**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE No.52 of 2016**

**ARISING FROM HCT CS 311 OF 2014**

**OTHEINO OKELLO KENNETH …………………………………….. CLAIMANT**

**VERSUS**

 **SPEAR MOTORS LTD ……………………………... 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. F X MUBUUKE**

**AWARD**

**BREIF FACTS**

The claimant was appointed as a sales representative effective 2/05/2013. He was be confirmed after 6 months’ probation and during this period the employer could terminate the service by giving 14 days’ notice and the employee by giving 7 days’ notice. On the 15/11/2013 he was dismissed for Absconding from work, when he did not return, after he was asked to bring his passport to assist in the investigation of allegations that he was clandestinely selling spare parts to the Respondents customers. His laptop was confiscated and his salary for the days he had worked that month were not paid. He prayed for a declaration that he was unlawfully terminated because he was not given a hearing, for unpaid salary, unpaid leave, General damages of Ugx. 100,000,000/= any other remedies deemed fit and costs of the suit.

**ISSUES**

**1. Whether the Claimants dismissal from employment by the Respondent was lawful?**

**2. What remedies are available to the parties?**

**EVIDENCE**

At the hearing the claimants were represented by learned Counsel James Bagonza of M/S Bagonza & Co. Advocates and the Respondents by Learned Counsel Mike Baingana of Spear Motors Limited. The claimant adduced his own evidence and the Respondents adduced evidence through their Chairman Board of Directors Mr. Wavamunno Gordon and the Company Secretary Ms. Judith Oseku Mukasa.

Both Counsel made written submissions for which Court is grateful.

**SUBMISSIONS**

It was submitted for the Claimant that he was dismissed without an investigation being carried out contrary to the Respondent’s Human Resources Manual marked as Annex “D”. Counsel also stated that he had not been accorded a fair hearing because the Respondents did not produce the investigation report or minutes to that effect. He cited **MOSES OBONYO VS MTN LIMITED LABOUR DISPUTE NO. 045/2015.** Whose holding was to the effect the Section 66 of the Employment Act which provides for a hearing before termination must be adhered to and on **BARCAYS BANK VS GODFREY MUBIRU SCCA NO.1/1998** in which the holding was to the effect that the termination of an employee by an employer could only be done based on a contract of service that governed the employment relationship. Counsel also cited **FLORENCE MUFUMBO VS UDB LANOUR DISPUTE CLAIM No.138/2014** which made it mandatory for an employer to give the employee he or she wished to dismiss a reason for the dismissal as provided under section 68 of the Employment Act, 2006. Counsel contended that although the claimant’s letter of dismissal gave absconding as a reason for dismissal, the dismissal was done without a full investigation as provided in the manual therefore the dismissal was unlawful. He prayed that the Claimant is compensated in accordance with Section 71(5) of the Employment Act, 2006.

Counsel for the Respondents made submissions before the Claimants made their own because the Claimants failed to comply with timelines set by Court.

He argued that the claimant had waived his right to a fair hearing as enshrined in Article 44(c) and Section 66(1) and (2) of the Employment Act, when he **“*refused to submit his passport and did not show up to answer the allegations leveled against him excluding himself from the hearing proceedings.”*** Section 66 (1) and (2) provides 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.***

He also cited **THREE WAYS SHIPPING SERVICES (GROUP) LTD VS CHINA CHONGAING INTERNATIONALCONSTRUCTION CORPORATION HCCS 538 OF 2005, R VS ABRAHAM (1985) 343 TO 347, REGINA VS JOHN (1972) 1 WLR 887** whose holdings are to the effect that where a person has knowledge of a legal right and abandons it he or she cannot seek a remedy for the breach of the right so abandoned. According to Counsel the claimant knew he was under investigation, he was sent home for his passport and he chose not to return and even traveled to Nairobi with the knowledge that the passport was not there. Therefore by this conduct the claimant waived his right to be heard and cannot now claim that there was unfairness when he locked himself out of the hearing by absconding.

