THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE NO. 315 OF 2015

ARISING FROM MGLSD NO. 359/2015

GRACE TIBIHIKIRRA MAKOKO ……. CLAIMANT

VERSUS

STANDARD CHARTERED

BANK(U) LTD ……. RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MS. ROSE GIDONGO

2.MS.HARRIET MUGAMBWA NGANZI

3. MR. EBYAU FIDEL

AWARD

BRIEF FACTS

Between 1995 and 2015, the Claimant was employed by the Respondent Bank in in various capacities in Uganda and Kenya. Between 2011 and 2015 she served on international assignment, as the Respondent's regional Head of Financial Markets and wholesale Banking for East Africa, based in Nairobi. According to her she performed excellently in 2014 and based on the Bank's internal rating scale, she was given a good performance rating.

However, in 2015, she was terminated, without a hearing and before her formal assessment and implementation of a performance improvement plan, she had been forced to undertake.

She contends that her dismissal was harsh, unacceptable and high handed and it was in breach of both the law and the Respondent's internal Human Resource Manual. She is unemployed to date and the manner in which she was terminated from the Respondent Bank reduced her employability and led to her suffering.

ISSUES

Although both parties were not agreed on the draft of issue 1 to the effect that this Court lacked jurisdiction to handle claims of wrongful dismissal and the award of damages, it was abandoned in light of the recent court of Appeal decision of ***AFENET vs Peter Wasswa Kityaba CA No.124 of 2017.*** The issues that remained outstanding were:

1. **Whether the claimant's dismissal was unlawful?**
2. **Whether there are any remedies available to the parties?**

REPRESENTATION

Mr. Partick Mugalula of Katende Sempebwa Advocates was for the Claimant and Mr. Moses Ssegawa of Sebalu and Lule was for the Respondent

EVIDENCE

The Claimant and the Respondent each called one witness each.

It was the Claimant's testimony that she joined the Respondent in 1995 and rose through the ranks to become its Regional Head of Global Markets East Africa. She was later sent to Nairobi on international Assignment, where she performed very well until the 2014 half year appraisal when she received a 3C rating, which was subsequently downgraded to 3D, despite a good performance in the second half of 2014. According to her this score was

attributed to failed Audits in Tanzania and Uganda, for which the respective CEO's were not reprimanded.

It was her testimony that as a result, of this down grading she was offered the option to resign or be placed on a Performance Improvement plan (PIP). She opted for the PIP, but before it was implemented, on 18/05/2015, she was dismissed, without affording her a fair hearing.

It was also her contention that instead of terminating her, she should have been sent back to her home nation for re-assignment.

RW1: Ms. Sylvia Mulomi, Head of Human Resources at the Respondent Bank, on the other, testified that the Claimant initially worked for the Respondent in Uganda and was later sent on international assignment to Nairobi as Head of Financial Markets. She was not sure whether the Claimant was given opportunity to respond to her assessments for Q1 2015. She said that the disciplinary procedure as provided under the Respondent's Disciplinary Procedures Policy), was not followed. It was also her testimony that getting a 3D rating, did not lead to automatic termination and the Claimant's contract was extended in spite of her score of 3D. She said there was no evidence of the Claimant's assessment for 2015. According to her the discussions between the Claimant and her supervisor did not amount to a fair hearing, but the Claimant was terminated for poor performance, which amounted to gross misconduct and this poor performance made her forfeit her shares, under the share option scheme. She said she did not know how the Respondent arrived at the decision to terminate the Claimant, but the reasons for her termination were stated in her termination letter. It was further her testimony the Claimant's that other officers who completed international assignments returned to their home countries. It was her evidence in chief that the reasons for terminating her

international assignment were the same reasons her contract of employment with the respondent was terminated.

SUBMISSIONS

1. **Whether the claimant's dismissal was unlawful?**

In his submission, Mr. Mugalula Patrick, Counsel for the Claimant, cited the definition of Dismissal as stated under Section 2 of the Employment Act, 2006, to mean, *"the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct."* He contended that the Claimant's dismissal was unlawful because no verifiable misconduct was established against her and because she was not accorded a fair hearing in accordance with Section 66 of the Employment Act, which provides that before an employee is terminated, he or she should be notified about the reasons why he or she is contemplated for termination and be given an opportunity for the to respond to these reasons, accompanied by a person of his or her own choice. It was also his submission that the Claimant was also not given any reasons why she was contemplated for termination, nor was she given any opportunity to make representations in her defence. He cited **Donna Kamuli Vs DFCU Bank LDC No.02/2015,** which relied on the Kenyan case of ***Queenvelle Atieno vs Centre for Corporate Governance (Industrial Court of Kenya, Cause 81/2012:*** in which court held that:

> **"*That it is insufficient that the employer had various discussions with the employee. It is immaterial that the employee was at one time appraised and found wanting. Appraisal and discussions held between employees and their employers touching on the employees work performance do not add up to a disciplinary hearing and can only be***

evidence in support of good or poor performance at a disciplinary hearing.”

He further stated that the various e-mails about the Claimant’s late coming, Customers complaints’ and about her purported rudeness, together with her appraisal’s reports should have been adduced as evidence against her at a disciplinary hearing, in which she could have had an opportunity to respond to the allegations. He contended that the Respondent’s refusal to hold a disciplinary hearing was a fundamental breach of the Claimant’s statutory and contractual rights under the law, her employment contract and the Respondent’s Human Resources Policy.

According to him, in spite of the Claimant’s good performance and long service to the Respondent for over 20 years, the Respondent alleged she was a poor performer and gave her 2 options to either resign or be placed on a PIP. She opted for the PIP, but the Respondent dismissed her instead.

