**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE NO. 139 OF 2016**

**ARISING FROM KDLG/LC/O66/2015**

**LOSIO LEMURESUK CHAPLIN …………………………………….. CLAIMANT**

**VERSUS**

**BUGOYE HYDRO LTD ……………………………... RESPONDENT**

**AWARD**

**BEFORE**

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

**PANELISTS**

**1. MS. HARRIET MUGANBWA**

**2. MR. F.X MUBUUKE**

**3. MR.EBAU FIDEL**

**BACKGROUND**

The claimants claim against the Respondent is for a declaration that he was unlawfully terminated, payment of retained salary of Ugx. 3,300,000/, general damages of Ugx. 100,000,000/=, aggravated damages of Ugx. 300,000,000/=, monthly salary arrears of Ugx, 6,600,000/= per month from the date of dismissal to date of judgement, salary loan arrears of Ugx. 43,589,929/=, payment of negotiated severance allowance and costs of the suit.

**BRIEF FACTS:**

The claimant was employed by the Respondents as the Operations Manager from 22/9/2008 effective 3/11/2008. He was confirmed in employment on the 28/10/2010. He was dismissed on 15/12/2015 on grounds that he had not taken proper disciplinary action against a one Clovis kalengutsa for driving the respondent’s vehicle without authorisation and causing an accident which dented it. At the time of his dismissal he was earning Ugx. 10,000,000/- per month and a net salary of Ugx. 6,600,000/=. He had an outstanding salary loan of Ugx. 43,589,929/=.

The respondents admitted that the claimant was their employee and that he had been dismissed. It was their case that the claimant had been lawfully terminated for failing to take adequate disciplinary action against his subordinate Clovis Kalengutsa.

**ISSUES**

1. **Whether the Claimants termination by the Respondent was lawful?**
2. **Whether the Claimant was entitled to the remedies sought?**

**SUBMISSIONS**

1. **Whether the Claimants termination by the Respondent was lawful?**

It was submitted for the claimant that his dismissal was substantively and procedurally unlawful because he was dismissed without a justifiable reason contrary to section 2 of the Employment Act and that the required disciplinary steps were not taken contrary to section 73(1) (b) of the Act. He argued that the claimant had worked diligently for 7 years without a tainted record and this was not disputed by the respondents. Learned Counsel Rwambuka Jonan, contended that the claimant had been charged with 2 offences; 1. Failure to report the incident of the 25/10/2015 and general misconduct. According to counsel the claimant was not guilty of any of the charges.

It was his submission that the claimant could not immediately report the incident of the 25/10/2015 before establishing what had actually happened. He stated that the claimant in accordance with the respondent’s accident and incidents reporting procedure undertook an investigation before taking action. He pointed out that the procedure provided for a report routing and that the injured person had to report the same to his or her supervisor who in turn reported to the HSE officer on the day of the occurrence. According to him the claimant had got to know about the incident from a security guard on the 28/10/2015. The guard claimed the vehicle had crushed and overturned. He commissioned an investigation and only got the report on the 3/11/2015. He subsequently made a report to the director on the same day. Therefore it was not true that he had not reported the incident. Counsel insisted that the claimant had followed the reporting routing and had made his report within 10 days yet the requirement was 14 days. He further submitted that the claimant was justified to give Clovis a warning because the respondent’s procedure in exhibit B2 provided for progressive disciplinary measures. He was of the view that the warning was sufficient because the claimant had confirmed that the vehicle had not overturned as claimed and it had been used by another officer after Clovis had used it and the officer said it was ok. He refuted the respondents’ testimony that the vehicle had overturned because the guard who was sitting behind it had not been harmed. He concluded therefore that the respondents were not justified to terminate the claimant.

