**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**

**LABOUR DISPUTE REFERENCE No. 302 OF 2015**

**ARISING FROM KCCA. LBR. No. CB/164/15**

**BONNY ALZEE BINEKA OCHWA ….…………………….. CLAIMANT**

**VERSUS**

**KYAMBOGO UNIVERSITY ……………………………... 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.ANTHONY WANYAMA**

**3. MR. JULAIN NYACHOWO**

**AWARD**

**BACKGROUND**

The claimant brought this matter against the Respondent’s for assessment of general, aggravated, exemplary and punitive damages arising from the Respondents unlawful termination of his services.

**BRIEF FACTS**

The Claimant was employed by the Respondent as an Assistant Domestic Bursar from 1991 until May 2014 when he was arrested for theft of various food items suspected to be property of the Respondent. He was charged before Nakawa Court and suspended from work. He was later terminated and according to him the termination was done without justification.

He filed a complaint with the Labour office in Nakawa and the Labour Officer made an award in his favour for payment of some reliefs which we have already been paid to him. However the Labour Officer declined to award damages because he lacked Jurisdiction to do so.

The issue for resolution is: **Whether the claimant is entitled to general**, **aggravated, exemplary and punitive damages and if so what is the quantum?**

Counsel for the claimant asserted that that damages were intended to compensate a successful litigant in monetary form, for the loss suffered for a wrong which is either a tort or a breach of contract. He cited **MOHANLAL KAKUBHAI VS WARID TELECOM UGANDA NO. 224 OF 2011** whose decision was to the effect that the assessment of the quantum of damages was the discretion of Court.

He argued that in the assessment of damages in cases of unlawful dismissal Courts are expected to award damages which reflect their disapproval of a wrongful dismissal of an employee. (see **ISSA BALUKU VS SBI INT HOLDINGS (U) LTD HCS No.792 OF 2005 AND BATULI WILLIAM VS NAKASONGOLA DISTRICT LOCAL GOVERNMENT HCCS No.372 OF 2007).**

Counsel contended that the claimant had served the respondent for over 23 years without a tainted record and he would have continued to serve until his retirement at the age of 60 years but for the unlawful termination. He also contended that given that the claimant was of advanced age’ he would not easily secure alternative employment and yet he was denied the opportunity to earn the salary increments that occurred after he was terminated. He was therefore of the strong view that the claimant should be awarded Ugx. 333, 406,848 as general damages and Ugx. 80,000,000/- as compensation for the humiliation, mental distress, pain and embarrassment he suffered and the physical inconvenience of having to travel from upcountry to attend the criminal hearings.

Counsel took exception to the manner in which the claimant was publically and falsely accused of refusing to attend disciplinary proceedings in the media, yet he was attending criminal court sessions at the time and he could not attend the hearings before Court pronounced itself on the charges of theft against him. He argued that the claimant had labored to explain himself to the respondent in writing in vain. He also appealed to the National Union of Educational Institutions and the Appointments committee to no effect. According to Counsel the respondents refused to give the Labour officer the reason for which they had terminated the Claimant and therefore the termination was unlawful. He prayed that the claimant is awarded aggravated damages of Ugx. 120,000,000/-for his loss of reputation because of the allegations of theft, caused immense humiliation and embarrassment. He cited **Donna Kamuli vs DFCU Bank…., Dr. Peter Waswa Kityaba Vs African Field Epidemiology Network (AFENET) and Isaac Nsereko Vs MTN Uganda Limited CS No. 156 of 2012.**

He also prayed for Exemplary /Punitive Damages for the humiliation the claimant suffered by the newspaper articles, the respondents failure to consider his appeal and the fact that he was not able to seek for alternative employment given his age. Counsel prayed for Ugx, 70,000,000/= as Exemplary /Punitive Damages.

Counsel also prayed for payment of interest on all the General damages, Aggravated and Exemplary punitive damages of 10% from the date of the award until payment in full.

