**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE APPEAL NO. 13/2018**

**(ARISING FROM LABOUR COMPLAINT, KCCA/NDC/LC/207/2017)**

**BETWEEN**

**HIVOS EAST AFRICA ………………………………APPELLANT**

**VERSUS**

**MUKALAZI DEUS MUBIRU………………………………RESPONDENT**

**BEFORE**

The Hon. Chief Judge Ruhinda Asaph Ntengye

Hon. Lady Justice Linda Lillian Mugisha

**PANELISTS**

1. Mr. Ebyau Fidel
2. Ms. Harriet Mugambwa Nganzi
3. Mr. F. X. Mubuuke

**AWARD**

This is an appeal against the decision of and grant of remedies by a labour officer sitting at Kampala City Council, one Namarwa Kulabako Ruth.

The respondent was employed by the appellant as a Senior Project Manager and on allegations that he breached the integrity-policy of the Appellant by being corrupt and accepting gifts and benefits by virtue of his position, he was summarily dismissed. Contending that his dismissal was unlawful because he was not accorded a fair and impartial hearing he lodged a complaint to the labour officer who held that indeed the hearing breached the Human Resource Manual and was contrary to a fair and impartial hearing and awarded the respondent certain remedies.

The appellant felt unsatisfied and lodged an appeal against both the decision and the remedies granted. The appeal is founded on the following grounds:

1. The Labour Officer erred in law and fact when she failed to correctly evaluate the evidence adduced by the appellant and thus arriving at a wrong decision.
2. The Labour Officer erred in law and fact when she ignored to refer to the Appellants integrity policy manual but rather placed emphasis on the testimony of the respondent thus arriving at a wrong decision.
3. The Labour Officer erred in law and in fact when she ignored to understand the intention of the drafter of the appellant’s Human Resource Manual.
4. The labour Officer erred in failing to examine and assess the conduct and culpability of the respondent in respect of the discharge of his employment duties.
5. The Labour Officer erred in law in awarding additional compensation without any findings as to the respondents’ entitlement to compensation.
6. The Labour Officer erred in law in awarding severance pay which the respondent is not entitled to
7. The Labour Officer erred in law and in fact in reaching a conclusion that the termination of the respondent was unlawful.
8. The labour officer erred in finding that the respondent was entitled to any of the remedies or reliefs awarded.

SUBMISSIONS

The appellant chose to argue grounds 1,2 and 4 together. Ground 3 was abandoned. Counsel for the appellant contended that the labour officer ignored the evidence of one Absolom Wanjala that the respondent had extorted money from Twelwaneko Listeners which evidence was exemplified by bank deposits into the respondent’s bank account. Counsel argued that the labour Officer ignored the definition of **“Manager”** in the human Resource Manual and replaced it with his own definition. According to counsel, in cross examination Absolom Wanjala confirmed that the respondent was answerable to him thus he was properly on the disciplinary committee as per **clause 11.4.4 of the Human Resource Manual**. Counsel contended that by ignoring to evaluate evidence relating to how the appellant’s whistle blower policy worked, the labour officer arrived at a wrong conclusion. He argued that the labour officer did not take into account the integrity policy of the appellant and thereby failed to appreciate that the respondent had breached the same. According to counsel the labour officer merely relied on the respondent’s testimony without evaluating it against the evidence of the integrity policy, failure of which led to a wrong conclusion.

In counsel’s view, the labour officer failed to examine and assess the conduct and culpability of the respondent given the bank slips showing money deposited into the account of the respondent; a written statement of one Imaka Isaac showing that the respondent solicited and received a bribe of 4,000Euros; the integrity policy; the dismissal letter, and a letter to the respondent detailing the particulars and allegations against the respondent.

According to counsel, the respondent did not deny receiving money from the sub grantees neither did he deny receiving money on his mobile phone number, nor the date and times the text messages were sent by him demanding payment of bribes from one Gerald Kenkya.

Consequently, according to counsel, the termination of the respondent was lawful as he had fundamentally breached his obligation under his contract having used his position to his advantages and solicited for bribes.

Counsel for the appellant argued grounds 5, 6, and 8 together as well. It was his contention that there was no reason for awarding any remedies since there was evidence that the respondent was accorded a fair hearing in accordance with **clause** **11.5 of the appellant’s Human Resource Manual**. According to counsel the details of the charges were given to the respondent before he appeared for a disciplinary hearing with his advocate. He contended that the respondent having been summarily dismissed for gross misconduct following a disciplinary process, he was not entitled to any remedies, especially when he was paid all his outstanding dues at the time of termination.