He also refuted the reasons given for her termination because in his view they were vague and unjustified. He contested the reason that; she *failed in oversight, over the governance and compliance requirements, leading to 2 failed audits in financial Markets in Uganda and Tanzania in the first half of 2014 and a rating of improvement required in the Kenya Audit for Q 4 of 2014,* because in Quarter 4 of 2014, there was no reference to any Audit in Kenya. He also contended that the failed audits in Uganda and Tanzania, did not warrant her termination because she was penalized for them when she was denied her bonus for failing to meet the expectations. Her bonus was reduced to zero by approximately USD 204,400 for the year 2014 and yet the financial Managers for Uganda and Tanzania, who were directly responsible were not penalized.

Counsel further contended that the audits in issue were carried out between January and March 2014[Q1 2014] and were discussed in the Claimant's half year assessment in June 2014 and as result was penalized. However, at the end of the year her international assignment was extended for another year, therefore, this was not a justified reason for her termination more than a year later. In any case, Section 62(5) of the Employment Act 2006 and Clause 8.5.1(o) of the Respondents Fair Accountability Disciplinary Policy and Procedures marked "C50", require that a penalty should be imposed within 15 days of occurrence of the conduct giving rise to the penalty, therefore terminating the claimant after she was already penalized was unlawful and unreasonable.

He also contended that the reason that she failed *"to meet the set revenue targets for Quarter 1 for 2015"*, was not a fair reason to dismiss the Claimant because she had not yet set her targets for 2015 against which her performance could be benchmarked. According to him the Respondent's witness testified that there was no document for assessment for 2015 and the procedures for determination of revenue targets between employee and employer as provided under clause 12.6(a) of Exhibit 53.

He also submitted that the allegation that she failed *"to demonstrate requisite leadership to the team in Financial Markets, leading to the above stated shortcomings"*, was vague. He cited **Rogers Kasozi vs NIC LDC No.283/2014** which relied on **Florence Mufumbo vs UDB LDC No. 138/2014** and **Kanyangoga vs Bank of Uganda LDC No.080/2014**, for the legal proposition that the **"reason"** used in section 68 connotes an explanation or justification for terminating or dismissing an employee, and the justification must make the

employee in issue understand the circumstances whether wrong or right that have led to his or her termination.

It was his contention that this **"reason"** was a mere excuse to dismiss the Claimant and was not substantive to enable the claimant understand what was meant by ***"a failure of leadership"*** therefore court should reject it.

He insisted that the Claimant's performance was not assessed prior to her dismissal and although the Respondent's Witness's testified that the Claimant was assessed every month, in cross examination she said that there was no document for assessment for 2015. According to him therefore, the half year performance Appraisal process as provided for under clause 12.6, was not carried out in 2015, yet the half year and end of year appraisals were carried out in 2014. He argued that it was irregular to dismiss the Claimant in May 2015, one month before the half year assessment was to take place. He insisted that performance assessment is the basis for performance management and any decisions based on performance, therefore the absence of an objective appraisal renders any decision to dismiss the Claimant baseless. It was his submission that by dismissing the Claimant without assessing her performance, the Respondent breached its own procedure and established practices. He argued that it was not only discriminatory but also in contravention with the law and it illustrated malice against the Claimant. He cited section 73 of the Employment Act and particularly 73(1) (b), (2) (b), (c), (d) as follows

> *73. Criteria for unfair termination:*
>
> *(1) A termination shall be unfair for the purpose of this part where-*
>
> …

(b) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee from service.

....

(2) In determining whether it was just and equitable for an employer to terminate the services of an employee, a labour officer shall consider

....

(b) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and handling of any appeal against the decision,

(c) the conduct and capability of the employee up to the date of termination

(d) The extent to which the employer has complied with the statutory requirement connected with termination, including the issuing of a certificate under section 61, and the procedural requirements set out in section 66 and

(e) The previous practice of the employer in dealing with the type of circumstances which led to the termination.

Mr. Mugalula contended that the Respondent violated Section 73(1)(b), (2)(b) and (c) because it did not follow its own procedures to investigate and ascertain whether there was consistent poor performance on the part of the Claimant, nor was her poor performance communicated to her, yet she performed with a rate of 2 in 2012 and 2013 which was equivalent to very good performance and in 2013 and 2014 with a rate of 3 which was good performance, before her dismissal. He further contended that by failing to

follow the statutory requirements relating to termination the Respondent had violated the procedural requirements under section 66 of the Employment Act 2006.

It was also his submission that in spite of being coerced by her superiors to accept to be put on a PIP (Performance Improvement Plan), which was not warranted given that her assessment showed that she had performed well, it was implemented.

He argued that the sanction imposed on the Claimant was not progressive contrary to clause 8.15.2(14) of the Respondent's Policy on Fair Accountability, Disciplinary Policy and Procedures, which provides that in order for poor performance to amount to gross misconduct, it must be shown that it was;

> *"... consistent failure to achieve a satisfactory standard of performance in the job after exhausting the progressive disciplinary procedure that is upon issuance of a final warning letter."*

In the circumstances the Claimant's dismissal was unlawful.

In reply Mr. Moses Ssegawa, Counsel for the Respondent did not dispute that the Claimant was employed by the Respondent and that she was posted to serve in a high-level position of regional Head Financial Markets, based in Nairobi. According to him the position she held was highly sensitive and demanding and it was highly rewarded, but equally attracted serious consequences if not performed according to the set standards.

It was his submission that the Respondent gave the Claimant substantive reasons for terminating her contract as shown in exhibit 22 as follows:

(i) *Failure in oversight over governance and compliance requirements leading to two(2) failed Audits in financial markets in Uganda and*

Tanzania in the first half of 2014and a rating of improvement required in Kenya Audit in Quarter of 2014.

(ii) Failure to meet set revenue targets for Quarter 1 of 2015.

