

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: KISAAKYE, ARACH-AMOKO, JJSC, ODOKI, OKELLO AND
KITUMBA AG. JJ.SC)

CIVIL APPEAL NO 06 OF 2012

BETWEEN

OMUNYOKOL AKOL JOHNSON ::::::::::::::::::::::::::::::: APPELLANT

AND

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Byamugisha, Kavuma and Nshimye JJA) dated 29th May 2012 in Civil Appeal No 71 of 2010)

JUDGMENT OF DR ODOKI AG. JSC

Introduction:

The appellant, Omunyoko Akol Johnson, filed an action in the High Court against the Respondent, the Attorney General, seeking a declaration that his dismissal from his job in the Public Service was illegal, ultra vires, void and of no effect. He also sought an order nullifying and setting aside the dismissal, and directing his reinstatement in his office as a Foreign Service Officer, with all his entitlements, benefits and privileges. Furthermore, he sought special, general, aggravated and exemplary damages, interest and costs of the suit.

The respondent denied the appellant's claims.

The trial judge entered judgment in favour of the appellant, holding that the dismissal of the appellant was unlawful. However the trial judge, declined to order the appellant's reinstatement and awarded him general and aggravated damages of

Shs180,000,000/=, among other remedies.

The appellant appealed to the Court of Appeal which dismissed his appeal with costs. The appellant has now appealed to this Court against the decision of the Court of Appeal.

Background to the Appeal:

The appellant was recruited into the Public Service of Uganda as a Foreign Service Officer Grade 6 on 20th September 1988 and posted to the Ministry of Foreign Affairs. He was on 9th July 1993 posted to Beijing in the Uganda Embassy in the People's Republic of China.

In March 1997 the appellant was given notice to return to Uganda. He did not do so immediately because the Ministry of Foreign Affairs did not have funds to cover the cost of shipping his personal effects to Uganda. He remained in Beijing until 21st October 1997 when he was arrested and detained for four days by the security agencies of the People's Republic of China. On 24th October 1997 he was repatriated to Uganda and sent on leave. On 4th March 1998, he was interdicted by the Permanent Secretary of the Ministry of Foreign Affairs and on 6th June 1998, the appellant was dismissed from the Public Service by the Public Service Commission without following the proper procedure.

As already indicated above, the appellant partially succeeded in the High Court and the Court of Appeal dismissed the appeal.

The Grounds of Appeal:

The appellant has filed fourteen grounds of appeal, some of which are repetitive. In my view, it is convenient to combine some of the grounds for purposes of considering them in this judgment. The first batch of the ground is ground 1 which complains that the Court of Appeal erred in not declaring that the dismissal of the

appellant was ultra vires, null and void. The second batch of grounds criticises the Court of Appeal for upholding the trial judge's decision not to reinstate the appellant. This complaint is addressed in Grounds 2, 3, 4 and 5. The third batch of grounds complain about the award of special and general damages by the trial judge. These are covered under grounds 6, 7, 8, 9, 10, 11 and 12. The fourth batch of ground relate to the failure to award punitive or exemplary damages which is covered in ground 13. The fifth batch of ground is ground 14 which complains about the award of interest on general damages.

I shall now address the various batches of grounds of appeal.

Representation and Submissions:

The appellant was represented by Ms Patrick Furah while Ms Robinah Rwakojo, Commissioner for Civil Litigation in the Ministry of Justice and Mr Kosiya Kasibayo, represented the respondent.

Both parties filed written submissions. However, the appellant in particular did not follow the requirements of this Court's Practice Direction on submission of Written Arguments (No 2 of 2005) as he exceeded the permitted number of pages by four times. He also filed too many authorities on each point totalling about 100 decisions and books covering 2000 pages. The appellant used derogatory and insulting language

against both the two lower courts and counsel for the respondent, for which his counsel apologized.

This Court must warn parties and other advocates against making unfounded allegations against Judges and other Counsel which are likely to undermine the due administration of justice. This practice is unacceptable and must be stopped forthwith.

Ground 1: Unlawful Dismissal of the Appellant

In the first ground of appeal, the appellant complains that the learned Justices of the Court of Appeal erred in law and in fact when they failed to hold that the dismissal of the appellant was ultra vires, null and void and to declare it as such.

In a lengthy submission, the appellant repeats most of the arguments he presented before the trial Court and the Court of Appeal with regard to the manner in which he was dismissed, which infringed the principle of natural justice, and rendered his dismissal null, void and invalid. He submitted that the Court of Appeal should have held that his employment was still subsisting, warranting reinstatement in his office. It was his contention that since the Court of Appeal failed to address itself to this issue, this Court should do so.

The appellant cited many authorities to support his submissions which include **Joy Tumushabe & Another vs M/S Anglo - African Limited & Anor** SCCA No 7 of 1991, **Julius Rwabinumi vs Hope Bahimbisomwe** SCCA NO 10 of 2009, **F J K Zaabwe vs Orient Bank & Others** SCCA No 04 of 2006, Administrative Law by HWR Wade 5th Edn. Pages 31, 41 etc., Ridge vs Baldwin (1964) AC 63, **Kamurasi Charles vs Accord Properties & Anor. SCCA No 3 of 1996**, **R.V University of Cambridge (1923) 1 Str 557**, **Muhwezi Jones vs Mbarara District Administration. HC Misc. Application**

No 13 of 1995 Federal Civil Service Commission & Others vs Laove (1990) LRC 482, General Medical Council vs Sparkman (1943) AC 644, Matovu & Others vs SSeviri & Anor CACA No 7 of 1979, Dr Julius Enon vs Makerere University HCC A No 381 of 2005, Cooper vs Watson & Others (1937) 2 KB 309, Lawlor vs Union of Post Office Workers (1965) Ch. 712 Judicial Review of Administrative Action by S A De Smith 2nd Edn.534, among others.

In reply, the respondent submitted that this ground of appeal had no merit because the trial judge diligently addressed this issue and came to the conclusion that the dismissal of the appellant was contrary to statutory law and the rules of natural justice; and was therefore **void ab initio**. The respondent contended that what the appellant is dissatisfied with is the failure to order his reinstatement.

In his judgment, the trial judge stated,

“On the basis of the evidence adduced, court finds that Regulation 36 of the Public Service Regulations were not complied with, almost in its entirety, before the decision to dismiss the plaintiff was taken. The plaintiff’s dismissal was contrary to statutory law and the rules of natural justice in that the plaintiff was not given a fair hearing. A decision taken in contravention of the rules of natural justice is void ab initio: Matovu & 2 others vs Sseviri & Anor. (1979) HCB 174. The finding on the first issue is that the dismissal of the plaintiff was unlawful.”

In the Court of Appeal, the appellant complained in Ground 2 of appeal that **“the learned trial judge erred in law and in fact in not declaring the appellants dismissal null, void ab initio, ultra vires and of no legal effect and in not granting an order nullifying and setting aside the said dismissal. ”**

The Court of Appeal upheld the holding of the trial judge that the appellant’s dismissal was unlawful and dismissed this ground of appeal. The complaint raised

by the appellant that the Court did not make an order nullifying and setting aside the dismissal is academic, since once the Court held that the dismissal was unlawful, it became null and void, and automatically was set aside. That is why both courts considered the issue of reinstatement of the appellant and the award of damages. Therefore, I do not find any merit in this ground of appeal, which should fail.

Grounds 2, 3, 4 and 5: Failure to Reinstate the Appellant:

The grounds of appeal which complain about the failure of the Court of Appeal to order reinstatement of the appellant in his office are contained in grounds 2, 3, 4 and 5. They are stated as follows:

- “2. The learned Justices of the Court of Appeal erred in law when they failed to order the reinstatement of the appellant to his job plus accrued missed promotional opportunities.*
- 3. The learned Justices of the Court of Appeal erred in law in upholding that the appellant’s statutory public employment had terminated by wrongful dismissal.*
- 4. The learned Justices of the Court erred in law when they upheld that the appellant’s employment was governed by the Employment Act.*
- 5. The learned Justices of the Court of Appeal erred in law and in fact to uphold that the appellant was in a contract of employment ”*

In his submissions on ground two, the appellant contended that a declaration that the dismissal of an employee is void should be followed by an order to reinstate that employee. This he argued is because the status quo of the employee has been restored. His contention was that an order declaring the dismissal of an employee as void goes hand in hand with another order to reinstate the employee.

The appellant relied on the case of **Federal Civil Service Commission**

vs Laove (1990) L.R.C 451, where the Supreme Court of Nigeria made a declaration that the unlawful dismissal of the respondent was void and of no legal effect and that the respondent was still an employee of the appellant and should, therefore, be reinstated as such without prejudice to his entitlements, promotions which might have accrued to him during his period of dismissal. The appellant submitted that in the present case his statutory public employment was still subsisting though he was dismissed and should, therefore, be reinstated and paid arrears of salary and allowances.

