THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMP ALA

LABOUR DISPUTE REFERENCE: NO. 034 OF 2021

(ARISING FROM NMC/LD No. 35/2021)

IGA BONNY

EGAWAYU WILLIAM

NAIRUBA GRACE ..... **CLAIMANTS**

VERSUS

VITA FOAM (2015) LTD ..... **RESPONDENT**

Before:

The Hon. Justice, Linda Lillian Tumusiime Mugisha

Panelists:

1. Hon. Rose Gidongo
2. Hon. Beatrice Aciro
3. Hon. Charles Wacha Angulo

AWARD

Facts of the Case

The Claimants were employed by the Respondents from 2015 until 2/10/2021 when they were terminated. According to the Claimants on 2/10/2021 the General Manager tasked them to explain a delivery note marked annex **"A"** on the Respondent's trial bundle, without any formal hearing. All the Claimants

denied having any knowledge of the said document, following which they were issued with termination letters, alleging that, they forged certain documents with the intention of misappropriating Company funds. They contend that their termination is unfair and unlawful because they were not given a hearing.

Before the hearing commenced, the Court was notified that the 1st Claimant lost interest in the case, and he undertook to pay costs for withdrawing. A consent agreement allowing his withdrawal was entered on the record and consent for the 2nd and 3rd Claimants to proceed was entered into by both Counsel.

Issues for Resolution

i. Whether the Claimant's summary dismissal was lawful?

ii. Whether there are any remedies available to parties?

Representations

1. Mr. Bazira Anthony of M/s. Byenya, Kihika & Co. Advocates for the Claimant.
2. Mr. Ongwen John Timothy of M/s. Mangeni Law Chambers for the Respondent.

Resolution of the Issues

1. Whether the Claimant's summary dismissal was lawful?

It was the submission of Counsel for the Claimants that, their summary dismissal was unlawful because the principles of substantive and procedural fairness in disciplinary matters, as provided under Section 6.1(1) of the Human Resources Manual were not followed. According to Counsel, Sections 5 and 6(6) of the Human Resource Manual emphasized the requirement to follow substantive and procedural justice as well as progressive disciplinary action. Therefore, any matter had to be thoroughly investigated and an employee had to be given an opportunity to defend themselves before sanctioning them, including dismissing them. He contended that, on 2/10/2021, the Claimants were individually summoned to General Manager's (GM) Office and asked them about a certain

delivery note. When they denied having any knowledge about it, they were individually asked to go to the reception and wait for their dismissal letters. According to him, Rw1, the Financial Controller confirmed this in his testimony. In addition, the Financial Controller carried out investigations on the same day and found that certain documents had been forged, leading to their dismissal.

Counsel contended further that, the Claimants were not subjected to a disciplinary hearing as provided under Sections 66 and 69 of the Employment Act, and even if they were summarily dismissed in accordance with Section 69 of the Act they were entitled to a fair hearing as provided under Section 66(4). He argued that there was no evidence on the record to indicate that the Claimants were notified about the infractions leveled against them prior to their dismissal or that they were given an opportunity to defend themselves. It was further his contention that the duo were not given adequate time to prepare a response to the allegations. He cited **Abituhaire William Fred & 2 others vs Bank of Uganda LD Nos. 177,179,045/= of 2014,** in which this court was of the legal proposition that, not less than 7 days would be reasonable time within which an employee can prepare a defense to the allegations leveled against him or her. In this case, the Claimants were denied this opportunity. It was further his submission that the allegations were not verified because no investigations were carried out to prove that indeed some documents that had been presented to them, were forged by themselves, prior to their dismissal. He reiterated the fact that RW1 testified that the investigations were carried out after the claimants left the General Manager's office and an Audit relating to the loss of Ugx. 15,856,100/= which was attributed to them, was only carried out after their dismissal. He contended that the Financial Controller couldn't be an expert on the identification of forgeries, involving handwriting and signatures, which were the reason for the Claimant's dismissal, moreover without giving them an opportunity to respond to any of the findings of this investigation and in addition without giving them notice or payment in lieu

thereof, yet they had served the Respondent for more than 5 years. He concluded that their dismissal was therefore unlawful.