(iii) Failure to demonstrate requisite leadership to te team in financial markets, leading to the above stated shortcomings.

He argued that section 69(3) of the Employment Act, entitles an employer to dismiss an employee, even 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. He also argued that the Claimant had cumulatively and incrementally broken her obligations arising under her contract of service. He asserted that the Claimant in cross examination conceded to the failed Audits in Uganda and Tanzania and the fact that the Financial Markets business in Tanzania was suspended from the interbank forex market by the central Bank of Tanzania because of poor performance. According to him, although the Claimant tried to trivialize the essence of these audits and the requirements for regulatory compliance in the Respondent's business, the transactions in financial markets especially relating to foreign exchange are highly regulated in light of the obvious risk of money laundering which is endemic in the banking industry. Therefore, given the sensitivity of these transactions, the Claimant had the primary responsibility for regulatory controls and specifically to:

"provide oversight in country; ensuring compliance with the highest standards of regulatory conduct and compliance practices as defined by internal and external requirements. This includes compliance with local banking laws, other applicable laws (e,g laws governing securities

activities , company law and anti- money laundering regulations and guidelines."

He insisted that the Claimant tried to shift the responsibility to the CEOs, but it was RW1 testimony that, the Claimant was the owner of the risk of financial markets and therefore she was accountable as per her job description. Counsel argued that her attempt to disown this responsibility was echoed by her Superviser's comments when he stated that:

"... her resolute style coupled with strong convictions can sometimes come across as lacking flexibility and not making personal ownership which may alienate her from her team and peers."

Counsel also cited her own evidence which was to the effect that she had

(i) high speed so iam susceptible to making mistakes and

(ii) Iam head strong

It was further his submission that in 2014, the Claimant failed to meet her revenue target of US$91 million, coupled with failed audits which resulted into a rating of 3D, and continued nonperformance through quarter 1 of 2015. He contended that according to RW1's testimony regarding exhibit R5, which is a table showing the Financial markets performance for the East Africa for YTD March 2015, at the end of quarter 1, she realized US$ 19.6 million, therefore she had a variance of US$ 8.1 million with a year on negative of 51%.

According to him, Counsel for the Claimant tried to mislead Court by alleging that there were no set revenue targets for quarter 1 of 2015, yet RW1 testified that, she did not find the Claimant's performance contract on the people soft system because she did not complete the requisite forms, which would be a failure on the Claimant's part. He insisted that the basis of her performance

assessment was “R5” , which is a monthly score card, which showed a variance of US$8 million and a year on negative of 51%. He argued that even if no targets had been set for the year, which was not possible, she was already off target.

He further submitted that the Claimant’s line superviser noted that, she needed to improve her leadership style to create more cohesiveness among her team to enable yielding of better performance from everyone in her team. He argued that by arguing that the case of failed audits was double jeopardy because it was one of the reasons she was rendered ineligible for a performance bonus, Counsel for the Claimant had failed to appreciate that the grounds collectively demonstrated a cumulative deceleration of her capability to execute her role as regional head of financial markets. He argued that, her actions were cumulatively intolerable in the context of her high-level executive role, for which, her actions amounted to a fundamental breach of contract of employment, which justified her termination, in terms of the Employment Act.

He contended that whereas Counsel for the Claimant argued that she was not accorded a fair hearing or given a reason for her termination as provided under, section 66 of the Employment Act and **Donna Kamuli vs DFCU Bank LDC No.002/2014,** the Court of Appeal in **DFCU vs Donna Kamuli CA No.121 of 2016,** which cited the Kenyan case of **Isaih Gikumu vs Mengai Oil Refineries Limited cause No. 296 of 2014,** held that the hearing contemplated under section 41 of the Employment Act 2007 of Kenya, which is identical to Section 66 of our Employment Act 2006, did not require an employer to hold a mini court. The hearing can be conducted either through correspondences or through face to face hearing. He submitted that this case was binding on this court. It was his assertion therefore, that, to the extent that the Claimant was

given opportunity to make representations to her line superviser and Group HR as evidenced by exhibit "C22" paragraph 1 and "C49B", she was accorded procedural fairness in accordance with section 66 of the Employment Act 2006.

He refuted the argument that it was illegal for the disciplinary penalty for the failed Audits to have been imposed after more than the 15 days prescribed under section 62 of the Employment Act, because the penalties provided thereunder included warning, reprimand and a suspension, which were not applicable to this case. He concluded that the Claimant's dismissal was lawful and Court should find so.

In rejoinder Mr. Mugalula argued that the Respondent had considered the Claimant's international assignment and her employment as one and yet the two were different. He asserted that it was erroneous for the Respondent to terminate the Claimant's open-ended contract without according her a hearing and without cause. He also reiterated his submissions regarding her dismissal and insisted that she was unlawfully terminated.

DECISION OF COURT

1.Whether the claimant's dismissal was unlawful?

It is trite that an employee /employer relationship is established by a contract of employment and the contract can be verbal or written. Section 2 of the Employment Act 2006, defines a contract of service as

> *"... any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship..."*

The Claimant was appointed by the Respondent as a clerical officer and confirmed in 1997, she grew through the ranks and on 20/03/2007, she was

promoted to the position of head of Global Markets Grade5, on 21/11/2011, she was promoted to high-level position of regional Head Financial Markets, in charge of East Africa, an international assignment. According to exhibit "C19", the terms and conditions of her International assignment were different from those provided under her home Country base contract with the Respondent. Noteworthy, was that "C19", made specific reference to the fact that once she completed the international assignment, she would revert to her home country base contract of employment. It stated in part as follows:

> *"… these documents are an addendum to your home country base contract of employment and at the end of your assignment you will revert to your base terms and conditions …"*

The bone of contention in this case, as we understand it is that, both the Claimant's international assignment and her country base contract were terminated by the Respondent, without any justification and without her being accorded a fair hearing, thus rendering her termination was unlawful.

