THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 47/97

CORAM: HON. MR. JUSTICE S.T. MANYINDO,DCJ
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE,JA
HON. MR. JUSTICE J.P. BERKO, JA

JULIUS EMOMERI……………………………………………… APPELLANT

VERSUS

SHELL (U)………………………………………………………… RESPONDENT

JUDGMENT OF JUSTICE A.E. MPAGI-BAHIGEINE, JA

This appeal is against the judgment and order of the High Court, (Egonda-Ntende J) dated 17-3-95, dismissing the appellant's suit claiming damages for wrongful dismissal.

The appellant, Mr. Julius Emomeri had been employed by the respondent, Shell (U) Ltd, in various capacities since 1976 and was at the time of dismissal on 14-5-93 Area Sales Manager of Eastern Region stationed at Mbale. His terms of employment as contained in the letter of appointment, Exh.D1, dated 24-3-76, were also governed by the Trade Union Agreement, Exh.P2, and the Respondent's 3taff Standing Instructions, Exh.P1. He was a member of the Staff Provident Fund and Staff Pension Scheme. His services, according to Ex.Dl, were subject to one month's notice on either side, expiring on any day of the calendar month.

On 21-4-93 the appellant was suspended from duty by the Managing Director as per his letter, Exh.P3, which reads as follows:

“<u>Notice of Suspension</u>

A serious complaint has been received regarding your work. Following our oral advice to you of this complaint, you are hereby suspended from work pending investigations into the complaint.

A decision on this matter will be communicated to you as soon as possible. During the period of suspension you will be paid your full basic salary and you will be required to report to your immediate supervisor at the normal reporting time on Monday 26-4-93.”

On 14-5-93 the appellant was served with a Termination Notice - Exh. P4:

Kindly refer to discussions held in the Managing Director’s office on Wednesday 12-5-93. In accordance with paragraph (a) of the terms of service as contained in your letter of appointment dated 24-3-76, your services with the company are hereby terminated. You will receive one month’s pay in lieu of notice. Hence the termination takes immediate effect.

Please arrange to return all company property, declare all collections from various customers and in particular reconcile the account of Shell Rock. Your terminal benefits may be used to clear any unsettled outstanding.”

The appellant was consequently paid terminal benefits totaling UShs.13,274,838/= which he accepted. A year later he sued the respondent for refund of deductions amounting to Shs.39, 297,426/=.

The respondent’s defence was that the appellant’s services had been lawfully terminated in accordance with his terms of service for gross misconduct and that all his terminal benefits totaling Shs.13,274,839/= were duly paid to him and there were no other benefits due to him.

The learned trial judge agreed with the respondent that the appellant had been guilty of gross misconduct and dismissed the suit with costs. Hence this appeal.

The memorandum of appeal is quite prolix comprising twenty grounds as follows:

1. That Respondent having been represented in the suit by advocates who were legally unauthorized to practice rendered all the pleadings filed, evidence given proceedings held and

submissions made by the said advocates and the judgment and decree passed by the Court in favor of the Respondent null and void and therefore the judgment and decree of the trial court should be quashed and set aside and substituted with another judgment in favor of the Appellant. This ground is supported by the affidavit of Julius Emomeri and of G.O. Emesu sworn in support of the Appellant's application for leave to appeal out of time at p.168 to 229 of the record of this appeal.

2. That the learned Trial Judge erred in the formulation of the issues for trial in the suit and the said error occasioned a miscarriage of justice to the Appellant.

3. That the Learned Trial Judge erred in Law in allowing the Respondent to present his defence during the Trial beyond the scope of the Respondent's pleadings.

4. That the Learned Trial Judge erred on the facts and in law in holding that the suspension and termination by the Respondent of the Appellant's employment was legally justified and lawful in the circumstances.

5. That the learned Trial Judge erred in holding that the Appellant was not legally entitled to Union representation prior to his suspension and subsequent termination by the Respondent.

6. That the learned Trial Judge erred on the facts in holding that the Appellant had been given a fair opportunity of being heard prior to his suspension and/or subsequent termination by the Respondent.