In reply Counsel for the Respondent argued that the dismissal was lawful because the duo committed gross misconduct, because they abused their office, and committed embezzlement thus causing financial loss.

He however contested the second Claimant's evidence on the ground that, this was not a representative action and the 3rd Claimant did not give the 2nd Claimant powers of Attorney, therefore the 2nd Claimant's evidence should be expunged off the record.

As already mentioned above on 15/3/2022, when this matter was mentioned, Counsel for the Claimants informed the court that all the Claimants had signed a consent in which they had nominated the 2nd Claimant Egwayu William to testify on their behalf. However, the consent was not on the record at the time, so the court directed him to file it the following day on 16/03/2022. The consent was filed as directed by Court and it included an attachment of an email from the 1st claimant expressing his intention to appoint the 2nd Claimant to represent him in this matter. Before the hearing commenced Counsel for the 1st Claimant informed the Court that the 1st Claimant had lost interest and was desirous of withdrawing from the matter altogether. He also undertook to pay the cost of his withdrawal. The 2nd and 3rd Claimants were in court on that day, therefore, the Court dispensed with the requirement for advertisement as provided under Order 8 rule 1, (as Amended), and Counsel for the Respondent conceded to this. Subsequently, the court expunged the evidence of the 1st Claimant from the record and granted the 2nd and 3rd Claimants leave to proceed with the matter and leave for the 2nd Claimant to testify on behalf of the 3rd Claimant. Counsel therefore had an opportunity to cross-examine the 2nd Claimant on matters relating to the 3rd Claimant, he, therefore, cannot turn around now and contend that there were

documents which the 2nd Claimant could not testify about regarding the 3rd Claimant. His objection is therefore overruled.

Be that as it may, it was his submission that, there was no need to give the claimants a hearing because he verbally admitted that they forged documents and stole money. According to Counsel, the evidence of Nkalubo Joseph regarding this confession was not controverted by the Claimants. Therefore, in accordance with **Kabojja International School vs Godfrey Owesigyire LDA No. 003 of 2015,** admission is enough for the employer to summarily terminate the employee without subjecting him or her to a disciplinary hearing. Counsel argued that when CW2 was cross-examined about the forged document on which he received Ugx. 30,000/= and he failed to explain why the Financial Controller had not sanctioned it for payment and this was but one of the many forgeries perpetuated by the Claimants.

He refuted the submission by Counsel for the Claimants regarding the Audit being carried out after the Claimant's dismissal, on grounds that the Audit was not intended for evidential purposes in their case but for good financial management of the Company's financial system and accountability.

According to Counsel the submission by CW2 that he was called in the presence of the General Manager, the Assistant General Manager, the Financial Controller, Human Resource Manager and asked to explain some of the documents, amounted to them being given an opportunity to get documents they wished to use for their defense and therefore to being given a fair hearing. He insisted that the Respondent accorded the Claimants a fair hearing but they misused it when they refused to explain or demand for more time for them to give a satisfactory explanation. He also insisted that the Claimant had an opportunity to appeal if they were dissatisfied with the Respondent's decision as provided under section 24(8) of the HR Manual but they did not do so. In his view the claim was premature before this court therefore it should be dismissed with costs.

Decision of Court

1. Whether the Claimant's summary dismissal was lawful?

Section 2 of the Employment Act defines "dismissal" as the discharge of an employee from employment at the initiative of the employer when the said employee has committed verifiable misconduct. Section 69(1) and (3) of the same Act provides that summary termination shall take place where an employer terminates an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term and 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 obligations arising under the contract of service. Section 66(1) and (2) of the same Act provides for the procedure to be followed before terminating or dismissing any person as follows:

> ***"66. Notification and hearing before termination***
>
> *(1) Notwithstanding any other provision of this part, an employer shall before (*our emphasis) *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 (emphasis ours) 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.*
>
> *4) Irrespective of whether any dismissal which is 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..."

