THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA)

CIVIL APPEAL NO 60 OF 2020

STANBIC BANK (U) LIMITED} ..... APPELLANT

VERSUS

OKOU R. CONSTANT} .....RESPONDENT

(Appeal from the Judgment of the Industrial Court of Uganda at Kampala delivered on 5th July 2019 by Hon. Chief Judge Ruhindi Asaph Ntengye, Hon Lady Justice Linda Lillian Tumusiime Mugisha and Panellists Mr. Ebyau Fidel, Mr. Michael Matovu and Mr. Anthony Wanyama in Labour Dispute Consolidated Claim No. 171 of 2014 arising from H.C.C.S No. 071 of 2013 and Misc. Cause No. 128 of 2012)

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

The appellant's appeal is against part of the award of the Industrial Court. The facts are that the respondent was a former employee of the appellant whose employment services was terminated on 9th November 2013 by termination letter but without notice as it took effect immediately. He was paid a salary up to the last day of work, three months' salary in lieu of notice according to the contract of employment, encashment of the outstanding leave days and this Provident pension payment. According to the appellants, as at the date of the respondent's termination from the appellant's employment, a miscellaneous loan of Uganda shillings 9,690,000 584/=, a staff loan of Uganda shillings 76,178,550/= and a credit card Balance of Uganda shillings 4,150,745/= was outstanding from the respondent, which sums were agreed to be payable on demand and to be deducted from the respondent's terminal benefits. The Industrial Court found in favour of the respondent and made the following award in favour of the respondent:

1. Reimbursement of Uganda shillings 90,019,879/= being monies deducted from the respondent's provident Pension Payment for purposes of clearing his outstanding loan obligations.
2. Reimbursement of Uganda shillings 28,858,583/= being part of the pension used to repay the loan obligations.
3. Uganda shillings 165,258,250/= being severance for 28 years the claimant worked for with the bank.
4. An award of Uganda shillings 85,000,000/= as general damages.
5. Interest at the rate of 15% per annum from the date of the award till payment in full.
6. No order as to costs.

The appellant was aggrieved by the award of the Industrial Court and appealed to this court on 5 grounds of appeal as follows:

1. The learned trial judges and panellists of the Industrial Court erred in law in holding that the termination of the respondent's employment by the appellant was wrongful.
2. The learned trial judges and panellists of the Industrial Court erred in law in relieving the respondent of this outstanding loan obligations yet he used and benefited from the money advanced.
3. The learned trial judges and panellists of the Industrial Court erred in law in allowing reimbursement of the outstanding loan obligations in the sum of Uganda shillings 90,019,879/= and a further Uganda shilling 28,858,583/= as part of the pension used to pay the loan obligations of the respondent.
4. The learned trial judges and panellists of the Industrial Court erred in law in awarding the respondent "severance allowance" outside this court contrary to the provisions of section 89 of the Employment Act, No. 6 of 2006.
5. The learned trial judges and panellists of the Industrial Court erred in awarding excessive general damages.

For his part, the respondent lodged a cross appeal on the following grounds:

1. The learned trial judges and panellists of the Industrial Court erred in law in holding that the respondent bank had legal authority to conduct search on all bank accounts disclosed by the respondent without a search warrant.
2. The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent aggravated and exemplary damages.
3. The learned trial judges and panellists of the Industrial Court erred in law to decline to award the respondent salary arrears for the remaining nine years of his permanent and pensionable contract.
4. The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent 10% of the above claim salary arrears, being the appellant's contribution towards the respondents NSSF and 7% of the above figure being the appellant's contribution towards the banks contribution pension fund.
5. The learned trial judges and panellists of the Industrial Court erred in law when they failed to properly evaluate the evidence on record thereby arriving at the wrong conclusions forming the basis of grounds 1, 2, 3 and 4 of the cross appeal.

For the respondent/cross appellant prayed that the cross appeal is allowed and the Industrial Court awards be set aside in part and in its place, the following additional declarations and orders are issued namely:

(a) A declaration that the act of the respondent of conducting a search (without) a warrant was illegal and an infringement of the respondent's right to privacy.

(b) An order that the respondent be paid general damages for violation of his rights (above).

(c) A further order that the respondent be awarded aggravated and exemplary damages.

(d) A further order that the respondent be awarded salary arrears for the remaining nine years of his permanent and pensionable contract.

(e) A further order that the respondent be ordered to pay 10% of the above claim salary arrears, being the appellant's contribution towards the respondents NSSF and 7% of the above figure being the appellant's contribution towards the banks contribution pension fund.

(f) That the costs be granted to the respondent/cross appellant.

The appellant prays that the appeal is allowed and the award of the Industrial Court set aside and replaced with an order dismissing the respondents suit. Secondly that the costs of the appeal and in the courts below be awarded to the appellant.

At the hearing of the appeal, the appellant was represented by learned counsel Mr Bwogi Kalibala the respondent was represented by learned counsel Mr Emmanuel Emoru. Also in attendance was The Head Legal Risk and Dispute Management of the appellant Priscilla Nakalembe. The respondent was in court. The court was addressed in written submissions and judgment reserved on notice.

Submissions of counsel.

The appellant's counsel addressed the court on both the appeal and the cross appeal of the respondent.

With reference to the background to the matter, the appellant's counsel submitted that the respondent was a former employee of the appellant whose employment was terminated on 9th November 2013 by a termination letter whereupon he was paid his salary up to the last day of work, three month's salary in lieu of notice according to the contract, leave encashment of the outstanding leave days and his provident pension payment.

On the date of termination, the respondent had a miscellaneous loan amount of Uganda shillings 9,690,584/=, a staff home loan of Uganda shillings 76,178,502/= and a credit card balance of shillings 4,140,345/= outstanding sums owed to the appellant. These sums were contractually

agreed to be payable on demand and deducted from the respondent's terminal benefits.

Respondent's case in the Industrial Court was that the termination of his employment was unlawful and this was because he was never subjected to any disciplinary proceedings prior to termination of his services, no reason was given by the appellant for the termination and he was not afforded a hearing before his employment was terminated.

On the other hand, the appellant's defence was on the basis that because the employment relationship was brought to an end by termination as opposed to a dismissal, there was no wrongdoing and the termination was lawful. Subsequently, the respondent filed Dispute No 171 of 2014 which was consolidated with Miscellaneous Cause Number 128 of 2012 being an action for enforcement of fundamental rights and freedoms.

The appellant's counsel argued ground 1 of the appeal separately and grounds 2 and 3 of the appeal together and grounds 4 and 5 separately. Secondly, he addressed the court on the cross appeal by dealing with each of the grounds in the cross appeal separately.

Ground 1.

The learned trial judges and panellists of the Industrial Court erred in law in holding that the termination of the respondent's employment by the appellant was wrongful.

The appellant's counsel submitted that its case was that the termination of the respondent's employment was lawful as the employment contract provided for termination and three months' notice or payment in lieu thereof and payment in lieu of notice was made. The appellant further contended that no reason for termination was needed to be given and no hearing was required as no misconduct was alleged and the employment relationship was being contractually brought to an end by contractual termination.

The appellant's counsel submitted that in order to determine ground 1 of the appeal, the issue for consideration is whether the term "termination" as

distinct from "dismissal" require a reason to be lawful. Secondly whether "termination as distinct from "dismissal" requires a hearing to be lawful and thirdly, whether the "termination" is wrongful in as far as it did not follow the procedures laid out in the Human Resource Manuals or Disciplinary Procedures to be lawful. Counsel submitted that the Industrial Court determined and answered the above issues in the affirmative.

On the question of whether the termination as distinct from dismissal requires a reason to be lawful, the appellant's counsel submitted that the starting point and analysis of the requirement of termination and dismissal is in terms of definitions. The appellants counsel relied on sections 2 and 65 (1) (a) of the Employment Act, Act No 6 of 2006. In section 2, the terms "dismissal from employment" means the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct. Secondly in terms of the phrase "termination of employment" it means the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as, expiry of contract, attainment of retirement age, etc.

The appellant's counsel submitted that the words "justifiable reasons" other than misconduct in the definition of termination of employment is instructive because it creates genus in essence which this term connotes. Further, examples are all instances of the contract of service coming to an end, and what follows includes other instances of a like kind. These are, the coming into an end of the contract or the fixed term automatically ending upon the retirement age being reached. Further the words import a list of examples for justifiable reasons that can be generated and are applied *ejusdem generis*. Apart from the definition of "termination" in the Employment Act, the automatic ending of employment contract by operation of law is to be found in the word "termination" which has the meaning assigned to it by section 65 of the Employment Act. For instance, under section 65 (1) (a) of the Employment Act, termination shall be deemed to

take place where the contract of service is ended by the employer with notice.

The definition therefore does not contain any requirement for a reason to be given for the termination of the contract with notice. What is required is the requisite notice. For such purpose termination or payment in lieu of notice. Counsel further relied on section 58 (3) of the Employment Act which provides for any other notice except the period of notice in the contract.

The appellant's counsel submitted that termination does not require a reason and its juxtaposition with dismissal which does require a reason is brought out clearly by section 69 of the Employment Act. Section 69 (1) and (3) deals with "dismissal" while section 69 (2) deals with "termination". Where there is a dismissal, the reason is required to be established or justified under a section 66 hearing. Further section 69 (1) provides that "subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by statutory provision or contractual term."

The appellants counsel argued that the provision clearly makes it the position that with termination, it was adequate to give notice or payment in lieu of notice. There was no separate requirement for a reason or justification of a hearing. Counsel relied on **Barclays Bank of Uganda vs Godfrey Mubiru SCCA No 1 of 1998** and **Stanbic Bank Ltd vs Kiyemba Mutale SCCA No 02 of 2010**. Counsel further submitted that the position of the law remains the same even after promulgation of the Employment Act, 2006 according to the Supreme Court decision in **Hilda Musinguzi vs Stanbic Bank Uganda Ltd; SCCA No 28 of 2012**. In that decision, the Supreme Court found that an employer cannot keep an employee against his will and section 65 (1) (a) provides that termination shall be deemed to take place where the contract of service is ended by the employer with notice. Further in **Stuart Jeffries Parker Ginsberg Ltd vs Parker (1988) 1 R.L.R 483** it was held inter alia that the right of an 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 above decision was also echoed in **Stanbic Bank Ltd vs Kiyemba Mutale** (supra). Further it was held that an employer may terminate the employee's employment for a reason or for no reason at all. However, the employee must terminate the employment according to the terms of the contract otherwise he would suffer the consequences arising from failure to follow the right procedure of termination. See also **Bank of Uganda vs Joseph Kibuuka and 4 others; Court of Appeal Civil Appeal Number 281 of 2016**.

Appellant's counsel submitted that the Industrial Court in supporting its decision that the termination without notice was wrongful and it required the employer to give a reason as required by the Termination of Employment Convention. However, the Court of Appeal clarified the true position of the International Labour Organisation Convention in its decision in **Bank of Uganda vs Joseph Kibuuka and 4 others** held that:

> I therefore find that in the absence of a specific provision in the law and in the face of the decisions of this Court and the decisions of the Supreme Court on that point of law which are binding on this Court, there is no support for the finding of the trial court that in every situation where an employer terminates employment under section 65 (1) (a) and subsection 2 of the Employment Act, and/or the terms of the contract of employment, reasons have to be provided to the employee for their action.

In the premises, the appellant's counsel submitted that article 4 of the International Labour Organisation Convention on which the Industrial Court based its findings that the respondent was entitled to a reason for his termination absence of which rendered his termination wrongful was/is not applicable. The article was not enacted as a section in the Employment Act, cap Act No 6 of 2006 and as such was/has never been domesticated and has no force of law in Uganda.

On the second aspect of the ground 1, the issue is whether the "termination" as distinct from "dismissal" requires a hearing for it to be lawful?

The respondents counsel submitted that from the authorities, since the termination can be with reasons or without, it does not require a hearing.

This is borne out by the provisions of section 66 (1) and (2) of the Employment Act, 2006 which deal with the rights before dismissal of an employee. The appellant's counsel submitted that the test of lawfulness of the termination is whether the requisite notice which in the case of the respondent was three months' notice was given on whether payment in lieu of the notice was made. The appellant was entitled to 3 months' notice or payment in lieu of notice and was paid in lieu of notice and therefore the termination of his employment by the appellant was lawful.

The appellant's counsel submitted that the third facet of that ground 1 was whether the "termination" is wrongful in as far as it did not follow the procedures laid out in the Human Resources Manual or Disciplinary Procedures to be lawful?

As far as this question is concerned, the appellant's counsel submitted that clause 16.0 of the Respondent's Employment Contract provided inter alia for three months' notice or payment in lieu of notice where an employee has served for 10 years or more. He submitted that the clause incorporates the Employment Act by making the notice of termination subject to the terms of the Employment Act. That the Employment Act in section 65 (1) (a) provides that termination shall be deemed to take place *inter alia* where the contract of service is ended by the employer with notice. In the premises of the Industrial Court erred in law to hold that the termination of the respondent's employment was unlawful or wrongful.

In reply to ground 1 of the appeal, the respondents counsel submitted that the termination of the respondent's employment was wrongful and the Industrial Court came to the correct conclusion. He submitted that the word "wrongful" is defined in **Black's Law Dictionary Eighth Edition** as not authorised by law, illegal or an unlawful act and it is also defined as conduct that is not authorised by law or in violation of a civil or criminal law.

As far as the law is concerned, the respondent's counsel submitted that Uganda ratified the Termination of Employment Convention number 158 of 1982 on 18th July 1990 and therefore the law was in force and ought to have

been applied in the employment laws of Uganda by virtue of article 123 of the Constitution of the Republic of Uganda and article 1 of the Convention which enjoins state parties to give effect to the convention through inter alia court decisions, arbitration awards, collective agreements or such other manner as may be consistent with national practice.

The appellant's counsel relied on article 4 of the Convention which provides that the employment of the worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Secondly, the respondent's counsel submitted that section 58 of the Employment Act clearly provides that the contract of service shall not be terminated by an employer unless he or she gives notice to the employee and exceptions are where the contract is terminated summarily under section 69 or where the reason for termination is attainment of retirement age.

Further the respondent's counsel submitted the reasons for termination are required for termination of the contract under section 65 (1) (c) and 69 of the Employment Act according to the decision in **Bank of Uganda vs Joseph Kibuuka and others; Civil Appeal No 281 of 2016**. Further section 69 (1) of the Employment Act defines a summary termination as a termination which takes place where the employer terminates the services of an employee without notice or with less notice than that to which the employee is entitled by any statutory or contractual term. In addition, section 69 (2) provides that subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term. Section 69 (3) provides that an employer is entitled to dismiss summarily and the dismissal shall be deemed as justified where the employee has, by his or her conduct, indicated that he/she has fundamentally broken his or her obligations arising under the contract of service. Further counsel submitted that this is supported by section 68 (1) of the Employment Act which

provides that in an action arising out of termination, the employer shall prove the reasons 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.

Further, the respondent's counsel submitted that the respondent's services were summarily terminated and therefore reasons were required for termination under section 65 (1) (c) and 69 of the Employment Act which provides for summary termination. Further in **Uganda Development Bank vs Florence Mufumba** (supra) the employer terminated the respondent's permanent and pensionable contract of service without giving any reason and the Court of Appeal in its interpretation of sections 58 and 69 of the Employment Act held that the services of the respondents in that case could not be terminated without notice and further that she could only have been terminated summarily without notice if she had committed a fundamental breach of her terms of service. Counsel submitted that an employer who wishes to terminate the services of an employee should do so within the confines of the law or suffer the consequences of failure to comply with the rules.

Coming to the facts of the case, the respondent's counsel submitted that the respondent was on a permanent and pensionable contract of employment and was wrongfully and unlawfully as well as summarily terminated from his services without any justification. Further that the respondent was employed on a permanent and pensionable basis by the appellant where he excelled. Counsel relied on the evidence of the Individual Performance Appraisal done on 18th September 2012 barely 2 months before the claimant's services were terminated. That the respondent was recommended as a potential candidate for "Head of Commercial Role". Further clause 17 of his employment contract incorporated other policies and procedures notified to the respondent and one such policy was the Discipline Management Policy which formed part and parcel of the employment contract. Clause 16.1 of the contract of employment provided for notice periods for termination and in particular provides that a person

who has worked for more than 10 years was entitled to 3 months' notice of termination. Further the Discipline Management Policy set out in detail, offences relating to termination and offences relating to dismissal. The documents created a legitimate expectation on the part of the employees, including the respondent, as regards what conduct is prohibited, the consequences of violating the policies and expectations that if he did not commit any transgressions of the discipline management policy that he would keep his job until the retirement age of 58 years.

Further, the respondent's counsel submitted that the evidence shows that Mr Buckley Gregory and Mr Sidney Mpipi requested the respondent to resign on several occasions and to pursue his case against the appellant bank while outside the employment of the bank. On 12th November 2012, the respondent was summoned by the Acting Head of Human Resources DW1 who handed him a backdated termination letter bearing the date of 9th of November 2012 effectively terminating his employment with immediate effect. That the letter of termination exhibit P2 does not give any reason for the termination without notice or give any noticed of the requisite three months provided for in clause 16.1 of the Employment Contract. It however required the respondent to hand over office on the very day the letter was given to him on 12th November 2012.

Further, the respondent's counsel submitted that clause 16.1 of the Employment Contract which the appellant relied on to terminate the respondent's employment services does not give power to the appellant to terminate as conceded by DW1. In the circumstances, the appellant only had recourse to clause it 16.1 of the Employment Contract; exhibit P1 to determine the length of the notice, the respondent was entitled to after finding the respondent culpable under the Displaying Management Policy for any or a combination of offences leading to termination and this should be after following due process under the policy.

In the premises, the services of the respondent could not be terminated without notice. What actually happened is that the respondent services were summarily terminated without notice as if he had committed a

disciplinary offence. But there was no single allegation that the respondent fundamentally breached the terms of his contract of service and it was clear that the termination of the respondent's employment was in breach of the statutory provisions under the Employment Act which override contractual terms.

The respondent's counsel further submitted that the appellant conceded that there was no adverse finding against the respondent in the fraud investigation and no disciplinary proceedings were commenced against the respondent. Furthermore, the employees who were actually found culpable in the fraud investigation were only given written warnings in relation to the fraud. In his testimony DW 1 David Mutaka in re-examination attempted to state the reasons for termination of the respondent's contract as follows:

> The claimant was terminated because following the investigation, he became uncooperative, he felt he had been unfairly treated. He was counselled by his line manager but became difficult coming to work late et cetera... He created an impression that he wanted to leave. Instead of letting him to be destructive, the bank decided to invoke the termination clause. There are no grounds to call for disciplinary.

Respondent contends that the reason came in the 11th hour during re-examination. No proof was adduced to support the allegations against the claimant yet under section 68 of the Employment Act, the burden to prove reasons for termination or dismissal lies with the employer. Further, the reasons fall below the threshold set in section 69 of the Employment Act which provides that summary termination which is what the respondent faced is only permissible or justifiable where the employee has fundamentally breached his contract of service.

It is the respondent's case that the trial court was alive to the laws and principles and such International Conventions applicable and held that the termination clause in the employment contract signed between the appellant and the respondent cannot be read in isolation. The court further held that the disciplinary management policy was part and parcel of the contract of employment of the respondent. Further that the right of an

employer to terminate the contract cannot be fettered by the courts. Further the procedure for termination should be followed to ensure that no employee's contract is terminated at the whim of an employer and if this were to happen, the employee would be entitled to compensation.

Further in **Mary Pamela Ssozi vs the Public Procurement and Disposal of Public Assets Authority HCCS No 62 of 2012**, it was held that an employer cannot unreasonably and without justification terminate a contract of an employee simply because there is a clause in the employment contract that allows for payment in lieu of notice.

Grounds 2 and 3 of the appeal.

2. The learned trial judge's and panellists of the Industrial Court erred in law in relieving the respondent of his outstanding loan obligations yet he used and benefited from the money advanced;

3. The learned trial judge's panellists of the Industrial Court erred in law in allowing reimbursements of the outstanding loan obligations in the sum of Uganda shillings 19,019,879/= and a further Uganda shilling 28,858,583/= as part of the pension used to repay the loan obligations of the respondent.

As a question of fact, the appellant's counsel submitted that at the date of termination, according to the termination letter exhibit P2, the respondent owed the appellant Uganda shillings 9,690,584/= being a miscellaneous loan advance to him, a staff home loan of Uganda shillings 76,178,550/= and a credit balance of Uganda shillings 4,150,745/=.

The appellant's counsel submitted that the evidence shows that the loan was obtained by the respondent. What is in issue is not that the loan was obtained but rather finding of the Industrial Court that the termination is unlawful. In the premises the basis of the award is that the loans were taken and would be repaid from the salary of the employee. In reaching its finding, the Industrial Court lumped all the loans instead of treating each loan as an independent loan agreement or contracts that could be interpreted in its own right. Under the specific independent loan contracts, for instance a

home loan was taken out by the respondent with agreed payment instalments and security. The obligation to repay the loan was not extinguished upon termination of the employment contract. In any case, the contract was terminated under its terms with payment in lieu of notice. Further, the terms of the credit card were never presented to the Industrial Court and it is unclear on what basis, the court reached its decision that it would be paid through salary deductions. The special claim by way of damages ought to have been specifically proved.

In conclusion, the appellant's counsel submitted that the loans were due and the respondent remained contractually bound to repay the sums outstanding and the grounds should be answered in the affirmative.

In reply to grounds 2 and 3 of the appeal, the respondent's counsel submitted on whether the learned trial judges and panellists of the Industrial Court erred in allowing reimbursement of the outstanding loan obligations in the sum of Uganda shillings 90,019,879/= and a further Uganda shilling 28,858,583/= as part of pension used to repay the loan obligations of the respondent.

The respondents counsel submitted that the court noted that the respondent did not have any loan obligation left and in fact had paid off the outstanding obligations using his pension funds from and other sources. What the court ordered was a refund of the money paid by the respondent for settlement of the outstanding loan obligations amounting to Uganda shillings 90,019,879/=. The respondent contends that the court was justified in ordering a refund of the money that was outstanding and the loan obligations of the respondent at the time of the impugned wrongful and summary termination.

Further the respondent's counsel submitted that it is trite law that an employer who is found by a competent court to have unlawfully terminated employment services does so on the understanding that he is liable to pay compensation therefore. The claim was for the repayment of the balances after the date of the unlawful termination (see **Okello vs Rift Valley Railways**

HCCS No 195 of 2009 as well as **Mbiika vs Centenary Bank LDC 023/2014**). In **Uganda Development Bank vs Florence Mufumba** (supra)) the court found that failure to service the loans which were serviced through salary deductions was a direct consequence of the wrongful termination and absolved the claimant of payments from salaries.

The respondent's counsel submitted that the retirement age under the employment contract age was 58 years, and the respondent, while under the employment of the appellant, was advanced Uganda shillings 84,096,550/= and a top up loan of Uganda shillings 23,489,036/= as housing facilities at 8% per annum interest whose payment was amortised to coincide with the respondent's 58th birthday as the official retirement date. Further he was advanced salary loan at half the prime lending rate. Further clause 15.3 of the Employment Contract provides for the respondent being given a home purchase or housing loan at 50% of the prevailing prime lending rate. At the time of the termination, the outstanding balance on the housing loan was Uganda shillings 76,178,550/=. Secondly, the salary loan had an outstanding amount of Uganda shillings 9,690,584/= and Uganda shillings 4,150,735/=. That it was a direct unforeseeable consequences of the unfair/wrongful termination that his obligations were accelerated and serviced at prime rates applicable to all employees. However, he was caused by the appellant to sign off his pension to pay off the outstanding loan at the time of the termination. Counsel further submitted that the pension of the employee had already been earned and was payable to the respondent. The appellant's counsel further relied on **Bank of Uganda vs Betty Tinkamanyire** (supra) where the Supreme Court found that it was inequitable for the respondent to lose pension rights though the court would not order her reinstatement.

Ground 4 of the appeal.

The learned trial judges and panellists of the Industrial Court erred in law in awarding the respondent "severance allowance" outside the scope and contrary to the provisions of the Employment Act, Number 6 of 2006.

The appellant's counsel with reference to section 87 (a) to (f) of the Employment Act, 2006 submitted that the section deals with the circumstances in which severance allowances will be paid and the only arguable applicable provision in the case would be a section 87 (a), if the respondent had been unfairly dismissed. Because the employment of the respondent was lawfully terminated, he was not entitled to any severance allowance. In support of the submission the appellant relies on the decision of the Court of Appeal in **Uganda Development Bank vs Florence Mufumba; Court of Appeal Civil Appeal Number 241 of 2015** where the circumstances in which severance pay could be paid was considered.

The appellants counsel submitted that because the respondent was lawfully terminated, the provisions on severance pay were inapplicable to him and ground 4 of the appeal ought to be allowed.

In reply the respondent's counsel submitted that severance package or allowance is payment or benefits an employee receives when they leave the employment of the company unwillingly. It is payable to a worker after a continuous service of at least six months. It helps protect employees who become victims of arbitrary and irrational decisions by employers who terminate service contracts of employees. Severance pay is similar to gratuity in the public sector. The respondent relies on section 87 of the Employment Act and submitted that it stresses that severance pay is due were among other things an employee has unfairly been terminated or dismissed. It follows that where the court determines that the contract of service was wrongfully terminated or the employee was unfairly terminated, severance allowance is payable (see **Bank of Uganda vs Joseph Kibuuka and others** (supra)). Further section 88 of the Employment Act provides the circumstances were no severance allowance shall be paid. Last but not least the calculation of severance pay is provided for under section 89 of the Employment Act which stipulates that it shall be negotiable between the employer and the workers or the Labour union that represents them.

Further where there is a policy to award severance pay and that policy stipulates how the pay would be computed, the employer will be bound by the terms of the clause in that policy. On the other hand, where there is no policy an award of severance pay may be calculated by providing for one month's salary per each year worked for the duration of the employment.

The respondent submitted that it has not been demonstrated how the court awarded severance allowance outside the scope and contrary to the provisions of section 89 of the Employment Act. Further the court found that there was no evidence of a negotiated method of calculation of severance allowance between the appellant and the Labour union neither was there any agreement specifying the calculation of severance allowance as provided for in section 89 of the Employment Act and in the absence of that, the court had recourse to previous authorities which interpreted sections 87 – 90 of the Employment Act and arrived at the position that it was one month's salary per each completed year of service. Having taken into account all the factors which are relevant: the court arrived at the correct holding that the respondent was entitled to severance pay of Uganda shillings 165,258,254/= for the 25 years he had faithfully served the appellant.

Ground 5 of the appeal.

The learned trial judges and panellists of the Industrial Court erred in awarding excessive general damages.

The appellants counsel submitted that the award of 85,000,000/= as general damages to the respondent by the Industrial Court had no basis to support it because the termination was lawful and the general damages do not arise. Alternatively, if the termination was found to be unlawful, the general damages was an arbitrary award in as far as it exceeded the monetary value of the period that was necessary to give proper notice of termination. Further the three months' salary in lieu of notice had already been paid by the appellant and the respondent acknowledged receipt of the same in his testimony.

Further, the appellant's counsel submitted that the award of the Industrial Court was based on wrong principles and was manifestly so high in the circumstances. The appellant's counsel further relied on **Bank of Uganda vs Betty Tinkamanyire; Civil Appeal No 12 of 2007** for the proposition that the contention that the contract of employment terminated prematurely or illegally should be compensated for the remainder of the years when they would have retired is untenable in law. Secondly, compensation for unlawful dismissal should be confined to the period in the of notice by way of payment. In that particular matter, the award for compensation was payment in lieu of notice amounting to 3 month's pay. The appellant's counsel submitted that this decision is binding on the Court of Appeal because it is a decision of the Supreme Court of Uganda.

Further, the appellant's counsel submitted that the award of general damages allegedly to atone for great anxiety, loss of self-esteem, mental distress, loss of dignity and reputation and inconvenience for being deprived of the means of feeding his family was erroneous and ought to be set aside.

In the alternative, the appellant's counsel submitted that the award was manifestly excessive has no foundation in law and amounts to a gratuitous award to the respondent who had been paid in lieu of notice.

The appellant prays that the appeal is allowed.

In reply, the respondent's counsel supported the award of Uganda shillings 85,000,000/= as general damages and submitted that it was not excessive. I have duly considered the authorities referred to in those submissions.

The Cross Appeal.

Ground 1 of the cross appeal.

The learned trial judges and panellists of the Industrial Court erred in law in holding that the respondent bank had legal authority to conduct a search on all the bank accounts disclosed by the respondent without a search warrant.

The appellant's counsel submitted that this ground arose out of inquiry by the appellant seeking to confirm whether the respondent was complying with his contractual obligations and particularly the Staff Accounting Handling Procedure which was part of his terms and conditions of service. Those terms and conditions of service required the respondent to disclose to the appellant all the banks in which he held accounts, the financial services industry being a sensitive industry. Further the respondent was still in the employment of the appellant when loan facilities in substantial sums had through connivance between some of the appellant's staff and particular borrowers been originated and approved based on inter alia irregular documentation including forged bank statements and false valuation reports. The appellant's case is that it was a prudent action by it to initiate an internal investigation identify which of its employees were involved in the racket.

Further, the appellant had written an email asking the other banks to find out if they held accounts for any of the Stanbic staff whose names were given. The inquiry was limited in scope and did not go to extent of asking for disclosure by the bank of the account details or transactions in the said accounts contrary to what the respondent contended. It was not an undercover inquiry and did not require a search warrant or court order. In light of that, the Industrial Court reached the correct decision that it was prudent to initiate internal investigations to be able to identify which of the employees were involved in the fraudulent lending and armed with this authority there was no legal requirement for a search warrant or a court order before embarking on the process. In the premises there was no breach of article 27 of the Constitution of the Republic of Uganda.

The appellants further submitted that in any case, it was open to the respondent's bankers to decline to give the information requested. Therefore, ground 1 of the cross appeal ought to be answered in the negative.

The respondents case as submitted by the respondent's counsel is that he relied on the holding of the Industrial Court and further submitted on article

27 (1) of the Constitution which provides for the right to privacy and it particularly prohibits subjecting any person to unlawful search of the person, home or other property of that person. Counsel submitted that the bank account of the respondent was property as held in **Attorney General of Gambia vs Momodou Jobe; Privy Council Appeal No 37 of 1982**.

Ground 2 of the cross appeal.

The learned trial judge and panellists of the Industrial Court erred in law when they declined to award the respondent aggravated and exemplary damages.

The appellant's counsel relies on section 22 of the Labour Disputes (Arbitration and Settlement) Act, No. 8 of 2006 which provides that appeals against the decision of the Industrial Court lie to the Court of Appeal only on points of law. Because the ground is problematic in that it relates to both law and fact, the appellant's counsel submitted that the focus on the point of laws only. The Industrial Court found that there was no defamation of the respondent by the emails of the appellant and it was not alleged that he was a person suspected of being involved in fraud. Therefore, the claim for exemplary damages was denied by the Industrial Court.

Further, the appellant's counsel submitted that the award of exemplary damages was based on principles which were not applicable to the circumstances of the respondent's case (see **Rookes vs Bernard (1964) 1 All ER 367**. See also **Frederick JK Zaabwe vs Orient bank and others SCCA No 4 of 2006**. The appellants further submitted that the respondent's conduct was neither oppressive, arbitrary, unconstitutional nor was the appellant a servant of the government. The appellant only required the banks requested to disclose information which were supposed to be disclosed to it under the terms and conditions referred to above by the employees. The respondent did not adduce any evidence to prove that the respondents alleged conduct was calculated to make a profit. Similarly, in the circumstances there was no basis for an award of aggravated damages. There were no aggravating circumstances and the appellant submitted that the respondent was paid

three month's salary in lieu of notice under a lawful termination which was contractual. He prayed that the cross appeal is dismissed.

The respondent's case is that upon finding that there was no breach of article 27 of the Constitution by the appellant, but contractually the respondent was bound for disclose the details of these accounts to the appellant, the prayer for exemplary damages was denied. The respondents counsel submitted that the respondent was victimised and terminated for blowing the whistle on chronic, large-scale human rights violation involving the appellant's financial crime control department. There was lack of compassion, callousness and indifference to the old and devoted services of the claimant. The appellant acted in fraudulent breach of the Employment Act, the Constitution and the Discipline Management Manual. That the appellant failed to inform the respondent of any misconduct on his part and the services of the respondent were terminated after maligning him in the banking industry through the impugned emails well knowing that he had specialised training specifically tailored for the banking industry. Further, the respondent's counsel submitted that the appellant made a false, spurious and unwarranted allegations of misconduct against the respondent on the internet which went viral and could potentially be replicated almost endlessly to cause the widest possible repercussions for the respondent. The appellant failed and refused or omitted to correct the false impression created by the emails that went viral on the Internet linking the respondent to fraud even after the final forensic report exonerated the respondent of any wrongdoing. Further that the evidence showed that the respondent was an outstanding performer. The respondent is a chartered accountant and whose training and education is geared towards working in the banking industry. In the circumstances the respondents counsel submitted that an award of Uganda shillings 300,000,000/= would be fair and invited the court to make the award.

Ground 3 of the cross appeal.

The learned trial judges and panellists of the Industrial Court erred in law when the decline to award the respondent salary arrears for the remaining nine years of his permanent and pensionable contract.

The appellant's counsel pointed out that the Industrial Court held that the only remedy to a person who is wrongfully dismissed was damages and therefore a claim for prospective earnings cannot stand. A similar decision can be found in **Omunyokol Akol Johnston vs Attorney General** which according to the appellant's counsel is distinguishable because it related to a public civil servant on permanent and pensionable terms. That the decision does not aid the respondent's case which is bound by clear contractual terms including the option of either party bringing the relationship to an end with notice or payment in lieu of notice. Further it was envisaged by both parties that the contract could be brought to an end by notice or payment in lieu of notice. In the premises, there was no basis whatsoever for awarding salary arrears because the same is speculative as both parties were at liberty to terminate the contractual relationship therefore the ground of cross appeal ought to be disallowed.

The respondent's case is that the Supreme Court reviewed various decisions and held that where unemployment is unlawfully or wrongfully terminated, the employee is entitled to pay for the remainder of the period till retirement and invited this court to follow the decision of the Supreme Court in **Omunyokol Akol Johnson vs Attorney General; SCCA 06/2012.** The respondents counsel submitted that the relevant uncontested evidence was that the respondent was employed on permanent and pensionable terms. Secondly that at the time he was terminated, she was earning Uganda shillings 6,610,330/= per month. The salary was supposed to finance his loan repayments until payment in full. Fourthly they compute the loss of salary earnings for the remaining nine years of retirement based on the time value of money premised on the respondent's base salary when he left compounded at 20% average increment per year discounted at the current

inflation rate of 5% and the total of nine years amounts to Uganda shillings 1,476,085,864/=.

Ground 4 of the cross appeal.

> **The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent 10% of the above claimed salary arrears, being the appellant's contribution towards the respondents NSSF and 7% of the above figure being the appellant's contribution towards the bank's contribution pension fund.**

The appellant's counsel contended that in rejecting the claim, the Industrial Court held that the claim was superfluous since it was based on earnings not acquired during employment as the NSSF Act stipulates. Secondly it is on the same basis that the claim of the employer's contribution to the Provident fund was rejected. In the premises, the claims were speculative and both claims are contributory with the employer and employee paying certain percentages during the subsistence of the employment contract.

The respondents case is that because clause 6.0 of the Employment Contract exhibit P1 enjoined the respondent to join the appellants pension scheme and provides that the respondent would contribute 2.5% of his monthly salary while the appellant contributes 7% of their monthly salary, the respondents counsel contended that this court finds that this is a proper case to order for payment of salaries up to the date of judgment or after the date of the award and it follows that the respondent would contribute 9.5% of the said amount to the NSSF fund.

Ground 5 of the cross appeal.

The learned trial judges and panellists of the Industrial Court erred in law when they failed to properly evaluate the evidence on record thereby arriving at the wrong conclusion forming the basis of grounds 1 and 2 of the Cross Appeal.

The appellants counsel reiterated submissions on grounds 1 and 2 of the cross appeal.

Ground 6 of the cross appeal.

The learned trial judges and panellists of the Industrial Court erred in law when he failed to award the respondent costs of the suit.

The appellants counsel relied on section 27 of the Civil Procedure Act, for the proposition that the award of costs is at the discretion of the court and just like any other discretion, it must be exercised judicially and not arbitrarily otherwise an aggrieved party is free to challenge the court's decision by way of an appeal. Because only part of the respondent's claims succeeded at the Industrial Court, the court expressly stated that there would be no order as to costs based on the outcome of the award.

In the premises, the appellant's counsel prayed that the cross appeal is disallowed with costs and the appeal allowed.

The respondents counsel abandoned this ground and submitted that it is a general ground of appeal and which cuts across all the issues raised in the cross appeal and was canvassed while arguing the rest of the grounds. The premises, the respondent prays that the appeal is dismissed and the cross appeal allowed whereupon the court should issue the following orders after setting aside part of the award and in the place make the additional declarations and orders that:

a) A declaration that the act of the appellant conducting a search on respondent's bank accounts without a warrant was illegal and an infringement of the respondent's right to privacy.
b) An order that the appellant pays general damages for violation of his rights in (a) above.
c) A further order that the respondent be awarded aggravated and exemplary damages.
d) Order that the respondent be awarded salary arrears for the remaining nine years of his permanent and pensionable contract.
e) Ordered that the respondent be awarded 10% of the above claimed salary arrears, being the appellant's contribution towards the NSSF

the 7% of the above figure being the appellant's contribution towards banks contribution pension fund.

f) Costs of the appeal and of the court below.

Consideration of the appeal

I have carefully considered the written submissions of counsel for the Appellants and the Respondent in the appeal and cross appeal respectively. I have also considered the record of appeal, the law and authorities cited by the counsel of the parties and taken them into account. The duty of this court as a first appellate court is to reappraise the evidence on record and draw its own inferences of fact as provided for under Rule 30(1)(a) of **the Judicature (Court of Appeal Rules) Directions, S.I No. 13-10**. Further in **Peters v Sunday Post Limited [1958] 1 EA 424** the East African Court of Appeal held that the duty of a first appellate court is to review the evidence in order to determine whether the conclusions drawn by the trial court should stand. In reappraisal of evidence, the first appellate court should caution itself regarding the shortcoming of not having had the advantage of seeing and hearing the witnesses testify.

The material facts as set out in the award of the Industrial Court were that the claimant had been employed by the defunct Uganda Commercial Bank in 1998 and thereafter from 1st January 2003 was employed by the successor of the Uganda Commercial Bank, the appellant bank. In the course of his employment the claimant secured and was granted salary loans at 8% per annum interest. An internal audit report indicated that there was fraud in the respondent bank related to the issuance of loans causing loss to the bank. In the course of investigation of the fraud, the Financial Crime Controls Department of the appellant posted a series of emails to various banks requesting for information on whether there were any accounts held by its listed staff including the claimant at their various banks. The claimant alleged infringement of his privacy and innuendo that he was involved in fraud and filed a human rights cause in the High Court against the respondent which was subsequently referred to the Industrial Court. On 9th

of November 2003, the appellant terminated the claimant's employment upon payment of three months' salary in lieu of notice.

The following issues were set out in the joint scheduling memorandum of the parties:

1. Whether the claimant's employment was wrongfully terminated?

2. Whether this court has jurisdiction to entertain any issues relating to alleged infringement of constitutional/fundamental rights and freedoms?

3. If so, whether the respondent's act of conducting inquiries or searches in respect of the search of the claimant's bank accounts without obtaining a search warrant or court order for the impugned purpose infringed or threatened the claimant's rights protected by articles 27, 24, 40 (2), 28 (1), 42, 44 (a), 44 (c) and 45 of the Constitution of Uganda?

4. What remedies are available?

On the first issue of whether the claimant's employment was wrongfully terminated, the court held that the termination of the claimant's services was wrongful and answered the first issue in the affirmative.

On the second issue as to whether the court has jurisdiction to entertain and determine any issues relating to infringement of fundamental rights and freedoms, they found that though the Industrial Court is a specialised court established to expedite labour justice, where the matter before the court is fundamentally distinct but has aspects of claims related to or originating from a dispute capable of being resolved at once, to avoid a multiplicity of suits, it has jurisdiction to dispose of the whole matter. The court therefore held that it had jurisdiction to entertain the matter and answered issue 2 in the affirmative.

On the third issue of whether the respondent's act of conducting inquiries or searches in respect of affairs of the claimant bank accounts without a search warrant or court order infringed on the claimant's rights protected by the Constitution, they Considered the evidence and answered the third

issue in the negative in that they found that there was no breach of article 27 of the Constitution the Republic of Uganda.

On the fourth issue with regard to remedies available to the parties, the Industrial Court declined to make declarations arising from alleged infringement of article 27 of the Constitution. Secondly on the question of the claim for salary arrears, the claim for salary from the date of termination to the date of the award was declined.

With regard to reimbursement of outstanding loan obligations, the Industrial Court allowed the claim for reimbursement of shillings 90,019,870/=. The court rejected the claimant's action to recover 10% NSSF contribution by the employer on the ground that the provision of section 13 of the NSSF Act does not apply where employment was terminated as it is a contribution of his earnings from employment. With regard to the claimants claim for 95% of the earnings not earned from employment, the same was rejected for the same reasons.

Further, the claimant's claim for severance pay was for a sum of Uganda shillings 165,258,250/= being severance pay for 28 years' service the claimant worked in the appellant's company. Further the claimant was awarded general damages of Uganda shillings 85,000,000/=. In relation to the claim for aggravated and exemplary damages, the same was denied. Finally, the claimant was awarded interest at the rate of 15% from the date of award till payment in full with no order as to costs.

Ground 1:

The first ground of appeal is the basic ground challenging the finding of the Industrial Court to the effect that the termination of the respondent was wrongful or unlawful.

Ground 1.

The trial judge and panellists of the Industrial Court erred in law in holding that the termination of the respondent's employment by the appellant was wrongful.

I have carefully considered the facts and circumstances of termination. Starting with the contractual provision under clause 16.0 which deals with termination of employment in exhibit P1 that has terms and conditions of employment, where it is provided as follows:

> Save in the event of summary dismissal, notice of termination of employment is subject to the terms as noted in the Employment Decree. Minimum period of notice to be given by you or the bank is as follows...

Subsequently as applicable to the respondent, it is provided that where the period of service is 10 years or more, the notice period is three months. Further in a letter dated 9th November 2012 entitled "Termination" addressed to the respondent which letter reads as follows:

> Reference is made to your employment contract...effective 1 November 2003 and the terms on termination of the contract of employment.
>
> This is to inform you that your services with the bank have been terminated with effect from 13th of November 2012. Your last working day will be 12th November 2012.
>
> You will be paid your salary up to the last day of work and Ugx. 19,820,990/= as 3 months' salary in lieu of notice as per the contract plus leave encashment of 13.33 current outstanding leave days on 23rd November 2012.
>
> You have an outstanding Miscellaneous loan of Ugx. 9,690,584/=, staff loan of Ugx. 76,178,550/= and a credit card balance of Ugx. 4,150,745/= which become payable on demand or you may contact the credit department on repayment options available to you before any of your dues can be processed. Please note that rates on your staff loan will be varied to prevailing customer rates.
>
> Please do a formal handover of role and hand over all company property in your possession including bank identity card to your line manager.

The respondent protested the letter in another letter dated 14 November 2012 addressed to the Head, Human Resource Stanbic Bank (U) Ltd. The letter reads in part as follows:

> Reference is made to yours dated 9th of November 2012, with reference 164409.

> I also refer to our meeting in your office on 12th November 2012 at 10:30 AM when you handed me the termination letter and said it was the outcome of the civil legal action against the bank by me.
>
> Whereas I respected the decision by the bank I feel it is unjust, malicious and ill intentioned. I would therefore seek further guidance on the matter.
>
> I have meanwhile completed the handover of all company property in my possession as instructed and wish to convey my appreciation to management for the time I have served the bank.

It is not in dispute that the respondent had commenced an action in the court challenging an email by the appellant bank seeking to get information about staff who had bank accounts in other banks. The facts are that in an email dated 24 July 2012, Stanbic bank wrote to several banks seeking for information about its staff members in the following words:

> Could you again help us find out if you hold accounts for any of the Stanbic staff below? The information is needed for an ongoing loan fraud investigation.

The list of names attached included the name of the respondent. Thereafter the respondent on 24th September 2012 filed an application for enforcement of fundamental rights and freedoms in the High Court in Miscellaneous Cause No. 128 of 2012 against the appellant in this appeal. He sought for several declarations inclusive of a declaration that the respondent's arbitrary act of conducting undercover enquiries or searches in respect of the affairs of the applicant bank accounts without obtaining a search warrant or court order for the impugned purpose infringed or threatened the applicant's rights protected by articles 27, 24, 40 (2), 28 (1), 42, 44 (a), 44 (c) and 45 of the Constitution. The grounds included an allegation that between the 11th and 24th of July 2012 and afterwards an officer in the Financial Crime Control Department of Stanbic bank in the course of her duty wrote and posted a series of circular emails to 24 banks and financial institutions including the regulator of financial institutions; Bank of Uganda and Bank of Africa (Uganda) Ltd, where the applicant currently holds a current account demanding for access to the bank account information of the applicant purportedly to further an ongoing loan fraud investigation. He

alleged inter alia that the bank did not have a reasonable cause to conduct the search of the applicant's bank accounts but at any rate not in the manner complained about.

In the affidavit in reply the respondent who is now the appellant in this appeal deposed in the affidavit of Gloria Matovu Kawooya responding to the amended notice of motion filed subsequently in an affidavit dated 1 April 2017 that the inquiry that the respondent complained about should be considered on the basis of the extent of disclosure of the bank account it required. What was requested for were not details of transactions on the said accounts but was limited to inquiry as to whether an account existed in the banks to which the emails were addressed. It is only the police who are the entity mandated to carry out such further inquiry in the context of the criminal investigation. The appellant bank also held the position that the terms and conditions of service disclosed that the respondent agreed to disclose all the banks in which he held accounts.

What is material being that having filed a notice of motion in September 2012, by 9 November 2012 the appellant bank had written a termination notice quoting a contractual provision allowing it to give notice. The question therefore is whether the termination was unlawful in the circumstances. It is not in dispute that the respondent was not given the requisite notice but was given payment in lieu of notice in terms of clause 16.0 of the terms and conditions of service exhibit P1 that I have referred to above.

"Termination" is defined by section 2 of the Employment Act as having the meaning given in section 65 of the Employment Act. Section 65 of the Employment Act, 2006 provides that:

> 65. Termination
>
> (1) Termination shall be deemed to take place in the following instances-
>
> (a) Where the contract of service is ended by the employer with notice;
> (b) Where the contract of service, being a contract for a fixed term or task, ends with the expiry of the specified term or the completion of the specified task and is not renewed within a period of one week from the date of expiry on the same terms or terms not less favourable to the employee;

(c) Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee; and

(d) Where the contract of service is ended by the employee in circumstances where the employee has received notice of termination of the contract of service from the employer but before the expiry of the notice.

(2) The date of termination shall, unless the contrary is stated, be deemed to be-

a) In the circumstances governed by subsection (1)(a), the date of expiry of the notice given;

b) In the circumstances governed by subsection (1)(b), the date of expiry of the fixed term or completion of the task;

c) In the circumstances governed by subsection (1)(c) or subsection (1)(d), the date when the employee ceases to work for the employer; and

d) In the circumstances when an employee attains normal retirement age.

Section 65 (1) of the Employment Act gives different scenarios for termination that include (a) the termination of the contract with notice by an employer, (b) the expiry of the contract term; (c) where the service is ended by the employee with or without notice; (b) where the contract of service is ended by the employee in circumstances where the employee has received a notice of termination of service but ends it before the expiry of the notice. The scenario in section 65 (1) (a) allows termination with notice by an employer. Secondly in section 65 (1) (b) – (d) the circumstances where termination is initiated by the employee and not employer are given except section 65 (1) (c) which envisages a notice of termination of employment but the employee ends it first. The cited provisions do not provide for termination by employer except with notice and this is consistent with other provisions of the Employment Act as we shall examine below.

Further, section 65 (2) of the Employment Act provides for the date when the termination shall be deemed to have occurred. These are by expiry of the notice when it has been given; expiry of a fixed term of the service contract; when the employee ceases to work for the employer; and attainment of retirement age by the employee. Section 65 (2) supports the conclusion that the word "termination" is restricted to termination of the

contract of employment by the employer with notice or by the employee in the circumstances given. The Employment Act, 2006 has a separate definition for "termination" from that of "termination of employment". With regard to "termination of employment" it provides that:

> ... means the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as, expiry of contract, attainment of retirement age, etc.

In order to read the two definitions in harmony, it is necessary to consider that the termination of employment by the employer at the initiative of the employer has to be for justifiable reasons other than misconduct and the specie of the things for which an employer may terminate the employment include expiry of the contract, attainment of retirement age etc.

Obviously the contract term 16.0 allows the appellant to terminate the employment of the respondent with notice. Therefore, the only question is whether the Employment Act allows the employer to terminate the contract of employment without notice where there is a provision for notice or payment in lieu of notice. In my judgment, this is the crux of the arguments in ground 1 of the appeal and the only matter to be considered. The appellant's counsel relied on section 65 (1) (a) which allows for termination with notice but clearly the facts do not support termination with notice. Instead, there was termination without notice and payment in lieu of notice. Section 65 (2) stipulates that under subsection (1) (a), the date of termination is the date of expiry of the notice given. Clause 16.0 of the terms and conditions of service of the respondent clearly stipulates that he was entitled to 3 months' notice which notice was not given. Therefore, it cannot be stated that there was any termination with notice. Granted, the contract term clause 16.0 allowed the respondent to be paid three months' salary in lieu of notice. The problem is that this provision of the contract cannot be read in harmony with the Employment Act in its definition of the word "termination" or "termination of employment". Secondly it cannot be read in harmony with section 65 which provides for the instances where termination is deemed to have taken place.

The above provisions are further supported by section 58 of the Employment Act 2006 which provides for notice periods as follows:

> 58. Notice periods
>
> (1) A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except –
>
> (a) where the contract of employment is terminated summarily in accordance with section 69; or
>
> (b) where the reason for termination, is attainment of retirement age.
>
> (2) The notice referred to in this section shall be in writing, and shall be in the form and language that the employee to whom it relates can reasonably be expected to understand.
>
> (3) The notice required to be given by an employer or employee under this section shall be –
>
> (a) not less than two weeks, where the employee has been employed for a period of more than six months but less than one year.
>
> (b) not less than one month, where the employee has been employed for a period of more than 12 months, but less than five years;
>
> (c) not less than two months, where the employee has been employed for a period of five, but less than 10 years; and
>
> (d) not less than three months where the service is 10 years or more.
>
> (4) Where the pay period by reference to which the employee is paid his or her wages is longer than the period of notice to which the employee would be entitled under subsection (3), the employee is entitled to notice equivalent to that pay period.
>
> (5) Any agreement between the parties to exclude the operation of this section shall be of no effect, but shall not prevent an employee accepting payment in lieu of notice.
>
> (6) Any outstanding period of annual leave to which an employee is entitled on the termination of the employee's employment shall not be included in any period of notice which the employee is entitled to under this section.

(7) during the notice period provided for in subsection (3), the employee shall be given at least one half day off per week for the purpose of seeking new employment.

I have carefully considered section 58 (1) of the Employment Act and it is clear that it provides that no contract shall be terminated without notice. That is a general rule as it subsequently gives the exceptions to the general rule which inter alia include the exception that a person may be summarily terminated provided it is in accordance with section 69 of the Employment Act. We shall presently consider section 69 of the Employment Act for purposes of cross-reference with section 58 (1). Further section 58 (8) (d) of the Employment Act provides that where an employee has been employed for 10 years, he or she is entitled to not less than three months' notice. This is consistent with the employment contract of the respondent that we have considered above. Further section 58 (5) of the Employment Act provides that an agreement between the parties to exclude the operation of section 58 shall have no effect but this would not prevent an employee accepting payment in lieu of notice. In the circumstances of this appeal, the respondent never willingly accepted payment in lieu of notice and in fact in his letter in response to the termination letter, he stated that he would seek further advice. Thereafter he brought an action challenging the termination of the services. There was therefore no compliance with section 58 (5) of the Employment Act in which an employee accepts the terms of termination through payment in lieu of notice.

For emphasis, I wish to state that the provisions of the Employment Act override the provisions of the contract of the parties. In addition section 58 (5) of the Employment Act, which makes void any provision of the contract of employment which excludes the provisions of section 58 on the aspect of notice, there are general provisions under sections 3 and 27 of the Employment Act 2006, that a written contract of service cannot exclude the application of the Employment Act 2006 to the extent that it applies to the detriment of an employee or purports to exclude an employee from presenting a complaint under the Employment Act. Except as provided under the Act a contract between an employee and employer, which

excludes the provisions of the Employment Act is void except contracts which confer better rights on an employee than those provided under the Labour laws. Section 3 of the Employment Act makes the provisions of the Employment Act applicable to written contracts of employment. Further, section 27 of the Employment Act provides as follows:

> 27. Variation or exclusion of provisions of the Act
>
> (1) Except where expressly permitted by this Act, an agreement between an employer and an employee which excludes any provision of this Act shall be void and of no effect.
>
> (2) Nothing in this section shall prevent the application by agreement between the parties, of terms and conditions, which are more favourable to the employee than those contained in this Act.

In addition, the appellants case is that the respondent was not summarily dismissed. However, his services were not terminated with notice as stipulated under section 58 of the Employment and the services of the respondent are deemed to have been summarily terminated. Section 69 of the Employment Act, 2006 provides for summary termination and states that:

> 69. Summary termination
>
> (1) Summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (3) An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service.

Section 69 (1) of the Employment Act gives the law that where an employee dismisses an employee or terminates the services of an employee without

notice, it shall be considered to be summary termination. This occurs where there was no notice or less notice than that the employee is entitled to by any statutory provision or contractual term. Secondly, section 69 (2) of the Employment Act, makes it even clearer that there can be no termination without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. The exception to termination with notice is summary termination which is expressly defined by section 69 (3) which gives the grounds upon which an employee may be summarily dismissed. It clearly stipulates that a dismissal shall be termed justified if the employee has by his or her conduct indicated that he or she has fundamentally broken his or her obligation arising under the contract of service. The issue is that where the termination is wrongful it can amount to an unlawful dismissal. Is summary termination of employment a dismissal?

The term "dismissal from employment", it defined under section 2 of the Employment Act and means

> The discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct.

The appellants case is that it did not dismiss the employee. It only gave payment in lieu of notice. The contract in the circumstances was summarily terminated without due process in terms of section 69 (1) of the Act.

The same meaning arises when considering the expression "wrongful dismissal". This is defined by **Halsbury's laws of England 4th Edition Vol 16** Paragraph 302 as follows:

> 302: "Meaning of 'wrongful dismissal". A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:
>
> (1) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

(2) His dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily.

In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal. The existence of the latter does not, however, abrogate the common law action which may still be particularly appropriate in two cases:

(a) where the employee is not entitled to bring an action for unfair dismissal;
(b) Where the damages for wrongful dismissal are likely to exceed the statutory maxima placed on compensation for unfair dismissal, as, for example, in the case of a well remunerated employee on long notice or a fixed term contract.

Where an employee is wrongfully dismissed, he is released, by the employer's repudiation of the contract's provisions, in particular from a restraint of trade clause.

In the circumstances of this appeal, it is the Employment Act 2006 which makes termination without notice a wrongful termination or a summary termination. For there to be a lawful summary termination, the provisions of the Employment Act, 2006 override any contractual provisions which allow for payment in lieu of notice where notice is provided for unless the employee accepts the termination by payment in lieu of notice. The acceptance cannot be that in the contract as such a contract that purports to exclude the application of section 58 of the Employment Act either expressly or by necessary implication or effect is void by virtue of section 58 (5) of the Employment Act.

The circumstances of this appeal are very clear that the respondent never consented to payment in lieu of notice. He was just given a termination letter notifying him of payment in lieu of notice and asked to hand over office

immediately. This was on the 12th November, the same date he was to handover. In the circumstances, because the appellant relies on the contractual clauses 16.0 which allows it to give three months' notice or payment in lieu of notice, there was no lawful basis for the payment in lieu of notice that was contained in the termination letter as it was without the consent of the respondent and based on a unilateral action of the appellant. For the payment in lieu of notice to have validity, the appellant ought to have first sought the consent of the respondent before issuing the termination letter. In the premises, the termination of the services of the respondent was wrongful or unlawful.

Having found it to be wrongful by virtue of the provisions of sections 58 (1), (2), (3) and (5) of the Employment Act; sections 65 (1) (a) and section 69 (1) which shows that the termination without notice was a summary termination unless the employee consents to the payment in lieu of notice. Further, under section 69 (3) the termination was not justified and could not be justified because it proceeded under the premises, that it was termination with payment in lieu of notice. For that reason, references to International Conventions are unnecessary because the termination was wrongful and attracts the consequences of wrongful termination.

In the premises, I would find that the Industrial Court did not err in law in reaching the conclusion that the termination of the services of the respondent was wrongful. Ground 1 of the appeal fails.

Grounds 2 and 3 of the appeal.