In response to the above submissions from the appellant, counsel for the respondent raised a preliminary objection to the effect that the appellant had raised matters of fact contrary to provisions of **Section 94(2)** which provides for appeals to be based on only points of law. He relied on **MAKULA INTERNATIONAL VS CARDINAL NSUBUGA SCCA 4/1981 and NETIS UGANDA LTD VS CHARLES** **WALAKIRA, LDA No. 22/2010 and EQUITY BANK (U) LTD VS MUGISHA MUSIMENTA ROGERS, LDA NO. 26/2017.**

He prayed this court to strikeout the appeal with costs. In the alternative counsel prayed that grounds 1, 2, 3, 4, 7 and 8 be struck out for being based on both facts and law. Counsel opted therefore to respond to only grounds of appeal on matters of law.

On the first ground of failure to evaluate evidence, counsel for the respondent strongly argued that it was not true that the respondent admitted to soliciting money. According to counsel the submission of the appellant was in a bid to distort facts so as to mislead court. Counsel referred this court to **page 30 of the judgment** where **under line 14**, the labour officer considered the evidence and pointed out that the respondent had explained that the monies received were as consideration in a private motor vehicle purchase transaction.

According to counsel, the respondent explained by disclosing the registration number and type of the vehicle so purchased and in the absence of availability of Kankya Gerald for cross-examination and in the absence of the investigator as a witness for cross-examination, the labour officer analyzed and evaluated the evidence properly and reached a correct decision. Relying on **Seyani Brothers & Co Ltd Vs Cassia Limited – HCCA 128/2011** which relied on **Marvin Baryaruha Vs** **Attorney General Misc. Cause 149/2016**, he submitted that Wanjala Absolom having investigated the matter could not be seen to sit on the disciplinary committee since he would be biased.

According to counsel, the labour officer throughout her judgment analyzed the appellant’s whistle blower policy and integrity manual policy and never ignored Wanjala Absolom’s testimony. He argued that there was no provision in the manual prohibiting the staff of the appellant from selling their private property to a worker of the appellant’s partners. In his considered view **clause 11.4.4. of the Manual** was clear as to who would comprise the disciplinary hearing and only one Anthony Wafula, the programs Manager being the manager and supervisor of the respondent could be part of the disciplinary proceedings and not the Finance Manager.

He argued that it was not proved that the money allegedly deposited on the respondent’s account was a bribe or kick back in the absence of the accusers for cross examination.

According to counsel, the accusers combined with some officials of the appellant to bring down the respondent whose project had a huge budget, the reason they failed to produce the accusers for cross examination.

Counsel submitted that the entire Award by the labour officer was lawful but inadequate because she was limited over the quantum of compensation. He prayed that this court awards general and aggravated damages as it did in **Dr. Omona Kizito Vs Marie Stopes Uganda LDC 33/2015 and in Donna Kamuli Vs DFCU Bank LDC 002/2015.**

**Decision of Court**

**General observations**

The Award of the labour officer as a whole is one of the best reasoned Awards that we, as an Industrial Court has been able to internalize. It is an Award that gives the brief facts of the case, issues to be determined and most importantly exhaustively discusses the issues one by one. We are indeed satisfied that the labour officer did her best to reach the decision that she did. We appreciate her reasoning on the participation of an investigator in disciplinary proceeding as a witness vis a vis as a member of a committee; we appreciate her reasoning on the time necessary for someone to prepare his or her defense and on the necessity for cross examination of witnesses. The labour officer correctly quoted and relied on decisions of superior courts.

But as we shall demonstrate later, the real question in this appeal is; **how far and to what extent does the burden of proof of a misconduct in employment matters shift from employer to employee?**

**Preliminary objections;**

**Section 94(2) of the Employment Act, 2006** provides;

**“An Appeal under this section shall lie on a question of law and with leave of the industrial court, on a question of fact forming part of the decision of the labour officer.”**

Although counsel for the respondent relied on cases like **Makula International Vs Cardinal Nsubuga, Netis Uganda Vs Walakira and Equity Bank Vs Mugisha** **Musimenta,** none of these authorities were attached to the submissions. We need not emphasize the fact that it is the duty of counsel to provide authorities that he/she intends to rely on. Since counsel did not do his/her duty, we shall ignore the authorities relied on. Be that as it may, as **Section 94(2) of the Employment Act** provides**,** it is only with leave of this court that a party can appeal against points of fact. There is no evidence whatsoever that the appellant applied for and was granted leave of this court to argue points of fact. Consequently, we agree with counsel for the respondent that all grounds of appeal that constitute points of fact be stuck out and they are hereby struck out.

