THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL SUIT NO 27 OF 2011

GAKURU PAUL::PLAINTIFF

VERSUS

SOUTHERN RANGE NYANZA TEXTILES ::::::::::::::DEFENDANTS

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

1.0 **Introduction and brief background.**

1.1 The Plaintiffs through M/s Bashasha & Co., Advocates presented this action seeking general damages for unlawful or wrongful termination of his employment and costs. He contends that he was on 18/2/2012, employed as a human resource assistant of the defendant, and was terminated on 25/8/2012, without justifiable cause and without notice.

1.2 The defendants were represented by M/s Sebalu & Lule Advocates. They contended in defence that the plaintiff failed to carry out his work diligently during the probation period and its extension, and as a result, his services were terminated in accordance with his appointment letter and the law. Further, that all his terminal dues were paid at the date of termination.

1.3 Evidence was adduced both by oral testimony and a witness statement and counsel presented written submissions as directed.

2.0 The following were raised as agreed issues for determination:-

a) **Whether the plaintiff was still on probation at the time of termination of his contract of employment?**
b) **Whether the plaintiff's employment contract was lawfully terminated?**
c) **Whether the plaintiff is entitled to the remedies sought in the plaint?**

3.0 **Resolution of issues.**

Whether the plaintiff was still on probation at the time of termination of his contract of employment?

3.1 It was an agreed fact that the on 18/2/2012, the plaintiff was employed by the defendant as a human resource assistant on probationary basis for a period of six months, with a salary of Shs. 750,000 per month. It was also not in contention that his services were terminated on 25/8/2012 and he was paid seven days salary in lieu of notice. It was submitted for the plaintiff that the probation period continued until 18/8/2012 and since his contract of service continued, it is deemed that his employment was confirmed and he became a permanent employee after that date. It was argued that the probation period was never extended by agreement as required by Section

67(2) of the Employment Act 2006 (hereinafter referred to as the Act).

3.2 It appears that the nature of the plaintiff's employment was not in contest. In clause 6 of his letter of employment it is stated that:

"the probation period is for a period of six months from the date of assumption of the duty. Probation may be extended for another six months' period to facilitate our adequate training or settlement into the company before confirmation in accordance with S.67 (2) of the Employment Act 2006".

It is provided in S.67 (2) of the Act that:

"The maximum length of probationary period is six months, but it may be extended for a further period of six months <u>with agreement of the employee"</u> Emphasis of this Court.

3.3 Both the plaintiff's letter of appointment and the defendant's human resource manual made provision for terms of probation and its extension. It was specifically stated in the appointment letter that probation would be subject to the provisions of the Employment Act. On the other hand, according to the HR manual (paragraph 1.6.5.) at the end of the probation period, where the probation period is neither terminated nor extended, the confirmation would be automatic, such confirmation to be done in writing.

3.4 It is not in contention that the plaintiff's employment was never terminated in the first six months of his employment. The defendant claims to have extended it after probation

ended six months as way of assisting him to improve in his duties. However, nothing was advanced to show that the period after 18/8/12 was an extension of the probation period. According to the Act, an extension can only be lawful if made in agreement with the employee.

3.5 According to DW1 (paragraphs 3.4 and 3.5 of her statement), the plaintiff was advised of the extension which he agreed to. It is not shown how and when that important notification was made and where it is strongly denied by the plaintiff, he must be believed. Although confirmation had to be in writing which was not done, the defendant as employer and not the plaintiff would be at fault. The plaintiff stated that he did raise the issue of his confirmation with Okello his immediate supervisor, but his concerns were not addressed. That notwithstanding, by retaining the plaintiff in their employment after 18/8/12, and for the plaintiff to continue carrying out the duties for which he was appointed, it is deemed that his employment of service was confirmed by implication. I am bound to follow the decision in **Ahmed Ibrahim BholmVrs Car & General Ltd SCCA 12/2002** that once the probation period lapses without a termination, the contract becomes effective. It follows therefore that, even in the absence of a written order confirming the employee in employment, an employee who has completed the statutory period of probation is deemed to have been confirmed.

3.6 I would resolve this issue to hold that at the time that the plaintiff's services were terminated, his employment was on permanent and not probation basis.

