

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM: BYAMUGISHA, KAVUMA& NSHIMYE, JJA**

CIVIL APPEAL NO.071/2010

BETWEEN

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

AND

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

*[Appeal from the judgment of the High Court of Uganda sitting at Kampala
(Kasule J) dated 9th March 2010 in HCCS No.028/2001]*

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JUDGMENT OF BYAMUGISHA, JA

The appellant was the plaintiff in the High Court.

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He filed an action against the Attorney General in his representative capacity by virtue of section 11 of the Government Proceedings Act. He was seeking a declaration that his dismissal from his job in the public service of Uganda was illegal, *ultra vires*, void and of no legal effect. He was also seeking an order nullifying the dismissal, and directing his reinstatement to his office as a Foreign Service officer with all his benefits. He sought special, aggravated and general damages, interest at court rate and costs of the suit.

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The appellant was recruited into the Public Service of Uganda as a Foreign service Officer Grade 6 on 20th September 1988. He was posted to the Ministry

of Foreign Affairs and deployed to the Uganda Embassy in the Peoples' Republic of China.

In 1997 he was given notice to return to Uganda. He did not do so immediately
5 apparently because the Ministry had no 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 at Guoman Hotel by the security agencies of the Peoples' Republic of China.

On 24th October 1997 he was repatriated to Uganda and was sent on leave. On
10 4th March 1998 he was interdicted by the Permanent Secretary Ministry of Foreign Affairs and the on 6th June the same year, he was dismissed from Public Service.

He filed an amended suit in the High Court in which he prayed for the reliefs
15 which I have already set out above. The respondent filed an amended written statement of defence in which he denied the allegations of any wrong doing and prayed for the dismissal of the suit with costs.

At the trial, the parties agreed on the following facts:-

- 20 1. That the appellant was employed by the Government of Uganda as a Foreign Service Officer on permanent and pensionable terms

2. The appellant was employed under the Ministry of Foreign Affairs as a Foreign Service Grade VI attached to the Uganda Foreign Mission in the Peoples' Republic of China.

3. That on 21/10/1997 the appellant was arrested and detained for 4 days in Guomen Hotel in the Republic of China.

4. On 24/10/1998 the appellant was forcefully repatriated from China and 4/03/1998 he was interdicted

5. He was subsequently dismissed from public service on 8/6/1998.

10 At the scheduling conference held on 11/04/06 the following issues were framed for court's determination:

1. **Whether the dismissal of the plaintiff from Public Service was lawful.**

2. **Whether the defendant is vicariously liable for the alleged assault, arrest and confinement of the plaintiff in the Peoples' Republic of China.**

3. **Whether the plaintiff is entitled to any remedies.**

The appellant testified in person and called one witness. The respondent called no witness. At the end of the trial, judgment was entered for the appellant against the respondent in the following terms:

1. Shs 180,000,000/= compensation, general damages and aggravated damages for loss of employment.
2. Shs 495,084/= withheld salary during interdiction.
3. Shs 1,500,000/= transport allowance for transporting his personal effects
5 to Kawo his home village in Kumi District.
4. US \$ 90 or its equivalent in Uganda Shillings at the obtaining current rate as at the time of effecting payment, being the cost of residence by the appellant at Speke Hotel, Kampala, Uganda.
5. US \$ 1,372 or its equivalent in Uganda shillings at the obtaining current
10 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 plaintiff's money that was in the bank.
6. The sums awarded above are to carry interest at the rate of 20% p.a. from the date of dismissal as regards the sums awarded in Numbers 1,3,4, and
15 5 and from the date of interdiction as regards the sums awarded in No.2 above till payment in full.
7. Costs of the suit.

The appellant was dissatisfied with the whole decision and he lodged a
20 memorandum of appeal containing 10 grounds. These grounds were reduced to 4 issues for our determination.

1. Whether the appeal is bad in law and whether the dismissal of the appellant was *ultra vires*, null, void and of no effect.
2. Whether the trial judge granted the most appropriate remedies and if not whether the dismissal ought to have been declared *ultra vires*, null, void and of no effect.
3. Whether the trial judge properly evaluated evidence relating to vicarious liability in respect to the alleged arrest assault and torture of the appellant.
4. What remedies are available to the parties?

10 Both counsel relied on their written submissions.

Counsel for the appellant submitted that the learned trial judge found that the appellant was unfairly dismissed because the right procedure was not followed.

He also stated that the trial court found that the appellant's contract was governed by the Constitution. He was supposed to remain in employment until

15 he attains 60 years which is the current age of retirement from public service.