The appellant also referred to the book entitled Employment Law 3rd edn P.271, where it is stated that “reinstatement means and requires the employer to treat the employee in all respects as if he had not been dismissed, Thus his pay; pension; seniority rights etc, must be restored to him and he will benefit from any improvement in terms and conditions which came into operation whilst he was dismissed

The appellant cited several other authorities to support his submission which included, **Vines vs National Dock Labour Board** (1956) 1 All. ER

Dr Patrick Mwesictve Isinpoma vs Attorney General Misc App No 242 of 2006, **Principles of Labour Law** by Roger N Rideout 3rd Edn. 15,

Opolot Michael Onone vs Attorney General HCT-CV-MA-0857/2008 (HC).

With regard to the third ground of appeal, the appellant submitted that the Court of Appeal erred in not holding that since the appellant was a public servant whose employment was regulated by statute, he was subject to public law remedies as laid down in **R vs East Berkshire Health Authority Ex parte Walsh** (1984) 3 All.ER 425.

The appellant also relied on **Chitty on Contracts** 27th Ed, page 799-880 where it is stated that employees who are holders of a tenured office or whose employment takes place under the authority and regulation of a statute giving it a public nature and having this protection, remedies of a public law nature might be available to invalidate a dismissal not carried out in accordance with the principles of natural justice. The author goes on to state that a person employed under a contract of employment cannot invoke public law remedies even if his employment is of a public nature, though an officer or office holder who does not have a contract of employment may be able to do so.

It was the submission of the appellant that in conformity with the facts of the present case, the appellant was under a statutory public employment governed by Article 173 of the Constitution which protects, public officers from being dismissed or reduced in rank without just cause or contrary to the procedure laid down in the Public Service Act and the Public Service Regulations.

The appellant relied again on the Nigerian case of Federal Civil Service Commission vs Laove (supra) where the court stated that “officers on the pensionable cadre of our civil service whose terms and conditions of service are governed by the civil service rules made under the Constitution and therefore having a constitutional flavour, acquired a distinct status which places their employment over and above the common law relationship of master and servant and introduced on these relationships, the vires element of Administrative Law.”

The appellant, therefore, maintained that he was entitled to administrative/public law remedies, and not damages for loss of employment as wrongly stated by the two lower courts. The appellant further argued that statutory public employment could only come to an end when terminated lawfully through the procedure provided by statute. Otherwise, the appellant contended, the statutory public

employment continues to subsist and therefore his employment is still subsisting. He relied on the decision of the Court of Appeal in **Kakumu Perez vs Attorney General** CCCA No 113 of 2003 where it was held that the appellant who had been dismissed from the post of District Forest Officer was still in office and was, therefore, entitled to his salary and benefits until his employment was terminated lawfully.

On ground four, the appellant complains that the learned Justices of the Court of Appeal erred when they held that the appellant's employment was governed by the Employment Act. The appellant pointed out that he was appointed a Foreign Service Officer on 20th September 1988, and was dismissed on 8th June 1998. The Employment Act came into force on 24th May 2006, nine years after the appellant had been dismissed and the Act could not apply to him retrospectively. He relied on the case of **Patel vs Benbros Motors Tanganyika Ltd.** EACA No 5 of 1968, to support his argument

The appellant also contended that the provisions of the Employment Act apply to contract employment not his statutory public employment which is governed by the Constitution, the Public Service Act and Public Service Regulations, among others.

In reply to the submissions of the appellant, the respondent argued that reinstatement of the appellant in the Public Service was not automatic but at the discretion of the Court. The respondent contended that the trial judge exercised his discretion judiciously and rightly refused to grant the remedy since it was not practical for the reasons he gave. The respondent pointed out that the appellant had spent 13 years out of Public Service at the time of judgment and had now spent 17 years since he left Public Service. A lot had happened by way of promotions and placements in the Ministry of Foreign Affairs and this alone made reinstatement not the most appropriate remedy in the circumstances of the case.

Regarding the argument by the appellant that the trial Court granted private law remedies rather than public law remedies, the respondent submitted that the common law principle that an employer should not be forced to retake an employee when the employer no longer wishes to continue engaging him which was stated by this Court in the cases of Bank of **Uganda vs Betty Tinkamanyire** Civil Appeal No 12 of 2007 and

Barclays Bank of Uganda vs Godfrey Mubiru SCCA No 1 of 1998, applies to public servants.

The respondent contended that this common law principle was incorporated in the laws of Uganda like the Employment Act, which the Court of Appeal relied on to confirm the decision of the trial judge. The respondent further submitted that where removal from office is not forbidden by statute, one could not competently claim reinstatement as of right as there is no law which expressly confers that right to him. It was reiterated that reinstatement is at the discretion of the Court which must be exercised judiciously and that this is exactly what the trial Court did and confirmed by the Court of Appeal. It was the contention of the respondent that reinstatement was not the appropriate remedy in this case, and that monetary compensation as awarded by the lower Courts was the most appropriate remedy in the circumstances of this case.

The substantial issue raised in these grounds and submissions is whether the Court of Appeal erred in law in upholding the decision of the High Court Judge not to reinstate the appellant in his job as a Foreign Service Officer.

In his judgment the trial judge gave two reasons why he found that reinstatement was not the most appropriate remedy in the circumstances of the case. For the first reason the judge stated,

“The plaintiff prayed to be reinstated in employment. There is no evidence from the defendant that the plaintiff would be welcomed to resume his former job. Court has therefore come to the conclusion that the defendant as employer does not want to have back the plaintiff as employee. Thus, therefore, is one of the cases, where the Court has to apply the common law principle that an employer should not be forced to retake an employee, the employer no longer wishes to continue to engage: See Bank of Uganda vs Betty Tinkamanvire, Civil Appeal No 1 of 1998 (SC) and Barclays Bank of Uganda vs Godfrey Mubiru. Civil Appeal No 1 of 1998 (SC) (unreported).”

The second reason the learned High Court Judge gave was stated as follows:

“Even as a matter of practicality, it is not appropriate, in this case, to order reinstatement It is almost 13 years ago since the plaintiff lost his employment. A lot of has happened by way of promotions and placements in the Ministry of Foreign affairs according to evidence availed by the plaintiff. This makes reinstatement of the plaintiff in his former employment to be not the best option. The Court declines to order reinstatement of the plaintiff. ”

As indicated earlier in this judgment the Court of Appeal upheld the trial judges’ decision that the dismissal of the appellant was unlawful. The Court of Appeal held that the appellant’s employment was governed by the Constitution, the Public Service Act and Regulations made there under, the Pension Act and the Employment Act. It also held that the appellant was employed on permanent and pensionable terms and with good conduct, he could have left the Public Service on reaching the retirement age of 60 years. The Court was alive to the provisions of Article 173 of the Constitution which protects the tenure of the office of public servants by providing that no public servant shall be dismissed or reduced in rank without just cause.

In her leading judgment with which the other members of Court agreed, Byamugisha (RIP) stated that the main question was whether the appellant should have been reinstated, she stated,

“The main thrust of the appellant’s grievances against the findings of the trial judge, as I understand it, is that the trial judge ought to have ordered his reinstatement in his job. Reinstatement of an employee is governed by the provisions of Section 71 of the Employment Act Part of the section states,

“(5) If the Court finds that the dismissal is unfair the Court may -

(a) order the employer to reinstate the employee or

(b) order the employer to pay compensation

(6) The Court shall require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed,

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable,

(c) it is not reasonably practicable for the employer to reinstate or reemploy the employee or

(d) The dismissal is unfair because the Employer did not follow a proper procedure.”

The learned Judge of Appeal then concluded,

“The provisions of this Section give powers to a Court to order reinstatement of an employee in the circumstances set therein. The same section sets out circumstances under which an employee may not be reinstated in his job. One of such circumstance is where the employee has been wrongly dismissed. The appellant was wrongfully dismissed from his job. He could only be reinstated if there was evidence that the employer was ready and willing to take him back. The learned trial judge considered all the facts that were before him

and arrived at the correct decision against the reinstatement. I have not been persuaded that he was wrong.”

The Court of Appeal relied on the provisions of the Employment Act in upholding the decision of the trial court, not to order reinstatement of the appellant in his job. The appellant has submitted that the Court of Appeal erred in so doing because the said Act which came into force on 24th May 2006 was not in operation when the appellant was dismissed on 8th June 1998. It was his contention that the Act could not apply retrospectively to him.

I entirely agree with the appellant’s submission that the Court of Appeal erred in applying the Employment act 2006 to this case, when the Act did not have a retrospective effect. The Employment Act Cap.219 was the equivalent law in existence at the time the appellant was dismissed but it was not referred to nor does it have similar provisions.

Secondly, the appellant contends that the Employment Act applies only to contract employment and not statutory public employment which is governed by the Constitution, the Public Service Act and Public Service Regulations among others. The respondent submitted that the Employment Act 2006, embodies principles of common law regarding employment. That may be so, but it seems to me that the Employment Acts were intended to apply to employees on fixed contracts who earn wages. In my view the appellant is correct in maintaining that the Employment Act does not apply in this case.

