

THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE NO. 045/2015

MOSES OBONYO.....CLAIMANT

VERSUS

MTN (U) LTD.....RESPONDENT

BEFORE

- 1. The Hon. Chief Judge, Asaph Ruhinda Ntengye**
- 2. The Hon. Judge, Linda Lillian Tumusiime Mugisha**

PANELISTS

- 1. MS. MICHEAL MATOVU**
- 2. MR. MUVUNWA EDISON**
- 3. MR. EBYAU FIDEL**

AWARD

BRIEF FACTS:

The Claimant was employed by MTN (U) LTD on probation on the 15th of March 2004 as a Customer Service Administrator. He was confirmed after three months. He rose through the ranks to the position of Segment Manager. On the 20th of June 2014 he was terminated from employment.

In his opinion he worked diligently as attested by his good appraisal reports and increase in salary to a gross of Ugx.6, 248,000/- after the 2013 IPF performance report. According to him, the increase in salary was the basis upon which he applied for and was given a loan of UGX58,000,000/= by Stanbic Bank Uganda. He claims the loan was guaranteed by MTN (U) Ltd, payable in 60 months.

He was not given a reason for the termination or an opportunity to defend himself, save that he was terminated in accordance with his contract. His termination was published on the company intranet

for all the employees to see, to his humiliation and embarrassment.

He attributes his failure to get another employment to the manner in which he was terminated by the respondents. According to him the respondents terminated him contrary to the employment Act 2006, causing him to suffer embarrassment, and incapacitating him from fending for his family as their sole bread winner.

He claimed for:

- a) Special damages of UGX. 69,225,935/= which included loan obligations of ugx 47,953,467/-, leave days worth Ugx5,478,202/-, NSSF contribution worth Ugx.2,794,269 and terminal benefits of Ugx. 13,000,000/-
- b) A declaration that his termination was unlawful
- c) Aggravated damages
- d) General damages interest above 20%
- e) Costs

At the commencement of the hearing the issues relating to NSSF and leave accrued were agreed upon and they don't form part of this Award.

The Respondent on the other admits that Claimant was their employee but denies that they unlawfully terminated him because he was terminated in accordance with his contract of employment and labour regulations. According to the Respondents they reserved the right to terminate the Claimant in accordance with the agreed written terms of employment contract. They also denied ever guaranteeing the claimants loan with stanbic Bank. They claim they only recommended him for the loan. They submitted that the Publication of terminated *on* the intranet was standard practice to prevent them from holding out. They believed that the termination of the Claimant did not warrant a hearing and therefore he was lawfully terminated.

ISSUES

- 1. Whether the Respondents termination of the claimant was lawful.**
- 2. Whether the Claimant is entitled to special damages of UGX 35, 642,000/ as payment of the loan obligation.**
- 3. Whether the claimant is entitled to aggravated damages?**

The claimant was represented by Ms. Nanteza Hasifa of M/s Tem Advocates and Solicitors and the respondent by Mr. Gimanga Sam of M/s Shonubi Musoke and Co. Advocate. Both Counsel made

their submissions in writing for which the Court is grateful.

RESOLUTION OF ISSUES

1. Whether the Respondents termination of the claimant was lawful.

The claimant contended that he was unlawfully terminated because MTN (U) LTD had not justified his dismissal, in his dismissal letter or in their testimony before this court. According to him the dismissal letter and the respondent's witness testimony were to the effect that he had been terminated in accordance with his employment contract. The claimant construed termination as defined under Section 2 and Section 68 of the Employment Act 6 of 2006 which provide respectively as follows:

Section 2. "... termination of employment" means the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc.

Section 68 (1) "...in any claim arising out of termination, the employer shall prove the reason or reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of section 71."

The claimant also relied on the holding in the case of BARCLAYS BANK VS GODFREY MUBIRU SCCA NO 1 OF 1998, in which it was held that "where the service contract is governed by a written agreement between the employer and employee, termination of the employment or services would depend on the terms of the contract and the law applicable." And the case of OKELLO VS RIFT VALLEY RAILWAYS (U) LTD HCCS NO 195 of 2009, in which it was held that:

"...the right of the employer to terminate the contract of service whether by giving notice for the duration stipulated or implied by the contract cannot be fettered by court. This however does not mean that an employer can unreasonably terminate an employee's contract because there is a provision of payment in lieu of notice, as was the case under common law. This is because under section 68(1) of the Employment Act 2006 it is provided that, "in any claim arising out of termination, the employer shall prove the reason or reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of section 71."

* The claimant also relied on the holding in the case of Barclays Bank Vs. Godfrey Mubiru

SCCA no.1 of 1998 in which it was held that :

“Where the service contract is governed by a written an agreement between the employer and employee, termination of the employment or services would depend on the terms of the contract and the case of *Okello Vs. Rift Valley Railways (u) Ltd HCCS no. 195 of 2009* in which it was held that:

...” The right of the employer to terminate the contract of service whether by giving notice for the duration stipulated or implied by the contract cannot be fettered by court. This however does not mean that an employer can unreasonably terminate an employee’s contract because there is a provision of payment in lieu of notice as was the case under common law

This is because under section 68(1) of the employment Act 2006 it is provided that,” in any claim arising out of termination the employer shall prove the reason or reasons for dismissal and where the employer fails to do so ,the dismissal shall be deemed to have been unfair within the meaning of section 71”

The respondents on the other hand argued that the termination of the claimant was done in compliance with his employment agreement and the prevailing labour legislation by paying three months in lieu of notice; they insisted that the claimant had been terminated and not dismissed.

It was their view that section 68(1) of the employment Act 6 of 2006 which defined termination to include instances where the contract of employment is ended by the employer by giving notice to the employee was to be construed as standalone and independent of any other provision. It was their submission that the case of *OKELLO VS RIFT VALLEY RAILWAYS (U) LTD SUPRA* was distinguishable from this case in that in Okello’s case, the plaintiff was terminated on grounds of having issued an offer letter following a recruitment exercise without authority, which facts called for a disciplinary hearing, while in the instant case, the claimant was terminated in accordance with the Claimants contract and there was no requirement for either a hearing or disciplinary action. In their view therefore the decision in Okello’s case was not applicable to this case.

RW1, Mr. Sekadde, testified that the claimant had been terminated in accordance with his employment contract with notice. He made specific reference to clause 5.1 of the contract which states that the contract could be terminated by either party giving 30 days notice. He said that the claimant had been given 30 days written notice but no reason had been advanced as a basis for the termination.

The Respondent submitted that the right of an employer to terminate an employee by way of notice

had received judicial recognition in the case of **BANK OF UGANDA VS BETTY TINKAMANYIRE, SCCA No. 12 OF 2007** where **TSEKOKO JSC** held that;

“...in my opinion where any contract of employment, like the present stipulates that a party may terminate it by giving notice of a specified period, such contract can be terminated by giving the stipulated notice for the period in default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no period for notice is stipulated compensation will be awarded for reasonable notice which should have been given depending on the nature and duration of employment...”

From the respondents testimony it was also clear that the claimant had not been given opportunity to defend himself because he was not given any reason for his termination.

We have already decided in this Court in the case of FLORENCE MUFUMBA VS UDB LDC NO. 138/2014, that an employer must give reasons for terminating an employee. In this case this court held that “... in terminating an employee there must be circumstances that are justifiable but which may have no bearing on the fault or misconduct of the employee. Such circumstances include but are not limited to expiry of contract, non-existence of the position due ... and instances provided under section 65...

In our opinion whether the employer chooses to terminate or dismiss an employee such employee is entitled to reasons for the dismissal or termination. In employing the employee, we strongly believe the employer had reason to employ him/her. In the same way, in terminating him or dismissing the employee there ought to be reason for the decision...”

The Employment Act 6 of 2006 imposes a duty on the employer to give a reason before terminating an employee, under Sections 2, 65 and 68(1) which should be read together. It is our considered opinion therefore that in addition to giving the necessary notice if it is provided in the contract of employment, the employer must give justifiable reason for terminating an employee.

The Respondents insisted that the termination was in accordance with his employment contract and that ***“the court should uphold parties contracts rather than overrule the clear intention of the parties.”***

They argued that they did not fail to give justifiable reasons but rather they terminated the employment in line with the relevant clause in the contract. They further submitted the employment had been terminated in accordance with the prevailing labour legislation which is the Employment Act 6 of 2006. As already decided in the case of ***FLORENCE MUFUMBA Supra***, the employer must give justifiable reasons before terminating an employee and reasons need not be fabricated or fanciful as the respondents would want us to believe. RW1 in his testimony actually stated that the claimant’s position had ceased to exist after re-structuring. He said;

“...the marketing division where he worked was restructured and the position was changed in scope...”

This however was not mentioned in the Claimant’s dismissal letter as a reason for terminating him. RW1 even stated that ***it had nothing to do with the claimant’s termination...”***

We are therefore inclined to agree with the holding in ***OKELLO VS RIFT VALLEY RAILWAYS (U) LTD HCCS NO 195 of 2009*** which was quoted with approval in the case of ***FLORENCE MUFUMBO ibid***, that although Section 68 (1) of the Employment Act does not fetter the employers right to terminate an employee it imposes a duty on him or her to give reasons to justify the termination. The decision is to the effect that in addition to giving notice as prescribed in a contract of employment or notice that is sufficient in case it is not prescribed, the employer also has to give justifiable reasons before terminating an employee.

FAIR HEARING

According to section 66 (1) of the Employment Act, a hearing is required when an employer is considering to dismiss or terminate an employee on grounds of poor performance and or misconduct. It is our considered view therefore that each termination case has to be considered on its merits before a hearing can be instituted.

Section 69(3) provides that in cases of summary dismissal where the employee by his or her conduct has fundamentally breached his/her contract of employment it may not be necessary

to conduct a hearing.

In conclusion the claimant who had worked for the respondent for 10 years was entitled to fair and decent treatment by the Respondents. The Claimants should have been given justifiable reasons for terminating him notwithstanding that they had paid him in lieu of notice. Their failure to do so rendered the claimants termination unlawful.

According to Section 71 (5)

“Where court finds that a dismissal was, unfair, court may order:

a) order the employer to reinstate the employee

b) order the employer to pay compensation to the employee”

The claimant did not pray for reinstatement so Court shall not consider the same.

Considering the loss and suffering the claimant has been subjected to

as a consequence of the Respondents unfair and unlawful act of terminating him and the fact that he had worked for the Respondents for 10 years without a problem, we are of the opinion that he should be compensated in general damages of Ugx.90, 000,000/-.

2. Whether the Claimant is entitled to special damages of UGX 35, 642,000/ as payment of the loan obligation.

It was not disputed that when the claimant was terminated the claimant had an outstanding salary loan of UGX. 47,953,467/-. According to the claimant the loan had been acquired on the understanding that the claimant would continue to be employed by MTN (U) Ltd. The respondents on the other had contended that it was not liable for the claimant’s salary loan or any private contract he may have entered into. They refuted any duty or obligation under the loan agreement between the claimant and his Banker. They argued that they were not party to the said loan agreement.

The facts on the record show that the respondent had recommended the claimant to the Bank for a loan. In their letter of recommendation the respondents had confirmed they would continue to pay the claimants salary into the account. The Respondents had also undertaken to pay the claimants provident fund into the bank to clear any outstanding amounts of loan and interest in the event that the claimant was terminated. The claimant endorsed this letter marked annex “F” and did no protest against the same.

It is our view that his endorsement of the letter amounted to authorization of MTN (U) Ltd to pay the provident fund to cover outstanding balances in case he was terminated and he defaulted. Therefore the argument that the Bank had erroneously deducted the claimant's provident fund contrary to the provisions under the Alexander Forbes retirement fund MTN (U) Ltd hand book and the Retirement Benefits Authority Act 15 of 2011 does not hold water.

Although the agreement between the bank and the claimant was a private arrangement to which the respondents were not privy, they guaranteed payment of salary into the loan account. It was the continuous payment of the salary that was the basis upon which the claimant took the loan. The servicing of the loan was therefore premised on the assumption that the claimant would continue in employment, he would continue to receive salary from the Respondent unless and until lawfully terminated and the salary would cater for servicing of the loan.

We agree with the respondents that the claimant's argument that by recommending him for the loan, the respondents had undertaken liability for any outstanding balances in case he was terminated or he defaulted was untenable. The letter stated in part:

"... We also confirm that upon termination of his employment, terminal benefits currently at Ug. Shs. 28,003,949/- will be paid through the Bank to repay any outstanding amount of the loan and interest after all company obligations have been met "

The claimant endorsed the letter with his signature. The Respondents responsibility in our view was limited to the remittance of salary into the account and to payment of the claimant's terminal benefits to cover outstanding balances in case of termination of the claimant, which the claimant authorised by his endorsement on the letter.

After a critical analysis of the letter of recommendation we find that the undertakings relating to the payment of terminal benefits to cover outstanding balances on the loan in case of default were premised on the assumption that the claimant should have been lawfully terminated.

In this case the employee was unlawfully terminated.

This court has already decided in the case of ***FLORENCE MUFUMBO vs UDB LDC 138/2014*** which quoted with approval the case of Okello vs ***RIFT VALLEY RAILWAYS (U) LTD HCCS NO. 195 OF 2009*** that an employer who unlawfully terminated an employee causing him/her to default on the repayment of a salary loan, which was dependent on the payment of the employee's salary would be liable to pay the outstanding balances of the said loan. In this case when the claimant was unlawfully terminated he failed to meet his loan obligations because his salary was

stopped. The loan at the time of filing this suit was standing at Ugx. 35, 642,000/-. We have already found that the loan was premised on the respondent payment of the claimant's salary into the Bank. It is our considered opinion therefore that the outstanding balance of the loan should be paid by the respondent.

The claimant is therefore awarded special damages of all outstanding balances of the loan from the date of this award till full and final payment.

2. Whether the claimant is entitled to aggravated damages and general damages.

General damages

The claimant prayed for general damages for unlawful termination. In his Submission Counsel for the claimant argued that the claimant had a well paying job at UGX 6, 248,000/-, that he was 39 when he brought this suit and that he had so far failed to get alternative employment. Counsel was of the view that although the decision in the case of **BANK OF UGANDA VS BETTY TINKAMANYIRE CIVIL APPEAL NO 12/ 2007**, bars claimant from claiming compensation for the remainder of the years of his contracts until retirement) the court should exercise its discretion and award the claimant damages because he was unlawfully terminated.

We have already found that the claimant was unlawfully terminated and awarded him general damages of Ugx.90,000,000/-

Aggravated damages

The claimant claimed aggravated damages on the grounds that his termination had been published by all and sundry at MTN to see, to his anguish and stress. According to him his reputation had been put in disrepute. He also believed that because of this publication, he had failed to secure alternative employment from elsewhere. He therefore prayed for interest of 20% on severance pay of UGX 12,496.000/- and 20% on special damages as aggravated damages.

We agree with counsel for the respondents that the publication was intended to notify other staff of the termination as a means of preventing terminated staff from holding out. From the evidence on the record it is clear that the publication was done internally and thus its impact on the claimant is not as severe as he would like court to believe. Therefore his prayer for aggravated damages fails.

In conclusion the Claimant is awarded the following;

- 1. Order for General damages for unlawful termination Ugx.90,000,000/-**
- 2. Order for Special damages of the outstanding loan from the date of award till full and final payment.**
- 3. No order as to aggravated damages**
- 4. No order as to costs**

General damages shall carry an interest rate of 12% from the date of award till payment in full.

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2. THE HON. JUDGE, LINDA LILLIAN TUMUSHIIME MUGISHA

PANELISTS

3. MS.MICHEALMATOVU

4. MR.MUVUNWA EDISON

5. MR. EBYAU FIDEL

Dated 30th June 2016