However, following the decision of the court of Appeal in **BAINGANA JOHN** **PAUL VS UGANDA CRIM. APPEAL** **068/2010**, evaluation of evidence is a matter of law and therefore in addition to grounds 5, 6, ground 1 is maintained given the court of Appeal precedent.

In arguing ground 1 of the appeal, the appellant took it together with other grounds which we have struck out. In assessing this ground we shall not refer to any arguments related directly to the other grounds as argued.

It was contended by the appellant that the labour officer did not evaluate properly the evidence related to the respondent’s solicitation of the bribe as testified by one Absolom Wanjala and that because of this failure, the labour officer reached a wrong conclusion. In his submission, counsel pointed out that the labour officer did not take into account bank slips (among others) as evidence that the respondent received monies on his account from Gerald Kankya, the Executive Director of Twelwanako Listeners Club.

Counsel for the respondent on the other hand argued that the respondent never admitted to soliciting money from the alleged whistle blower and that the labour officer considered the evidence adduced pointing out that the respondent had received the money as consideration for a private motor vehicle purchase transaction. According to counsel in the absence of availability of Kankya or the investigator for cross examination, the labour officer analyzed and evaluated the evidence that made his decision as contained on **pages 27, 28, 29, 30 and 31 of the** **judgment.** These pages of the Award of the labour officer mainly constitute the reasoning of the labour officer on the necessity of availability of witnesses for cross examination. We take note that the claimant was summarily dismissed under **Section 69(3) of the Employment Act** which states:

**“An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has, by his or her conduct, indicated that he or she has fundamentally broken his or her obligations arising under the contract of service.”**

Summary dismissal denotes a dismissal which is instant, without notice or payment in lieu of notice. It is a dismissal that is as a result of a fundamental breach of an employee’s duties under the contract and we think that gross misconduct of an employee is always an indicator of a fundamental breach of an employee’s obligations. A fundamental breach is such a breach that goes to the root of the contract and which is incompatible with the continuance of the employment. Whether a given breach is a fundamental breach will always depend on the circumstances of a given case.

In the instant case the claimant was employed as a senior project manager, connecting voices of citizens. He was alleged to have used his position to solicit for and receive gratification for what he had done as an employee. He admitted having received money but denied that it was for gratification as he insisted it was for a private transaction. In evaluating this evidence the labour officer at page 30-31 of the Award had his to say.

**“At page 8 of her submissions, the respondent acknowledges that the complainant did not deny receiving money on his bank account. At page 8 still, the respondent again acknowledges that the complainant explained that the money was from a separate personal transaction involving the purchase of a vehicle.**

**From the above, it is clear that while the complainant accepted receipt of money on his bank account and some mobile money deposits, he directly denied receiving it for any dishonest purposes.**

**This was an exculpatory answer inevitably necessitating the evidence of a bank and mobile money deposit to be subjected to cross examination so as to satisfy the tribunal that the impugned bank deposit was not for any other lawful purpose except the wrong purpose for which the complainant was accused. It necessitated the presentation of the complainant’s accusers for cross examination so as to verify the veracity of the allegations and the fact of existence of a car purchase arrangement or otherwise… Irrespective of my earlier finding that Kankya Gerald and Isaac Imaka were not compellable witnesses owing to their being whistle blowers, I find that the respondent should have taken seriously their legal duty to present the investigator for cross examination. I therefore answer issue number three in the affirmative.”**

Whereas we agree with the labour officer on the necessity of availing the investigator for cross examination, we fundamentally differ from her on the purpose for cross examination in the circumstances of this case. In criminal proceedings, the burden to prove the charge against the accused is always on the prosecution and it never shifts. The prosecutor is under a burden to prove the case beyond reasonable doubt and the weakness of the defense is never a reason to shift this burden. In civil proceedings, particularly in employment matters, the burden on the employer to prove a misconduct is on a balance of probability and it shifts to the employee as and when evidence is adduced against the employee.

In the instant case there was evidence adduced by the appellant that money had been deposited into account of the respondent by one Kankya who was a principal officer of an organization that sought a grant from the appellant for whom the respondent worked as project manager who had authority over processing such grants. Evidence was in form of bank deposits and by mobile money which the respondent did not deny. The appellant having adduced this evidence, the burden shifted to the respondent to prove that the received money was not solicited as a bribe but as payment for consideration of a purchase of a vehicle.

In our considered view it was not enough discharge of this burden for the respondent to merely deny and state that the received money was for a purchase of a vehicle. The burden shifted to the respondent to adduce evidence to prove the purchase of a vehicle from Kankya by for example producing a sale agreement or any other evidence to support the existence of such an arrangement. It was a misdirection on the part of the labour officer in her evaluation of evidence to suggest that such evidence of purchase of a vehicle would have come from cross examination of the investigator. The labour officer’s statement that;

**“It necessitated the presentation of the complainant’s accusers for cross examination so as to verify the veracity of the allegations and the fact of existence of a car purchase arrangement…”** suggested that the whole burden was on the appellant to prove misconduct and that it did not shift at all which, as already stated, was wrong in principle.