With regard to the procedure, it was his submission that the claimant had rejected the invitation for a hearing soon after Clovis had been heard on the 5/11/2015 because he saw no reason why he had to. This lead to his suspension for a month. Counsel asserted that the suspension was also to enable an investigation to be carried against the claimant but the claimant was not given any report. He contended that Annicent Busingye the operations manager who commissioned the investigation, was the investigator, complainant, chairperson and judge in the hearing which was a violation of the rules of justice. He did not agree with the reason that no committee could be established because the company was small. He insisted that it was a one person committee headed by Annicent because the other members were witnesses.

He further argued that the respondent’s employee hand book policy provided for progressive disciplinary procedure and since the claimant had a good record and he had followed the set procedures as laid down in the accident incident reporting procedures, the list they could have done would have been to give him a warning. He cited **ALEX MESTODIUS BWAYO VS DFCU BANK HCCS NO.78/2012** which cited **ISAAC NSEREKO VS MTN HCCS NO. 56/2012,** in which Lady Justice Elizabeth Musoke as she then was laid down the tenets of a fair hearing to include; notice of allegations had to be given to the accused employee, the allegations to be set out clearly and brought to the attention of the accused, an opportunity to be heard formally a right to cross examine, among others. Counsel insisted that the claimant should have been given an investigation report and given the opportunity to call witnesses which was not done. He concluded that the respondents had not accorded the claimant a fair hearing in accordance with Section 66 of the Employment Act.

In reply Learned Counsel for the respondent Mr. Joshua Byabashaija restated the gist of the case as an the incident that occurred on the 25/10/2015 when an employee one Clovis Kalengutsa drove a company car out of company premises without authorisation and in the company of a guard who was manning the respondent power generation plant in Kasese. The unauthorized mission was involved in an accident which was considered a gross violation putting the employee, the guard and the company’s property at risk.

Counsel argued that as a representative of senior management at Kasese the Claimant failed to address the seriousness of the accident when he gave Clovis the errant officer a warning instead of a more severe punishment and that was the reason he was terminated. Counsel insisted that the incident was of a serious nature because of the steep HSE obligations the respondent had and the danger it could have posed to their reputation. He insisted that the claimant should have consulted with his supervisor before issuing the warning. It was his submission that the respondent believed that the incident was a major transgression that required a harsher punishment which would have sent a message to other staff. He was of the view that the warning seemed like a cover up because the claimant realised that the respondents were carrying out an independent investigation. Counsel argued that by issuing the warning the claimant had violated section 62 of the Employment Act because the decision should have been made by the employer and not by him. According to counsel the claimant should have consulted with the managing director before taking action and that is the reason why he had been terminated.

With regard to whether the termination was procedural lawful. Counsel submitted that the respondents had handled the matter justly. He stated that the occurrence of the incident had not been denied, the claimant admitted to writing the warning letter. He further argued that the respondents had to the best of their ability set up a disciplinary committee comprising five persons who included the Acting managing director and 2 witnesses. He insisted that although the other 2 staff had been referred to as witnesses they were part of the committee and they had participated in the decision to terminate the claimant. He therefore refuted the claimant’s assertion that the Acting MD was the complainant, the investigator and the prosecutor in the case. He invited court to guide on what such small company’s should do when they made the effort to discipline staff who had fallen short of the requirements under their job descriptions, contracts and or Human resources manual because it was not always possible to have a perfect disciplinary process. He was of the opinion that for the court to determine whether a termination was lawful or not, Court should be guided by section 68 whose emphasis was for the employer to prove that he or she genuinely believed that the employee in question had failed in their duties and this was the case in the instant case. Counsel argued that the respondents were considerate and took cognizance of the claimant’s good performance, he had been given him an opportunity to be heard and he was paid his terminal benefits, in lieu of notice, and compensation amounting to Ugx. 32,726,000/= which he received without protest and therefore he could not turn around to claim unlawful termination. He argued that in order to appreciate why the respondents had considered the incident so seriously Court should consider what could have happened had the Vehicle overturned and its occupants, had died or got injured. He insisted that the claimant should have communicated to his superiors before taking the decision to warn the claimant. He cited **ROBERT MUKEMBO VS ECOLAB EA (U) LTD CS No.54/2007** to distinguish between termination and dismissal and to show that an employer had a right to terminate an employment contact with reasonable notice and that once the claimant had received his or her terminal benefits, he or she could not then claim unlawful termination. Counsel insisted that the respondents maintained the right to terminate the claimant as long as they did so within the precepts of section 68 (2) which they had done. He also relied on **GRACE MATOVU VS UMEME LDC No. 4/2014** where court found that the procedures applied in disciplinary committees need not conform to the procedures of Courts of law as a basis to guide company’s such as the respondent on how to ensure a fair hearing in light of the limited number of staff and hierarchy. He disagreed with Counsel for the claimant’s reference to the proceedings as a kangaroo court yet the respondents had made effort to ensure fairness by giving him a hearing and a certificate which had not implicated him in any wrong doing.