7. That the Learned Trial Judge misdirected himself in holding that the Appellant should have lodged his complaint with the Union before his suspension and subsequent termination and the said misdirection occasioned a miscarriage of justice to the
Appellant.

8. That the learned Trial Judge erred in law in importing into the letters of Suspension and Termination of the Appellant extraneous matters which were not contained in the said letters.

9. That the learned Trial Judge misdirected himself in holding that the Respondent was legally entitled to dismiss the Appellant without giving any reason therefore and the said misdirection occasioned miscarriage of justice to the Appellant.

10. That the learned Trial Judge erred in law in accepting the Respondent's evidence as to the legality of the termination of the Appellant and the said error caused a miscarriage of justice to the Appellant.

11. That the learned Trial Judge erred in treating DW2 and DW4 as truthful witnesses and the

said error occasioned a miscarriage of justice to the Appellant.
12. That the Learned Trial Judge erred in holding that the Appellant was not legally entitled to payment of terminal benefits under his employment contract with the Respondent.
13. That the learned Trial Judge erred in law in not considering the evidence adduced by the Respondent of waiver of the Si.immary Dismissal of the Appellant and substitution therefore of a general termination without limitation as the terminal benefits that were to be paid to the Appellant upon his termination by the Respondent’s letter dated 14th May, 1993.
14. That the Learned Trial Judge was too biased in favour of the Respondent and against the Appellant and as such he did not consider the case of the Plaintiff at all or sufficiently and the said omission and error occasioned a miscarriage of justice to the Appellant.
15. That the Learned Trial Judge erred in rejecting the Appellant’s claim for specific damages.
16. That the learned Trial Judge erred in holding that the Appellant did not suffer any loss and damage and he erred in rejecting and dismissing the Appellant’s claim for general damages.
17. That the Learned Trial Judge erred in refusing to consider and assess the general damages the Appellant was legally entitled to claim in the circumstance of the case and the said omission occasioned a miscarriage of justice to the Appellant.
18. That the learned Trial Judge erred in law in holding that the Respondent was legally justified to make deductions from the Appellant’s wages.
19. That the learned Trial Judge erred in law in refusing to award to the Appellant the payment of damages claimed in lieu of Notice of Termination of the Employment Contract, and he also erred in law in not awarding to the Appellant general damages to compensate the Appellant for the loss caused to the Appellant due to the termination of his Employment Contract in disregard of and contrary to the provision of S.24(2),(e) and S.24(3) of the Employment Decree, 1975, merely because it was not pleaded by the Appellant as special damages.
20. That the learned Trial Judge erred in law in awarding costs against the Appellant in respect of the suit which was instituted by the Appellant in good faith and justifiably to enforce his rights under the Employment Decree 1975.”

Mr. George Emesu, Counsel for the appellant, abandoned grounds, 1,2,9 and 20. The remaining grounds were still tediously repetitive and could be summarised thus: that the learned trial judge was wrong in his finding that the appellant was lawfully dismissed and that his entitlements were

paid to him.

Regarding the question of dismissal Mr. Emesu contended that there was no sufficient evidence to justify the Judge's finding of lawful dismissal; the correct procedure was never followed and further, that the respondent having condoned the appellant's misconduct and taken a lenient stand should not go on to penalise the appellant by deducting his dues.

Mr. Sam Serwanga, Counsel for the respondent, in his brief reply maintained that the dismissal was lawful. There was abundant evidence that the appellant was guilty of gross misconduct leading to a loss of Shs.43 million and all proper channels were followed to discharge him. All his dues were duly paid, the respondent did not owe him anything, he submitted.