> **2. The learned trial judges and panellists of the Industrial Court erred in law in relieving the respondent of his outstanding loan obligations yet he used and benefited from the money advanced.**
>
> **3. The learned trial judges and panellists of the Industrial Court erred in law in allowing reimbursements of the outstanding loan obligations in the sum of Uganda shillings 90,019,879/= and a further Uganda shilling 28,858,583/= as part of the pension used to repay the loan obligations of the respondent.**

Grounds 2 and 3 of the appeal deal with the question of the awards of compensation having found that the termination was wrongful.

From the outset, a wrongful termination or dismissal amounts to a repudiation of the contract and therefore damages may be assessed on the basis of statutory provisions or restitutio in integrum. According to **Halsbury's laws of England 4th Edition Vol 16 Para 302 where there is** "wrongful dismissal" of an employee, the employee is released by the employer's repudiation of the contract provides. It states that:

> 302: "Meaning of 'wrongful dismissal". A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. ...
>
> Where an employee is wrongfully dismissed, he is released, by the employer's repudiation of the contract's provisions, in particular from a restraint of trade clause.

For the principles of the award of general damages, the East African Court of Appeal in **Dharamshi v Karsan [1974] 1 EA 41** held that general damages are awarded to fulfil the common law remedy of *restitutio in integrum.* The principle is that of restoration of the claimant to a position he would have been as nearly as can be achieved, to a position he or she would have been in as if the wrongful termination as in this case had not occurred.

The argument for reimbursement of the respondent by the order of the Industrial Court was that the loans were taken by him on the premises that they would be recovered from the salary of the respondent but since his services were wrongfully terminated, he should not suffer the wrong of unlawful termination by not having the means to pay for the loans.

I have carefully considered the submissions of counsel and the ruling of the Industrial Court on the issue of reimbursement of outstanding loan obligations. According to the Industrial Court, the authority of the **Uganda Development Bank vs Florence Mufumba** (supra) established the principle that where the termination is unlawful, the employee would be entitled to relief from any loans that were the subject of repayment through salary.

The decision relied on does not establish a general principle and each case has to be considered on the basis of its own facts. This is because in **Uganda Development Bank vs Florence Mufumba** (supra), the appellant had four years left before retirement while in this case, the respondent had nine years before his retirement at the age of 58 years. The underlying principle is that where a loan is secured on the salary earnings of the employer and the employer unlawfully terminates the employment, and further makes the employee liable to pay for the loan from any other sources not envisaged at the time of the entering into a salary loan agreement, any failure of the employee to service to the loan would be a foreseeable and necessary consequence of the unlawful termination of his or her employment. In addition, as far as the respondent in this appeal is concerned, one must consider the fact that having terminated the services of the respondent, the interest rate chargeable on the loan was increased to a normal lending rate when it was a less by 50% per annum of the rate in the market. Again this would be a normal and foreseeable consequence of unlawful termination of employment to the prejudice of the employee.

There are however some other imponderables which must be considered which include, the prospects of the employee getting another employment and being able to service the loan. Further, the court should also consider the submissions of the appellant in this appeal that each loan has to be considered on the basis of the contractual provisions that govern it and there cannot be any blanket principle affecting that. For instance, where there is a mortgage which is secured by another security or the mortgaged property is the security, it cannot be said that what is envisaged is that the loan would be fully serviced from salary. Each contract has to be examined on the basis of its terms. Obviously, where the loans are serviced by the earnings of the employee from the employer through provision of the employment services, the evidence established that what was envisaged was the payment through salary earnings. In addition, the assessment of loss should primarily be based on the evidence of loss which has actually occurred and prospective loss. Several decisions on this principle were cited with approval by the Supreme Court of Uganda in **Robert Coussens vs**

Attorney General; Civil Appeal No 8 of 1999. These authorities included **British Transport Commission vs Gourley [1956] AC 155** at 197 per Earl Jowitt that:

> the broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as would put him in the position as he would have been if he had not sustained the injuries.

Though the above precedent dealt with a disability claim on the basis of injuries suffered, the principle is the same and is based on the common law principle of *restitutio in integrum*. In the assessment of the future prospects of the injured party, one looks at his or her prospects of earning a continuing income. In **British Transport Commission vs Gourley** (supra) at page 212 it was further observed that:

> If [the plaintiff] had not been injured, he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful even if he had remained in good health and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate of the present value of his prospective loss.

According to Oder JSC in **Robert Cousens vs Attorney General** (supra):

> ... an estimate of the prospective loss must be based in the first instance on the foundation of solid facts otherwise it is not an estimate but a guess. It is therefore, important that evidence should be given to the court as many solid facts as possible. One of the three facts that must be proved to enable the court to assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of his injury. The method of assessment of loss of earning capacity after the facts have been proved is, in my view, persuasively stated by **McGregor on Damages Fourth Edition paragraph** 1164 (page 797, as follows:
>
> > the courts have evolved a particular method of assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury

> from earning in the future. This amount is calculated by taking the figure of the plaintiff's present annual earnings less the amount if any, which he can now earn annually and multiply this by a figure which, while based upon the number of years during which the loss of earning power will last, it is discounted so as to allow for the fact that a lump sum is being given now instead of periodic payments over the years. This figure has long been called the multiplier; the former figure has not come to be referred to as the multiplicand. Further adjustments however, have to be made to the multiplicand or multiplier on account of a variety of factors; viz the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidents of inflation and taxation.

The method of assessment in the above decisions applied to loss of earnings on account of disability. However, it analogously applies to loss of employment and future prospects of re-employment. What is material to consider is that the court should take into account the actual impact of the loss of earning capacity on account of unlawful dismissal or unlawful termination of employment. This would cover the actual loss of earnings up to the date of the award as well as any prospective losses. In **Uganda Development Bank vs Florence Mufumba** (supra) the facts are that the claimant had served the bank for 10 years and had four years left before her retirement when she was terminated without any reason and reasons were formulated after the unlawful termination. The circumstances in this appeal are very different in the sense that the respondent had nine years left before his unlawful termination. His grievance of loss of prospective earnings is related to the allegation that he was defamed and was unable to get employment in the banking industry because of the false impression given to other banks on account of an email requesting other banks to disclose whether the respondent had an account therein. The appellant indicated that it was investigating fraud. This was contained in an email which formed the basis of his grievance and action for enforcement of his fundamental rights and freedoms where he contended that his right of privacy was violated by the appellant.

Further the facts of this case are that the appellant was paid all the outstanding loans from the terminal benefits of the respondent as well as from any other sources. In the premises, there was no outstanding loan at

the time of assessment of the loss to the claimant/respondent to this appeal. The Industrial Court ordered reimbursement of the amounts which had been paid by the respondent in the settlement of his outstanding obligations. David Mutaka who testified as DW1 indicated in his witness statement that the employment of the respondent was terminated upon the payment of three months' salary in lieu of notice and outstanding leave entitlement and the terminal benefits were duly paid.

The respondent filed a statement on 15th May 2018 before the Industrial Court where he stated that he was 55 years old. His case is that upon his summary termination, he was deprived of any income and consequently his house remained incomplete and a total waste due to the harsh weather. Secondly, due to the summary termination, the outstanding balance on the housing loans was **Uganda shillings 76,178,550/=**. He contended that the appellant took a coercive measure against him to pay the outstanding balance on the House loans by using his pension to repay the salary loan obligations. Secondly, his loan obligations were accelerated and serviced at prime rates applicable to non-employees for which he claimed reimbursement of funds used to clear the outstanding loan amounts at the time of his unfair termination.

The Industrial Court after making reference to two authorities namely their decision in **Mbiika vs Centenary Bank; LDC 023/2014** and **UDB vs Florence Mufumba (**supra) stated that:

> The authorities above cited by counsel for the claimant are clear for the legal proposition that where the respondent is found by a competent court to have unlawfully terminated an employee who has taken out a loan on purely (that) the understanding the loan is payable by salary deductions; the claimant will not be liable for payment of the balances on the loan up to the date of the illegal termination. Accordingly, (having) declared that the termination of the claimant was illegal, and in view of the above legal principle, we allow the prayer for reimbursement of 90,019,879/=.

The primary question following the principle the Industrial Court relied on is whether there was any understanding that the particular loan is payable

by salary deductions. I accept the submission that the contract on which the loan is based is a material consideration and there can be no blanket conclusion that there was an understanding that all the loans are payable by salary deductions. It follows that the Industrial Court erred to make a blanket finding that the loans were given on the understanding that they would be solely serviced through the salaries earned by the respondent from the appellant. It therefore required evidence on the subject matter of the outstanding loan amounts.

The evidence of the respondent and particularly paragraph 22, 23 and 24 of his written witness statement is as follows:

> 22. While in the employ (...ment) of the respondent I applied and was advanced a loan facility of 84,096,550/= (in words...) and later a top up of 23,489,036/= (in words...), to enable me construct a residential house on my land comprised in Plot 1041, Block 115 Guluma Kyaggwe, Seeta, Mukono district.
>
> 23. These two loans were at 8% and they were amortised to coincide with my 58th birthday as the official retirement age. ...
>
> 24. I was also granted two salary loans at an interest that was half the prime lending rate and credit card whose outstanding balances were Uganda shillings 9,690,584/= and Uganda shillings 4,150,745/= respectively at the time of the impugned termination.

Further in his written statement in paragraph 42 he stated as follows:

> 42.At the time of my summary termination, the outstanding balance on the housing loans was Uganda shillings 76,178,550/=.

I have also carefully considered the home loan offer letter dated 27 February 2008 which according to the letter was under the terms and conditions of the home letter offer. The loan was to be repaid in full within 132 months and the first instalment would be due 30 days after the first disbursement. The monthly payment was Uganda shillings 960,000/= and in paragraph 6 it is indicated that the mortgage protection of Uganda shillings 84,096,550/= was over the life of the borrower. The mortgage protection premium was to be arranged by the bank's insurance and payment would

be in monthly. Interest was to be charged at 8% per annum below the bank's prime rate prevailing from time to time which at the time was 16%.

Further I would like to emphasise two particular provisions in paragraph 3.1.2 (d) where it is provided that the interest under the loan would be "debited to the borrower's account held with the bank, monthly in arrears". Further paragraph 4 provided for security and there was to be a first ranking legal mortgage over the property referred to above. Secondly a mortgage protection policy for the whole amount over the life of the borrower ceded to the bank. The policy should cover death and permanent disability. Further in paragraph 6.4 it is provided that the borrower will inter alia ensure that funds are available in the borrower's account to cover the monthly capital instalment plus interest. The bank shall recall the facility if the borrower fails to meet the scheduled loan repayments.

It is therefore my considered Judgment that the conclusion of the Industrial Court that the home loan was to be repaid from the salary of the respondent is purely a matter of inference from the evidence. It is not based on a specific provision of the contract concerning the home loan facility. Secondly there was a specific salary loan whose details were given and the outstanding amount also indicated. In assessing the likely impact of the termination, it is a question of evidence as to whether payment was being made by the respondent from his salary. Particularly it is indicated that the bank may apply any monies standing to the credit of the borrower on any account held with the appellant bank for the repayment towards the discharge of the obligations of the borrower.

Clearly, the sums of Uganda shillings 9,690,584/= and Uganda shillings 4,150,745/= from salary loans were envisaged to be paid through deductions from the monthly earnings of the respondent. On the other hand, while the 960,000/= per month could be deducted from the monthly earnings of the respondent, there were further securities by which the discharge of all the outstanding loans were envisaged. These included the life insurance policy which was dedicated to the bank covering death, permanent disability and the mortgage itself which was charged on the property, the subject matter

of the home loan. There was supposed to be a valuation of the property after construction of the building had been completed. One may argue that the termination frustrated the home loan contract but this can be considered in assessment of damages. It was however erroneous for the industrial court to reimburse all the outstanding amounts which had been cleared by the respondent in the repayment of the loan. The respondent had obligations towards the bank in as much as the appellant had its obligations which it had breached by the unlawful termination. Obligations of the respondent was to be paid over a period of nine years from the time of termination of his services. The best way to handle the matter is to assess the damages due to the respondent and offset the outstanding amounts owed the appellant by the respondent from assessed amounts.