Ultimately the question which remains to be answered is whether the Court of Appeal erred in upholding the decision of the trial judge not to be reinstate the appellant in his employment. The appellant argues that the lower Courts erred in applying private law remedies to a statutory public employment governed by different regime of laws and rules.

The appellant relies on Article 173 of the Constitution which provides;

“A public officer shall not be -

- (a) Victimised or discriminated against for having performed his or her duties faithfully in accordance with this Constitution or***
- (b) Dismissed or removed from office or reduced in rank or otherwise punished without just cause.”***

The appellant cited several authorities where public servants have been reinstated in their posts after finding that their dismissals were unfair or unlawful.

I agree with the appellant that his employment was subject to the Constitution, statutes and regulations thereunder. He could not be dismissed without just cause. In this case he was dismissed unlawfully

and both courts below held so. Under normal circumstances, the appellant would be entitled to reinstatement as the first option. I agree with the two Courts below that reinstatement is not automatic and depends on the particular circumstances of each case. The Court has discretion to order reinstatement after taking into account all the circumstances of the case.

In the present case, the trial judge gave reasons why he found that reinstatement was not the most appropriate remedy. The Court of appeal agreed with those reasons.

This Court is always too slow to depart from two concurrent findings of the Courts below without any sound reasons. A most compelling reason why reinstatement was not practicable was the long passage of time between the dismissal and the conclusion of the case in the High Court.

The appellant was dismissed on 8th June 1998 and the High Court delivered its judgment on 9th March 2010, a lapse of 13 years. During this period many things had changed in terms of posting and promotions, and it would have been difficult to find an appropriate placing for the appellant. As the appellant himself testified, some of his colleagues were now occupying higher posts. What then would become of him? Further, the Court of Appeal delivered its decision on 29th March 2012 and this appeal was heard on 10th September 2014. The appellant who was born in 1961 is now 53 years of age and would have to retire in seven years' time, on reaching the retirement age of 60 years.

In conclusion, I am unable to fault the Court of Appeal for upholding the order of the trial Judge not to reinstate the appellant in his employment, I find that the two Courts below were justified in holding that the most appropriate remedy for the appellant was the award of damages to compensate him for the loss of his employment. Accordingly, I find no merit in these grounds of appeal which should

fail.

Grounds 8 and 9: Failure to re-evaluate evidence relating to torture, arrest and trespass to property:

In ground 8, the appellant complains that the learned Justices of Appeal erred in law and in fact when they failed to re-evaluate evidence as regards his arrest, torture and confinement. In ground 9, the appellant criticizes the Court of Appeal for failing to re-evaluate the evidence regarding trespass to his property.

In his submissions, the appellant recounts how he was arrested at his residence by the Chinese Police, hand cuffed, beaten in the presence of the Ugandan Ambassador to China, Major General Okecho and officials from the Ugandan Embassy in China and thrown behind a police pick-up truck and transported to Guomen Hotel while being stepped on by the police in their boots like a chicken thief. The appellant stated that he informed the Permanent Secretary of the Ministry of Foreign Affairs of his arrest through a loose minute. He claimed that he was stripped off of his diplomatic immunity by the respondent following his arrest. He argued that the Chinese Police could not have arrested him had his diplomatic immunity not been lifted. According to the appellant, this shows that the respondent was part of the plan to arrest him and therefore, the respondent is vicariously liable for the actions of the Chinese Police. He further contends that if it was purely a Chinese affair, then it would have been the responsibility of the Chinese Government to convey the appellant from China to Entebbe using their own resources by buying an air ticket, and not the Ugandan Government. Furthermore, the appellant submitted that the Ugandan Ambassador acted under the orders of the Permanent Secretary of the Ministry of Foreign Affairs, thus making the Government of Uganda vicariously liable for the actions of the Chinese Police. Finally, he argued that the respondent had a duty to prove that the detention of the appellant was justifiable, which it failed to do.

On the failure to re-evaluate evidence regarding trespass to his property, the appellant submitted that no person should be subjected to unlawful search of his property under Article 27(1)(a) of the Constitution. He contended that the Ugandan Ambassador to China unlawfully searched his suitcase and his money, degree certificate, passport, and air ticket taken away which amounted to trespass. He prayed for an award of Shs.150 million as general damages.

The respondent submitted that the Court of Appeal was alive to the principles governing the re-evaluation of evidence by the first appellate Court, and contended that it is not the length of the analysis that matters but its adequacy.

The respondent maintained that the Court of Appeal had carefully reevaluated evidence of alleged arrest, assault, and torture and trespass to property and came to the conclusion that the respondent was not vicariously liable for whatever violations that were allegedly meted on the appellant while in China.

The respondent referred to the finding by the trial judge where he stated,

“There is no direct witness evidence to contradict the evidence of the plaintiff as to his arrest and assault. That notwithstanding, it is the duty of this Court to analyse all the evidence adduced on the issue and decide whether or not the said evidence is worthy of belief or not ”

The respondent further submitted that before coming to the conclusion that the appellant had failed to establish on balance of probabilities that the defendant was vicariously liable for the alleged assault, and confinement, the trial judge considered the following matters:

- The appellant did not mention these serious allegations of his being arrested and tortured at the earliest opportunity and this made his evidence suspect.

- The appellant did not report to Police about the said allegations as soon as he arrived in Uganda.
- The appellant submitted to Court a medical chit from MAC Clinic, of Medical Associates Consultants of Bombo Road, Wandegeya, Kampala, to prove his injuries but the information he gave to the doctor was that he had been assaulted by “unknown men,” contrary to his evidence on record where he stated who had assaulted him.
- The appellant did not claim that from China to Uganda, he was under arrest or surveillance of any security personnel.
- The appellant’s witness, one Major David Stephen, who was his long standing friend did not claim in his evidence that he came to know from the appellant that the appellant had been arrested, confined and handcuffed on orders of the Uganda Embassy staff or any other person.

The respondent submitted that the decision of the Court of Appeal should be upheld on these grounds.

It is well settled that it is the duty of a first appellate Court to reappraise the evidence and come to its own conclusions as to whether the findings of the trial Court were supported by evidence adduced at the trial. This Court restated this principle in the case of **Kifamunte vs Uganda** (1999)

2. E.A. 127, at page 131 as follows:

***“We agree that on first appeal from a conviction by a judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial judge.*”**

The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it When the question arises which witness is to be believed rather than another and that question turns on manner of demeanour, appellate Court must be guided by the impressions made by the judge who saw the witness, but there may be other circumstances quite apart from the manner and demeanour which may show whether a statement is credible or not and which may warrant a Court to differ from the judge even on a question of fact turning on the credibility of a witness whom the appellate Court has not seen. See Pandva Vs. R (1957) E.A. 336 at 338, Okeno vs R (1972) E.A. 32, Bitwire vs Uganda, Supreme Court Crim. App. No. 23 of 1985 at p. 5. ”

Regarding the duty of this Court as the second appellate Court, the Court went on to observe as follows:

“It does not seem to us, except in the clearest of cases, that we are required to re-evaluate the evidence like the first appellate Court save in Constitutional cases. On a second appeal, it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles. See Pandva vs R (supra) Kairu vs Uganda (1978) HCB 123.”

In his memorandum of appeal to the Court of Appeal, grounds 7 and 8 formed the appellant’s complaints relating to the evaluation of evidence regarding his arrest, confinement and assault, and trespass to property. Both parties submitted on these two grounds.

However, it appears that the Court of Appeal did not consider these grounds of appeal at all. In my view, this was misdirection in law. An appellate Court ought to consider all the grounds of appeal and pronounce on them in one way or another. If, in view of the holding on other grounds it is not necessary to consider certain grounds, the Court should say so giving reasons.

In the present case, the Court of Appeal did not explain why it did not consider the two grounds of appeal. It may well be that it thought that by addressing the issue of damages, it was sufficient to say nothing about them. I think this was error because the Court of Appeal as a first appellate Court had a duty to re-evaluate the evidence concerning the two grounds and come to its own conclusions.

The Court of Appeal having failed in its duty as a first appellate Court, it seems that this Court must review the evidence accepted by the trial judge to ascertain whether his findings and conclusions can be supported. This Court has to bear in mind that it cannot assume the duty of the first appellate Court and re-evaluate the case wholly, and must also bear in mind the fact that it has not had the opportunity to see or hear the witnesses like the trial judge and form its views on the demeanour and credibility of the witnesses.

The trial judge gave a detailed analysis and consideration of the evidence adduced by the appellant and decided to disbelieve the appellant for reasons he gave. Some of the matters the trial judge took into account were outlined by the respondent in his submissions. The trial judge observed,

“This Court also finds it rather difficult to believe that a Police Force of a sovereign State of the Republic of China could have been ordered by the Ambassador of Uganda to carryout unlawful acts of arrest, confinement and assault in public places such as the compound of the residence of diplomats in China, in the motor vehicle pick-up in which the plaintiff alleges he was transported while handcuffed and sat upon by the Chinese Police and then to Guo-men Hotel and finally to the airport where he boarded Thai Airways without any restraint of this police by some other authorities.”