**DECISION OF COURT**

From the record, the evidence and submissions, it was not in dispute that the claimant had worked for the respondents for 7years and had a clean record. It was also not disputed that an incident in which a staff one Clovis Kalengutsa drove a respondent company’s car outside the company’s operational area without authorisation and accompanied by the guard who was supposed to be manning the respondents power generation plant in Kasese. The vehicle was allegedly involved in an accident which dented the car. It was also not disputed that the claimant as operations manager had investigated the incident and subsequently issued a warning to the errant officer. The respondents were not satisfied with the punishment he had issued and reviewed it to a termination. It was also not disputed that the claimant was terminated because the respondents faulted him for issuing a warning and not a harsher punishment for what they considered was a gross violation putting the employee, the guard and the company’s property at risk and terminated his services.

The question for resolution is whether the respondents were justified to terminate the claimant?

It was the respondent’s case that the claimant should have immediately reported the incident before taking any action against the errant officer.

The claimant on the other hand testified that he had followed the respondents reporting mechanism to the letter and he was not expected to report immediately but to verify the facts and report with 14 days and in this case he had reported within 10 days. A close scrutiny of the reporting procedure regarding work related injuries and specifically, incidents and accidents, on page 24 of the claimants trial bundle showed that;

***“...*** ***serious accidents/incidents MUST be reported as detailed in the Accident and Incident investigation and reporting procedure.***

***It is the duty of the injured person to report to his/her supervisor to ensure that he/she reports the injury to the HSE officer on the day of the occurrence and that the relevant documentation, including sick leave form is completed…”***

The procedure further tabulates the report routing to be followed by injured persons as follows;

1. ***The injured person reports the injury/incident to the supervisor,***
2. ***the supervisor initiates an incident/accident report(the HSE Officer should be involved in the investigation),***
3. ***the injured completes the incident /accident report with the assistance of the supervisor and the HSE officer,***
4. ***the Operation’s Manager sends the report with final comments to the HSE Officer, the HSE Officer makes comments and enters data in the database and makes copies of the original incident/accident form and the copies are sent to the relevant supervisors and management to ensure that all additional recommendations made are actioned then***
5. ***the Operations manager sends the final report to the management***

The claimant testified that he had followed this procedure to the letter and his testimony was not controverted by the respondents. Their case was that the claimant had issued a warning to the errant officer and not a harsher punishment. From the report routing it is clear that the claimant role was to ensure that the facts of each case are well established by following the set steps and finally sending a final report of the incident or accident. In this case the claimant went ahead and issued a warning to the errant officer. Given that the claimant was not the final person, he had to send the final report to management for them to make a final decision therefore the warning was not a conclusive disciplinary penalty. As the most senior person at the plant we think that issuance of the warning was within his discretion and it did not preclude management from issuing a harsher punishment as they eventually did. We do not think that the claimant had erred in any way. The report routing is very clear that he was not the final decision maker but management. We do not believe that he issued the warning because the MD had commissioned an investigation. He was required to investigate the matter and issue a report to management which he did, in addition he issued a warning.