Citing section 58 (1) (a), 69(2) and 69(3) of the Employment Act 2006, Counsel submitted that the Respondent was right to summarily dismiss the claimant because they suspected he was clandestinely meeting its customers and selling to them spare parts which was injurious to the business because their customers were being diverted. He insisted that the Respondent summoned the claimant and asked him to present his passport to enable the respondent verify the allegations but the claimant testified he traveled to Nairobi where he fell sick and therefore he could not return immediately. Counsel however asserted that the claimant did not prove that he had fallen sick because he did not state the date when he fell sick and was admitted. According to Counsel the medical form adduced in court did not indicate when he was admitted. Counsel contended that the claimants failure to turn up for duty without justifiable cause for 4 working days despite the Respondent communicating and notifying him about the implications of absconding amounted to a fundamental breach, therefore the Respondent was justified to dismiss him summarily.

Counsel further submitted that the dismissal letter cited the reason for dismissal as absconding from duty without authority and this reason according to him was in tandem with Section 68 of the Employment Act, **OKELLO VS RIFT VALLEY RAILWAYS (U) HCCS No. 195 OF 2009 and FLORENCE MUFUMBO (Supra)** which are to the effect that before an employer chooses to terminate or dismiss an employee the employee is entitled to justifiable reasons for the dismissal. Counsel insisted that the claimants absconding from duty amounted to a fundamental breach of contract. He cited **BARCLAYS BANK VS GODFREY MUBIRU(supra)**. He stated that according to the Respondent’s Processes, Procedure and Internal Control Manual Marked “D” absconding amounted to gross misconduct which was punishable by dismissal. He asserted that the Respondent complied with the Manual before dismissing the Claimant.

**DECISION OF COURT**

We have carefully analyzed the evidence on the record, the submissions of both counsel and the law applicable and resolve the issues as follows:

**Issue 1 Whether the Claimants dismissal from employment by the Respondent was lawful?**

Section 66, of the Employment Act 2006, provides for the procedure to be followed before an employee is terminated and dismissed.

It is not disputed that the Claimant was employed by the Respondent, as a Sales Representative on the 2/05/2013 and he was dismissed on the 16/11/2013, 14 days after his probation. Before we resolve this issue it is important to establish whether section 66 is applicable to this case given the above facts.

Section 67(2) of the Employment Act 2006, provides that:

***“… The maximum length of a probation is six months but it may be extended for a further period of not more than six months with the agreement of the employee…”***

It is settled that the employer has the responsibility of informing the employee that the probation period has come to an end by formally confirming the employee in the positon he or she was appointed to. In case of any extension the employer must specifically indicate that the extension was done in agreement with the employee in accordance with section 67(2) supra. Where there is no formal confirmation, extension or termination after the expiration of the probation period it shall be deemed that the employee has been confirmed in that position. See **DR. PAUL KAGWA VS PLAN INTERNATIONAL LABOUR DISPUTE CLAIM No.175 OF 2014.** There is no evidence on the record to indicate that the claimant’s probation was confirmed, extended or terminated. In the circumstances given that he was terminated 14 days after the expiry of his probation and there is no evidence that it extended, we hold that he was confirmed in the position of Sales representative and therefore Section 66 of the Employment Act applies to his contract of employment.

**We shall now proceed to resolve the issue whether he was lawfully terminated by the Respondents?**

It was the Respondents submission that the Claimant waived his right to be heard when he **“*refused to submit his passport and did not show up to answer the allegations leveled against him excluding himself from the hearing proceedings.”*** It is clear from the letter of dismissal that the Respondent suspected that the Claimant was clandestinely selling spare parts to its customers to the detriment of their business.

RW2 Oseku Judith Mukasa, testified that the claimant had been asked to bring his passport to assist with the investigations into allegations that he was moving in and out of Uganda to buy spares. In her evidence in chief, she stated that the claimant would be exonerated depending on the travel pattern or frequency of travel to Nairobi and any further explanation given. She however admitted that he was terminated without an investigation and although he did not receive their warning about the implications of his absconding marked Annex “B” he received a phone notification. According to her the claimant was dismissed for gross misconduct for absenteeism.

The claimant did not deny that he was asked to bring his passport to help in investigations. It was his testimony that when he traveled to Kenya to pick the passport he fell sick and was admitted therefore he could not return immediately. He however admitted that about 3 to 4 days later, the Human Resources Officer called him via phone and asked him to collect his dismissal letter. He insisted that he did not receive the warning marked “B” which was about his absconding from duty and according to him, he was dismissed without a reason.