While Section 68 of the Act requires the employer to prove the reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to be unfair. This section further provides that *"...the reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee."*

These principles of the law are based on Article 4 of ILO Convention 158, which provides in part that: *"... no employee should be terminated unless there is a valid reason connected to the employee's conduct or work based on operation standards required of him under the contract..."*

It is however a settled position of the law, that an employer's right to terminate an employee cannot be fettered by the Courts of law, so long as the employer follows the correct procedure before exercising the right to terminate or dismiss. In ***Hilda Musinguzi Vs Stanbic Bank (U) Ltd SCCA 05/2016,*** the Supreme Court was emphatic on the fact that:

"... the right of the employer to terminate a contract of employment cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employee's contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation..." (emphasis ours).

Therefore, for an employee to succeed in a claim for unlawful dismissal, the employee must prove that he or she was not notified about the infractions levelled against him or was not given an opportunity to respond to the infractions or give his or her defense in writing and or orally before an impartial disciplinary tribunal or committee, accompanied by a person of his or her own choice. On the other hand, the employer was expected to comply with Sections 58, 65,66,68,69, and 70(6) of the Employment Act (read together), which provide for both substantive and procedural fairness, before the employer can exercise the right to dismiss an employee.

This court in **Akeny Robert vs Uganda Communications Commission LDC No. 023/2015,** following the supreme courts holding in **Pk Semwogerere & Anor Vs Attorney General (Constitutional Appeal No.1 of 2002,** was of the considered view that ***"...the interpretation of provisions of a Statute concerned with the same subject should be construed as a whole..."*** as is done in the interpretation of the constitutional provisions that are concerned with the same subject, therefore Sections 58,65,66,68 69 and 70(6) are concerned with the same subject of termination or dismissal have to be construed as a whole. Whereas Section 58 provides for notice before dismissal or termination, Section 65 defines termination, Section 66 provides the procedures to follow before terminating or dismissing an employee irrespective of any other provision in that part, Section 68 requires proof of the reason, Section 69 circumstances under which summary termination is justified and Section 70(6) places the burden of justifying the dismissal on the employer. Therefore, to determine whether a dismissal based on grounds of misconduct is unlawful or unfair, all these provisions must be construed as a whole.

The Employment Act 2006, does not define what amounts to misconduct, however, we are persuaded by rule 12 of the Tanzanian Code of Good Practice Rules 2007, cited in **Employment and Labour Law Relations in Tanzania, edited by Bonaventure Rutinwa, Evance Laula and Tulia Ackson, Law Africa, 2014** to the effect that, in deciding whether the dismissal on grounds of misconduct is fair, there must exist a rule which the employee has contravened, the rule must be reasonable (*the test for reasonableness is measured by its operational justification, that is if it serves to promote the employer's business and the welfare of the employers generally and if it does not impose unreasonable burden on the employee.)* and that termination was the appropriate sanction. Further, the employer is required to prove that the employee was guilty of misconduct, by showing that the misconduct in question exists (in accordance

with Section 68 of the Employment of Uganda), either in law or in a disciplinary code, the employee's contract of employment, a collective bargaining agreement or other related policies. He or she must further prove that the employee broke the rule by conducting an investigation of the alleged misconduct and adducing evidence that links the employee and the disciplinary offense levelled against the employee. And also showing that the infractions leveled against him or her or the misconduct alleged, exists either in law or in his or her disciplinary code of conduct or other Human resource-related policies.

It is an agreed fact that the Claimants in the instant case were summarily dismissed on allegations that they forged certain documents with the intention of misappropriating Company funds. It is also not in dispute that, save for being called into the General Manager's office, in the presence of the Human resources manager and Financial controller, and asked to explain certain documents including a delivery note that the Respondent claimed they had forged with the intention of misappropriating Company funds, they were not subjected to any disciplinary procedures as provided under Section 66. This was confirmed by RW1, the Respondent's financial controller when he testified that the Respondent saw no need to subject them to a hearing because they had all admitted to the infractions leveled against them. However, he did not adduce any evidence of the purported admissions nor did he provide a copy of any minutes of the meeting which was considered to be evidence of a disciplinary hearing which was accorded to them, to enable us to determine whether indeed they were subjected to a fair hearing. It was also the testimony of RW1 that an investigation into the same infractions leveled against the claimants was only commenced after they were called to the General Manager's office to explain the alleged forged documents. We further do not associate ourselves with the assertion by Counsel for the Respondent that the Audit relates to the loss of Ugx. 15,856,100/- which was carried out after their dismissal was intended for the proper financial