Although the respondents insisted that according to the employee hand book they reserved the right to terminate an employee whose conduct merited immediate dismissal without recourse to the progressive disciplinary process, it is clear from the report routing procedure that they had to establish the facts of each case first before making a decision. We think that when the claimant commissioned an investigation he had established the facts on their behalf and the issuance of the warning should not have been considered as a conclusive punishment. We think his position as Operations Manager mandated him to issue a warning which in our view did not preclude management from giving a harsher punishment. We did not see how the warning had affected management’s authority to issue a higher punishment if the warning was not satisfactory.

 The report routing procedure indicated that the operations manager had to submit his report to management which was the final step. Indeed when he made his submissions management invited Clovis Kalengutsa the errant employee for a disciplinary hearing and subsequently dismissed him. In the premises it is our considered opinion that the claimant’s issuance of a warning was not a justifiable reason for the respondents to terminate him.

On the propriety of the hearing, this court has decided in many cases that the standards of a disciplinary hearing need not conform to those of a court of law but the basics tenants of natural justice must be applied. What is important is that the employer should inform the employee about the reasons he is considering for his or her dismissal/termination, he/she should grant the employee opportunity to be heard and or defend him or herself and the employer need not prove the case against the employee beyond reasonable doubt.

Section 66 (2) of the Employment Act provides that;

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

 ***...***

***(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 may make***

***…***

1. ***Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay a sum equivalent to four weeks’ net pay…”***

This provision envisages that the employer applies the basic principles of natural justice irrespective of whether it was a dismissal or termination or it was a summary dismissal or not.

The respondents constituted a committee comprising the MD and 2 witnesses. The director had commissioned the investigation, he was the chairperson of the committee and he made the final decision. The record shows that the Acting MD Annicent Busingye had commissioned an investigation by the security company which reported to him, it seems there was no investigation report that was produced because none was adduced as evidence, the claimant testified that he had not been given the copy of the report and his evidence was not controverted. The minutes of the disciplinary meeting showed that the claimant had been charged with general misconduct but the issues discussed only related to the incident about the vehicle.

The key principles of natural Justice are that no one shall be a judge in one’s own cause and that no one shall be condemned unheard. The claimant was not able to respond to the investigation report since it was not availed to him and the committee was chaired by the Acting Managing Director who was the prosecutor and at the same time the judge. Even if the other members were considered to be members of the committee it seemed they were junior to the claimant and therefore were not competent. In the circumstances we find that the hearing did not meet the tenets of natural justice and therefore it was unfair.

1. **Whether the Claimant was entitled to the remedies sought?**

Having determined that the claimant was unlawfully terminated, he is entitled to remedies.

**DAMAGES**

It was submitted for him that having worked for 7 years with a clean record, earning a salary of Ugx. 10 million per month and he had followed the reporting procedure and policies of the respondent to letter yet he was unlawfully rendered jobless, in accordance with the Court’s decision in **FLORENCE MUFUMBO VS UDB LDC No. 138/2014** and **DONNA KAMULI VS DFCU BANK LDC, No. 2/2015** Court should exercise its discretion and award him aggravated damages of Ugx. 200 million and general damages of Ugx. 100 million. He argued that aggravated damages should be awarded because the claimant had been accused of being a poor performer and had not proved that he was. The respondents on the other hand stated that if the court was inclined to grant remedies, it should consider that the claimant had been paid and he received payment in lieu of notice and his terminal benefits and therefore he did not deserve any remedies. He cited **PAUL MICHEAL BUKENYA VS GLOBAL TRUST BANK LTD LDC No. 112/2014** whose decision was to the effect that once a claimant is paid all his benefits and accepts them at the time of termination of his employment he losses a right to subsequently bring a claim on that basis. The case of **BUKENYA MICHAEL** (supra) is distinguishable. In that case the claimant was lawfully terminated. We appreciate that the claimant in this case unlawfully lost his job which was the source of his livelihood and was denied a fair hearing. We also take cognizance that at his age it may he may not easily find a new. In the premises given the salary of Ugx. 10,000,000/- that he was earning per month, given the number of years he had worked for the respondents and his clean record , the unfairness of the disciplinary hearing and the pain he suffered as a result of unlawfully losing his job, we think an award of Ugx. 100,000,000/= as general damages is sufficient. We however decline to award him aggravated damages because he failed to prove the same.

