THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: *Tumwesigye; Arach-Amoko; Mwangusya; Opio-Aweri; Mwondha; JJ.S.C.*

CIVIL APPEAL NO. 005 OF 2016

Between

HILDA MUSINGUZI ..... APPELLANT

And

STANBIC BANK (U) LTD ..... RESPONDENT

(Appeal from the Judgment and orders of the Court of Appeal Kampala by Kasule, Bossa and Butera, JJA dated 4th November 2015 in Civil Appeal No 28 of 2012)

JUDGMENT MWANGUSYA, JSC

The appellant, Hilda Musinguzi sued the respondent in the High Court seeking damages for unlawful termination of her employment contract. The respondent pleaded that the appellant's contract had been lawfully terminated after according her a hearing and paying her terminal benefits as was provided in her employment contract and in accordance with the Employment Act, 2006

At the commencement of the trial the parties agreed on the following facts:-

1. The appellant was employed by Uganda Commercial Bank (UCB) on the 27th April 1988
2. In 2002, the defendant acquired Uganda Commercial Bank Ltd, the successor in title of Uganda Commercial Bank and became the plaintiff's employer effective 1st January, 2003.
3. On 13th March 2006, the plaintiff was appointed as service centre head Bundibugyo.
4. On the 12th November 2007, following a Robbery at Bundibugyo Service Centre, the plaintiff was suspended pending investigation.
5. On the 10th March 2008, the defendant terminated the plaintiff's employment without notice.
6. Subsequently on 30th May 2008 the defendant paid to the plaintiff shs3,44,569/= stated to be 3 months' pay in lieu of notice, 12 days outstanding leave, half pay for December to February, 2008 and March 2008 salary, computed after deducting PAYE and miscellaneous loan.

Two issues were framed for trial namely,

1. Whether the termination of the plaintiff's employment was unlawful and/ or unfair.
2. Remedies available to the parties.

At the conclusion of the trial the trial judge (Elizabeth Musoke) found that appellant's contract was lawfully terminated and was not entitled to any damages for unlawful dismissal.

The appellant appealed to the Court of Appeal which upheld the finding of the trial judge and dismissed her appeal. Hence her appeal to this Court.

The memorandum of appeal raises the following grounds:-

1. The learned justices of Appeal erred in law when they failed to properly re-evaluate the evidence on record.
2. The learned justice of Appeal erred in law and fact when they upheld the finding of the trial Court that the appellant was not dismissed from employment.
3. The learned justices of appeal erred in law and fact when they held that the termination of the appellant's employment was after due process.
4. The learned justices of Appeal erred in law and fact when they held that the termination of the appellant's employment was lawful and fair.

The appellant was represented by Mr. Nerima Nelson while Mr. Isaac Walukaga appeared for the respondent. Both Counsel filed written submissions which they adopted at the trial with Counsel for the respondent making only a few corrections.

Counsel for the appellant opted to argue all the grounds of appeal together. According to him the crux of the appeal is whether the appellant was lawfully dismissed from the employment which has been the contention throughout the trial of this case

He faulted the Court of Appeal for failing to re-appraise the evidence on record and simply reproducing the finding of the High Court judge verbatim. According to him if their Lordships had properly re-evaluated the evidence they would have found that the appellant was dismissed on un-proved grounds making the dismissal illegal. He submitted that the illegality stemmed from the fact that the appellant

had been dismissed without notice for alleged gross negligence leading to a loss of Shs.1,281,960,000/= which had not been proved. He cited section 2 of the Employment Act which defines dismissal from employment, Section 68 which provides for proof of reason for termination and Section 69 which provides for summary termination. He concluded that the termination of the appellant's employment amounted to summary dismissal because it was without notice and was due to alleged gross negligence that ought to have been proved but wasn't.

In his submissions Counsel for the respondent opted to argue grounds 3, 4 and 1 together and conclude with ground 2. He submitted that according to the agreed facts and issues already set out in this judgment the appellant was terminated and not dismissed and the issue framed by the Court of Appeal was whether the termination of the appellants employment was lawful and or unfair which was the same issue framed at the commencement of the trial. He submitted that the issue of dismissal now being introduced by the appellant was not the issue before both the High Court and the Court of Appeal and should not be introduced at this stage. He cited Section 6 of the Judicature Act (Cap 13) for the proposition that the appellant can only take out a second appeal to this Court on matters where the Court of Appeal has confirmed, varied or reversed the decision or orders of the High Court. He stated that as a second appellate Court this Court is not required to evaluate evidence in the same manner as the first Appellate Court would but to decide whether the first appellate Court on approaching its task applied the relevant principles properly.