It was submitted for the Respondents in reply that, following the labour officer’s award, the claimant had been paid all the compensation awarded to him and therefore he did not deserve more. Counsel contended that the claimant was given an opportunity to be heard but he refused to attend the disciplinary hearing leading to his dismissal.

It was further his submission that it was presumptuous of counsel to argue that the claimant would have served until retirement and in any case having served for over 20 years there were no prospects for any career growth. Counsel refuted the computation of Ugx. 333, 406,848 as general damages and Ugx. 80,000,000/ as compensation and stated that it was not only presumptuous but also exorbitant, and given that all his entitlements had been paid to him the claimant was not entitled to general damages. He prayed that the claim is denied.

**DECISION OF COURT**

It is not disputed that Respondents invited the claimant for a hearing and gave him an opportunity to respond to the allegations of theft of food items believed to be their property. It is also not disputed that the claimant did not attend the hearing on the ground that he was attending Criminal Court proceeding before the Nakawa Court on the same allegations. It is further not disputed that he filed his matter before the Labour Officer who entered an award in his favour and made several awards excluding the computation of damages.

The matter on computation of Damages was then referred to this Court for the award of damages.

On whether the claimant should be awarded damages, it is the general principle that damages are intended to put a party in the position in which he or she would have been had the wrong done against him or her not been occasioned by the Respondent. The Employment Act provides under Section 66 (1) and (2), that

***“66. Notification and hearing before termination***

***(1) 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,***

***(2) Notwithstanding any other provision of this part, an employer shall before reaching a 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 subsection (1) may make.***

In the instant case, the Respondents gave the claimant an opportunity to be heard when they invited him for a hearing even though it was done through the media. He however declined to attend the hearing on the ground that he was still attending criminal proceedings against him in the Magistrate Court of Nakawa.

Whereas criminal proceedings are governed by the rules governing a Court of law, a disciplinary hearing is an administrative hearing and its character and standards are completely different from a Court of law proceedings. In a disciplinary hearing an employer need not prove a case against the employee beyond reasonable doubt. The employer is only obliged to afford the employee in question, an opportunity of being heard before he or she is terminated. In this case the claimant was given that opportunity and he did not take it. He was not in custody or on remand so as to be incapacitated from attending the hearing and a criminal proceeding does not preclude civil proceedings from taking place. It is also the position that an employee’s exoneration on criminal charges does not preclude an employer from proceeding with disciplinary charges dealing with the same alleged conduct (see the South African case of **LIEUTENANT COLONEL D.S SEWATI vs BRIGADIER N. MASIYE STATION COMMANDER, SA POLICE SERVICE, BRAKPAN, LIEUTENANT GENERAL MS PETROS, PROVINCIAL COMMISSIONER, GAUTENG, COLONEL P. VAN DER MERWE PRESIDING OFFICER CASE N0. J291/2011).** We are further persuaded by the decision in the South African, Supreme Court of Appeal Case in **OLD MUTUAL LIFE ASSUARANCE CO SA LTD vs THAMELA ADVOCTE GUMBI CASE No.211/2006** where it was decided that; “***The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer’s decision to dismiss cannot be challenged on the basis of procedural unfairness…”***

The claimant in the instant case did not adduce any other evidence to justify his failure to attend the hearing. We have therefore not found any basis upon which his claim for damages, can stand. In the absence of any evidence to the contrary we are inclined to believe the Respondent’s submission that the claimant did not deserve to be paid more than the Labour Officer had awarded him given that he locked himself out of the disciplinary hearing. In our considered opinion the conduct of the criminal proceedings in which the claimant was party was not a sufficient ground for him not to attend the disciplinary proceedings especially so when he was not in custody or on remand. Having locked himself out of the disciplinary hearing he cannot claim damages.

In the premises this claim is dismissed with no order as to costs.

Delivered and signed by:

**1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ………………..**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ………………..**

**PANELISTS**

**1. MR. EBYAU FIDEL ………………..**

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**DATE………………..**