The learned trial judge then concluded that the appellant had failed to establish that the respondent was vicariously liable for the actions of the Chinese Police. The trial

judge concluded:

“For the reasons given above, without in any way derogating from the fact that the plaintiff was entitled to be heard in his defence, this Court holds, on the second issue that having analysed the evidence before it, that the plaintiff has not established on a balance of probabilities, that the defendant is vicariously liable for the alleged assault, arrest and confinement of the plaintiff in China. Court finds that the plaintiff has not established to the Court’s satisfaction on a balance of probabilities that such assault, arrest and confinement happened to the plaintiff in the manner the plaintiff alleges it happened. ”

In my view, the trial judge was justified to come to the above conclusion on the evidence which was before him.

Regarding the claim that the appellant’s right to property was interfered with, the trial judge stated that the appellant did not report this matter at the earliest opportunity when replying to the disciplinary charges said against him. Nor did he protest or inform any authority in China or Uganda. The trial judge then held,

‘Further there is no evidence from the plaintiff that there was any unlawful conversion of the money or any documents of the plaintiff by any one of the Embassy staff to the plaintiff. This issue is not therefore proved on a balance of probabilities.’

I am unable to fault the trial judge in his findings and conclusions which in my view were sufficiently supported by the evidence on record. Accordingly, grounds 8 and 9 should fail.

Grounds complaining about award of special, general and aggravated damages:

The appellant has listed several grounds of appeal in which he criticises the Court of Appeal for upholding the awards of damages made by the trial judge.

The four grounds are stated as follows:

“6. The learned Justices of the Court of Appeal erred in law when they upheld an award of a private law remedies of compensatory damages of Shs.180,000,000/= for loss of employment.

7. The learned Justices of the Court of Appeal erred in law in upholding the speculative award of Shs.180,000,000/= as earnings of the appellant up to retirement time in the absence of pleadings to that effect.

11. The learned Justices of the Court of Appeal erred in law and fact in upholding wrong computation of special damages which excluded salary increments, leave salaries, Foreign Service earnings and other financial entitlements leading to an inordinate low award.

12. The learned Justices of the Court of Appeal erred in law and in fact in not awarding general and aggravated damages. ”

Some of the grounds of appeal are repetitive while others are misconceived. For instance, grounds 6, 7 and 11 are repetitive in that they complain about the failure to award special damages while ground 12 complains that no award of general and aggravated damages was made whereas the trial judge awarded a sum of Shs. 180,000,000/= to cover them. Be that as it may, since the grounds are related, I shall consider them together.

On ground 6, the appellant submitted that the trial judge erred in awarding the appellant compensatory damages based on an erroneous view that his employment had come to an end whereas it was still subsisting. He contended that the appropriate remedy was to award him special damages consisting of his salary arrears from the date of dismissal till judgment. The appellant also made an interesting argument that the trial judge made an error when he turned the Court into an appellate Court and substituted the decision of the Public Service Commission with his own. It was the contention of the appellant that the trial judge should have

restricted his role to nullifying the decision of the Public Service Commission since it was arrived at in disregard to the laid down procedures and remitted the matter back to the Public Service Commission to determine the matter according to law. However, I note that this was not one of the reliefs requested by the appellant in his plaint. A Court cannot grant relief not sought in the plaint.

Regarding ground 7, the appellant submitted that the award of Shs. 180,000,000/= as earnings of the appellant for 20 years of 26 years of the remaining years of his service was erroneous because it was based on a private law remedy, and was also speculative. He strangely argued that the award was uncertain because the appellant could have died through natural causes before reaching retirement age or resigned or even dismissed lawfully.

The appellant further argued that the trial judge used obsolete salary scale to compute his earnings until when he would have reached retirement age. The appellant refers to the Supplementary Record of Appeal which indicates that his salary has been increased from Shs.740,940/= to Shs.1,042,202/= per month.

The appellant contends that allowances due to the appellant were overlooked like Foreign Service earnings, salary in lieu of leave, disturbance allowance and other financial entitlements like the cost of damaged clothes, and medical expenses.

The appellant referred to the decision of this Court in **Bank of Uganda vs Betty Tinkamanvire** SCCA No. 12/2007 where it was held that an employee is entitled to full compensation only in those cases where the period of service is fixed. It was the appellant's contention that the authority was inapplicable to his employment since it was not on a fixed contract. Appellant also relied on the decision of the Court of Appeal in **Ivamulemve David vs Attorney General** CACA No. 104/2010 where it was held that the appellant could be awarded salary increment for the time he was unlawfully dismissed till judgment.

The appellant maintained that the trial judge should have computed his earnings for the entire period of 26 years of the remaining period of service, and not 20 years. He submitted that he should be paid his salary arrears and allowances according to the current rates.

On ground 11, the appellant submitted correctly in my view that special damages must be specifically pleaded and proved in order for them to be granted. He pointed out that he specifically pleaded for special damages

in form of unpaid salaries, unpaid salary in lieu of leave, loss of Foreign Service earnings and other unpaid allowances. He maintained that he produced documents showing the various salary structures of Public Service from 1997 - 2013. However, he submitted that the trial judge and the learned Justices of Appeal ignored them and awarded an inordinate low award of special damages of Shs. 180,000,000/= for loss of employment.

The appellant argued that since the respondent did not dispute the figures presented by the appellant concerning special damages, the figures should be considered as accepted. He relied on the decision of this Court in **Kabu Auctioneers & Court Bailiffs, Mulgbhai & Co. vs. F K Motors Ltd.** SCCA No. 19/2009 and **Attorney General vs. A. K. PM Lutava** SCCA No. 16 of 2007 to support his submission.

The appellant further submitted that he should have been paid accumulated salary in lieu of leave. He relied on the case of **Uganda Commercial Bank vs Yerusa Nabudere & Anor** SSCA No. 5/2003 where this Court affirmed payment of accumulated salary in lieu of leave to the estate of the late Nabudere.

The appellant criticised the trial Court for computing his earnings from the date of interdiction beyond the date of judgment because that was not pleaded.

The appellant prayed that he be paid special damages totalling Shs.220,129,471/= and US\$274,300.5 to cover salary arrears with increments, allowances with increments, salary in lieu of leave with increments, loss of Foreign Service earnings from March 1998 up to 30

June 2014. He provided a table of salary arrears and allowances with increments from 2008/2009 to 2013/2014.

In reply, the respondent submitted that the Court of Appeal properly identified the

grievance of the appellant on the issue of damages which was that the trial judge ought to have awarded a separate sum for each claim of damages. The respondent supported the view of the Court of Appeal that an award of damages is an exercise of discretionary power of the trial Court and an appellate Court is reluctant to interfere with such an award because it is considered imprudent to substitute the trial Court's opinion with its own. It was the submission of the respondent that the award of omnibus figure of Shs. 180,000,000/= did not cause any injustice to the appellant and therefore this Court should not interfere with it.

In her lead judgment, with which the other Justices of Appeal agreed, Byamugisha JA (RIP) stated that the complaint raised by the appellant was that the trial judge ought to have awarded separate sums for each claim of damages. The learned Justice observed that damages are compensatory and the injured party must be awarded such sum of money as will put him in the same position as if he had not sustained the wrong complained of. She underscored the principle that an award of damages is in the discretion of the trial Court and an appellate Court will not interfere with such an award unless the Court acted on a wrong principle or the amount awarded is so manifestly excessive or manifestly low that a misapplication of law is inferred.

With respect, I think the learned Justice correctly stated the principles governing the award of damages. The learned Justice then concluded,

“In the instant, the learned Judge awarded an omnibus sum of Shs.180 million to cover general and exemplary (sic) damages and loss of employment. There is no cross-appeal by the respondent challenging the award as being manifestly excessive. The appellant is not complaining that the amount is manifestly low as to have occasioned a miscarriage of justice. Ideally, the trial judge ought to have indicated how much he awarded under each head of damages. Failure to do so, however, is insufficient for this Court to interfere with the award. There is no evidence of any injustice which the

appellant suffered as a result of the omnibus award. Consequently, the ground would fail. ”

The first point to consider is whether the trial judge was correct in awarding one omnibus sum for general and aggravated damages instead of awarding separate sums for each claim of damages. The appellant made separate claims for special damages, loss of future earnings, payment in lieu of leave, Foreign Service allowances, lunch, housing, and transport allowances among others, as well as general, aggravated and exemplary damages.

In his judgment, the learned trial judge considered the various heads of special damages claimed and observed that the appellant had another 26 years before reaching retirement age of 60 years. He also accepted the evidence that the appellant had been earning a salary of Shs.247,542/= per month at the time of his dismissal. The appellant was also earning a transport allowance of Shs.99,107/=, Shs.75,000/= for tea and Shs. 115,000/= for lunch, making a monthly package of Shs.746,649/= at the time of his dismissal. The trial judge also considered that the appellant had lost prospects of promotion.