4.0 **Issue 2: Whether the plaintiff's employment contract was lawfully terminated?**

4.1 As rightly pointed out by defendant's counsel, a court considering whether a dismissal was unfair or unlawful, the provisions of S.73 (2) of the Act would apply. The Court should consider the conduct and capability of the employee prior to the termination, procedures adopted by the employer in reaching the decision to dismiss the employee, communication of that decision to the concerned employee and the handling of any appeal against the decision to terminate. I emphasize that where the contract of service has been reduced into writing as was the case here, the parties are bound by its terms and the employee will expect to be dismissed only in accordance with the procedure agreed upon by them. See **Wilson WanyamaVrs Development & Management Consultants International HCCS 332/2004.**

4.2 The plaintiff testified that he diligently carried out his assigned duties and he was never reprimanded or warned about incompetence. That he was not party to any disciplinary proceedings and received no notification of his dismissal. He deemed his termination as unjustified and unlawful. It would thus become incumbent upon the defendant to show that the

dismissal was fair and made in accordance with the terms and conditions of service binding them with the plaintiff. They must in addition show that they acted reasonably in dispensing with the plaintiff's services. See for example, **Robert Mukembo Vrs Ecolab East Africa (U) Ltd HCCS No. 54/2007.** It was for that reason submitted for the defendant that the plaintiff failed to perform his tasks or to keep proper records and assumed roles that were not assigned to him. It was submitted further that a formal procedure including a disciplinary hearing was followed before he was terminated.

4.3 The settled position in our law is that an employee has the right to terminate the services of an employee at any time and for any reason, or for none. As I have said, such termination must be in accordance with the Act and any terms in a contract of service and the rules and regulations governing the employment, if any. See **Robinah Sajjabi Vrs UCB HCCS No. 506/1996 and Barclays Bank of Uganda Vrs. Godfrey Mubiru SCCA No. 1/1998.** In this case, the defendant chose to give reasons for the termination. There were four listed counts in the letter of termination as follows:

- ✓ Failure to exhibit results in controlling absenteeism at the department level
- ✓ Failure to exhibit results in controlling missing out punches
- ✓ Failure to play his role in managing the monthly performance appraisal forms at the department level
- ✓ Failure to ensure proper record keeping of the HR records

4.4 The plaintiff testified that at inception of duty, the defendant did not assign him or define his actual duties but admitted that most of the defendant's employees were casual workers. Indeed the plaintiff's duties were not included in the contract but DW1 in her testimony enumerated them to be control of absenteeism of company workers, reinforcement of the workers' *"punch in and out"* system and management of appraisal forms at the department level. The plaintiff admitted that his work depended mostly on these casual workers and that he strived to ensure their attendance using the attendance register. From his conceded involvement with the *"punch in and out system",* I am prepared to believe that the plaintiff was responsible for controlling absenteeism at department level.

4.5 That said it is not clear how the plaintiff was expected to ensure attendance of the workers. According to DW1 he was expected to 'sensitize' the workers to avoid absenteeism and advise them of its consequences to their pay.Further that the plaintiff was expected to have an absenteeism register and a charge sheet. The latter was meant to act as a warning to erring workers and she did admit absenteeism registers existed but were not available in Court. The plaintiff admitted that there was absenteeism at department level as well as *"missing out"* punches. He explained however that he tried as much as possible to get the employees to work. That the finger register was managed not by him but by the departmental managers who signed the print outs of the register and

forward to him to make the final entries into the records. He explained that the register which was an IT component would sometimes fail and the register would give faulty records omitting to include some attendances which would at times necessitate manual verification. That the problem of *"missing out punches"* was also attributed to the same fault. He stated that management was notified of the faulty system but no amends were made.

4.6 Further it was stated that at inception of his employment, the defendant had no performance appraisals, a matter he brought up first with one Irene and then Okello. It is not clear whether any appraisal forms were made available and whether the plaintiff failed to manage them. No evidence was called from any supervisor or departmental manager to show that the plaintiff failed to cooperate with them to have the appraisals done.

4.7 In his testimony, the plaintiff stated that the duties of record keeping did not fall under his docket. That the defendant employed three record keeping officers who held that mandate and were under the supervision of Okello. This would dispel the accusation that the plaintiff failed to ensure proper record keeping of human resource records, an accusation which was in fact not fully substantiated. DW1 was not clear about which documents were poorly maintained or lost and her contention that the plaintiff failed to supervise the persons concerned with record keeping, was at best, vague.

4.8 In general the plaintiff's actual duties and the extent of his powers in the different departments were not very clear. DW1 did admit that at the inception of his employment, the plaintiff was verbally informed of his duties by Ms. Irene Mboga his immediate supervisor. In my view, the plaintiff demonstrated that he did his level best to carry out his responsibilities and his evidence did not receive strong rebuttal. Although verbal warnings are permitted under the HR Manual (paragraph 7.4), it is not clear if and when he was warned about his shortcomings. There being no documentation of the alleged interactions during June 2012, I choose to believe that none happened. The performance appraisal form admitted as DEX 3 was a document generated by the defendant. It was not shown that it was ever brought to the plaintiff's attention or that he was given a chance to rebut it or explain some of its contents while still in employment.