management of the respondent and yet the loss was attributed to the claimants and was one of the reasons they were dismissed. By conducting the investigations and the Audit after having already issued the Claimants with their summary dismissal letters, was a clear violation of the correct procedures provided for under the law already stated before and its own Human Resources Manual which provided for substantive and procedural fairness. In any case, no evidence was adduced by the respondents, to indicate that the claimants admitted to committing the alleged infractions leveled against them. It was Counsel's submission that the Claimants denied knowledge of the alleged forged documents. Therefore we find it peculiar that in the same vain they could render an admission. We respectfully do not agree with Counsel for the Respondent that by summoning the Claimants to appear before the General Manager, in the presence of the Assistant General Manager, Financial Controller, and Human Resource Manager to explain some of the alleged documents, without giving them prior notice of the infractions and an opportunity to prepare their responses or to defend themselves, can be construed as being given a fair hearing. In any case, he did not adduce the minutes of the said meeting to enable this court to determine whether they were accorded this "fair hearing". In the absence of such minutes and given that the summary dismissal letters were issued on the same day they were called to explain themselves, we are inclined to believe counsel for the Claimant that they duo were never accorded any hearing.

It was further the submission of Counsel for the Respondent, that the Respondent found no reason to subject the Claimants to a hearing because they admitted to committing the infractions leveled against them. As he rightly submitted, it is the position of this court that, where an employee admits to committing alleged misconduct, for which the employer considers the sanction as dismissal or termination, he or she would not be required to subject such an employee to disciplinary procedures as provided under the law (supra) or its human resources

policies. (See, **Kabojja International School vs Godfrey Owesigyire Labour Dispute Appeal No. 003 of 2015).** However, the employer has the onus to prove that the employee did make an admission to committing the infractions leveled against him or her before the employer can exercise the right to terminate or dismiss such an employee without rendering any hearing. The Respondent in this case did not prove that the Claimant made an admission.

In the circumstances, in the absence of any evidence to show that the Claimants made an admission to committing the infractions leveled against them and given that they were not notified about the infractions leveled against them before their dismissal and they were not given reasonable time within which to make a response to the allegations in writing or orally before any disciplinary committee, and in the absence of any evidence to prove that the claimants committed the allegations levelled against them, it is our finding that their summary dismissal was in breach of the substantive and procedural requirements provided for under the Respondents Human Resource Manual and the Employment Act as already cited above, therefore their summary dismissal was unlawful.

2. Whether there are any remedies available to parties?

Having found that, the Claimants were unlawfully summarily dismissed they are entitled to some remedies.

He prayed for the following remedies:

a) Declaration that the Respondent unfairly dismissed the Claimant's employment. We have established that their summary dismissal was unlawful. It is so declared.

b) Issuance of a certificate of service

Section 61 (1) of the Employment Act does not make it mandatory for an employer to issue a dismissed employee with a certificate of service but rather it provides for the employee to request for it. The Section provides as follows:

"Certificate of Service

On the termination of a contract of service an employer, if so requested by the employee, *(emphasis ours)* ***shall provide the employee with a certificate…"***

The Claimants did not adduce any evidence to show that they requested their respective certificates of employment and that they were denied. This notwithstanding, however, we find nothing to prevent the Respondent from issuing the said certificates. The Respondent is therefore ordered to issue them with their certificates of employment.

c) General damages

It is a settled principle of the law that the only remedy available to an employee who was unlawfully dismissed in addition to the remedies provided for under the Employment Act is an award of damages. The Court of Appeal in **Stanbic Bank (U) Ltd vs Constant Okuo**, held that General damages are based on the common law principle of *restitituto integrum.* Appropriate general damages in employment matters should be assessed based on the prospects of the employee getting alternative employment or employability, how services were terminated, and the inconvenience and uncertainty of future employment prospects. The Hon Chief Justice(Emeritus) Katureebe, in **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** on the award of General Damages stated thus:

> *"... Having found that the appellant was wrongfully terminated, the Court should have proceeded to make an award of general damages which are always at the discretion of the court to determine. ...*
>
> *In my view, that adequate compensation would have been a payment in lieu of notice, a measure of general damages for wrongful dismissal (emphasis ours)...".*

In ***Vires Vs National Dock Labour Board*** [1956] 1QB 658 which was cited in Stanbic Bank Ltd Vs Kiyimba Mutale (supra), it was stated thus:

"It has long been settled that if a man employed under a contract of personal service is wrongfully dismissed, he has no claim for remuneration due under the contract after repudiation. His only money 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."

It is therefore settled that damages are awardable where the employee is unlawfully terminated. Damages are awarded at the discretion of the Court and are intended to return an aggrieved party to the position he or she was in before the injury caused by the Respondent. Having established that the Claimants worked for the Respondent from 2015 until their unlawful summary dismissal on 2/10/2021, they are entitled to an award of general damages for unlawful dismissal. Although they did not adduce any evidence that they mitigated the loss of their employment, they are still entitled to an award of damages. They claimed an award of Ugx. 200,000,000/= as damages. The 2nd Claimant was earning a gross pay of Ugx. 916,000/= per month. The 3rd Claimant was earning Ugx. 453,742/= per month. In the circumstances, we think that an award of **Ugx. 22,000,000/=** for the 2nd Claimant and **Ugx. 12,000,000/=** for the 3rd Claimant is sufficient as general damages.

d) Aggravated damages

We found no aggravating circumstances to grant this claim. It is denied.

e) Severance allowance

Section 87(a) of the Employment Act entitles an employee who has been in an employer's continuous service for a period of 6 months and is found to have been unfairly dismissed/terminated to payment of severance allowance. Section 89 of the same Act provides that severance allowance should be negotiated between the employer and employee. However, where no formula for calculating severance pay exists, as held in **Donna Kamuli VS DFCU Bank LDC 002 OF 2015,** the reasonable method for calculating severance pay shall be payment of 1 month's salary for every year the employee has served. This decision was upheld by the Court of Appeal in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA No. 0124/2017.** We have already established that the

Claimant worked for the Respondent from 2015 to 2021, when they were unlawfully dismissed therefore they served for a period of 6 years. We found nothing on the record to indicate that the parties had an agreed formula for calculating severance pay, therefore in accordance with the decision in **Donna Kamuli** (supra), they are entitled to payment of 6 months each at the rate of Ugx. 916,000/= per month for the 2nd Claimant amounting to Ugx. **5,496,000/=** and at a rate of Ugx. 453,747/= amounting to **Ugx. 2,722,482/** as severance allowance.

f) 4 weeks' pay for failure to observe the legal requirements

We have already awarded general damages which we consider sufficient.

g) Outstanding NSSF contributions

Although this court is of the legal position that an employee's NSSF contribution is personal property, therefore, the employee has a right to lodge a claim for his or her unremitted NSSF contributions, however, the employee has the onus to prove that his or her contribution was not remitted to the fund, however where court establishes that the employer did not remit it, the court will order the employer to remit the unremitted contributions to the Fund. In the instant case, however, the claimant did not adduce any evidence regarding this claim for unremitted NSSF, in terms of quantum, when it ceased to be remitted; therefore we had no basis upon which to grant it. It is therefore denied.

h) Interest

An interest of 10 % per annum shall accrue on all the pecuniary awards above, from the date of filing this matter at the industrial court until payment in full.

In conclusion, this claim succeeds in the above terms. No order as to costs is made.

Delivered and signed by:

The Hon. Justice, Linda Lillian Tumusiime Mugisha

Ag. Head Judge

The Panelists Agree

1. Hon. Rose Gidongo

2. Hon. Beatrice Aciro

3. Hon. Charles Wacha Angulo

31st November, 2023