On ground 3 of the appeal Counsel submitted that the propriety of termination of an employment Contract is informed by the Employer's compliance with the Law and the Contract executed with the Employee. The issue as to whether the termination of the appellant's employment was unlawful and/ or unfair was informed by this consideration.

The finding of the High Court which was upheld by the Court of Appeal was that a disciplinary hearing had found that the appellant had left her Branch without handing over to her junior as required by her Employers regulation, and during her absence there was a Robbery at the bank. She had also allowed her staff and SAFI Cleaners to watch DSTV over weekends thus compromising the security of the Bank. She was paid in lieu of the requisite three months' notice and this fact was admitted by both parties at the commencement of the trial. He submitted that Section 68 (I) and (2) were not applicable because the appellant's services were terminated and the provisions on dismissal were not applicable.

In rejoinder Counsel for the appellant emphasised that under Rule 30 of the Court of Appeal Rules the Court had a duty to re-appraise the evidence relating to the matters into contention and not merely reproducing the finding of the trial Court and agreeing with them. He submitted that the Court of Appeal evaluated the respondent's evidence in isolation and disregarded the appellant's case. On the distinction between termination and dismissal he described the various ways of terminating a contract of employment to include termination with notice, termination with payment in lieu of notice, dismissal and summary dismissal and concluded that the appellant's

termination was by dismissal and was unlawful. That the termination letter was with immediate effect and not a termination with notice or payment in lieu of notice.

I will resolve the issue as to whether or not the appellate Court properly evaluated the evidence before coming to the same conclusion as the trial Judge that the dismissal of the appellant from her employment was lawful. The role of the Court of Appeal as the first appellate Court and the Supreme Court as a second appellate Court was discussed in the case of **Fr. Narsensio Begumisa and others and others Vs Eric Tibedaga (Supreme Court Civil Appeal No 17 of 2002) [2004] UGSC 18 (22 June 2004)** as follows:-

> **"I notice the slight change from the wording of the otherwise identical predecessor to that rule r. 29(I) of the Court of Appeal for East African Rules, 1972, which provided that "the Court shall have power, (a) to re-appraise evidence ....."**
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> **In my view, however, that change did not alter the purport of the rule. By either wording, the rule declares the Court's power to re-appraise evidence, rather than impose an obligation to do so. The legal obligation on the first appellate Court to re-appraise evidence is founded in Common Law, rather than in the rules of procedure. It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as the Law. Although in a case of conflicting evidence the appeal Court has to make due allowance for the fact it**

has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own conclusion. This principle has been consistently enforced, both before and after the slight change I have alluded to. In Coghlan Vs Cumberland (1898) I Ch. 704 the Court of Appeal (of England) put the matters as follows:-

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case and the Court must reconsider the materials before the judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong ..... when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be and other circumstances, quiet apart from the manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the Court from differing from the judge even on a question of fact turning on the credibility of witness whom the Court has not seen."

The issue facing the Court of Appeal was not turning on the demeanor or credibility of witness because the material facts relating to the termination of the appellant from her employment had been admitted at the beginning of the trial. The trial Court laid out the factors and circumstances leading to the termination of the appellant's employment and came to the conclusion that the termination had been unlawful. The Court of Appeal, after laying down the reasoning and finding of the High Court came to the same conclusion.

The complaint by the appellant that the Court of Appeal did not properly re-evaluate the evidence on record is not well founded because the Court pointed out the evidence as had been considered and relied on by the trial Court and recorded its full agreement which to me was a matter of style. This Court can interfere in those concurrent findings only if satisfied that the two Courts were wrong and or applied wrong principles of the law.

In order to satisfy myself that the two Court applied the right principles it is necessary to consider the principles governing termination of an employment contract and apply them to the present case which will answer the original issue framed by the trial which was also the basis for the concurrent finding by the two Courts that the appellants contract had been lawfully terminated. At this juncture I wish to set the contents of the letter addressed to the appellant leading to the termination of her services with the respondent Bank.

"Dear Hilda.

Re Termination

Refer to the staff commendation and disciplinary Committee which you attended at the Bank's Head Office on 29th January, 2008 with respect to gross negligence under dereliction of your duties.

I wish to inform you that you have been terminated from Stanbic Bank with immediate effect.

Please hand over all company property in your possession, including the Bank Identity Card to your Line Manager."