4.9 Submissions made for the defendant seemed to suggest that the termination was by summary dismissal. I disagree. The defence evidence strongly points to the fact that the plaintiff had prior warnings of his incompetence, was given notice of a disciplinary hearing and paid his terminal benefits. This would point to an ordinary termination. Indeed, the plaintiff's contract made provision for termination in accordance with S.58 of the Act. It is provided under that section that termination is possible only after notice in writing to the employee in a language that they understand. Further that an employee who has served for a period of six months but less

than a year is entitled to notice of not less than two weeks. After my findings in the first issue, the plaintiff fell under that category of employees and those provisions appear to be mandatory.

4.10 To the contrary, the plaintiff contended that he had no notice of any disciplinary proceedings or of his termination. He explained that one Saturday morning, Ms. Irene Mbogga informed him that he was expected for a meeting in the board room. He proceeded there to find Ms. Masibo and a security guard with a termination letter reliving him of his services w.e.f. 25/8//12. That the letter was handed over to him after which he was marched off the premises by the security guard. He admitted receiving his August salary and seven days salary in lieu of notice. He denied facing the disciplinary committee and argued that his termination should have been signed by the General Manager and not Ms. Mbogga, the human resource manager.

4.11 In paragraph 5.3 of her statement, DW1 stated that the plaintiff was notified to attend a disciplinary hearing which was scheduled for 4/8/12 and therein informed of the infractions to which he was expected to answer. That he was even advised that he was allowed to bring along a colleague to the hearing whose time and venue was indicated. None of those facts were reduced into writing and since the plaintiff denied receiving any formal invitation to a disciplinary hearing, I am persuaded that there was no notice of such a

meeting or his imminent termination, and the defence did not offer any in their evidence. It is not even explained why the plaintiff was advised to bring along *"a colleague",* as such an important and incriminating meeting would call for the attendance of the employee's legal counsel or such supportive person. Such an invitation would infact strengthen the plaintiff's assertion that he believed he was being invited for a meeting just like any other ordinarily called by the company.

4.12 The procedure to be followed before termination was well submitted by both counsel. It is provided under S.66 of the Act that:

"An employer shall before reaching a decision to dismiss an employee on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal".

Beyond the contract of service, the right to notice was emphasized in the HR Manual which in paragraph 7.3 provides that in all cases where disciplinary action is to be taken, the employee has a mandatory right to a hearing and right of appeal.

4.13 The defendant argues that the meeting of 4/8/12 was a disciplinary hearing and their counsel's argument is that a disciplinary body should not be expected to hold strict adherence to procedures as those applied in the Court of law. See for example, **General Medical Council Vs Spackman (1943) ALL ER 627**. With respect, I have not been persuaded

that the meeting which the plaintiff attended on 4/8/12 constituted a disciplinary hearing preceding his termination. Even where I were to believe so, in my estimation, the proceedings were so flawed and fell short of what was expected of such proceedings in accordance with the HR Manual and the Act.

4.14 **DEX 5** are minutes of a meeting held in the defendant's visitor's room on 4/7/12 (and not 4/8/12 as stated by DW1 and her counsel). The minutes were recorded by Mrs. Sarah Masibo W. and the purpose was to *"..advise Paul Gakuru on his performance and professional ethics"*.Indeed the contents of the minutes indicate the proceedings to have been more to do with guidance and advise to the plaintiff to improve on his input as a team member, improvement of his professional ethics and control of absenteeism and record keeping. It is not shown that the plaintiff was made fully aware that he was attending disciplinary proceedings and no specific counts (the type that were included in termination letter) were read out to him inviting specific responses to explain or exonerate himself.

4.15 Specifically, it is not shown that he was given a chance to defend himself of any allegations of incompetence with regard to staff attendance, appraisal and record keeping which would be a contravention of S.66 of the Act that created a mandatory right to a hearing before termination. The fact that the plaintiff accepted his weakness and promised to change for the better would have no bearing on his termination because there was

no definite decision taken and communicated by management as an account of the disciplinary proceedings and it was concluded with only emphasis on all the aspects raised, since the plaintiff had admitted to change for the better. **DEX 4** (an alleged apology by the plaintiff) would also have no bearing to his termination because it was made on 3/4/12 well before the alleged disciplinary hearing. Infact, assumption of non-assigned duties or insubordination was not one of the reasons advanced for the plaintiff's termination.