**PAYMENT OF LOAN BALANCES AS SPECIAL DAMAGES**

The claimant also prayed for the payment of his outstanding loan balances as special damages. It was submitted for him that the respondents were aware that he had a loan which he serviced with his salary and they would remit his salary to his account. In light of **OKELLO NIMROD VS RIFT VALLEY RAILWAYS HCCS 195/09** counsel was of the view that the claimant was entitled to his loan being paid because it was intended to be wholly settled by deductions from his salary. He asserted that it is the position of the law that an employer who unfairly without reason terminated an employee who is servicing a salary loan, that employer should pay the special damages the claimant suffered. We agree. Exhibit B10 on the claimant’s trial bundle shows that the respondents had recommended the claimant to acquire the loan and had undertaken to remit the salary to the account until the loan was repaid. This court has held in many cases that an employer would be liable to pay the outstanding balances of a loan acquired by an employee if the loan was secured solely by salary remittances and the employee had been unlawfully terminated. The respondents are therefore ordered to pay the claimant’s outstanding loan balance was Ugx. 43,589,929/=.

**SALARY ARREARS**

 The claimant also prayed for the payment of salary arrears from the date of termination to the date of award in light of **FLORENCE MUFUMBO** (supra) and **OMUNYOKOL AKOL VS A.G SC CA No.6/2012.**  The assumption is that the claimant who was employed on permanent terms would have served until retirement. We are of the considered opinion that this may not be the case because there was a possibility that the he could voluntarily terminate the employment relationship, the employment relationship could also have been terminated by other unforeseen reasons such as death, lawful termination, resignation etc. We believe that arrears connote that the employee worked and was not paid. We do not subscribe to counsels assertion that once a termination found to be unlawful it should be deemed that the termination never took place. Once one is terminated whether lawfully or unlawfully, the termination takes effect and the only remedy for unlawful termination our considered opinion would be the award of damages. In this case the employee/claimant was not working therefore he did not accrue arrears. In the premises this prayer is denied.

**PAYMENT OF SEVERANCE ALLOWANCE**

Counsel submitted that because he was unlawfully terminated the claimant should be paid Severance Allowance as provided under section 87 of the Employment Act. He stated that severance allowance was supposed to be negotiated between parties but since most don’t negotiate it, court should adopt the decisions in **RONALD KAMINANDA (** *which counsel did not cite in full and did not provide to court)* and **DONNA KAMULI** (supra) and order that the claimant is paid 1 months’ salary for every year he worked. Section 87 (a) provides that:

***“Subject to this Act, an employer shall pay severance allowance where an employee has been in his or her continuous service for a period of six months or more and where any of the following situations apply:***

1. ***The employee is unfairly dismissed by the employer….***
2. ***…..”***

In the circumstances the respondent is ordered to pay the claimant severance pay at the rate of 1 month salary for each year h2e worked. He worked for at Ugx. 10,000,000/- per month for 7 years therefore he will be entitled to Ugx. 70,000,000/- as Severance pay.

 In conclusion an award is entered in favour of the claimant in the following:

1. **A declaration that the claimant was unlawfully terminated.**
2. **General Damages of Ugx. 100,000,000/=**
3. **An award for the payment of his outstanding salary loan balances of Ugx. 42, 589,929/=**
4. **Severance pay of Ugx. 70,000,000/-**
5. **Interest of 20% on 2-4 above till from date of judgement till full payment.**
6. **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. HARRIET MUGANBWA ……………………….**

**2. MR. F.X MUBUUKE ……………………….**

**3. MR.EBAU FIDEL ……………………….**

**DATE……………………………………….**