In the premises, I would allow grounds 2 and 3 to the extent of finding that it was just to reimburse the payments in respect of the salary loan amounting to Uganda shillings 9,690,584/= and Uganda shillings 4,150,745/= according to the decision of this court in **Uganda Development Bank vs Florence Mufumba** (supra) but not the sum of **Uganda shillings 76,000,000/=** which was outstanding on the home loan account until after assessing damages and offsetting the outstanding amount owed the appellant.

Ground 4:

> **The learned trial judges and panellists of the Industrial Court erred in law in awarding the respondent "severance allowance" outside the scope and contrary to the provisions of the Employment Act, No 6 of 2006.**

In arguing this ground, the appellants counsel relied on section 87 (a) to (f) of the Act for the proposition that it gives the circumstances in which severance allowances will be paid and the only arguable applicable provision is that section 87 (a) if the respondent had been unfairly dismissed. The appellant's counsel submitted that the respondent was lawfully terminated and therefore was not entitled to any severance allowance he relied on the decision of this court in **Uganda Development**

Bank vs Florence Mufumba (supra) which considers the circumstances in which severance pay could be paid. I have carefully considered section 87 of the Employment Act which provides as follows:

> 87. When severance allowance is due.
>
> Subject to this Act, an employer shall pay severance allowance where an employee has been in his or her continuous service for a period of six months or more where any of the following situations apply –
>
> (a) the employee is unfairly dismissed by the employer;
>
> (b) the employee dies in the service of his or her employer, otherwise than by an act occasioned by his or her own serious and wilful misconduct.
>
> (c) the employee terminates his or her contract because of physical incapacity not occasioned by his or her own serious and wilful misconduct;
>
> (d) the contract is terminated by reason of the death or insolvency of the employer;
>
> (e) the contract is terminated by a Labour officer following the inability or refusal of the employer to pay wages under section 31; or
>
> (f) such other circumstances as the Minister may, by regulations, provide.

The appellant's counsel predicated his submissions on section 87 (a) that the employee was not unfairly dismissed by the employer and therefore no severance allowance is payable. The flipside of the argument was that the employee was lawfully terminated from his employment by payment in lieu of notice under the contract of employment. In my judgment, sections 87 and 88 of the Employment Act, have to be read together because both of them deal with severance allowance while section 89 deals with calculation of the quantum of severance allowance. In section 88 (1) it is provided that no severance allowance shall be paid in circumstances where the employee is summarily dismissed with justification. In my judgment therefore where an employee is summarily terminated without any justification, severance allowance is payable and this does not have to turn on the meaning of the terms "unfair dismissal" under section 87 (a) of the Employment Act. The word "unfairly dismissed" appearing under section 87 (a) of the Employment

Act is not defined and should be given its ordinary meaning as being a dismissal without any justification or without following the due process either in the contract or in the statute or both.

Having found that the termination of the appellant was wrongful as held by the Industrial Court, I also find that the wrongful dismissal was unfair in the sense that the appellant purported to give notice of termination by indicating that he would be paid in lieu of notice with no opportunity for the respondent to accept payment in lieu of notice since he was supposed to vacate that very day and to hand over company property. The respondent protested the termination of services and challenged it because it was prompted by a court case he had filed against the appellant for alleged infringement of his fundamental rights and freedoms namely; the right to privacy. In the premises therefore the Industrial Court reached the correct conclusion that the respondent was entitled to severance allowance. I further note that the appellant did not show in any way that the calculation of the severance pay for 25 years at one month's salary per annum was erroneous in fact or law. In the premises, I dismiss ground 4 of the appeal for want of merit.

Ground 5.

> **The learned trial judges and panellists of the Industrial Court erred in law in awarding excessive general damages.**

This ground can be handled together with the ground No. 2 of the **Cross Appeal** because it deals with the appropriate remedies in the circumstances. Ground 2 of the cross appeal is that:

> **The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent aggravated and exemplary damages**.

Secondly, ground 3 of the cross appeal is that:

> **The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent salary arrears for the remaining 9 years of his permanent and pensionable contract**.

The question of the award of salary arrears for the remaining 9 years of any permanent and pensionable contract can be considered under the doctrine of *restitutio in integrum* which I have set out above and is therefore relevant in considering general damages, prospective earnings and any other punitive damages.

Similarly, in ground 4 of the cross-appeal cross appellant/respondent to the appeal averred that:

> **The learned trial judges and panellists of the Industrial Court erred in law when they declined to award the respondent 10% of the above claimed salary arrears, being the appellant's contribution towards the respondents NSSF and 7% of the above figure, the appellant's contribution towards the banks contribution pension fund.**

In my judgment, the question of any contribution based on salary arrears or salary has to be handled together with any entitlement to the appropriate quantum of damages based on salary earnings or prospective earnings. The determination of the questions in the cross appeal relating to damages together with the question of whether the respondent had been awarded excessive general damages can be handled together for a coherent and logical flow.

In ground 5 of the cross-appeal, the cross appellant averred that:

> **the learned trial judges and panellists of the Industrial Court erred in law when they failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion forming the basis of grounds 1 and 2 of the Cross Appeal.**

The cross appellant abandoned ground No 5 of the cross appeal as it cuts across issues of evaluation of evidence that was considered in the other grounds of the cross appeal.

With reference to the question of whether there was an award of excessive general damages as far as ground 5 of the appeal is concerned, the

industrial Court awarded Uganda shillings 85,000,000/= as general damages and in arriving at this award they stated that:

> ... We associate ourselves with the submissions of counsel for the claimant (and the claimant testified) that the claimant suffered great anxiety, loss of self-esteem, mental distress, loss of dignity and reputation, and inconvenience since he had been deprived of fending for his family from his contracted job for the remainder of the term up to retirement. He was in a senior position in the bank and had worked for over 25 years. Given his status in the bank and the wealth of experience he had acquired, and given that he still had much time to work till retirement and considering any natural and unexpected hazards that could have prevented him from working till retirement, we hereby award the claimant 85,000,000/= as general damages.

Apart from the considerations for suffering great anxiety, loss of self-esteem, mental distress and loss of dignity and reputation as well as inconvenience, the court also took into account the position of the appellant and the fact that he had time to work left until retirement. Apparently, the court took into account the period that he would have worked if he had not been summarily terminated. The appellants counsel submitted that the learned trial judges and panellists of the industrial court did not take into account any relevant factors for the award of general damages and erred in principle. Clearly the court took into account the above factors which went beyond the considerations necessary for the award of general damages as there were other awards such as severance pay and reimbursement for the payments the respondent had made for the clearance of its outstanding loan amounts. These were presumably calculated on the basis of his salary. I earlier indicated that the outstanding home loan amount which the respondent had cleared was refunded to him after he had cleared the loan from his pension funds.

The fact that the respondent owed the appellant the outstanding home loan amount is not in dispute and the sum outstanding on the home loan was a sum of Uganda shillings 76,178,550/=. In handling ground 2 and 3 of the appeal, I found that the outstanding loan obligations of the respondent ought to have been considered as an offset against any amounts that were found

due by the court pursuant to an award of damages on account of the summary termination without justification.

The award of general damages after allowing severance pay which is meant to compensate the appellant for the early termination of services is excessive because it bundles the heads under which award are possible in cases of unlawful or wrongful termination of services. In the premises, I will set aside the award of Uganda shillings 85,000,000/= and substitute it with an award of this court.

For purposes of award of damages, I have considered the precedents. As the decision in **Barclays Bank of Uganda vs Godfrey Mubiru; Supreme Court Civil Appeal No. 1 of 1998** is concerned, the judgment of Kanyeihamba JSC on the question of payment in lieu of notice does not apply as the facts obviously considered occurred before enactment of the Employment Act, 2006. Under the current legal regime, termination has to be with notice unless the employee accepts payment in lieu of notice and consideration of general damages as three months' salary is inappropriate., A contractual payment of three months' salary is a special damage if it is not paid in the circumstances of this case, the termination was found to be unlawful or wrongful.

In **Stanbic Bank Ltd vs Kiyemba Mutale; Supreme Court Civil Appeal No. 2 of 2010**, Katureebe JSC on the issue of appropriate damages for unlawful termination where the Court of Appeal upheld an award of Uganda shillings 115,056,960/= on the basis that had the appellant opted for early retirement, he would have earned that amount stated that:

> With the greatest respect, I think both the High Court the Court of Appeal were in error here. First it is mere speculation as to what the appellant would have done if he had not been dismissed. He may not have opted for early retirement, as indeed he had not. Secondly, the proposals for employees who took early retirement was a special scheme for those persons. Once his contract of employment was terminated, albeit wrongfully, the respondent could no longer be treated as an employee of the appellant. As indicated above he was entitled to his payment in lieu of notice, his accrued pension, and damages for wrongful

> dismissal. In that regard I agree with the submission of counsel for the appellant that the appellant could only be awarded what was in his contract of employment. That contract comprised in his letter of appointment and the Personnel Policies Manual....
>
> Again, with great respect, this, in my view, was a misdirection as to the law, since the law has been clearly laid down by this court in several decisions and as stated in various legal texts as indicated. Having found that the appellant was wrongfully terminated, the court should have proceeded to make an award of general damages which are always in the discretion of the court to determine.

The above passage together with the common law position that I have set out earlier is that upon wrongful termination, the employee is released by the employer's repudiation of the contract provision. In the circumstances of this appeal, it is the statutory provisions of the Employment Act, which provided that the definition of summary termination in the circumstances rather than the contract of employment. The statutory provisions prevail over the contractual provisions in relation to the manner of bringing to an end the contract. Because notice was not given, the respondent was entitled to 3 months' notice. Secondly the circumstances of the termination date are related to the action of the respondent to commence a human rights enforcement action in the High Court against the appellant bank whereupon he was unfairly dismissed which dismissal was cloaked as a termination under the terms of the contract of employment. In the circumstances therefore, the appellant was entitled to damages for the unlawful termination of services for no justifiable reasons whose damages ought to be assessed on the basis of the principle of restitutio in integrum. According to Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** at page 896 the award of general damages is compensatory and its purpose is that:

> the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.

This is based on the common law principle of restitutio in integrum and requires the court to assess the natural or probable consequences of the

wrongful act. If the respondent had been given three months' notice, there would be no case. However, the provisions of the Employment Act, make it clear that unless the employee consents to payment in lieu of notice, the contract clauses which provide for payment in lieu of notice thereby doing away with notice, cannot be enforced without the consent of the employee. Payment in lieu of notice in such circumstances is not an adequate measure of restitutio in integrum because the termination under the Employment Act amounts to a summary termination without justification.

One of the statutory remedies for summary termination without justification or unfair dismissal without justification is the payment of severance pay as calculated by the Industrial Court. It follows that the award of general damages should be based on the manner in which the services were terminated following the respondent's action in a court of law to enforce his fundamental rights and freedoms which he stated had been infringed. The assessment of damages therefore has to await inter alia determination of the proposition that the appellant's right to privacy had been infringed.

Needless to say, the appellant bank through its servants wrote a letter requesting for information on whether the respondent held any bank account in any of the respondent banks which received the letter or email of the appellant's official. The written email request could not amount to an infringement of the right of privacy of the respondent because it was a request to the respondent banks which they could decline to honour.