4.16 The HR Manual did not indicate the constitution of the disciplinary body of the company. Going by **DEX 5**, the meeting was chaired by Ms. Mbogga (HRM). The only other two attendees were Ms. Masibo and the plaintiff. Although Ms. Mbogga could handle such a disciplinary function, under paragraph 7.3 of the HR Manual, all dismissal cases are the preserve of the General Manager.It was not shown that Management was aware of the disciplinary steps being taken against the plaintiff neither is there evidence that the matter was referred to the General Manager for action. Certainly Ms. Mbogga had no powers to sign the termination letter. She did not indicate that she was acting on the instructions of the General Manager and thus, the letter of termination dated 25/8/2012 would be void.

4.17 I would conclude by holding that the process of terminating the plaintiff's contract of service was not lawful. He was not given notice of disciplinary proceedings or his pending

termination, the reasons for terminating his services were not properly communicated and, he was not given a chance to defend himself. Even then, the counts leading to his dismissal were not justifiable or correct. Even if they were, since the process of termination was flawed, it would not matter whether or not the plaintiff was culpable of the counts as "charged". The result is that the plaintiff was not accorded procedural fairness before his services were terminated.

4.18 I accordingly resolve the second issue to find that the plaintiff's employment contract was not lawfully terminated.

Issue 3: Whether the plaintiff is entitled to the remedies sought?

5.1 The plaintiff sought general damages with interest for what I have deemed an unlawful termination. Citing the Supreme Court decision of **Bank of Uganda Vrs Betty Tinkamanyire SCCA No. 12/2007**, defendant's counsel argued that the plaintiff would be entitled only to payment which he would have been paid in lieu of notice, had the dismissal been lawful. I do not agree with that line of argument. The decision in Bank of Uganda (supra) did agree with the principle laid out in **Barclays Bank of Uganda Vrs Godfrey Mubiru** (supra) that compensation for an unlawful dismissal should be confined to the monetary value of the period that is necessary to give proper notice, i.e. 'compensation in lieu of notice. However, the Court did not, as argued by defence counsel deny the

aggrieved party general damages. The court was of the view that depending on the circumstances, an employee who is unfairly or unlawfully dismissed should be compensated adequately in accordance with the law. Accordingly, Justice Kanyeihamba (as he then was) considered the manner in which the appellant had conducted herself as an employee and the dismal treatment she received from her employer. For that, he made an award of aggravated damages, which is a category of general damages,

5.2 The decision in **Southern Highlands Tobacco Union Ltd Vs David Mcqueen (1960) EA 490** is instructive. A person who is wrongly dismissed is entitled to compensation for the financial loss he has suffered as a result of his dismissal. Although such a person is required to mitigate damages as far as they can, they are not required to involve themselves in expenditure to do so. Still, the burden of proving that such person could have obtained suitable employment, lies on the opposite party. Where such aggrieved person has obtained new employment, their actual emoluments can be considered. Where they have not obtained other employment, the Court has to assess the likelihood of employment being obtained, and the expected remuneration from such employment.

5.3 In my view, the plaintiff was treated unfairly. He should have been afforded notice. Again, since the defendant chose to give reasons for the termination and hold what they termed, disciplinary proceedings, he should have been afforded a fair

hearing. The period of notice should have afforded him time to prepare himself to leave honorably and seek employment elsewhere. The manner in which he was unceremoniously marched off the defendant's premises was humiliating. He testified that by the time he filed the suit, he had not yet obtained new employment. It was not shown that he was able to obtain employment elsewhere. Under such circumstances, general damages would be appropriate compensation. See for example **Kiyingi Vrs NIC (1985) HCB 41**. It is a type of damages that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim. They follow the ordinary course and relate to all other terms of damages, whether pecuniary or non-pecuniary. They can include future loss as well as damages for paid loss and suffering. See **Uganda Commercial bank Vs Deo Kigozi 2002 EA 293 and Storms Vs Hutchinson [1905] AC 515.**

5.4 The plaintiff provided no possible figure for compensation in both his pleadings and evidence. A figure of Shs. 50,000,000 was suggested in the submissions. I find the figure rather exorbitant. I do take into account the position that the plaintiff held in the defendant company, the period for which he had stayed in their employment, the manner of his termination and subsequent misfortunes in finding new employment, together with the inevitable inconvenience he suffered. I find a sum of Shs. 10,000,000 more appropriate in the

circumstances. I would in addition award interest and costs in his favour.

5.5 In the final result, judgment is entered for the Plaintiff against the defendant in the following terms.

a. A declaration that at the time his employment contract was terminated, the plaintiff was not on probation, but confirmed in the employment of the defendant.
b. A declaration that the plaintiff's employment contract was unlawfully terminated
c. General damages for unlawful termination of the plaintiff's contract in the sum of Shs. 10,000,000 (Ten million shillings only)
d. Interest at 15% per annum from the date of filing the suit until payment in full.
e. Costs of the suit.

Signed

EVA K. LUSWATA

JUDGE

22/01/2020