Article 4 and 7 of the ILO Convention No. 158 of 1982 on Termination of Employment ,which was ratified by the Government of Uganda on 18/10/1990, provide that;

> "Article 4
>
> > *The employment of a 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. …*
>
> *Article 7*

> *The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot be reasonably expected to provide this opportunity.*

Sections 66 and 68 of the Employment Act, 2006, which make it mandatory for an employer contemplating the dismissal or termination of an employee, on grounds of poor performance or misconduct, to notify the employee about the infractions leveled against him or her and to give the employee reasonable time within which he or she can respond to the infractions, before the dismissal or termination occurs, are in Pari material with ILO Convention 158(supra).

Section 8 of the of the Respondent's Human Resources Manual, provides for a **Fair Accountability Disciplinary Policy,** to provide for;

> *"… consistent standards for disciplinary process and procedures to ensure that where the conduct or performance of an employee fails to meet expected standards, they are managed in a fair timely and consistent way and in accordance with the group's fair Accountability Principles(the Principles). …"*

It was not disputed that the Claimant's termination was based on allegations of poor performance of her international assignment.

It was the Respondent's case that the her dismissal was as a result of a collective and cumulative deceleration of her capability, because of failed Audits in Tanzania and Uganda in 2014, her failure to meet her revenue targets for the 1st quarter of 2015 plus the grounds stated in her letter of termination,

which amounted to a fundamental breach of her duties as Regional head of Financial markets.

We have carefully analysed the record and established that, the Respondent had an annual performance assessment framework, which comprised monthly, quarterly and 1/2 yearly assessments. From the time the Claimant assumed her international assignment in 2011, the record of her assessments indicates that she was performing very well, until the annual performance assessment for 2014, when she was rated 3D. It is however not disputed that she was penalized for this performance by denying her a performance bonus of USD 204,000, which was reduced to zero. Her international assignment was however extended for another year, until 2016.

Nothing on the record shows that the results of an assessment undertaken in particular year of assessment period would be reckoned in a subsequent year of assessment period or that the Respondent applied a cumulative performance assessment procedure. The "**Fair Accountability Disciplinary Policy and Procedures** (supra**)** under section 8.5.1 of its Human Resources manual, sets out the general Principles of the disciplinary procedure in part as follows:

> *2.1 General principles*,
>
> a) *Conduct and Performance issues: Minor conduct and performance issues shall be managed on an ongoing basis by line Managers in line with the fair Accountability Principles ("the Principles") and this policy, through the appraisal process and where appropriate, a performance improvement plan.*
>
> *The formal disciplinary process will be commenced where the conduct or performance fails to improve to required standards*

despite informal improvement processes or where the concerns about conduct or performance are sufficiently serious to warrant disciplinary action.

...

(c) Line managers to consult HR: HR must be consulted before commencing any formal process...."

In our understanding, this provision caters for informal processes of monitoring the performance of staff, by empowering line supervisors, to provide informal guidance to their subordinates on how to improve their performance, including placing them on performance improvement plans. Therefore, staff would only be subjected to formal disciplinary processes, where the informal processes failed to yield any improvement and this had to be done after consulting with Human Resources.

There was no evidence adduced, to indicate that the Claimant's line manager subjected her to any informal guidance or placed her on a performance improvement mechanism, as provided in the Respondent's policy(supra) or that the HR was consulted or that she was actually placed on a formal disciplinary process/procedure before she was terminated.

Even if we were to consider the scorecard assessment of March 2015, under exhibit "R5", as a basis for the Respondent's dissatisfaction with the claimant's performance, there is no evidence to show that the Respondent made any efforts to follow its Human Resources procedures regarding performance management, before dismissing the Claimant. Ms. Mulomi, RW1's testified that there were conversations purportedly held between the Claimant and her line managers in May 2015, she was not privy to their content. She said that:

"…there were conversations held in May in respect of quarter 1 2015, I do not have proof of those conversations, I do not know whether she was assessed. I was not there she was stationed in Kenya Nairobi… Half year assessment would occur in June 2015… the period of assessment had not yet commenced in 2015 before termination…"

The Claimant attached a copy of transcriptions as evidence of these conversations and since they were not controverted by the Respondent, Court found no reason not to consider them as the conversations which RW1 testified about. A perusal of the transcriptions however, did not indicate that the Respondent subjected the Claimant to any formal disciplinary process or that she was given any opportunity to improve her performance, as is provided under section 66 of the Employment Act and the Respondent's disciplinary Policy, respectively. It seems to us that these were informal conversations which should have escalated into formal disciplinary procedures, but there was no evidence of any disciplinary process on the record.

It was the Respondent's case that given the recent Court of Appeal Decision in **DFCU vs Donna Kamuli CA No.121 of 2016,** that a Disciplinary hearing contemplated under Section 66 of the Employment Act, did not require an employer to hold a mini court and it could be conducted either through correspondences or through face to face hearing, therefore, having been given an opportunity to make representations during her performance assessment, the Claimant was accorded a fair hearing.

Although an administrative disciplinary procedure need not conform strictly to the standards of a court of Law, they must apply the minimum standards of natural justice as envisaged in Article 28 of the Constitution of Uganda 1995(as amended). We do not believe that it was the intention of the Court of Appeal

in **DFCU Vs Donna Kamuli**(supra) to disregard these principles of Natural Justice. We are fortified by the holding of Chief Justice **KATUREEBE** (as he then was), in **BAKALUBA PETER MUKASA V NAMBOOZE BETTY BAKIREKE ELECTION PETITION APPEAL NO. 04 OF 2009,** that a right to a fair hearing is one of the fundamental rights guaranteed by the Constitution of Uganda under Article 28 and it is one of the rights provided under **Article 44 of the Constitution,** that are non-derogable. His Lordship cited ***BLACK'S LAW DICTIONARY (6th Edition) which defines*** "***fair hearing*** as follows: -

> ***"Fair hearing; One in which authority is fairly exercised: that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence."*** (Emphasis added).