The trial judge then concluded,

“Taking all the above factors into consideration, Court awards the plaintiff a sum of Shs.180,000,000/= as compensation and general and aggravated damages for loss of employment. This sum represents approximately twenty (20) years of pay, at the monthly salary (less tax) and allowances the plaintiff was receiving at the time of his dismissal. The sum also represents general and aggravated damages for the inconvenience, loss of prospects of future employment and entitlements, and the suffering the plaintiff was subjected to in being suddenly dismissed without a fair hearing. ”

In my view, the trial judge acted on a wrong principle in failing to award separate sums of damages for each claim. A claim for special damages is based on different

grounds and principles than a claim for general damages. Special damages represent actual losses suffered by the claimant as a result of the wrong committed and must be specifically pleaded and proved. General damages are at large and are assessed by the Court on the basis of the injury, suffering and inconvenience caused to the plaintiff.

In the present case, the Court of Appeal erred in not interfering with the omnibus award of special, general and aggravated damages. The Court of Appeal erroneously stated that the award included exemplary damages which had been rejected by the trial judge. The Court of Appeal was not justified in concluding that the award caused no prejudice to the appellant when some of his claims for special damages were not considered.

The appellant pleaded particulars of the various items of special damages which included unpaid salaries, unpaid allowances for transport, housing lunch disturbance, medical treatment, cost of air ticket to China, and cost of two nights he spent in Speke Hotel, among others.

According to his plaint, the total amount of special damages was Shs. 42,787,778 and US\$136,425,07. The appellant detailed out how he arrived at these figures covering the period 1998 to 2005.

In his evidence at the trial, the appellant stated that at the time of his dismissal in 1998 his salary was Shs.247,542 per month but over the years the salary had been increased in 2005 to Shs.720,575/= per month and that by November 2007 it was Shs.740,940 per month.

The trial judge accepted the evidence of the appellant that his monthly salary at the time of his dismissal was Shs.247,542/=. He also accepted the appellant's evidence that he was earning a transport allowance of Shs.210,000 per month, a monthly

housing allowance of Shs.99,107/= and Shs.75,000/= and Shs. 115,000/= as tea and lunch allowance respectively.

The trial judge found that the appellant was earning a total package of Shs.746,649/= per month at the time of his dismissal. He acknowledged that the appellant had 26 years of working before he reached retirement age. The trial judge concluded,

“Taking all the above factors into consideration court awards the plaintiff a sum of Shs.180,000,000/= as compensation and general and aggravated damages for loss of employment. This sum represents approximately twenty (20) years of pay at the monthly salary (less tax) and allowances the plaintiff was receiving at the time of his dismissal. The sum also represents general and aggravated damages for inconvenience loss of prospects of future employment and entitlements, suffering the plaintiff was subjected to in being suddenly dismissed without a fair hearing. ”

It is not clear why the trial judge considered only 20 years instead of 26 years the remaining working age of the appellant. I think the total period of 26 years should have been taken into account in calculating his unpaid salaries and allowances. In other words, the sum of unpaid salaries and allowances should have been arrived by this computation: $746,649 \times 12 \times 26 = 232,954,488/=$.

However, if the periodic increases in salary and allowances of public servants is taken into account, in view of the evidence produced by the appellant, it is reasonable to conclude that the appellant's salary would have been raised by at least 25% over the years. The sum of Shs.232,954,488 would be increased by 25% that is by 58,238,622/= to make a total of Shs.291,193,110/=. I would award the appellant a sum of Shs.300,000,000/= for loss of earnings of salary.

The Court of Appeal, therefore, erred in not awarding this sum as special damages.

The appellant also claimed US\$274,300.15 for loss of Foreign Service allowances which he would have received on posting to Foreign Missions. The trial judge rejected this claim, holding that they were merely speculative as the appellant never actually earned them. I am unable to fault the decision of the trial judge on this head of damages.

The trial judge awarded the appellant Shs. 1,500,000/= he claimed as transport allowances to transport his personal effects to his home area in Kumi. This award was not contested.

The trial judge rejected claims for housing allowance while abroad and disturbance allowance as speculative. I think the trial judge was justified in reaching that decision.

The trial judge held that the claims for salary in lieu of leave and settling down were covered by the overall award of general damages. With respect, I think that there should have been a specific award for salary in lieu of leave as claimed by the appellant. The sum claimed for eight years was Shs. 1,595,025/= while at the headquarters and US.\$3,810.2 while at the Mission abroad.

The trial judge accepted the evidence of the plaintiff that his last gross salary was Shs.746,649/= per month. He also held that the appellant would have had another 26 years in service. The appellant's evidence was that he was entitled to 30 days leave per year while at the headquarters. Therefore, for 26 years, the appellant would have been entitled to an amount of Shs. 19,412,874/= salary in lieu of leave. The appellant should have been awarded this sum. Salary in lieu of leave while away on Mission was speculative and was not recoverable.

The trial judge awarded a sum of US. \$1,392, the appellant incurred to send Francis Aluvia to China to collect his property. This amount was not contested. The trial

judge also awarded the appellant Shs.245,542/= as salary withheld during interdiction. Again this sum was not contested.

The trial judge declined to award special damages for medical expenses because these were not proved. He also declined to award damages for the damaged suit as evidence of the plaintiff was not credible on the issue. The claims for housing allowance and for disturbance allowance were also rejected as speculative. I am unable to find that the trial judge erred in rejecting these claims for the reasons he gave.

As regards the omnibus award of Shs. 180,000,000/= “as compensation and general and aggravated damages for loss of employment” as

Stated by the trial judge, it is clear that the award included special damages for loss of employment on the one hand, and general and aggravated damages on the other. Efforts have been made in this judgment to make separate awards of special damages on specific heads claimed. The last issue that remains for this Court is to determine whether the omnibus sum awarded should be interfered with in awarding general and aggravated damages in this case.

In my view taking into account the fact that the appellant has been awarded special damages for salary arrears but recognizing the fact that the appellant lost his employment while still young, as a result of which he has suffered embarrassment and inconvenience, and the loss of future earnings, I would award the appellant Shs. 150,000,000/= as general damages.

Ground 13: Failure to award punitive or exemplary damages

The appellant complains that the learned Justices of the Court of Appeal erred in law and in fact by upholding no award of punitive or exemplary damages. The appellant submitted that punitive damages apply to cases of oppressive, arbitrary, harsh or unconstitutional action by the servants of Government or while there was a

desire to make a profit. He relied on the case of **Rooks vs. Barnard** (1964) AC 1131, to support his submission. He contended that punitive damages are usually penal in nature and are awarded to punish the offender and appease the victim. He cited the case of **Uganda Revenue Authority vs. Wanume David Kitamirike** CACA No. 43/2010 in support of his submission. The appellant submitted that his unlawful dismissal without a hearing, the unlawful arrest, confinement and torture, were oppressive and unconstitutional, deserving an award of substantial amount of punitive damages.

Secondly, the appellant contended that there was unjust enrichment of the respondent at the expense of the appellant when the Court awarded him only Shs. 180,000,000/= which was too far less than the amount the appellant would have earned had he stayed working in the Foreign Affairs Ministry.

The respondent supported the decision of the trial judge in not awarding punitive damages. The respondent agreed with the appellant that the principles governing the award of exemplary or punitive damages were enunciated in the case of **Rooks vs Bernard** (supra), but argued that the appellant had failed to prove that his dismissal was high handed, oppressive and unconstitutional and that the ordering of the Chinese Police to arrest, confine and torture him were also unconstitutional, oppressive, and arbitrary as he alleged in the plaint.

In his judgment, the trial judge stated,

To the extent that the plaintiff admits that while in China, the Uganda Ambassador had brought to his attention (Plaintiff's) some aspects of alleged indiscipline which acts constituted some of the charges against the plaintiff, goes to show that there was a prima facie case against the plaintiff to answer before the Public Service Commission. What made the process of subjecting the plaintiff to disciplinary control illegal was the failure to hold a full hearing and giving the plaintiff a fair hearing. This Court is therefore, unable to find in this

plaintiff's case, that apart from the wrong and illegality stated above on the part of the defendant, there was callousness, lack of compassion and indifference towards the plaintiff on the basis of the above, and also on the basis of resolution of issues as to unlawful arrest, unlawful confinement, assault, and defamation, this Court declines to award any punitive damages to the plaintiff."

In the Court of Appeal, the appellant complained about the failure of the trial judge to award punitive or exemplary damages in the eighth ground of appeal. However, the learned Justices of the Court of Appeal appear not to have expressly considered the ground save to decline to interfere with the discretion of the trial judge when he awarded an omnibus sum of money to cover general and aggravated damages.

With respect, I think that the learned Justices of the Court of Appeal erred in not considering the claims of exemplary damages separately because they were not part of general or aggravated damages awarded. As indicated above, the trial judge declined to award them and therefore, it was incumbent upon the Court of Appeal to address the issue and come to its own decision.

