented in accordance with the law.

Even if we are not convinced that, by not completing the PIP the Respondent's work would be paralysed, we are inclined to agree with Counsel for the Respondent that by refusing to avail himself to discuss the PIP which, he had an opportunity to formally refute, with evidence against allegations of nonperformance, he breached the Respondent's performance Management Mechanism which was an integral part of his employment Contract with the Respondent and in our considered opinion, his actions amounted to defiance and therefore to insubordination, which was defined in **Chandia Christopher vs ABACUS PHARMA (Africa) Ltd, LDR No. 237/2016**, as depicting :

*"... acts of defiance of authority or refusal to obey instructions. It involves acts of disobedience. it is a direct or indirect refusal of an employee to perform a reasonable directive from his employer or a mockery, insult or disrespect of an employer by an employee ..."*

We have no doubt in our minds that an employee's refusal subject him or herself to the employer's performance Management Mechanism and the Appraisal system in particular, which forms an integral and fundamental part of the employment relationship, is not a matter to be taken lightly. In the Circumstances we have no reason to disagree with Counsel Waniale's submission that, the Claimant's refusal to be subjected to the PIP as he did amounts to insubordination which this court cannot condone. Before taking leave of this issue we shall resolve the issue of absconding from duty.

The SSI, marked R25(ii) under L/1, entitles all employees to annual leave of 23 working day within the year and requires that supervisors and managers should ensure that leave plans are prepared annually, subject to operational requirements and convenience. We have no reason to doubt the submission by Counsel for the Claimant that, he submitted his leave plan to the Respondent. However the SSI under L/1, 1.3 also provides that, *“ The administration of leave is centralized to the HRD and coordinated by the HR personnel. Any employee wishing to take leave will pick their cards from HRD for authorization of leave by the LMs after which the card will be routed to HRD for record keeping.”*

The Claimant was therefore required to pick a leave card from HRD and have it endorsed by his supervisor before going on leave. Although he testified that, his leave was approved by his supervisor, he did not adduce evidence of the said approval. It was also his testimony that he notified his Boss and his colleagues that, he was going on leave. He included Mabwejian George his supervisor, in his notification email, dated 26/06/2015. The email stated in part as follows:

*“ ...Subject: leave notes*

*Team I will be proceeding on leave from 29<sup>th</sup> June to 17<sup>th</sup> July 2015. During my absence the following will need attention...”*

In light of the wording of L/1, 1.3, the Claimant he was informing his boss as well as his colleagues that he was going on leave. The Claimant should not have informed his Boss the way he did, rather he should have sought his approval by requesting him signing his leave card from HRD which would have been on his record as evidence that he sought and got approval to go on leave on the scheduled dates in the leave schedule.

In the absence of evidence of this approval, he cannot rely on **Florence Mufumbo** (supra), because in Florence's case, she had been directed to take her leave so that it would not accumulate and carryover and the Respondent in her case was aware of the dates on which she was scheduled to take leave, in the instant case, it was a requirement for an employee to have the date approved by a Line Manager before embarking on leave, even if the date was already stated in the leave plan. The employee was required to make an application by having his supervisor sign off a leave card, because the date on which the leave would be taken was subject to operational requirements and convenience.

This Court in **Mbiika** (supra) and many other cases, has held that, although section 54 of the Employment Act entitles an employee to take rest days/leave, the rest days cannot be taken at the whims of the employee. The employee must apply for and be granted the period within which these rest days should be taken, to ensure that the employer's business is not paralyzed by the absence of employees who have taken their annual leave.

Therefore, the Claimant having not adduced any evidence to show that his supervisor signed his leave card, the reliance on the holding in **Mufumbo** (supra) to the effect that, it would not be a fair reason to terminate or impose disciplinary penalties on an employee, where he or she is entitled to take leave and the employer is made aware on which dates the leave is to be taken and the employer raises no objections to the proposed dates, cannot hold.

In any case, the Claimant admitted in cross examination that, his Boss had to endorse his leave, but on 28/06/2015 a day before he was scheduled to take his leave on 29/06/2015, the Boss made it a condition for the Claimant to sign the PIP before taking leave. He was aware that his taking leave was subject to him

discussing and signing the PIP, and that the leave stood cancelled until he complied with his Supervisor's directives for him to sign the PIP.

He however refused to comply with this directive and as already discussed, this was a breach of a fundamental part of his contract. By further taking leave without authority, in our view he compounded the breach of the SSI. The Respondent was therefore justified to impose disciplinary measures against him.

In conclusion, it is our finding that by refusing to avail himself to complete the PIP even after the Managing Director upheld the Appraisal ranking on Appeal, and by going ahead to take leave without authorization, even after he had been not to do so before signing the PIP, the Claimant violated the Respondent's performance Improvement mechanism which as stated earlier is an integral and fundamental part of the employment contract/relationship between him and the Respondent. Therefore, his actions amounted to defiance and disobedience to lawful instructions which amount to insubordination which in our considered view is a fundamental breach of the contract, warranting summary termination. The Respondent was therefore justified to summarily terminate the Claimant in accordance with section 69 of the Employment Act(supra). The termination was therefore lawful.

However, as already stated above, termination should be done in accordance with the procedure for termination as stated under section 66 of the Employment Act, by giving the employee in issue a hearing. Section 66(4) of the Employment Act provides that:

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

It was the Claimant's testimony that, he was invited for the hearing on the day he returned from leave, to attend the hearing on the same day of 20/07/2015 and his termination letter was dated 21/07/2015. As submitted by Counsel for the Claimant, this court in , **Ogwiko Deogratitious vs Britania Allied Industries Ltd LDC No. 018 of 2016**, stipulated that, the requirement in a proper procedure for termination, is for the employee in issue to be informed about the infractions leveled against him or her, he or she is given time to respond to the infractions and an opportunity to physically appear before an impartial tribunal to present his /her response and time to adduce any other evidence where necessary before the tribunal makes a decision. It was also his testimony that he appealed against this procedure and he was given another opportunity to be heard. He asked to file a written defence to the infractions leveled against him, which he did. He did not deny that he attended the second hearing and although he insists that, he was not given the reasons for his termination, we are satisfied that the reasons were stated to him at the first hearing, he made a response to them in writing and before the Appeals tribunal. The tribunal was not satisfied with his explanations and terminated him. It is settled that the right of an employer to terminate his or her employees cannot be fettered by the Courts provided he or she follows the proper procedure for termination. See Section 66 and 68 and 70(6) of the Employment Act and see **Hilda Musinguzi vs Stanbic Bank SCCA No 05/2016.**)

## **2 . Whether the Claimant is entitled to any remedies?**

Although the claimant was lawfully terminated, he is entitled to some remedies.

### **1. Salary Arrears.**

Having stayed the dismissal of 21/07/2015, when he was given another date for hearing and he was eventually terminated on 24/08/2015, he is entitled to his

salary for the period 21/07/2015 to 24/08/2015 when he was still considered the Respondent's employee.

**2. Savings from the Provident Fund**

Having been dismissed for fundamental breach of contract he is not entitled to the Respondent's contribution to provident fund.

**3. Bonus for the year 2014 and PAYG**

The Managing Director having upheld the ranking of below target, the Claimant has no basis to make these claims. They are denied

Having established that he was lawfully terminated he is not entitled to the remaining Claims.

In conclusion this claim fails with no order as to costs.

Delivered and signed by:

**1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**

**2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**



**PANELISTS**

**1. MR. EBYAU FIDEL**

**2. MS. HARRIET MUGAMBWA NGANZI**

**3. MR. FX. MUBUKE**



DATE.....

16/10/2015