The employee's right to a fair hearing is provided for, under Section 66 and 68 of the Employment Act, which make it mandatory for an employer contemplating a dismissal due to misconduct or poor performance , to explain to the employee the reason to the employee, give him or her an opportunity to respond to the reason, within a reasonable time and the reason must be a justifiable reason. The employer is not expected to prove the reason beyond reasonable doubt, but he or she must show that it existed at the time of the termination and it was a justifiable reason to warrant dismissal. In any case the decision in **Donna Kamuli** is distinguishable from the facts in the instant case. Whereas, in Donna Kamuli's case there was a third party in form of a moderation Committee, which was involved in reassessing the Claimant's performance, and in so doing considered the representations she made regarding her performance, before her termination, in the instant case, the

Claimant was dismissed in May before the ½ yearly performance assessment, and based on her line Manager's assessment under exhibit R4, without according her any opportunity, to respond to the assessment or to be placed on a performance improvement plan, as provided under the Respondent's disciplinary policy(supra).

We do not accept the argument that the discussions she had with her line manager as referred to in the letter of termination, were sufficient to warrant her termination, especially given that there was no a record of the discussions on the Court record. Instead evidence was led in court as proof of her poor performance and in our considered view, this evidence ought to have formed the basis of the "discussions regarding her alleged poor performance" which would have escalated into a disciplinary process, before the termination was actually affected. This Court's holding in **Akeny Robert Vs Uganda Communications Commissions LDC No. 023/2015**, is to the effect that it is not the role of Court to supervise the disciplinary/grievance process between the employer and employee, but to ensure that the disciplinary process is undertaken in accordance with the proper procedure for termination, under the Employment Act 2006, before the termination is effected. In any case the Respondent's disciplinary Policy was emphatic on the requirement to undertake formal disciplinary procedures where the line manager believed that the employee was not improving and this was not done in the instant case.

Courts have taken judicial notice of the fact that, performance assessments are intended to track of the performance of an employee, of motivate them to maintain high standards of performance, by identifying the employee's strengths and pointing out their shortcomings and giving them reasonable time

within which to make improvement, before taking severe action such as dismissal against them. We believe that this principle is the basis of the Respondent's "**Fair Accountability Disciplinary Policy and Procedures(supra).**

Therefore the discussions referred to by the Respondent in our considered view were not conclusive given that, they were not escalated to a formal disciplinary procedure in which the allegations would have been put to her. They were merely informal discussions about her performance assessment which ought to have been formalized in a disciplinary hearing. This Court in, **Jason Njeru Kiggundu vs Imperial Bank Uganda Ltd LDR. No. 172 of 2015,** held that,

> *"…Given the express provisions of section 66 of the Employment Act above cited, in order for the appraisals and emails to constitute a fair hearing, there must be evidence that the employee was given time to react to the allegations of incompetence or misconduct and the employer made a decision to terminate the employee after considering the reaction of the employee. The traditional method of appraisal where only the superviser grades and gives marks to the supervisee after which he or she gives certain recommendation, without noting the side of the supervisee will not in our view match the standard portrayed in Donna Kamuli case above mentioned. …"*

As already discussed, there is no evidence on the record to indicate that Claimant was given an opportunity to formally respond to her Line Manager's appraisal/assessment or any allegations of poor performance or that she made any response to the allegations of poor performance and her response was considered before she was issued with the letter terminating her employment. These was no evidence to show that she was aware that the

Respondent was contemplating her termination, on grounds of poor performance. There was also no evidence on the record to indicate that she was aware about a cumulative assessment procedure, which would culminate into her termination, on grounds of a collective and cumulative deceleration of her capability, as stated in her letter of termination. Moreover, this purported cumulative assessment included the assessment for 2014, in which she was rated 3D and penalized by denying her a performance bonus, but did not affect the extension of her assignment for another year. In our considered view, it was a closed assessment, which could not form part of subsequent assessments.

Therefore, in the absence of evidence that the Claimant was subjected to a formal disciplinary process in which the allegations of her poor performance were explained to her and in which she was given an opportunity to respond to the allegations before she was terminated, the minimum standards of a fair hearing were not met, therefore, the Respondent violated section 66(1) and (2) (supra), and ILO convention 158 on termination of Employment. We are also not satisfied that merely stating the reasons for termination in the letter of termination, without providing proof of the reasons, was sufficient to warrant the Claimant's termination. The Respondent did not adduce any proof of the reasons stated in the letter of termination thus violating Section 68 of the Act(supra).

It was also the Claimant's case that whereas it was agreed that on completion or termination of her international assignment, she would be sent her back to her home country, she was not sent back to her home country after she was dismissed from her international assignment. She contended that instead of sending her back, her home based contract was also unlawfully terminated.

According Mr. Mugalula, the Respondent discriminated upon her because she was treated differently from other employees who had been sent on assignment and returned to the business, upon early termination of their assignments, she was also terminated without a reason and without following the proper procedure when terminating both her international assignment and home based contract of employment.