The heading of the letter is Termination and the terminology used in the letter is that the appellant had been terminated. Under section 2 of the Employment Act dismissal from employment is defined as discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct. On the other hand termination of employment means the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc. The Act seems to use the two terms interchangeably as demonstrated by section 68 which I will discuss later. Both definitions contain the word discharge. The discharge of the appellant was not at the expiry of her contract, attainment of retirement age or any other related cause but for misconduct for which she was subjected to a disciplinary process before she was discharged. In order to understand as to whether or not her discharge was unlawful and/or unfair and the consequences that follow I will discuss not only the principle but also the application of the Employment Act which govern both the employer and employee

in their relationship during employment and the rights if any that may accrue at the termination of the employment.

The starting point is that normally an employer cannot be forced to keep an employee against his will and S. 65 (I) (a) provides that termination shall be deemed to take place where the contract of service is ended by the employer with notice. In the case of **Barclays Bank of Uganda Vs Godfrey Mubiru (Supreme Court Civil Appeal No 1 of 1998)** Kanyeihamba, JSC described the process of termination of a contract of employment as follows:-

> **"In my opinion, where any contract of employment like the present stipulates that a party may terminate it by giving notice of specified period, such contract can be terminated by giving the stipulated notice for the period in default of such notice by the employer the employee is entitled to receive payment in lieu of notice and where no period of notice is stipulated, compensation will be awarded for reasonable notice which should have been given depending on the nature and duration of employment. Thus in the case of Lees Vs Arthur Greaves Ltd (1974) I C.R. 501, it was held that payment in lieu of notice can be viewed as ordinary giving of notice accompanied by a waiver of services by the employer to terminate by notice. Indeed in the English case of Rex Vs Stewart Jefferies Parker Ginsberg Ltd 1988 I. R. L. R. 483 at p. 486 it was held that notwithstanding statutory or employment contract provisions, if the parties agree upon a payment in lieu of notice for a period shorter than stipulated the employer is entitled to terminate the contract of**

employment by offering the payment in lieu of notice. The right of employer to terminate the contract of service whether by giving notice or incurring the penalty of paying compensation in lieu of notice for the duration stipulated or implied by the contract, cannot be fettered by the Courts. The employee is only entitled to compensation only in those cases where the period of service is fixed without provision for giving notice. "

The respondent exercised a recognised Employer's right to terminate the appellant's contract. It was admitted at the trial that the appellant was paid a sum of Shs3,440,569/= in lieu of notice, 12 days outstanding Leave, half pay for December 2007 to February 2008 and the March 2008 salary. The payment in lieu of notice was made after the appellant had raised a complaint that her termination had not complied with the Employment Act and in compliance with the Act a payment was made and to me it is immaterial that the payment was made after the termination of the contract because once the payment was made as a corrective measure the respondent cannot be faulted for not meeting the requirement of the Employment Act, 2006.

The appellant faulted the respondent for termination of her employment without proof of reason for termination as required under Section 68 of the Employment Act which provides as follows:-

"68. Proof of reason for termination.

1. **In any claim arising out of termination the employer shall prove the reason for the dismissal, and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of Section 71.**

2. **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.**

3. **In deciding whether an employer has satisfied this section, the contents of a certificate such as referred to in section 61 informing the employee of the reasons for termination of employment shall be taken into account." (underlining for emphasis)**

S 68 (I) demonstrates that the words 'dismissal' and termination are used interchangeably. As already observed the discharge of the appellant was a dismissal and a reason was assigned for her discharge. It is not disputed by both parties that the appellant was first suspended on 2th November, 2007 following a robbery at Bundibugyo Service Centre. The appellant was given notification of a disciplinary hearing which was conducted on 23rd January 2008. During cross examination the appellant testified that between September 2007 and January 2008 she was subjected to three disciplinary proceedings each of which related to independent and distinct incidents.

The letter of termination refers to the disciplinary hearing on 29th January 2008 for negligence under dereliction of duty. In the case of **Barclays Bank of Uganda Vs Godfrey Mubiru** (Supra) where the respondent had committed breaches for which he had been warned Justice Kanyeihamba makes the following observation.

"The above documentary information and instruction show clearly the great importance the appellant attached to the powers and lending limits of the Respondent as a Bank branch Manager. In my opinion ignoring them or repeatedly exceeding them coupled with failure to report the same to the appellant would amount to a fundamental breach of his contract by the Respondent. Managers in the banking business have to be particularly careful and exercise a duty of care more diligently than mangers of most businesses. This is because bank manage and control money belonging to other people and institutions, perhaps in their thousands and therefore are in special fiduciary relationship with their customers whether actual or potential. Thus in, Harmer Vs Cornelius C. 1858 5 C.B. (N. S) 236, it was held that where an employee held himself out as being skilled to do a certain type of work and is employed on that basis impliedly undertakes that he possess and will exercise reasonable skill or competence in that work. Moreover it is my opinion that in the banking business any careless act or omission if not quickly remedied, is likely to cause great losses to the Bank and its customers. Loose talk, irregular or unconditional banking acts or behaviour could lead to speculation about and the undermining of the reputation of the appellant and therefore loss of customers and investors upon which the existence and business of a bank depend....."