After carefully considering the medical form marked “D”, which was adduced by the Claimant as evidence that he was admitted, we have not found anything mentioning or referring to the claimant’s admission. We have only found a caption stating that; ***“Review one week later.”*** Although the form is dated 9/11/2013 it does not indicate that this was the date on which the Claimant was admitted at the clinic nor does it state the date of discharge. A scrutiny of the form further showed that the Claimant was reviewed on the 16/11/2013 which was 7 days after the 9/11/2013 when he was purportedly first seen by the doctor. It is unbelievable that a patient on admission was reviewed after 7 days! We believe that a doctor will only admit a person into a medical facility if the doctor believes that the person is in such critical condition which requires close monitoring and therefore we would expect that the person/patient would be frequently reviewed by the Doctor and in any case at least every day. The medical report which the Claimant adduced as evidence of admission however states otherwise. The review happened after 7 days. We therefore have no doubt in our minds that the claimant was not in such a critical condition to warrant admission and therefore he was not admitted.

 **The next question is whether he actually traveled to Kenya to pick his passport?**

We have not found on the record, any evidence of travel documents or immigration exit or entry permits, indicating that the claimant traveled to Kenya. The claimant did not adduce any evidence to that effect. He testified that he had no passport but he was in the process of acquiring a Ugandan passport. He said ***“… I never acquired a passport. … I have a temporary East African passport. Iam about to acquire a Ugandan passport. … Yes I traveled to Kenya to pick my passport … yes I knew I had none but I went to Kenya…”*** We do not believe him when he said he traveled to Kenya to pick his passport, because he had no passport in the first place and secondly he did prove he had traveled. In the absence of any proof of travel we are inclined to agree with Counsel for the Respondent that the Claimant did not travel to Kenya as he claimed he did.

**Was the respondent justified to summarily dismiss him?**

Section 68 of the Employment Act is to the effect that before an employer dismisses an employee on the grounds of misconduct or poor performance, the employer must prove the reason for the dismissal. In other words the employer must prove the misconduct or poor performance although the proof needn’t be beyond reasonable doubt. What is required of the employer is to follow the procedure laid down under section 66 (1) and (2) of the Employment Act (Supra). The Section provides as follows:

***68. Proof of reason for termination***

 ***(1) 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***

***(2) The reason or 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….”***

The Respondent stated that the reason for the Claimant’s dismissal was that he absconded from duty and under the Company’s Manual, it was a gross misconduct termed absenteeism. The Manual provides that:

***“… Any of the following constitutes gross misconduct and any employee found guilty of any of them after a full investigation, will be dismissed, even for a first instance.”(Our emphasis)***

* ***Absenteeism without authority…***
* ***…***

RW2 the Company Secretary testified that the Claimant was dismissed without a hearing because he absconded. It was also Counsel for the Respondent’s argument that the Claimant waived his right to be heard when he “***refused to submit his passport and did not show up to answer the allegations leveled against him excluding himself from the hearing proceedings.”***

We have already established that the claimant was not admitted and he did not travel to Kenya to pick his passport. We have also established that he was aware that passport was needed to help in an investigations into allegations that he clandestinely sold Spare parts to the Respondent’s customers but he failed to produce his passport. We have also established that he did not report to work for 4 days.

 It is our considered opinion that the Respondent’s obligation to carry out a full investigation as was required under the Company’s Manual and to prove the reason for termination as provided under Section 68 of the employment Act 2006, was frustrated by the claimant’s failure to abide by the Respondent’s instructions to produce his passport and this was further compounded by his failure to provide a justifiable reason for his failure to show up for duty for 4 days. An employee is expected to report to work every day in accordance with his contract of service, unless he has a justifiable reason for not doing so. See section 75(i) of the Employment Act.

Having not traveled to Kenya, the Claimant was expected to have reported to work to enable the Respondent complete the investigations. His failure to report to work in our opinion meant that he locked himself outside the investigations and therefore outside the disciplinary hearing as per section 66(supra) His actions also constituted absconding from duty.

In the circumstances we find that the Respondent dismissed the claimant lawfully.

**What are the remedies available?**

Given that the claimant was lawfully dismissed he is not entitled to any remedy. The Respondents however stated that they had in their possession his laptop and outstanding salary for the days he served before his dismissal. The Respondents are ordered to return the laptop to the Claimant and to pay him his salary for the days served before his termination. No order as to costs is made.

Signe and delivered by:

**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. F X MUBUUKE ………………………..**

**DATE…………………………………….**