He criticized the trial judge for not ordering for his reinstatement by relying on the common law principle that an employer should not be forced to take back an employee that an employer no longer wishes to continue to engage. He

criticized the judge for relying on the authorities of **Bank of Uganda v Betty**

20 **Tinkamanyire-Civil Appeal No. 12/07(SC)** and **Barclays Bank v Godfrey**

Mubiru –Civil Appeal No.01/98(SC) and claimed that the two cases were

distinguishable in that the employment was not permanent and pensionable like

that of the appellant. He also stated that the two cases relied on by the trial judge applied private law and yet the appellant's employment contract was governed by public law.

- 5 The respondent in his submissions complained that the grounds of appeal as framed were argumentative and offended rule 86 of the rules of this court. This complaint was overtaken by events when the grounds of appeal were reduced to 4 issues for our determination.

On the complaint by the appellant that the trial judge erred in not granting the
10 appellant the declarations he sought, learned counsel pointed out that such orders are granted under judicial review and yet the matter was brought by an ordinary plaint.

- 15 There is no doubt that the appellant's employment was governed by the Constitution, the Public Service Act and the regulations made there- under, the Pensions Act and the Employment Act. The appellant was employed on permanent and pensionable terms. With good conduct, he could have left public service on reaching the retirement age of 60 years.

- 20 The Constitution, under **Article 173** protects the tenure of office of public servants by providing that "no public servant shall be dismissed or removed

from office or reduced in rank without just cause”. The Constitution, therefore, envisages dismissal from office before retirement age for just cause.

The Public Service Act (Cap 288 Laws of Uganda) has no specific provisions for dismissal but section 11 gives power to the Commission to make regulations
5 prescribing disciplinary penalties and awards. The Commission has regulations in place - S.I.No.288-1 and the relevant regulation is 36 that govern misconduct which justifies dismissal. Although the learned trial judge relied on common law principles and the decided cases on the subject, he did not err in so doing. The common law principle of an employer having powers to dismiss an
10 employee was incorporated in our laws.

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
15 provisions of section 71 of the Employment Act. Part of the section states:

“(5) If court finds that a dismissal is unfair, the court may-

(a) order the employer to reinstate the employee;

(b) order the employer to pay compensation to the employee.

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(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 re-employ

5 *the employee, or*

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

10 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 wrongfully dismissed. The appellant was wrongfully dismissed from his job. He could only be
15 reinstated if there was evidence that the employer was ready and willing to take him back. The learned trial judge considered all the factors that were before him and arrived at the correct decision against the reinstatement. I have not been persuaded that he was wrong.

20 As for damages which were awarded, the complaint which was raised by the appellant as I understood it is that the trial judge ought to have awarded a separate sum for each claim of damages. A claim for damages if proved by the

plaintiff, results in compensation in monetary terms. The principle which has to be borne in mind is that the person who claims to have been injured must be awarded such sum of money which will put him in the same position as he would have been in if he had not sustained the wrong complained of.

5 Award of damages is an exercise of discretionary powers of the trial court.

Usually an appellate court is reluctant to interfere with such awards because it is considered imprudent to substitute the appellate's court own opinion with that of the trial court. The exercise of discretion should be done with care and on principles that have been laid down.

10 However there are two settled areas where an appellate court will interfere with the exercise of discretion. The first is where the trial court acted on wrong principles and the second is where the amount awarded is manifestly excessive or manifestly low that a misapplication of a wrong principle is inferred.

15 In the instant appeal, the learned judge awarded an omnibus sum of Ug. Shs. 180 million to cover general and exemplary damages and loss of employment. There was 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.

20 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.

5 In the result, I have not been persuaded that the appeal has merit. I would dismiss it with costs to the respondent.

Dated at Kampala this...**29th**.....day of...**May**...2012.

10 **C.K.Byamugisha**
Justice of Appeal

JUDGMENT OF S.B.K.KAVUMA, JA

15 I have read, in draft, the judgment prepared by C.K.Byamugisha, JA. I agree with that judgment, the reasoning and the orders therein.

Dated at Kampala this ...**29th** ...day of ...**May**...2012

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S.B.K.Kavuma
Justice of Appeal

25 **JUDGMENT OF A.S.NSHIMYE, JA**

I have had the benefit of reading in draft the lead judgment of Hon. Justice C.K.Byamugisha, JA.

I agree with hear reasoning and conclusion that the appeal lacks merit and ought
30 to be dismissed with costs.

Dated this ...**29th** ...day of ...**May**...2012

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5 **A.S.NSHIMYE**
JUSTICE OF APPEAL