The principles governing the award of exemplary or punitive damages were set out by Lord Delvin in the case of **Rooks vs. Barnard** (supra) and generally approved in the case of **Cassel & Co Ltd vs. Broome** (1972) A.C. 1027. In **Rooks vs. Barnard** (supra), it was decided that the three cases where exemplary damages might be justified were:

1. Where the government servants had been guilty of **"oppressive, arbitrary or unconstitutional action"**.
2. Where the *"defendant's conduct had been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff"* and

3. Where such an award was sanctioned by Statute.

Furthermore, Lord Delvin stated that where exemplary damages are awarded, three considerations were to be borne in mind, namely,

1. The plaintiff cannot recover exemplary damages unless he was a victim of punitive behaviour.
2. Restraint is to be exercised, for an award of exemplary damages can be used as a weapon both for or against liberty.
3. The means of the parties while irrelevant in the assessment of compensation are relevant to the award of exemplary damages.

One of the fundamental principles emerging from both **Rooks Vs. Barnard** (supra) and **Cassell & Co Ltd. Vs. Broome** (supra) is that in general, exemplary damages should not be awarded since the object of awarding damages is to compensate the plaintiff and not to punish the defendant.

Applying the above principles to the present case, I agree with the trial judge that the conduct of the respondent in bringing disciplinary proceedings against the plaintiff was not oppressive, arbitrary, or unconstitutional as it was entitled to do so in order to allow the appellant opportunity to answer charges laid against him. The fact that the procedure followed by the respondent did not give the appellant a fair hearing does not mean that the respondent acted in an oppressive or arbitrary manner.

Secondly, the trial judge rightly rejected the appellant's claim that the respondent was vicariously liable for the actions of the Chinese Police in confining or torturing him as he alleged. Thirdly, the respondent did not stand to make a profit which

exceeded the appellant's compensation because the respondent was not responsible for the award made by the Court.

For these reasons, I am of the view that the trial judge was justified in declining to award exemplary damages to the appellant, and the failure of the Court of Appeal to consider the matter did not occasion any prejudice to the appellant. Therefore, ground 9 should fail.

Ground 14: Award of higher interest on general damages

In ground 14, the appellant complains that the learned Justices of Appeal erred in upholding an award of a higher interest of 20% not pleaded for on the general and aggravated damages. The appellant submitted that it is a cardinal principle of law that a Court should base its decision on pleaded matters. In support of this principle, he relied on the cases of **Julius Rwabinunu vs Hope Bahimbisabwe** SCCA No. 10/2009, **Hotel International Ltd vs Administrator of the Estate of the late Robert Kavuma** SCCA No.37/1995 and **Standard Chartered Bank (U) Ltd vs Grand Imperial Hotel (U) Ltd**. CACA No. 13/1999.

The appellant pointed out that he had prayed for interest of 25% on special damages to be awarded from the date of interdiction or consequent dismissal until judgment, and interest on general, aggravated and punitive damages at the Court rate from date of judgment until payment in full. He contended that the trial judge erred in awarding an omnibus interest rate on both general and aggravated damages from the date of his dismissal until payment in full. The appellant submitted further that interest on general damages cannot be awarded from the date of his dismissal because at the time of dismissal the Court had not yet assessed those damages. The appellant referred to the cases of **Prem Rata vs Mbiva** (1965) EA 592, **Sietco vs Noble Builders (U) Ltd** and **Mukisa Biscuits Manufacturers Co Ltd vs Nile Distributors Ltd** No. 2 (1970) E.A 475.

On the other hand, the appellant argued, in cases of wrongful dismissal, interest should be payable from the date of dismissal: see **Bold vs Brough Nicholson and Hall Ltd** (1963) 3 A LL ER 87.849. Finally, the appellant submitted that the current bank rate of 20% should be considered appropriate.

The respondent submitted that since the appellant was seeking to be awarded a lower rate of interest than what the Court had awarded him, it had no objection. Although an award of interest is in the discretion of the Court, the respondent submitted that the rate of interest of 20% on general damages was too high and should be reduced to 8%, running from the date of judgment not dismissal.

It is well settled that the award of interest is in the discretion of the Court. The determination of the rate of interest is also in the discretion of the Court. I think it is also trite law that for special damages the interest is awarded from the date of loss, and interest on general damages is to be awarded from the date of judgment.

In the present case, the respondent has conceded that the trial judge erred in awarding interest on general damages from the date of dismissal. It does appear to me that the error was caused by the trial judge in lumping special damages together with general damages. The appellant never pleaded or prayed for such a high interest. Therefore, the trial judge should have awarded the appellant interest on general damages at the Court rate from date of judgment. The rate of interest of 20% should have been awarded on special damages from the date of interdiction or dismissal till payment in full. Accordingly, I find merit in this ground of appeal which should succeed.

Decision:

In the result, this appeal partially succeeds. I would set aside part of the decision of the Court of Appeal and substitute it with the following orders:

1. The appellant is awarded special damages of Shs.300,000,000/- for arrears of salary which he would have earned in 26 years of service.
2. The appellant is awarded Shs. 19,414,874/= as salary in lieu of leave for 26 years.
3. The appellant is awarded interest on special damages in paragraphs 1 and 2 above at 20% from the date of his dismissal till payment in full.
4. The appellant is awarded Shs. 150,000,000/= as general damages, with interest at Court rate from the date of judgment till payment in full.
5. The appellant is awarded 50% of the costs in this Court and of the Courts below.
6. The following orders of the trial Court which were upheld by the Court of Appeal are confirmed:
 - (a) Shs. 495,084/= withheld salary during interdiction from 04.03.98 to 08.06.98
 - (b) Shs.1,500,000/= transport allowance for the appellant to transport his personal effects to his home area in Kawo Village, Kumi District.
 - (c) US\$90 or equivalent in Uganda Shillings at the obtaining current rate of exchange as at the time of effecting payment being the cost of residence by the appellant for the two nights at Speke hotel, Kampala.

- (d) US\$1,372 or its equivalent in Uganda Shillings at the obtaining current rate of exchange as at the time of effecting payment, being the cost of an air ticket to one Francis Aturia, who had to go to China to retrieve the appellant's money that was in the bank.

Dated at Kampala this 8th day^{of} April 2015

Dr B J.ODOKI
AG JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KISAAKYE; AKA CH-AMOKO JJS. C; ODOKI; OKELLO & KITUMBA Ag. JJSC)

CIVIL APPEAL NO. 06 OF 2012

BETWEEN

OMUNYOKOL AKOL JOHNSON:..... APPELLANT

AND

ATTORNEY GENERAL:..... RESPONDENT

[An Appeal arising from the Judgment of the Court of Appeal (Byamugisha, Kavuma, Nshimye, JJA) dated 29th May, 2012 in Civil Appeal No.71 of 2010.]

JUDGMENT OF DR. KISAAKYE, ISC.

I have had the benefit of reading in draft the Judgment of my brother, Odoki, Ag JSC. I agree with him that the learned Justices of Appeal erred when they held that the Employment Act, 2006 also applied to the appellant. Furthermore, I agree with his finding that it was wrong for the learned trial judge to order an omnibus award of Uganda Shs. 180,000,000/ = being compensation for general and aggravated damages for loss of the appellant's employment. I therefore agree with him that this appeal should partly succeed. In his proposed order, Odoki, Ag JSC, together with the other members of the Coram have substituted the omnibus award of Shs. 180,000,000/ = with 3 orders which I however take issue with. First, they have awarded the appellant Shs. 300,000,000/=, being arrears of salary he would have earned in the 26 years of service he would have served the government, if he had not

been unlawfully dismissed by the respondent. This figure includes a 25% increase in the appellant's arrears from 1998 to 2014.

Secondly, they have ordered that this award of Shs. 300,000,000/= should attract interest at the rate of 20% per annum from the date of dismissal until payment in full.

Thirdly, they have also awarded the appellant Shs. 150,000,000/ = being general damages for loss of his employment while he was still young and for embarrassment, inconvenience and loss of future earnings.

In as much as I agree with the majority that this appeal should succeed in part, I take issue with the Court's refusal to order the reinstatement of the appellant back to his employment. I also take issue with the award of Shs. 300,000,000/ = which covers a total of 26 years, from the date of the appellant's dismissal in 1998 to 2024, the date he would have retired from government service. I further take issue with the rate of interest awarded, as well as the period when it is supposed to commence and end, as well as the amount of general damages that have been awarded.

With the exception of the orders that I have specifically referred to in this Judgment, I agree with the rest of the orders as proposed in the Judgment of my brother, Odoki, Ag JSC.

The arguments of the parties were properly outlined in the Judgment of my brother, Odoki, Ag. JSC. Except where they are relevant to my discussion, I will not delve into them.

I will now proceed to discuss why I would partially allow this appeal and the orders I would accordingly make.

Reinstatement of the Appellant in His Employment

2
5

In spite of the period that it has taken our Courts to finalize the appellant's

claims, I would not have a problem ordering reinstatement of the appellant into his employment.