On the matter of termination of services, the learned judge made these findings:

"The plaintiff was terminated for gross insubordination which puts him out of any claim under Article 18(b) of Part Two of the Union Agreement. The defendant was entitled to terminate the plaintiff's services with or without **assigning any reason".**

It is settled law that a master is entitled to dismiss his servant summarily for any misconduct or for failure to exercise good faith

towards him **Sinclair v. Neighbour (1966) 3 AER 988, (1967) 20B 279**

John E1etu v. Uganda Airlines (1984) HCB 39. The record indicates

serious allegations leveled against the appellant as evidenced by Exh.D2, D4 and D5. These involved failure, despite warnings, to comply with the respondent's instructions regarding credit to Petrol Stations which eventually resulted in a total loss of Shs.43,880,848/= to the respondent - Exh.D8. The appellant was also found to have cashed the same voucher twice within a period of two weeks. The learned judge found this was tantamount to theft which indeed it was. Even as late as 1993 despite repeated warnings as evidenced by Exh.D2, D3, D4 and D5, the appellant was still in the habit of flouting his employer's operational instructions. The record further contains evidence which the learned judge does not seem to have taken into account in his judgment. This was that the appellant engaged in business of importation of petroleum raw materials using the respondent's transportation. This necessarily rendered him a competitor of the respondent. The position at law is that no matter how much or how little time and attention he may devote to it, he is deemed to have an interest which conflicts with his duty to his employer and for this cause he may be dismissed. In my opinion there was sufficient evidence to justify the learned judge's finding that the appellant was guilty of gross misconduct for which he had failed

to give satisfactory explanation to the respondent.

The next issue is whether the trial judge was right to hold that -the proper channels as laid down in the Staff Standing Instructions Exh.Pl and the Union Agreement, Exh.P2, were followed by the respondent. Mr. Emesu maintained that they were never followed while Mr. Serwanga contended that they were followed.

The learned judge found:

"I have considered the evidence adduced on **this** question of termination of the plaintiff's employment I find that on finding of a very serious breach of instructions by the plaintiff, the defendant suspended the plaintiff This, they were entitled to do without prior notice. Following his suspension which was in writing, I would have expected the plaintiff to lay down his requirement, for Union representation if he wanted to invoke the assistance of the Union where he was the Chief Shop Steward. He did not do this. He did not protest the suspension or termination in writing but a month later pocketed the payments made to him and a year later in June 1994 commenced this action."

A look at the Staff Standing Instructions clause 4.0 indicates:

"4.0 Penalties for Breach of Discipline:

Disciplinary action may take any of the various forms:

1. A verbal warning-
2. A written warning -
3. Suspension -
4. Demotion,
5. Termination with notice or pay in lieu.
6. Summary Dismissal."

There is no doubt that the appellant was warned both verbally and also by letters referred to above. The respondent had the option of a summary dismissal but decided to take a lenient view of a termination with notice after pleas from the appellant. Quite surprisingly Mr. Emesu contended that the respondent having taken a lenient view or condoned the appellant's conduct all along, should not now open old wounds, and that the plea of misconduct would not be available to the respondent as a ground for dismissal. It is to be observed from clause 4.0 above that what Mr. Emesu described as condonation is in fact an elaborate internal mechanism for ensuring fair treatment to an employee before the ultimate penalty is handed down. Therefore it

should not be held against the respondent. I think that that condonation would only be relevant if the respondent had retained the appellant in the service after having had knowledge of the facts, and paid to him the stipulated wages or salary without objection or protest which is not the case here. See Philips v. Foxall L.R. 70.B. 666 at p.680; Boston Deep Sea Fishing and Ice Co. v. Ansell, 39 Ch.D. 339 at In this case where there was a repetition of fences or continuing breach of the contract, the respondent had the right to discharge the appellant at any time taking the entire record of misconduct into account, the condoning and pardoning of the appellant's earlier misconduct being deemed to have been conditioned upon future good conduct which never materialised in this case. See Sinclair v. Neighbour (supra). Ordinarily, where an employee is in breach of the contract of employment, the employer, waiting a reasonable time before acting will not amount to condonation of the offence or waiver of his right to discharge him. Further the appellant had the opportunity of explaining his side of the matter to the Administration which never came off satisfactorily. He never invoked his Union representation at any moment though he was the Chief Shop Steward, for whatever it could have been worth.

I inevitably conclude and agree with Mr. Serwanga that all the available channels of a lawful discharge were utilised. There is therefore no merit in the ground that there was no sufficient evidence to found a lawful dismissal.