We do not accept the contention of counsel for the respondent that **“if indeed the appellant disbelieved the respondent, and there was nothing personal against the respondent, the appellant was going to secure the presence of at least the investigator to the matter, to appear and disapprove the respondent’s assertion. In this case it was the appellant’s duty to disprove the respondent’s assertion.”**

There is nothing further from the law. As stated above, counsel’s submission is in effect saying that the appellant had the burden to prove the nonexistence of the purchase arrangement between the respondent and one Kankya, which in our view, means that the burden did not shift to the respondent. We accordingly find counsel’s submission without merit. It is apparent that the labour officer misdirected herself on the burden of proof when she was evaluating the evidence of receipt of the money from Kankya. Had she not done so she would have found, as we find now, that the respondent received the money from Kankya in his capacity as project manager of the appellant as gratification for the part he had played in securing a grant for Twelwaneko Listeners club for which Mr. Kankya was principal officer.

However, we agree that the disciplinary process had a lot to be desired. We entirely agree with the labour officer as well as counsel for the respondent that it was unfair for the appellant to grant the respondent insufficient time to prepare for the defense of his case. The record reveals that the respondent was notified on 30/5/2017 to appear before a disciplinary committee on 31/5/2017.

These proceedings were suspended and he was notified once again on 12/6/2017 to appear and indeed he appeared for the hearing on 13/6/2017. The aspect of an employee being given sufficient time to prepare for defense is an aspect that is part of a whole process of affording an employee a fair hearing as described in **Section 66(1) of the Employment Act.** We therefore applaud the labour officer for having correctly found that the respondent was not accorded sufficient time to prepare his defense.

Having said all the above, and as already stated earlier on in this Award, **Section 69(3) of the employment Act** justifies a summary dismissal where the employee by conduct indicates a fundamental breach of the contract of service. We have no doubt in our minds that, given the responsibility of the respondent as project manager of the claimant, his receipt of money from one of the beneficiaries of the grants processed by him on behalf of the appellant, in the circumstances that he did, amounted to a fundamental breach of his contract of service and the appellant was entitled to dismiss him summarily under this Section of the Law. However, **Section 66(4) provides;**

**“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 the employee a sum equivalent to four week’s net pay”.**

In the case of **Bank of Uganda Vs Kanyangoga L,D.C 80/2014** where this court found that the claimant had not been given sufficient time to prepare a defense but had fundamentally breached the contract of service, he was allowed four weeks’ pay.

The employment contract fundamentally is based on the trust and confidence that either of the parties has in each other unlike in any other contract which is based strictly on the terms in the contract. Once there is evidence that this aspect of trust and confidence is lost between employer and employee, and that it is lost as a result of a probable breach of the understanding between the two, then the relationship necessarily comes to an end. This is the reason that this court has over time held that where there is a fundamental breach and the employer exercises the right to dismiss summarily under **Section 69 (3)** above mentioned, but with flows in the hearing process as provided under S**ection 64(1) of the Employment Act,** the employee would be entitled to only 4 week’s net pay under **Section 66(4)** of the same Act. This is as opposed to when an employee is not given any opportunity at all to look at the charges against him/her, later on be given any opportunity to defend them, which calls for a declaration of unlawful dismissal and award of damages and any other reliefs deemed fit by the court.

In the instant case by receipt of the money from a beneficiary of the grants of the appellant, the respondent breached the trust and confidence that the appellant had in him to continue being in the job of processing and approving grants of a similar nature for any other beneficiary, but because of the flows in the hearing process, we hold that he will be entitled to 4 week’s net pay as provided for under **Section 66(4) of the Employment Act.**

Consequently, ground No. 1 succeeds, with a declaration that the respondent fundamentally breached his contract of service by soliciting and accepting a bribe and therefore the labour officer did not correctly evaluate the evidence so as to reach a correct decision. The decision of the labour officer that the respondent was unlawfully dismissed is hereby set aside. No order as to costs is made.

**Delivered & Signed:**

1. The Hon. Chief Judge Ruhinda Asaph Ntengye …………….
2. Hon. Lady Justice Linda Lillian Mugisha …………….

**PANELISTS**

1. Mr. Ebyau Fidel …………….
2. Ms. Harriet Mugambwa Nganzi …………….
3. Mr. F. X. Mubuuke …………….

Dated: 27/04/2020