It should be remembered that all the Courts, including this Court have ruled that the appellant's dismissal was *void ab initio*. This means in law, the appellant's dismissal never took legal effect. Because the appellant's dismissal was found to be void ab initio, the *de jure* position was that the appellant's employment persisted, although the de facto position is that the appellant has been out of office since 1998 to date.

It therefore follows that reinstatement should follow our finding that the appellant's dismissal was void ab initio. The appellant's employment has never been terminated in law, because the purported dismissal by the Public

Service Commission without following the due process of law was of no effect.

One of the factors relied on by the Courts in declining to order the appellant's reinstatement into his employment is the long period the appellant has been out of office, which totals to 17 years. Both Courts below and this Court have argued that it is not practicable for the Government to take the appellant back because of this time lapse. It has further been argued, among other reasons, that it would be difficult to place the appellant back in office and to establish the appropriate rank since his colleagues had since been promoted. The majority have further argued that ordering the reinstatement of the appellant to his former employment would amount to imposing the appellant on his employer.

With due respect to my brothers and sisters, I respectfully disagree with their position. First, I do not see why the delay by the Courts to conclusively deal with the appellant's claim should prejudice the appellant's prayer for

2
5

reinstatement into his employment. The record shows that once the appellant was unlawfully dismissed from office in 1998, he filed this action in the High

Court in 2001. The record further shows that the matter stalled at the High Court for a total of 9 years. During this period, the Attorney General sought and was granted numerous adjournments by the Court. Eventually, the matter was decided without the Attorney General adducing evidence in support of the government's case.

While I take serious note of the fact that 17 years have lapsed since this unlawful act was done by the respondent, I have also considered the fact that for the most part, the appellant has not been responsible for this delay. He should therefore not suffer the consequences of delay he has not caused.

I am also not convinced with the reasoning by the trial Judge, the Court of Appeal and this Court that the appellant could only be taken back into government's employment if there was evidence that the employer was willing to have him back. In the case of a public office such as the one that the appellant held, who, on behalf of the government would have to make this determination that the appellant was welcome back to his original ministry or not welcome?

In my view, this reasoning is untenable in law, since it is extending the common law principle of not forcing private sectors employers to retain employees they are not willing to continue employing.

In 2006, Uganda enacted the Employment Act, which provided for reinstatement, as a possible remedy to an employee who is unlawfully dismissed from a non-public sector job unless the employer proves that such a reinstatement would cause unnecessary hardship to the employer. But as I noted earlier, the Employment Act does not apply to the appellant because he was employed in the Public Service.

2
5

The respondent in this case did not adduce any evidence to show what

unnecessary hardship Government would suffer by reinstating the appellant into his employment. It is the lower Courts that came to this conclusion, which unfortunately was not supported by evidence on record. The fact that the law now allows reinstatement even in the private sector should support the fact that reinstatement in public sector jobs, which do not depend on individual preferences, should also be possible.

Apart from the legal arguments in support of the appellant's reinstatement onto his employment, there are also other constitutional and public policy considerations, in my view, to support reinstatement of unlawfully dismissed employees back to their employment.

First of all we should also not lose sight of the fact that the appellant as a Foreign Service officer was holding a public office. Article 38(1) of the Constitution of Uganda gives Ugandan citizens a right to participate in the affairs of their government at individual level. Holding a job in the Public Service is, in my view, one way a qualified Ugandan citizen can exercise his

or her right under this Article.

Secondly, Courts should guard against a culture of impunity in employment where "errant" public officers deliberately ignore set procedures and use unconstitutional methods to kick out their juniors unlawfully, well knowing that their only remedy, after protracted legal battles such as the one the appellant has gone through, will be monetary compensation, that is if the unlawfully dismissed public employee survives through it.

In my view, Courts should not shy away from reinstating public employees who are victims of unlawful and unconstitutional conduct into their positions, where the affected employee is ready and willing to resume his/her employment. For us to do so, we will be encouraging a culture of impunity

among public officials entrusted with positions of authority. This is because such officials and others holding positions of power, will continue to engage in such unconstitutional conduct, well knowing that victims' recourse in such cases is only in monetary compensation and not in reinstatement.

Secondly, unlawful dismissals can have serious economic consequences on the affected employee. In a situation where the employee who is unlawfully dismissed had made financial arrangements based on his/her anticipated monthly salary and emoluments, the consequences of a sudden loss of a job can be devastating. This is likely to be the case where, for example, such an employee has taken out a salary loan or mortgaged his/her property with the hope of paying the loan installments out of his/her salary. Such mortgaged property may be repossessed as a result of his or her inability to service the loan. The affected employee may also be rendered unable to meet his parental obligations, among others.

The value of employment goes beyond the monetary benefits one gets.

Whereas monetary compensation can go a long way to atone for some economic losses of an employee who is unlawfully dismissed from his/her permanent and pensionable employment, loss of employment should not only be viewed from an economic angle. The sudden loss of a job on the employee can have devastating effects on the affected employee as a person, who may not only suffer a loss of sense of purpose but a range of other social- psychological effects as well. There is therefore need to also look at the professional and social fulfillment perspective and sense of stability that comes with holding the job.

It is for all the reasons above that I would order the appellant to be reinstated in his employment.

I will now turn to consider what additional remedies I would grant to the appellant.

Award for lost earnings from the date of dismissal till the date of judgment of this Court

Apart from the order reinstating the appellant into his employment, I would also award him his salary and allowances he would have earned from the date of his dismissal until the date of this judgment.

I am aware that the majority has awarded the appellant Shs. 300,000,000 being lost earnings he would have earned from 1998 (when he was dismissed) to 2024 (when he would have retired). This Court has relied on the evidence that was tendered by the appellant as proof of what his salary and allowances were, at the time he was dismissed. Basing on these monthly earnings of the appellant in 1998, the Court has, after a 20% adjustment to cater for promotions and increments to cover of the period 1998-2024, arrived at an award of 300,000,000/ = to cover what the appellant would have earned if he had not been unlawfully dismissed.

Even with the evidence that the appellant provided to the Court, I am not satisfied that this Court is in position to ascertain the arrears of salary and allowances that the appellant would have earned if he had not been unlawfully dismissed.

In *Lukyamuzi v Attorney General & Electoral Commission, Supreme Court Const. Appeal No.2 of 2007*, the appellant successfully moved this Court to quash the decision of the Speaker of Parliament, acting on the directives of the Inspector General of Government, to remove him from Parliament for failure to declare his wealth. This Court did not make a specific award of how

much the appellant was entitled to in terms of lost emoluments for the remainder of the Parliamentary term that he did not serve as a result of his unconstitutional removal from Parliament. Rather, this Court directed the Clerk to Parliament to compute the appellant's dues, which were then filed in this Court and became part of the decree of this Court.

Following our decision in the *Lukyamuzi* appeal, I would similarly order the Ministry of Public Service, working, where necessary, with the Ministry of Foreign Affairs, to compute the dues owing to the appellant from 1998 to the date of our Judgment. This directive would have to be implemented within 60 days from the date of our Judgment and to be filed with the Registrar of the Supreme Court. I would also order that when the Ministry of Public Service has done its computation, it should afford an opportunity to the appellant to study the computation and to lodge with the Ministry of Public

service within a period of 2 weeks, any concerns he may have regarding the computation, with a view to addressing any queries he may raise. Upon the Ministry's completing the re-examination of its computation, and being satisfied that it is the final computation that has been done, the Attorney General would file the computation of the appellant's dues in this Court. The amount so computed would then form the decree of the Court and would attract interest at the rate of 6% per annum from the date of our judgment until payment in full.

Payments of Appellant's Salary and Allowances from the date of our Judgment until the appellant's date of retirement

The period after our judgment i.e. 2015 - 2024 (9 years) should be treated differently from the period prior to rendering our final judgment. I would not make an order for payment of the appellant's salary after the date of our judgment.

As I observed earlier in this judgment, the employment of the appellant has never been terminated in law. Hence, after the judgment of this Court, the appellant would have been able to resume his duties with the respondent, since his employment would be continuing. The respondent would reinstate the appellant on its payroll at such level as the Ministry of Public Service would have reconstructed, and either retain him in Foreign Service or transfer him to any other Government department, (that is if this was part of his terms). The respondent would also have the option to deal with him as it deals with its other employees in continuing service including retiring him in public interest, if he qualifies for this option.

If the appellant engages in any other conduct that warrants disciplinary action after his reinstatement, the employer will also be entitled to take such disciplinary action that will be appropriate including dismissal or termination, but only after complying with the law on disciplinary action.

The appellant will only be able to hold onto his job, provided that he does the work properly. Payments to the appellant will also only become due after he has duly rendered the agreed upon services to the employer.

It therefore follows that earning his salary until his retirement age would depend on whether he continues to render his services as is required of him

under his terms of employment. It is therefore not right for us as a Court, in my view, to pre-suppose that the appellant would have served until his retirement and to impose him on the employer for the remaining 9 years.