The next question is whether the appellant is entitled to a refund of the deductions made from the dues paid to him. This was ground 12 of the memorandum of appeal. Mr. Emesu argued that the claim was restricted to gratuity of Shs.16,078,150/= and severance pay of same amount. He however later conceded that the gratuity claim could not be maintained under special damages. I think he correctly did so because gratuity is a matter of express agreement between the parties and as the learned judge rightly found it was not provided for anywhere, neither in the Staff Standing Instructions nor in the Union Agreement. He then went on to attack the learned judge's finding that the appellant was not entitled to severance pay. He strangely and vigorously defended the appellant's entitlement to severance pay.

As already pointed out the learned judge found as a fact that the appellant was terminated for gross insubordination which puts him out of any claim under Article 18(b) of Part Two of the Union Agreement which states:

"(b) Terminal Benefits: All employees whose services are terminated except for gross misconduct, shall receive terminal benefits as per severance pay."

It is not clear why this provision caused Mr. Emesu so much difficulty. It is too plain to permit of any misconstruction that the appellant could claim severance pay he had been terminated for gross misconduct. .

Regarding the other deductions made by the respondent, Mr. Emesu submitted that the appellant admitted having used the money in the course of his employment but was never given a chance to explain or adduce evidence in Court though he testified. The amounts involved are:

1. Shs.549,000/= - Travel advance unaccounted for.
2. Shs.2,801,500/= - Housing allowance for **6'/2** month - (16th
May-31 December).
3. Shs.1,295,476/= - Maintenance loan for 1993.

The appellant claimed a refund of these items citing sections 31 and 32 of the Employment Decree No.4 of 1975 that his salary was not liable for such deductions.

It is settled law that a willful or intentional breach of the contract may be ground for forfeiture of the employee's right to compensation. A fortiori, wages may be held to have been forfeited because of dishonesty even without agreement between the parties. The employer may recoup or set off a debt or other liquidated count against the amount of wages the damages sustained by his misconduct resulting in injury/loss to employer. **Konig v. Kanjee Naranjee Properties Ltd (1968)EA 233.** The employee seeking recovery of extra compensation has the burden of showing facts and circumstances sufficient to justify the inference of such entitlement. This the appellant failed to do. It is on record that the appellant failed to account for Shs.549, 000/= in respect of Travel Advance. He also admitted owing the respondent the maintenance loan of Shs.l,295,476/=. Regarding the housing allowance of Shs.2,80l,500/=, this was to facilitate his accommodation during employment with the respondent and not otherwise. The learned judge rightly disallowed it as employment had ceased. Mr. Emesu submitted that the appellant was never given a chance in Court to account for all the monies. It is not clear what this means since he testified in Court. The learned judge after minutely examining the evidence dismissed all these claims, quite correctly in my view.

Another point raised by Mr. Emesu was that the appellant was entitled to three months' notice under section 24 of the Employment Decree instead of one month under the express agreement. Clearly the appellant did not claim three months' notice in his plaint, and therefore it was rightly

not given to him as he did not claim it. See **John Eletu v. Uganda Airlines Corporation** (supra). The appellant was content with the money given to him in lieu of notice under the contract of employment. He cannot now be heard to complain.

For reasons given above I would dismiss the appeal.

Dated at Kampala this 21st day October, 1999

A. E Mpagi-Bahigeine
Justice of Appeal

JUDGMENT OF MANYINDO, DCJ

I agree with the judgment of Mpagi-Bahigeine, JA just delivered. In view of the clear gross misconduct by him, the appellant must consider himself very lucky to have been accorded full benefits on discharge.

I would dismiss the appeal with costs to the respondent and as Berko, JA also agrees it is so ordered.

DATED at KAMPALA this 21st day of October, 1999

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGMENT **OF J. P. BERKO, J. A.**

I have had the advantage of reading in draft, the judgment prepared by my learned sister Justice A.E. Mpagi—Bahigeine in which she sets out the facts and discusses fully the question of law which arise in this appeal. I agree with her that the appeal should be dismissed and I have nothing to add to what she says with regard to costs.

Dated at Kampala this 21st day of October 1999

J.P Berko

Justice of Appeal