The respondent's action was based on article 27 of the Constitution which provides as follows:

> 27. Right to privacy of person, home and other property.
>
> (1) No person shall be subjected to—
>
> (a) unlawful search of the person, home or other property of that person; or
>
> (b) unlawful entry by others of the premises of that person.
>
> (2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

The respondent's counsel submitted that there was interference with the privacy of the respondent's property in the sense that a bank account was property. On the other hand, the appellant's counsel submitted that the respondent was under a contractual duty to disclose all his bank accounts to the respondent. I find that there was no unlawful search of the person, home or other property of the respondent. Secondly, the alleged interference with his account could only be done by the respondent banks to whom the request for disclosure was addressed and who owed the respondent a duty to keep his confidentiality. The appellant bank had no statutory authority to obtain any information from the respondent's balance without a court order or police intervention. The email of the appellant to the respondent banks was therefore of no legal effect and could not therefore amount to an infringement of the respondent's right to privacy. In the premises, I will not overturn the holding of the Industrial Court as the basis of the action was whether there was an infringement of article 27 rights of the respondent by the appellant. The Industrial Court reached the correct conclusion that there was no infringement by the appellant of the right to privacy of the respondent and ground No 1 of the cross appeal fails.

This takes me back to the issue of appropriate damages, the respondent having been awarded severance pay. In my assessment, the appropriate general damages should be based on the prospects of the respondent to get alternative employment since he was of advanced age and had nine years left. Was he employable material in the circumstances? Secondly, his training was in the specialised area of banking. The above notwithstanding, no one could predict whether the respondent could have been given the appropriate notice of termination. To say so would be speculative because his services were summarily terminated without any justification. For that reason, I would award the respondent damages for summary termination of his services by which he suffered inconvenience, and uncertainly in his future prospects. His loans were accelerated for payment and treated at a double rate of interest. I would find that his loans should be calculated at the same rate as that of an employee under the contract. Secondly, he is awarded damages of Uganda shillings 50,000,000/- as general damages. I

will further consider whether these damages should be aggravated as prayed for in ground 2 of the cross appeal.

The outstanding loans shall be offset from the awards in favour of the respondent.

Ground 2 of the cross appeal is that:

> the learned trial judges and panellists of the industrial court erred in law when they declined to award the respondent aggravated and exemplary damages.

Award of aggravated damages.

In **Bank of Uganda vs Betty Tinkamanyire; Supreme Court Civil Appeal No. 12 of 2007**, the respondent had been dismissed in her absence and the dismissal followed a circular published to all employees of the appellant and displayed on notice boards which read that:

> Staff who are incompetent, poor time managers (particularly late coming), alcoholic, thieves, fraudsters and those who are insubordinate, will no longer be tolerated in the bank.

The respondent received a letter terminating her services on the date the circular was posted on the notice boards and no reasons were given in the termination letter. In awarding aggravated damages, Kanyeihamba JSC stated as follows:

> The illegalities and wrongs of the appellant were compounded further by its lack of compassion, callousness and indifference to the good and devoted services the appellant had rendered to the bank. After her unlawful dismissal, the appellant's officers carried out an inquiry into the respondent's history of employment and performance. They found that not only had she a clean record but her zeal and performance as an employee of the appellant were exemplary. In the inquiry, her fellow workers expressed praises and commendations of her. The report of the inquiry showed quite clearly that this should have been an excellent case where the respondent should have been reinstated with apologies. Instead, the senior managers of the appellant chose to stand on their high horse of pride and confirmed the illegal termination of her employment.

> In my opinion, the acts of the appellant were not only unlawful, but were degrading and callous. In my view, a good case has been shown for the respondent to be eligible for the award of aggravated damages.

The Supreme Court awarded aggravated damages of Uganda shillings 100,000,000/=.

I have carefully considered the facts of this appeal and the circumstances are similar to that of the Supreme Court decision immediately cited above. The cross appellant was cited for exemplary conduct and he had an impeccable record with the appellant bank. The respondent/cross appellant protested the email of the appellant to various banks. The impugned email read as follows:

> Good morning colleagues
>
> Could you again help us find out if you hold accounts for any of the Stanbic staff below? The information is needed for an ongoing loan fraud investigation.

What follows is a list of names of the staff of Stanbic bank Ltd which includes that of the respondent. The email itself merely states what is required of the respondent banks, and the information sought was whether they had accounts for any of the Stanbic bank's staff listed in the email. Secondly the fact that the information is needed for an ongoing loan fraud investigation. I agree with the submissions of the appellant's counsel that if such information was provided, then it could be followed up by a search of the account after a search warrant has been obtained by a court of law.

The conduct of the respondent after that email was to file an action in the High Court for enforcement of his fundamental rights and freedoms under article 50 of the Constitution of the Republic of Uganda. The matter was transferred to the industrial court which handled as a corollary matter to the employment dispute relating to the subject of summary termination of the respondent services with the appellant bank. They found that there was no infringement of article 27 of the Constitution of the Republic of Uganda. The conduct of the appellant pursuant to the filing of the human rights enforcement action however leaves a lot to be desired because the

respondent did not indicate any policy forbidding a member of staff from suing the employer for enforcement of his constitutional rights. The respondent was not subjected to any disciplinary hearing. This is against the fact that the respondent was considered and awarded for excellent performance. In December 2012 the respondent was awarded the long service certificate of 25 years in recognition of his services. 19 April 2008 he was awarded the achievement certificate for long and distinguished service of over 20 years. There are several other supporting certificates showing that the respondent was a very hard-working and valuable member of the appellant bank. The letter of termination shows that his services with the bank had been terminated with effect from 13th November 2012 and last working day will be 12 November 2012. He was required to immediately handover the property in his possession including his identity card.

Such conduct is humiliating and unacceptable because it is based purely on the whims of the managers of the appellant. If the respondent was guilty of some form of misconduct or if the bank wanted to lay off its senior staff, that would be different and reasons would be subscribed. However, no reason whatsoever was ascribed for this summary termination other than the informal reason established from the evidence which is of the fact that the respondent had filed an action in court to vindicate his rights. This was not put in writing but was the reason that DW1 had for the treatment of the respondent and this was discerned from the evidence. Though the alleged violation of human rights was subsequently not proven, the bank had a right to defend itself as it did before the Industrial Court against the allegations of violation of the privacy of the individual contrary to article 27 of the Constitution. Article 50 of the Constitution of the Republic of Uganda is instructive and provides that:

> 50. Enforcement of rights and freedoms by courts.
>
> (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

The right to bring the action is based on the claim per se therefore is not conclusive as to whether the right or freedom guaranteed under the Constitution had been infringed or threatened. The respondent based himself on the letter requesting for information from his banks and believed that it violated his right to privacy. He stated his beliefs in an affidavit in support of the application for enforcement. Article 50 (1) of the Constitution entitles a litigant to bring before a competent court for redress an action for enforcement of rights and freedoms by the courts. Such a person should not be victimised in the way the respondent's employment services were summarily terminated in the circumstances; I would allow ground 2 of the cross appeal. I would award the respondent/cross appellant a sum of Uganda shillings 50,000,000/- as aggravated damages.

Finally, I have considered grounds 3 and 4 of the appeal.

In ground 3, having awarded the respondent severance pay, general and aggravated damages, the respondent whose services were terminated could not be paid as if the contract subsisted. His remedy was to be compensated for the summary termination without justification.

With regard to ground 4 as to whether further contributions to NSSF and appellant's contribution to provident fund be paid for, the same reason applies because the contract was repudiated and the appellant's remedy was compensation for the wrongful termination.

Grounds 3 and 4 of the appeal have no merit and are disallowed.

Ground 5 of the cross appeal was abandoned.

With regard to ground 6, the industrial court was justified in not awarding costs to the respondent because the respondent partially succeeded in the claim and the appellant also partially succeeded in defending parts of the claim for instance for aggravated damages and other matters for which the respondent cross appealed to this court.

Nonetheless, the appellant's appeal partially succeeded while the respondents cross appeal partially succeeded. In the balance, each party will bear its own costs of the appeal and the cross appeal.

In the final analysis, as my sister Hon Lady Justice Irene Mulyagonja, JA and Hon. Lady Justice Monica K Mugenyi, JA agree, the following orders would issue in the appeal and cross appeal.

1. The employment services of the respondent with the appellant were wrongfully terminated in that the termination amounted to a summary termination without justifiable cause.

2. The order to reimburse the respondent in the sum of Uganda shillings 9,690,584/= and shillings 4,150,745/= issued by the Industrial Court is upheld but the sum of Uganda shillings 76,178,500/- on the home loan ordered to be reimbursed to the respondent is reversed.

3. The award of severance allowance to the respondent ordered by the Industrial Court is upheld.

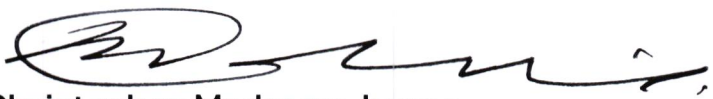
4. The award of Uganda shillings 85,000,000/= as general damages to the respondent by the Industrial Court is set aside and substituted with an amount of Uganda shillings 50,000,000/= as general damages which is enhanced by an award of aggravated damages in the sum of Uganda shillings 50,000,000/=.

5. The sum of Uganda shillings 76,178,550/= owed to the appellant by the respondent is set aside. The basis of calculating the outstanding home loan shall be recalculated by applying an interest rate of 8% per annum to arrive at the actual amount owing on the home loan as at the time of the summary termination of the contract of service of the respondent. This amount shall be offset from the sums awarded to the respondent.

6. All the sums awarded by virtue of this appeal and the cross appeal shall carry interest at the rate of 8% per annum from the date of the award of the industrial court till payment in full.

7. Each party shall bear its own costs of the appeal and the cross appeal.

Dated at Kampala the 17th day of March 2023



Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Madrama, Mulyagonja & Mugenyi, JJA)

CIVIL APPEAL NO. 60 OF 2020

STANBIC BANK (U) LIMITED:: APPELLANT

VERSUS

OKOU R. CONSTANT:::RESPONDENT

(Appeal from the Judgment of the Industrial Court of Uganda at Kampala delivered on 5th July 2019 by Hon. Chief Judge Ruhindi Asaph Ntengye, Hon Lady Justice Linda Lillian Tumusiime Mugisha and Panelists Mr. Ebyau Fidel, Mr. Michael Matovu and Mr. Anthony Wanyama in Labour Dispute Consolidated Claim No. 171 of 2014 arising from H.C.C.S No. 071 of 2013 and Misc. Cause No. 128 of 2012)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my brother, **Cristopher Madrama Izama, JA** in this appeal. I agree with his reasoning and the final orders that he has proposed.

Dated at Kampala this 17th Day of March 2023.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA

AT KAMPALA

(Coram: Madrama, Mulyagonja & Mugenyi, JJA)

CIVIL APPEAL NO. 60 OF 2020

BETWEEN

STANBIC BANK (U) LTD ..... APPELLANT

AND

CONSTANT R. OKOU ..... RESPONDENT

(Appeal from the Judgment of the Industrial Court of Uganda at Kampala (Ntegye, Chief Judge; Mugisha, J; Ebyau, Matovu & Wanyama, Members) in Labour Dispute Consolidated Claim No. 171 of 2014)

JUDGMENT OF MONICA K. MUGENYI, JA

1. I have had the benefit of reading in draft the judgment of my brother, Justice Christopher Madrama, JA in respect of this Appeal.

2. I agree with the findings and conclusions therein, as well as the orders issued.

Dated and delivered at Kampala this ....17th.... day of .....March....., 2023.

Monica K. Mugenyi

Justice of Appeal