It is also my view, that the period spanning from the date of our judgment till the appellant's retirement should not be the concern of this Court. I am not aware of any law that allows an employee to be paid salary in advance for the remainder of the years to his retirement. In this case, this amounts to 9 years advance payment. To make matters worse, this advance payment of salary will

be carrying interest at the rate of 20% per annum from 1998; the date of
the appellant's unlawful dismissal! In my view, the appellant is only entitled to earn the post judgment salary so long as he remains in service. This Court cannot predict that the appellant would have earned that salary because salary is dependent on continued employment and is earned on a monthly basis for the services provided by an employee.

I am also not aware of any law that gives Courts power to impose an employee on his employer and vice versa, by making the assumption that an employee hired on permanent and pensionable terms will serve until he or she reached retirement age. Article 40 of the Constitution of Uganda gives a

right to employee to "withdraw his labour according to law." Termination of an employment relationship, even where such employment is permanent and pensionable, is therefore possible by both the employer and the employee, provided it is done lawfully. Court's business should be to ensure that if the termination of one's employment was not done properly, the victim is accorded the appropriate remedies.

It is not therefore not right, in my view, for this Court to order payment for the duration of the appellant's remaining years of service. It goes without saying that an employment relationship can always be lawfully terminated by either party. For instance, an employee may opt to resign his job in search for greener pastures, or for better career progression opportunities. There is also the option of voluntary early retirement or retirement by the employer in public interest. On the other hand, the employee may also misbehave and hence cause the employer to terminate his employment. In the worst case scenario, an employee may die before he reaches his retirement date.

It therefore follows that such award based on the assumption that an employee

who is employed on permanent and pensionable terms will automatically serve his or her entire term until he or she attains retirement

age is, in my view, very speculative. In this particular case, it presupposes that the appellant would have worked for the government until 2024.

In *Bank of Uganda v. Betty Tinkamanyire, Supreme Court Civil Appeal No. 12 of 2007,* Kanyeihamba, JSC (as he then was) rightly rejected this claim for the

respondent employee who had been unlawfully dismissed when she had 4 years only remaining to reach her retirement age. In his judgment, he argued thus:

“The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.”

I entirely agree with the reasoning above. In cases where an employee is unlawfully dismissed from permanent and pensionable service, the Court should, in my view, be only concerned with the period from the date of the unlawful dismissal up to the date of its judgment. Once the Court has ordered the employee to resume his employment, the laws and regulations that regulate his employment should kick in.

It therefore follows that my order for reinstatement of the appellant into his employment would make it unnecessary for me to order for the payment of the appellant’s salary and allowances after our judgment.

What rate of interest should be awarded on the Appellant’s emoluments and for what duration?

The majority has ordered that the appellant be paid interest at 20% on 300,0,000/=, from the date of his dismissal till payment in full.

As I pointed out earlier in this judgment, I do not agree with this award but rather with an award properly computed by the Ministry of Public Service.

However, since the majority have ruled in favour of awarding the appellant the 300,000,000/= as special damages for lost earnings, I will briefly comment on the additional order that has been made to award a 20% interest rate on this sum. This rate of interest is very high and unjustified, in my view, when one takes into account the fact that this transaction was not a commercial transaction.

I appreciate the fact that the appellant has been denied enjoyment of his salary for 17 years since 1998. However, I am also cognizant of the fact that the appellant is also going to get a lump sum payment instead of the monthly salary he would have received if he had not been unlawfully dismissed.

I would instead award interest at the rate of 6% per annum on the salary and allowances he would have earned as computed by the Ministry of Public Service, from 1998 when he was dismissed till the date of our judgment.

But apart from the rate of interest, I am also unable to agree that the appellant's lost earnings after our judgment, comprising of up to 9 years of what would have been his monthly salary and earnings, from the date of this judgment until the appellant's year of retirement in 2024, will be attracting interest from the date of his dismissal in 1998! The appellant was due to retire in 2024 if he had not been unlawfully dismissed from service. Until then, he would have continued, like all other government employees, to earn his salary and allowances on a monthly basis. So, if he was terminated prematurely and unlawfully, the salary he would not have earned i.e. from 2015 (after our judgment) till 2024 (when he would have retired) cannot

and should not earn interest from 1998 when he was dismissed. I would therefore not award interest on this salary. As I argued earlier in this judgment, reinstating the appellant into his employment would avoid this scenario.

General Damages

The majority have awarded the appellant Shs. 150,000,000/= as general damages for the inconvenience and embarrassment he has suffered as well as loss of future earnings. I find this award unjustifiably high, given that the award of 300,000,000/= already covers the entire period up to the year the appellant would have retired from public service. It therefore follows that under the formula used by the majority, he has not lost any future earnings, since he will have been paid for the entire period from the date of dismissal to the date of retirement.

Given that I would order his resumption of his duties as opposed to the lump sum payment of 300,000,000/=, in addition to payment of his dues from the date of his dismissal to the date of our Judgment, I would accordingly award him 50,000,000/= shillings as general damages. This order takes into account the fact that under my judgment, the appellant would also be able to earn his pension. My award of general damages also takes into account the

fact that much as the appellant had been unlawfully dismissed from his employment, he had a duty to mitigate his loss by seeking alternative employment during the entire time he was pursuing his claims in Court. This amount would attract interest at 6% per annum from the date of our Judgment.

Conclusion

I would therefore allow this appeal to succeed in part and make the following Orders:

- a) That the Ministry of Public Service computes the appellant's dues from 1998 (the date of his dismissal) to the date of our judgment, not later than 45 days from the date of this Judgment.
- b) That the computed dues should be filed by the respondent with the Registrar, Supreme Court, not later than 60 days from the date of our Judgment.
- c) That immediately after the computation of his dues, the Public Service Commission should reinstate the appellant to his employment either in the Ministry of Foreign Affairs or in any other Ministry to the level commensurate with the last computed salary he would have been earning at the time of the Judgment of this Court.
- d) That, in the event that the appellant cannot be reinstated in his employment, the respondent should arrange to retire him in public interest but with full benefits calculated on the basis of the last computed salary he would have been earning at the time of the Judgment of this Court.
- e) That the appellant be paid Shs. 50,000,000/= as general damages for the inconvenience he has suffered as a result of the unlawful decision of the Public Service Commission.
- f) That the appellant be paid his salary in lieu of leave from the date of his dismissal till the date of our Judgment.
- g) That the appellant be paid all the other awards that were made by the trial Judge, which are listed in the Judgment of Odoki, Ag. JSC,

Order of the Court

As the rest of the members agree with the Judgment of Odoki, Ag. JSC, this appeal is allowed in part on the terms proposed by him in his lead Judgment.

Dated at Kampala this 8th day of April 2015

HON.DR.ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA**

AT KAMPALA

(CORAM: Dr.Kisaakye, Arach-Amoko JJ.S.C; Dr.Odoki, Okello, Kitumba, Ag. JJ.S.C).

CIVIL APPEAL NO.06 OF 2012

BETWEEN

OMUNYOKOL AKOL JOHNSON.....

APPELLANT

AND

ATTORNEY GENERAL.....

RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala

*(Byamugisha, Kavuma, Nshimye JJ.A.) dated 29th May, 2012 in Civil Appeal No. 71
of 2010).*

JUDGMENT OF ARACH-AMOKO. JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother the Hon. Odoki Ag. JSC and I agree that the appeal succeeds partially. I also agree with the orders proposed by him.

Delivered at Kampala this. **8TH** Day of **APRIL** 2015

M.S ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT Kampala
(CORAM: KISAAKYE, ARACH-AMOKO, JJSC , ODOKI, OKELLO
AND KITUMBA, AG. JJSC)

CIVIL APPEAL NO. 06 OF 2012 BETWEEN

OMUNYOKOL AKOL JOHNSON.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

**Appeal from the decision of the Court of Appeal at Kampala Byamugisha (RIP),
Kavuma and Nshimye JJA) dated 29th May 2012 in Civil Appeal No. 71 of 2010**

JUDGEMENT OF OKELLO, AG. JSC

I have had the benefit to read in draft the Judgment of my learned brother Justice Dr. Odoki, Ag. Justice of the Supreme Court and I agree with him that this Appeal should succeed partially. I also agree with the Orders he has proposed.

Dated at Kampala 08 TH.....day of APRIL.2015,

G.M. OKELLO
AG. JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

**(CORAM: KISAAKYE, ARACH-AMOKO, JJSC, ODOKI, OKELLO, KITUMBA,
AG.JJSC)**

CIVIL APPEAL NO. 06 OF 2012

BETWEEN

OMUNYOKOL AKOL JOHNSON:..... APPELLANT

AND

ATTORNEY GENERAL;..... RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Byamngisha,
Karuma and Nshimye JJA) dated 25th May 2012 in Civil Appeal No. 71 of 2010]*

JUDGMENT OF KITUMBA, AG.JSC.

I have read in draft the judgment of my learned brother Justice Dr Odoki, I concur
with it and the orders proposed therein.

Dated at Kampala, this 8TH DAY OF APRIL

2015

■

JUSTICE OF THE SUPREME COURT