Indeed, the letter confirming her international assignment marked “C19” on the trial bundle(supra) stated that on completion or termination of the International assignment, she would revert back to her home-based contract of employment with the Respondent. This was not controverted by the Respondent. It was RW1’s testimony that the termination of the international assignment automatically terminated her home-based assignment. We found no evidence on the record to the contrary. We also established that according to “C19”, the terms and conditions of service under the international assignment were different from those provided under the home-based contract of employment, the remuneration rates and currencies were also different. Therefore, the Respondent was expected to refer the Claimant back to her home country after terminating her international assignment. She was expected to revert back to her home-based contract whose termination should have been undertaken under a separate process. It was RW1’s testimony however that according to the termination letter dated 18/05/2015, which followed the termination of her international assignment, her home based contract with the Respondent was terminated for the same reasons. The Respondent in the circumstances did not follow the procedure laid down under its disciplinary policy and the Employment Act, to terminate the home based contract of employment.

We therefore have no reason to disagree with Mr.Mugalula, that the Respondent violated section 73(b) of the Employment Act , which provides that:

> *"... (1) A termination shall be unfair for the purposes of this part where-*
>
> ...
>
> *(b) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee from service.*
>
> ..."

when it failed to act in accordance with justice and equity in terminating both the international assignment and her home-based contract the way it did. It is our finding therefore that the termination of both her international assignment and home-based contract was unlawful.

2.Whether there are any remedies available to the parties?

It was submitted for the claimant that, having been unlawfully terminated, the Claimant was entitled to the remedies claimed.

a) Counsel prayed for a declaration that she was unfairly terminated. We have already established that she was unlawfully terminated, it is so ordered.

b) Order for reinstatement

Counsel submitted that section 71(5)(a) of the Employment Act grants this court jurisdiction and discretion to order the Claimants reinstatement to her former employment with the Respondent with salary arrears for unpaid wages.

In reply Counsel for the Respondent argued that 71(6)(c), provided that the court had to consider whether it was reasonable or practicable to reinstate or re employ the employee before making such an order and given that it was more than 4 years since the Claimant was terminated, and more than 9 years since she was employed within the organization's structure, having been placed on international assignment in 2011, it would be impracticable and unreasonable to reinstate her.

In deed the court is empowered to order a reinstatement where it considers it reasonable to do so. However, the Supreme Court already resolved that it would be wrong to force an employer to keep an employee whom the employer no longer wants and he or she is at liberty to terminate the employee if he or she observes the law and correct procedure when terminating the employee. The court can only order reinstatement in very rare circumstances where it establishes that the trust and confidence between the employer and employee still exists, or that the duration between the termination and the resolution of the dispute between the employer and employee is recent.

In the instant case however, it is not in dispute that the Claimant was terminated from the services of the Respondent more than 9 years ago. In our view is a long time and given the circumstances under which she was terminated, we do not think that it would be prudent to order a reinstatement. We believe that, given the dispute between the Claimant and the Respondent, the working environment and working relationship may not be conducive for the Claimant to effectively perform her duties and for the Respondent to have the trust and confidence it originally had in her. In the circumstance's reinstatement cannot succeed. This prayer is therefore denied.

c) General Damages

It was the Claimant's prayer that she was entitled to an award of damages of USD 10,000,000 for the unlawful, humiliating and unfair treatment by the Respondent. Counsel cited **Florence Mufumbo vs Uganda Development Bank Limited, LDC No. 138/2014** in which this Court held that; *"Damages are generally compensatory in nature and the injured party must always be awarded such sums of monetary as may put him or her in the same position as if the wrong complained of had not been occasioned. Whereas general damages are damages generally suffered by the claimant at the instance of the respondent."*

He also cited **Bessy v Olliot and Lambaert (1682) T Raym 467; 83 ER244,** cited by Chief Justice Katureebe (as he then was) in his paper, Principles governing the award of Damages in Civil cases, to the same effect and **Dr. Peter Waswa Kityaba vs African Field Epidemiology Network(AFNET) LDR No. 84/2016,** for the proposition, that over time when granting an award of damages, courts have taken into consideration their disapproval of the manner of dismissal of employees, depending on the merits of each case.

Counsel insisted that as a result of her good performance, the Claimant made a lot of profits for the Respondent as exhibited in R7, she had worked for the Respondent for over 20 years and built significant good will in her professional reputation. She was being considered by the Respondent, for a position at the Central Bank and inspite of her very high skills and professional reputation, she remains unemployed because of the great damage occasioned to her by the unlawful termination. He invited court to consider the non- pecuniary losses, such as pain and suffering experience by the Claimant and as elucidated by

Musoke J, in **Sarah Watsema Goseltine and anor vs AG HCCS No. 675 of 2006** when computing damages.

He prayed that Court awards a figure that is commensurate with the level of disapproval deserving of the acts of the Responden's agents towards the Claimant and an award of USD10,000,000 was an adequate figure.

In reply the Respondent refuted, the prayer for USD 10,000,000 and considered it outrageous and a way to make this court a means for unjust gain. He argued that there was no correlation between the claim for an award in damages and the instant case. Counsel contended that even if Article 126(2)(c) of the Constitution of Uganda established the principle provides that; in adjudicating cases of both civil and criminal nature, the court shall, subject to the law apply adequate compensation to victims of wrong; the Industrial Court being a court of equity should not be abused by litigants and counsel who seek to make it a platform of vengeance. He cited the holding of His Lordship Chief Justice Bart Katureebe (as he then was) in **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** regarding Article 126(2) (c)(supra), that

> *"… Court must address itself to the principles of law applicable and then within the law, determine the measure of adequate compensation. It cannot be based on mere speculation…"*

And with regard to termination of an employee, thus:

> "*… it is trite law that normally an employer cannot be forced to keep an employee against his will. There can be no order for specific performance in contracts of employment. However the employer must be prepared to pay damages for wrongful dismissal, for any period of notice stipulated in the agreement and pay any other benefits , like pension dues , that*

have accrued at the time of the termination… and by way of analogy the position in England in HALSBURY'S LAWS OF ENGLAND Vol. 16 para 3015 as follows:-

"An employee who has been wrongfully dismissed will normally have no option but to accept the employer's repudiation and sue for damages for breach of contract."