The above observation underlies the fact that while the Law protects employees from unlawful terminations of their employment they are

accountable to their employers for acts which in course of their duties may compromise the interests of their employers. My reading of Section 68 (2) of the Employment Act, 2006 is that it does not impose such a high standard of proof of the reasons for termination as would be required in a Court trial. If the respondent believed that the appellant committed acts of and/or omissions which compromised the security of the Bank leading to a loss of some money in a robbery the respondent was justified in terminating her contract because a lot is expected of an employee charged with the responsibility of running a Bank facility as was stated in the case of **Barclays Bank of Uganda Vs Edward Mubiru** (Supra). The respondent was in my view rightly held accountable for the loss in the Branch and as already stated the right of an Employer to terminate a contract cannot be fettered by the Courts so long as the procedure for termination is followed to ensure that no employee's contract is terminated at the whims of an employer and if were to happen the employee would be entitled to compensation.

Following from the above discussion I agree with both Courts below that the termination of the appellant's contract was lawful. She was accorded a fair hearing judging from what she stated in Court. She was paid all her entitlements in accordance with Section 65 of the Employment Act and having found no reason to interfere with the concurrent finding of the Courts below I find no merit in this appeal which I would dismiss with costs.

Dated at Kampala this 28th day of SEPTEMBER 2017

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Hon. Justice Mwangusya Eldad

JUSTICE SUPREME COURT

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

(CORAM: Tumwesigye, Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, JJSC.)

CIVIL APPEAL NO. 05 OF 2016.

BETWEEN

HILDA MUSINGUZI::APPELLANT

AND

STANBIC BANK (U) LTD::RESPONDENT

{Appeal arising from the judgment of the Court of Appeal at Kampala (Kasule, Bossa and Buteera, JJA), in Civil Appeal No. 28 of 2012 dated 4th November, 2015}.

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Mwangusya, JSC, and I agree with his decision that this Appeal should be dismissed with costs.

Dated at Kampala this 28th day of SEPTEMBER 2018

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M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Tumwesigye; Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, JJ.S.C.

CIVIL APPEAL NO. 005 OF 2016

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AND

STANBIC BANK (U) LTD::RESPONDENT

(Appeal from the Judgment and Orders of the Court of Appeal at Kampala by Kasule, Bossa and Buteera, JJA, dated 4th November 2015 in Civil Appeal No. 28 of 2012)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft the judgment of my learned brother Mwangusya, JSC. I agree with him that the appeal has no merit and should be dismissed with costs.

Dated at Kampala this.......28th..........day of...SEPTEMBER.......2018.

OPIO-AWERI

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: *Tumwesigye; Arach-Amoko; Mwangusya; Opio- Aweri; Mwondha; JJ.S.C.*

CIVIL APPEAL NO. 005 OF 2016

Between

HILDA MUSINGUZI ..... APPELLANT

And

STANBIC BANK (U) LTD ..... RESPONDENT

(Appeal from the judgment and orders of the Court of Appeal Kampala by Kasule, Bossa and Butera, JJA dated 4th November 2015 in Civil Appeal No 28 of 2012)

JUDGMENT MWONDHA, JSC

I have had the opportunity to read in the draft judgment of my brother Hon. Justice Mwangusya, JSC. I agree with his reasoning, decision and order. There's no merit in the appeal and would be dismissed with costs.

Dated at Kampala this 28th day of SEPTEMBER 2018

Mwondha

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: TUMWESIGYE; ARACH-AMOKO; MWANGUSYA, OPIO-AWERI, MWONDHA, JJ.SC)

CIVIL APPEAL NO: 05 OF 2016

BETWEEN

HILDA MUSINGUZI :: APPELLANT

AND

STANBIC BANK (U) LTD ::RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Kasule, Bossa and Buteera, JJA) dated 04th November, 2012]

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Justice Eldad Mwangusya, JSC and I agree that this appeal lacks merit and it should be dismissed.

As all members of the court also agree, the appeal is dismissed with costs.

Dated at Kampala this 28th day of SEPTEMBER 2018

Hon. Justice Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT