THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE CLAIM NO. 138 OF 2014
(*ARISING FROM HCT C.S NO.184 OF 2012*)

BETWEEN

FLORENCE MUFUMBA (CLAIMANT) VERSUS UGANDA DEVELOPMENT BANK.(RESPONDENT)

BEFORE

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

Panelists

1. Mr. Ebyau Fidel
2. Mr. Micheal Matovu
3. Mr. Mavunwa Edison Han

AWARD

BACKGROUND

The claimant, Mufumba Florence, was an employee of the respondent by virtue of her appointment in August 1998 of Internal Auditor. She eventually became Principal Internal Auditor and her salary was correspondingly increased. In January 2010 her monthly salary was raised to 5,565,695. On 14/06/2011 she and other staff were advised via email to take their leave balance for the year 2010 before end of June 2011 to avoid forfeiture of the same.

She requested to take her leave from 17th June 2011 but she was advised to take it from 27th June 2011. She took her leave on that date though she would once in a while come to office to work on pressing matters.

On 5/7/2011 while in office she received a memorandum from the Chief Executive Officer to inter alia show cause why she should not be disciplined for absconding from duty. She wrote an explanation.

On 8/7/2011, while still in the office, she was served with a termination letter from the Chief Executive Officer. She responded by questioning the propriety of termination and on 20/7/2011 she was invited for a meeting about the same. On 10/08/2011, the Chief Executive Officer, wrote to the claimant to the effect that her termination had been converted into retrenchment and that she would be paid 114,291,500/=.

ISSUES:
Both counsel agreed and addressed court on the following issues:

1) Whether the claimant's contract was illegally and wrongfully terminated by the respondent.
2) Whether the claimant was liable to pay the loans advanced to her by the respondent and if so by how much?
3) Remedies, if any.

EVIDENCE
The claimant adduced her own evidence and closed the case and the respondent adduced evidence from 2 witnesses.

In her testimony the claimant informed court (through a sworn written statement) that she had always been an employee on permanent terms of the respondent until she was terminated although she always performed diligently. She informed court that one Gabriel Etou, the Chief Executive Officer had disagreements with her stemming from her professional duties and developed malice against her.

She said that after she and other staff were advised to take leave balances for the year 2010 before end of June 2011 she communicated that she was to take her leave on 27th - 13th July 2011 and she in fact took her leave although she would come to office to attend to urgent and pressing matters.

On 5/07/2011 while in office she received a memo from the Chief Executive Officer to show cause why she should not be disciplined for abscondment to which she responded on 8/07/2011. She received a termination letter detailing no reason for the same.

On 20/7/2011 she met the Board which tried to justify the termination without any hearing. On 10/8/2011, the Board through the Chief Executive Officer wrote to her saying that the termination had been converted into retrenchment.

She claimed various sums of money for various reasons and claimed that as a result of the termination of her job she was embarrassed and humiliated.

Having admitted that she secured a loan from the respondent bank, she testified that because she was illegally terminated, she ought not to pay the said loan.

In cross examination, she told court that when the position of Ag. Head of Audit Department was advertised she did not apply for it.
She informed court that the appraisal was carried out by the Board Audit Committee and that she participated in the said appraisal.

She told court that she did not obtain a signed form for leave from the Chief Executive Officer but agreed with him that she would go on leave on a certain date. She said that she received a hearing after she was dismissed. She insisted that she was not rendered redundant but she was unfairly dismissed.

The respondent adduced evidence from two witnesses. The first witness, one Mily Kasozi testified that in accordance with the Bank's Manual, the Bank reserved the right to terminate the services of any staff by giving notice thereof but not necessarily reasons thereto. She told court that indeed the bank on 8/7/2011 terminated the services of the claimant and offered her all her benefits including cash in lieu of notice. According to her, the claimant lodged an appeal to which the bank responded by maintaining the termination on grounds of redundancy. She testified that by counterclaim the respondent was entitled to recover the loans granted to the claimant.

The second witness for the respondent was one Charles Ocici. He testified that the position of the claimant as Ag. Head Internal Audit was rescinded by the Board and the position was advertised to which the claimant never applied. He testified that the claimant's professional skills and competence were subsequently found wanting by the Board Audit Committee. He told court that the claimant did not obtain approval before taking her leave.

SUBMISSIONS:

Counsel for claimant submitted that the employer could only dismiss an employee if such employee had committed a verifiable misconduct and therefore imputing a fault on the part of the employee. He submitted that the Employment Act overrides agreements of Human Resource Manuals and that no position in an agreement or contract of service may exclude or limit the operation of the Act to the detriment of the employee. He relied on sections 2,4 and 27(2) of the Employment Act. He also submitted that sections 66, 73,75(b) of the Employment Act were not complied with before the decision to dismiss or terminate the claimant was taken since she was not given a fair hearing and this was against the rules of natural justice. He submitted that redundancy as a reason of termination was an afterthought because it was not in the original letter of termination. In his view, the Board and the Chief Executive Officer were guided by emotions rather than the law in arriving at a decision. In his submission even if the employer provided payment in lieu of notice of termination, such employer had to give reason for termination. Counsel relied on section 68(1) of the Employment Act.

On the second issue counsel submitted that because the respondent had unlawfully terminated the contract of the claimant, she would no longer be able to repay the loans and was therefore entitled to the value of the outstanding loan as special damages. He relied on the authorities of **FOREST AUTHORITY VS SAM KIWANUKA C.A. 005/2009 AND OKELLO NYAMLORO VS RIFT VALLEY (U) LTD. CS 195/2009**. He submitted that his client was entitled to

severance allowance and all other claims stipulated in the memorandum of claim.

Counsel for the respondent on the other hand submitted that the employer need not give reasons for dismissing an employee for as long as the requirement of notice to such employee were satisfied. He relied on section 58 of the Employment Act and the authority of **STANBIC BANK VS KIYEMBA MUTALE S.C.C.A No. 02/2010.**

He submitted that the respondent was justified in dismissing the claimant for her failure to pass the appraisal. He relied on section 2 of the Employment Act.

In his submission on the second issue, the claimant was liable to pay the loans since they were not pegged to only salary deductions in accordance with the payment schedule which covered the period when the claimant would not be in the employment of the bank having been formally retired. He relied on **KABU AUCTIONEERS & BAILLIFS & AMOR VS F.K. MOTORS LIMITED**, **S.C.C.A NO. 19/2009**. He submitted that since the claimant did not plead the loan deductions as special damages she could not recover the same. He relied on **OMUNYOKOL AKOL JOHNSON VS ATTORNEY GENERAL S.C.C.A NO. 06/2012.**

RESOLVING THE ISSUES

1. **Whether the claimant's contract was illegally and wrongfully terminated by the respondent**.

The fact that the claimant was an employee of the respondent on permanent terms before she was terminated is not in dispute. The evidence on the record is that she was terminated on 8/9/2011 and the termination letter did not disclose any reason for termination. The reason for termination was subsequently communicated to the claimant on 10/8/2011 as redundancy resulting into retrenchment. This was after the complainant had raised questions as to why she had been terminated.

Whereas the claimant argued that no employee is legally dismissed/terminated without giving her any reason, the respondent argued that there is no such legal requirement.

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

The same section says that "termination" has the meaning given by

section 65 which states the instances under which termination is deemed:

"(a) Where the contract is ended by the Employer with notice.

(b) Where a contract of service, being a contract for fixed term or task, ends with the expiry of the specific term of 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 fevourable 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, but before the expiry of the notice.

(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".

As distinct from "termination of employment", section 2 defines "dismissal from Employment" as **"the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct."**

It is our firm conviction, that **in terminating** the employment of 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 to restructuring, bankruptcy or dissolution of the employer, atainment of retirement age and instances provided for under section 65 mentioned above.

On the other hand **in dismissing** an employee, the employer must establish that there is verifiable misconduct on the part of the employee. It is our view that verifiable misconduct includes but is not limited to abuse of office, negligence, insubordination, and all those circumstances that impute fault on the part of the employee which include incompetence.

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 that the employer had reason to so employ him/her. In the same way, in terminating or dismissing the employee there ought to be reason for the decision.

We do not accept the contention of counsel for the respondent that section 58 of the Employment Act does not require an employee to be informed of the reasons for termination.

Whereas the said section does not mention any reasons for termination of employment, it nevertheless deals with giving notice to the employee before termination. We do not think that the fact that the section does not provide for giving reasons for termination of employment automatically gives the employer a flat card to dismiss without reason contrary to the provisions of section 2 mentioned above.

In this particular case, the claimant was advised to take leave and she in fact took leave though she continued to appear in the office to handle urgent matters. We are satisfied on the evidence that she informed the Chief executive Officer of her intention to proceed on leave and that there was no objection from him. This is very clear from the written explanation that she gave to the Chief Executive Officer when she had been asked to show cause why she should not be disciplined for absconding from work.

In our view, in the circumstance of this case, the fact that the claimant did not get a signed approval of the Chief Executive Officer could not vitiate the claimant's having officially taken leave. This is because, the claimant's evidence that she was advised by the same Chief Executive Officer to take leave on 27/06/2011 was not controverted. The said Executive was not called to testify to the fact that the claimant indeed absconded having not been granted the leave. Even then it was not disputed that she was entitled to take the leave and section 75(b) of the Employment Act provides:-

"The following shall not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty:

a) ………………………………………………………………………………………
b) The fact that the employee took, or proposed to take, any leave to which he or she was entitled to under the law on a contract".

We view this legal provision to mean that where an employee is entitled to take leave and his or her employer is made aware of the dates of the intention of the said employee to take the leave, and the employer raises no objection as to the proposed dates, once such employee takes his or her leave, the employer is estopped from denying that such leave was authorized. It follows therefore that the said employer cannot impose disciplinary action against such employee.

We take serious exception to the fact that the termination letter contained no reasons for the termination only thereafter for the respondent to give reasons of abscondment as well as failing the appraisal. Section 68 and 71 of the Employment Act reinforces our opinion that in the event of either a "dismissal" or a "termination" the employer is obliged to give reasons at the time of dismissal or termination and not later.

Section 68 provides:

”68 proof of reason for termination

(i) In any claim arising out of termination the employer shall prove the reason or 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.

(ii) The reasons for dismissal shall be matters which the employer, at the time of dismissal genuinely believed to exist and which caused him or her to dismiss the employee.

As already discussed above we do not think the circumstances under which the claimant went on leave amounted to abscondment so as to constitute reason for dismissal or termination. Failing the appraisal was forwarded as another reason for the termination of the contract of employment of the claimant. We must say that failure to mention this fact in the termination letter constituted dishonesty on the part of the respondent. Even then in our view, this fact imputed incompetency on the part of the claimant and therefore, section 66 of the Employment Act should have been complied with before the decision to terminate the claimant was taken. The said section provides

“66 Notification and hearing before termination”

(i) Notwithstanding any other provision of this part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

(ii) Notwithstanding any other provision of this part, an employer shall before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under sub-section (1) may make.

We note that the words “dismiss” and “terminate” are interchangeably used in sections 66, 68 and 71.

In our view this is only to emphasize the point that either way, reasons must be given by the employer and the reasons must be in existence at the time the decision is made.

We have looked at the Human Resource Management Policy Manual of the respondent. Chapter five of the said Manual deals with discipline. No evidence

was adduced to show that any of the provisions there under were complied with. Chapter four of the same manual deals with performance and section 4.12 in particular prescribes how to deal with an under performer thus:

"**4.12 managing under performers**
The following procedure shall apply
(a) UDL management shall ensure that where poor performance is identified appropriate steps are taken to enable the member of staff learn and adjust to the required performance standard.
(b) Under performers shall be counseled, coached and retrained for better performance but in case they fail to improve, their services shall be terminated after appropriate written warning"

We do not find any evidence on the record that the above sections of the Employment Act and the Human Resource Manual respectively were complied with and this being the case, and in addition to the earlier reasons above, it is only wise for this court to conclude that in accordance with section 73 (b) of the Employment Act and in the circumstances of this case, the employer did not act in accordance with justice and equity in terminating the employee from her employment.

Consequently the first legal question is answered in the affirmative.

The second legal issue is whether the claimant is liable to repay the loans advanced to her.

The respondent through legal counsel argued that the claimant had not entered the counter claim in response to the loans and that therefore she admitted that she owed the same.

Considering that in her memorandum of claim the claimant prayed for declaration that she was not liable to repay the loan, we do not accept this argument. It is not denied that the claimant took loans from the respondent. The evidence reveals that a percentage of the loan was being recovered from the deductions from the earnings of the claimant by virtue of her employment with the Bank.

We accept the contention of counsel for the respondent that one of the loans had a repayment period of 15 years which would elapse in 2026, ten years after which the claimant would have retired if her services had not been terminated. We have perused the housing loan agreement for Ug. shs 102,500,000 which is secured by monthly installments from the salary of the claimant, terminal benefits as well as a mortgage. Another loan is a car loan of Ug. shs 25,000,000 recoverable within a period of 4 years by salary deductions. Although we have not seen on the record the personal loan agreement, the claimant never denied

that she took it and we too take the position that she owes the respondent such a loan.

We take the position that whoever secures a loan from a money lending institution under agreed terms is obliged by law to pay the same and the lending institution is mandated by law to recover the same in the event of default.

The contention of the claimant is that following her unlawful termination she was no longer able to repay the loans since she could no longer service the same. The case of **OKELLO NYAMLORO VS FIRTVALLEY (U) LTD. CS 195/2009** is very relevant to the facts in this case. The defendant in the said case having guaranteed a salary loan on behalf of the plaintiff, and his employment having been wrongfully terminated, the court held that the defendant was liable. This was because the court found out that

"the loan was being repaid at approximately Ugx. 2,224,481/= per month both principal and interest. The loan was premised on the understanding that the plaintiff would continue to be employed by RVR and pay off the loan eventually which was frustrated by the unlawful act of the defendant…."

It is not clear on the evidence before this court how much money was deductible from the salary of the claimant to cover each of the loans and how much (if any) was paid into the loan account from other sources of the claimant. What is clear and not denied is the fact that the Housing loan extended to 15 years, ten years after the normal retirement of the claimant. This in our view presupposed that the claimant would have to find other means to service her loan after retirement from the bank. In respect to this loan therefore she would only be entitled to relief from the respondent for only the value of deductions from her salary up to the time she would have officially retired.

The vehicle loan was to be recovered within four years and as in the case of the Housing loan, the installment amounts recoverable and over what period are not revealed on the record. If the same principle of deductions was applied across all the loans, we are of the considered view that the same applies up to the time the claimant would have officially been retired. Should any of the loans have been intended to be wholly covered by the salary and any other emoluments of the claimant, then, she would be entitled to a relief in the whole sum of the loan.

It is the decision of this court therefore, that on the second issue the claimant is only liable to repay such amounts on the loans that she would have been obliged to pay under the loan agreements after retiring from the service of the respondent bank lawfully.

The third issue relates to remedies.

(i) Severance allowance

In his submission counsel for the respondent seems to suggest that since severance was payable under the bank's Human Resource Policy if one was terminated on the ground of redundancy and since the claimant categorically denied this, she was not entitled to the same. We do not accept this contention. This court has already ruled that the termination of the complainant was unlawful and had very little, if at all, to do with redundancy.

Consequently we agree with the submission of counsel for the claimant that under section 87, 88, 89 and 90 of the employment Act, the claimant is entitled to severance allowance.

SALARY IN LIEU OF NOTICE

This item was conceded to by the respondent, it is therefore granted. The claimant will be paid salary for 3 months in lieu of notice.

SALARY FOR ONLY JULY 2011

The respondent submitted and the claimant agreed that she was terminated on 8/7/2011. Nonetheless both parties concurred that she was entitled to 2,341,554/= and we rule that so be it.

PROVIDENT FUND

The claimant in the memorandum of claim, claimed under paragraph 13, Ugx.10,182425/= as provident fund contribution.

Counsel for the respondent in the defense and counterclaim generally denied this item under paragraph 6.

In fact in his submission counsel for the respondent conceded to this amount at page 15 of the submission. We have no reason to disallow.

SALARY FOR 66 MONTHS

According to the claimant, the decision of **OMUNYOKOL AKOL JOHNSON** VS **ATTORNEY GENERAL (S.C.C.A NO. 06/2012**) arrears of salary from the time of illegal termination of employment to the time the claimant would have ordinarily and legally retired were payable to the claimant as special damages. According to counsel for the claimant, this decision departed from the earlier decision of **BANK OF UGANDA VS BETTY TINKAMANYIRE S.C.C.A 12/2007**

which had held that the contention that an employee whose contract of employment was illegally terminated was entitled to be paid salary for the period that remained up to the normal and legal retirement was not acceptable.

On the other hand according to counsel for the respondent the case of **OMUNYOKOL AKOL JOHNSON** (supra) did not repeal or depart from the decision in **TINKAMANYIRE** (supra).

We have carefully perused both of the above authorities. It is our considered opinion that whereas the case of **OMUNYOKOL** was handling issues affecting a civil servant appointed under the public service Act, and therefore entitled to pension and other privileges under the Act and other related laws and regulations, the case of **TINKAMANYIRE** was handling issues concerning employees under the Employment Act where employees were engaged on contractual terms. It is therefore our opinion that the case of **TINKAMANYIRE** is still the law as far as employment in the private sector which falls under the employment Act as well as the various Human Resource Manuals and various agreed contractual terms is concerned .We therefore consider appropriate to allow a claim of salary arrears from the date of the unlawful termination to the date of this Award.

AGGRAVATED AND GENERAL DAMAGES

Damages are generally compensatory in nature and the injured party must always be awarded such sums of money as may put him or her in the same position 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, aggravated damages are punitive intended to give relief to the claimant for the embarrassment that the respondent may have intended that the claimant suffers.

In **OBONYO AND AMOR VS MUNICIPAL COUNCIL OF KISUMU 1971 EA 91 at 96** relied upon by the respondent, the judge **said "..........it is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff as, for example, causing him/her humiliation or distress".**

The argument of counsel for the respondent that the claimant was lawfully terminated and therefore was not humiliated is not acceptable since we have already ruled that termination was unlawful.

The claimant had served the bank for 10 years and had four years left before her retirement . She was terminated without any reason only to formulate the reasons after the termination of her job. We think this constituted humiliation

and distress especially that she was served with the termination while on leave but in her office doing urgent business of the Bank. We are of the considered opinion that 150,000,000/= is sufficient for general damages and 200,000,000/= for aggravated damages.

SALARY ARREARS

We agree with the submission of counsel for the respondent that there was no evidence to show that 972,648 was owing to the claimant. The fact that documentary evidence to this effect was in possession of the respondent did not preclude the claimant from applying to the court to order the respondent to produce the said documents.

LEAVE PAY FOR 2011

We are not convinced by the submission of counsel for the claimant that she is entitled to one month salary. We are of the opinion that although no evidence was adduced to prove that the respondent granted at least one day off per week to the claimant for her to secure employment as provided under section 58(7) of the Employment Act, this omission could not by any imagination translate into a month's leave pay. However the respondent in a letter of 10/8/2011 addressed to the claimant conceeded to pay 2,341,554 in accordance with the Human Resource Policy of the Bank. Accordingly we grant this sum.

All in all we allow the claim with the following orders.

(1) The termination of the claimant's employment was unlawful.

(2) The claimant will recover such sums of money as was recoverable under the three loan agreements from her salary up to the time she would have retired.

(3) The claimant will recover salary for 3 months in liew of notice

(4) The claimant will recover 2,341,554 being salary for the month of July 2011

(5) The claimant will recover 10,182,452 being provident fund contribution.

(6) The claimant will recover salary that she would have been entitled to up to the date of this Award had she not been un lawfully terminated.

(7) The claimant will recover 83,215,239 being severance allowance.

(8) The claimant will recover 150,000,000 being general damages.

(9) The claimant will recover 200,000,000 being aggravated damages.

(10) The claimant will recover the costs incurred to prosecute this claim.

(11) The claimant will recover 2,341.554 being leave pay for 2011.

(12) The claimant will be entitled to interest at 25 percent per year from the date of this Award till payment in full as well as costs incurred.

SIGNED:

1. The Hon. Chief Judge Ruhinda Asaph Ntengye..

2, The Hon. Lady Justice Linda Lillian Tumusiime Mugisha..............................

PANELLISTS

1. Mr, Michael Matovu……………………………………………………….
2.Mr, Ebyau Fidel…………………………………………………………….
3.Mr. Mavunwa Edson………………………………………………………