As for the measure of damages to be given for such breach, it is stated in paragraph 307(Halsbury's Laws) as follows: -

"In the case of a fixed term contract, this means that the starting point is the remuneration for the remainder of the fixed term, but most contracts of employment are terminable by notice so that the employee is entitled to recover only the amount of remuneration during the notice period. That renumeration includes wages salary, including a reasonable amount of any variable such as commission, loss of vehicle and other fringe benefits and any other loss of pension rights…

As the action for breach of contract, not debt, the employee is under a duty to mitigate his loss and certain amounts must be deducted from the prima facie measure of damages and adjustment to reflect the incidence of taxation,

It was counsel's submission that, based on the above stated principles, notwithstanding the lawful termination, the Claimant was adequately compensated to the extent that she was paid 3 months in lieu of notice and among others accorded her pension benefits.

He refuted the arguments by Counsel for the Claimant that raised historical records of her remuneration and past performance on the grounds that she

was indeed rewarded and she took the reward for the said performance therefore it cannot be reckoned. He also contested the argument that she had earned profits for the Respondent yet her target was USD 91 m and it was not amended to USD82.2m as claimed therefore her earning of USD 84 m was below target. He also contended that the Claimant attempted to avoid responsibilities of the failed audits yet she wanted the revenues for the respective markets to be attributed to her. Therefore, she cannot use historical performance for which she was fully compensated to earn damages. He also stated that the assertion that she was to get a job with the Central Bank was mere conjecture and it should be disregarded. He concluded that she was not entitled to damages and if court was inclined to grant them the principles for the award of damages as have been highlighted must be taken into account.

We have already declared that the claimant was unlawfully terminated because the Respondent failure to follow the law and proper disciplinary procedures as provided under the Respondent's Policy when terminating her. Although Counsel for the Respondent's cited ***Stanbic Bank vs Kiyimba Mutale(supra)*****,** as the basis for the computation of general damages for wrongful dismissal, the bone of contention in this case was the award of terminal benefits of Ugx. 115, 056, 960/=. Chief Justice Katureebe, however also discussed the award of General Damages and stated as follows:

> *"As for the general damages, the High Court awarded Shs. 2,000,000/=the Respondent did not appeal against the adequacy of that award. It appears to me that both the High Court and Court of Appeal were anxious to award a substantial sum of money to the respondent, but with respect, totally misdirected themselves as to the principles upon which such compensation should be based. In his lead Judgment*

Twinomujuni JA states in the very first paragraph that "the respondent had sued the appellant for special and general damages for wrongful dismissal" Yet throughout the judgment the learned justice of Appeal does not discuss the principles upon which the respondent should be awarded what he sued for i.e special and general damages. …

Having reached the conclusion that "the respondent was therefore unlawfully dismissed outside the terms and conditions of employment" the learned Justice then went on to state:-

"The fact that the appellant dismissed the respondent ultra vires the contract of employment makes it only difficult to determine the nature of the remedy he is entitled to receive"

His Lordship went on to state that:

"… 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.

…

In my view, that adequate compensation would have been a payment in lieu of notice, a measure of general damages for wrongful dismissal(emphasis ours) and payment of accrued pension rights. The High Court could have awarded substantial general damages but in its discretion, it chose to award only shs. 2,000,000/. … I think that the respondent could have been awarded substantial general damages for wrongful termination of his employment, taking into account his status, the manner of termination " (*Emphasis ours).*

Therefore, compensation for unlawful termination should include an award of general Damages which as stated by the Hon.The Chief Justice, as he then was, (supra) are awarded at the discretion of Court.

The Claimant in the instant case, worked for the Respondent for about 20 years, with a clean record until 2015, when she was dismissed from employment. She was holding a very high profile and sensitive position of Regional Manager Financial Markets, East Africa, KS. 14,000,000 per annum equivalent to Ugx. 490,000,000 per annum but she was terminated contrary to her contract and the Employment Act, 2006. It was her submission that the wrongful termination reduced her employability hence remaining unemployed by the time of filing this matter.

It is our considered opinion that given her high status as head of global markets, East Africa and the banking Industry as a whole and given her long service to the Respondent, with a clean track record, but her contract and international assignment were terminated in total disregard of the proper procedure under the Respondent's Human Resources Manual and the Employment Act 2006, and given that her dismissal had major implications on her employability because a Bank Manager of her caliber were expected to be impeccable and taking cognizance of the embarrassment, humiliation and inconvenience she suffered as a result of her dismissal, she is entitled to compensation in form of General Damages. We think that an award of **Ugx. 1,000,000,000/-** is reasonable as general Damages.

Alternative Claims:

d) Payment of amount outstanding on her contract of Employment

It is trite that the basis of an employment relationship is a contract of employment which sets out the terms and conditions of service and the work to be performed and the attendant remuneration. By the time of her dismissal the Claimant was under international assignment which had been extended up to January 2016. In Kiyimba Mutale(supra) Chief justice Katureebe held that:

> *"it is trite law that an employer cannot be forced to keep an employee against his will. There can be no order for specific performance in contracts of employment..."*

Therefore, once a contract of employment is terminated, the employee ceases to render any services to the employee and in turn he or she is not expected to have any claim of any remuneration from the employer. In our considered opinion a claim for the amount outstanding on a contract is therefore speculative. In any case there is no guarantee that the employee would serve the duration of the contract because it could be terminated by resignation, death or dissolution of the organisation among many reasons. There is no guarantee that the contract will be automatically renewed either. The Employment Act does not provide for such a remedy to an employee who is unlawfully terminated.

Even if the termination was unlawful, compensation for the wrong must be reasonable and commensurate to the economic injury suffered by the Claimant. We are inclined to agree with Counsel for the Respondent that the compensation sought should not be aimed at punishing the employer or unjustly enriching the claimant. In the premises this claim cannot stand it is denied.

Redundancy Package

It was submitted for the Claimant that she was entitled to a redundancy package as set out under section 10 of the Respondent's Human Resources Policy Exhibit C51 at page 127 of the additional trial bundle.

Counsel for the Respondent on the other hand argued that the Claimant was terminated as opposed to being rendered redundant, therefore this prayer is a nullity.

After carefully perusing exhibit C51, it is clear that a redundancy pay would only occur in circumstances where an employee is terminated for reasons other than misconduct and poor performance but for reasons such as incapacity, collective termination and retirement. We have already established that the claimant was unlawfully dismissed. It is settled that the remedy for a person who is unlawfully dismissed is *a payment* in lieu of notice, a measure of general damages for wrongful dismissal and payment of other benefits stipulated in the contract of employment and other remedies prayed for as provided for under the Employment Act 2006. We have already awarded her General damages, therefore redundancy pay does not apply.

The Value of unvested Share Options

It was submitted for the Claimant that according to a table referred to under paragraph 6.3.8 on page 18 of the written submissions indicating that the claimant had earned unvested shares over the years 2010-2014 worth USD108,750(401,445,187/-), which was never paid to her. It was Counsel for the Claimant's submission that but for her unlawful termination she would have received the entire sum and therefore she is entitled to it and having testified that she did not receive it, it should be paid to her.

In reply Mr. Ssegawa argued that whereas the Claimant in her memorandum of claim prayed to the USD 250,000 as her vested share options, evidence was led to show according to R3A-3D, RW1's testimony and exhibit 6, from the date the Claimant was admitted to the scheme, she had progressively cashed out all the options that vested and at the time she had unvested shares of USD$9,400 which lapsed upon her termination in accordance with the terms set under the share award scheme marked R6 on page 51 of the Respondents documents. He quoted part of exhibit 6 as follows:

> *"Discretionary share awards ...are granted under the authority of the Board Remuneration Committee. The Grant of a share award gives the recipient a right to aquire certain shares in the future subject to certain conditions being met(for example continued employment and meeting performance targets).*

It was his submission that in the circumstances the Claim for USD 108,750 of shares due to the Claimant is not supported by any evidence whatsoever and should be disregarded.

Although the Respondent argues that the Claimant's cashed out all the options which vested and at the time of her termination, she only had USD 9400 unvested shares. According to the notes to p3 statement attached to R3B,the fact that expected value of the shares was calculated at 47% which took into consideration the time taken for the award to vest , the risks that the award may not vest, for among others none compliance with performance conditions or termination of employment.in our view was indicative of the fact that they had not yet vested therefore they could not have been cashed out as yet. Cleary the payment that was issued in April of the following year excluded payment of deferred share options. In any case the testimony that the

Claimant had cashed by the Claimant was not backed by any receipt to or acknowledgement by the Claimant. We therefore have no reason to refuse to award the claimant unvested shares over the years 2010-2014 worth **USD108,750(401,445,187/-).**

The Claimant also prayed for basic compensation for unfair termination and additional compensation for unfair termination as provided under section 78(1) and (2) of the Employment Act.

Compensation Under section 78 relates to compensation which can be awarded by a labour officer and not this court. This Court in **Edace Micheal vs Watoto Child Care Ministries LD Appeal No.016/2015,** this court held that section 78 of the Employment Act, 2006, *"... in our view covers whatever damages that could have arisen from illegal termination although section 78(3) provides for maximum amount of additional compensation which in our view is equivalent to damages.*

Unlike the Industrial Court, the discretion of the Labour officer to award such damages under section 78(3) is limited to 3 months wages of the dismissed employee's salary..." It was settled in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017** that:

> "***....the Industrial Court, can determine any dispute which can be filed in the high court .In that respect it has unlimited jurisdiction on the question of remedies that it can lawfully order...".***

In the circumstances this court cannot make a compensatory order which is provided under Section 78, as already stated the Court has discretion to award damages as compensation, and it already has, in the circumstances the prayer for compensation and additional compensation claimed, fails.

Aggravated damages

She also claimed aggravated Damages of **USD15,000,000**. According to Counsel for the Respondent dismissal of the Claimant was high handed, callous and founded on ill. According to him her distinguished long service was not taken into consideration when she was threatened and bullied and punished in a discriminatory manner and ultimately dismissed in a discriminatory manner.

We did not find any aggravating circumstances to warrant the award of aggravated damages. Although the Claimant was terminated without following the Respondent's Disciplinary procedure and the Employment Act 2006, No evidence of callousness, oppressiveness, high handedness, ill will or discrimination given that the circumstances under which other employees holding international assignments were terminated was adduced, to warrant se an award of aggravated damages, amounting to USD 15,000,000 is denied.

Interest

Interest of 15% per annum is awarded on all the pecuniary awards granted from the date of this award until payment in full.

Costs

No order as to costs is made.

In conclusion this claim succeeds in the following terms:

1. **Declaration that the Claimant was unlawfully dismissed.**
2. **An award of Ugx. 1,000,000,000 Bn as General damages for unlawful dismissal**
3. **Payment of USD108,750(401,445,187/-) in unvested shares.**
4. **Interest of 15% per annum on 2 and 3 above from date of award until payment in full.**

5. **No order as to costs is made**

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

……

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

……

PANELISTS

1. MS. ROSE GIDONGO

…….

2.MS. HARRIET MUGAMBWA NGANZI

…….

3. MR. EBYAU FIDEL

…….

DATE 24/JULY/2020