**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE APPEAL No.029/2019**

**ARISING FROM KCCA/CEN/LC/297/2018**

**NYAKANA JOSEPH ………………………….. APPELLANT**

**VERSUS**

 **VICTORIA UNIVERSITY …………………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. ADRINE NAMARA**

**2.MS. SUSAN NABIRYE**

**3. MR. MICHEAL MATOVU**

**AWARD**

**BACKGROUND**

On 2/01/2016 the Appellant was employed by the Respondent as its Registrar. During the course of his employment, he was given additional duties as Acting University Secretary, Vice chancellor and Head of quality Assurance.

On 11/01/2018, he requested for an increase in his remuneration owing to the increased work load and according to him, the University Council recommended that his emoluments are increased.

On 25/06/2018, he received a termination letter, on grounds of “poor performance and unsatisfactory conduct. The termination took effect on 2/07/2018. He filed a complaint before the labour officer challenging the unlawful dismissal. On 3/09/2019, the Labour officer delivered a ruling in favour of the Respondent. The appellant being dissatisfied with the decision filed this appeal.

**GROUNDS OF APPEAL**

1. **The Labour Officer erred in law when he held that the Respondent fairly and lawfully substantially terminated the Appellant’s contract.**
2. **The Labour Officer erred in law when he held that the Appellant is not entitled to damages and costs.**
3. **The Labour Officer erred in law when he held that the Appellant is not entitled severance allowance.**
4. **The Labour Officer erred in law when held that Appellant is not entitled to basic compensatory order and additional compensation.**
5. **The Labour Officer erred in law when he failed to properly evaluate the evidence on the record.**

**REPRESENTATIONS**

The Appellant was represented by Mr. Solomon Kisambira Baleese of Ajju, Baleese, Bazirake Advocates, Kampala and the Respondent by Ms. Brigette Nasonko of Walusimbi and Company Advocates Kampala.

**SUBMISSIONS**

1. **The Labour Officer erred in law when he held that the Respondent fairly and lawfully substantially terminated the Appellant’s contract.**

It was submitted for the Appellant that, the labour officer erred in law in holding that the Appellant’s contract was fairly and lawfully terminated, yet he stated that it had procedural shortfalls. According to Counsel the labour officer’s reliance on the letter dated 26/06/2018 at page 242 of the record and page 70 of the labour officer’s ruling, and section 27(2) of the Employment Act 2006, to the effect that the Appellant accepted the termination because it was offering him favourable terms was ridiculous. He argued that the Appellant could not have consented to a termination which had already occurred. According to him the Appellant was simply following the practice for terminated employees to embrace their terminations because there was no other option to do otherwise. In any case he did contest the termination in the same letter and he did not suggest that it was in any way lawful, He contended that the Appellant was never given a hearing before the termination nor was he ever notified about any infraction on his part. He argued that, given the absence of any minutes of any disciplinary hearing, the termination was done contrary to Article 28 of the Constitution which guarantees a right to a fair hearing and section 66 of the employment Act which provides for a fair hearing and the procedure to be followed before termination. Counsel also relied on **Jabi vs Mbale Municipal Council (1975) HCB 191** cited in **Batuli George William Vs Nakasongola District Local Council CS 372 of 2007** and **Eng Pascal R. Gakyaro vs Civil Aviation Authority CACANo.60/2006 which** elucidated the same legal principal and stated that a decision taken without following the principles of natural Justice renders the decision void and of no effect.

It was counsel’s submission that, it is a mandatory requirement for an employer to conduct a hearing before an employee is dismissed and whatever falls short of this automatically becomes an unlawful and wrongful dismissal, irrespective of whether the employer believed that the employee was guilty of employment offences. He contended that the Appellant was condemned unheard because no evidence was adduced to prove his incompetence nor was he given an opportunity to question his accusers. He stated that in **Batuli**(supra) Court emphasised a person’s right to respond to allegations leveled against him or her, the right to question the persons who made the allegations and an opportunity to examine the evidence against him or her.

According to him, the Labour officer contradicted himself when he stated that the appellant’s termination was substantively fair and procedurally unlawful and unfair, when he stated at page 72-73 of the record that:

 *“… the respondent failed to avail proof of holding a disciplinary hearing inline with section 66 of the Employment Act No.6 of 2006 this was required to verify the internal audit findings against the claimant. Therefore, we find that the termination of the claimant was procedurally unfair and unlawful. Having seen the above procedural shortfalls from the Respondent in as far as providing a fair hearing and justifying the grounds for the termination, this office declares the termination though substantively fair, was unlawful and unfair procedurally.”*

Counsel disagreed with the labour officer’s this holding which is to the effect that, even if the right to a fair hearing and the procedure for termination is flouted the termination could still stand as a fair termination. He asserted that, given that the Appellant was terminated without being notified about the infractions leveled against him, without being given an opportunity to know the evidence adduced against him and without an opportunity to respond to the infractions, his termination was unfair and unlawful. He prayed that ground is 1 should be resolved in the affirmative.

In reply, Counsel for the Respondent restated the facts as stated in the background above, and added that the Appellant was justifiably terminated because of his lack of commitment to the university, unsatisfactory performance, lack of team work and insufficient answers to audit queries. According to him, the termination followed a detailed back and forth communication to and from the Appellant regarding the unsatisfactory performance.

She however raised a preliminary point of law to the effect that although, the Appellant’s complaint allegedly occurred on 25/06/2018, he only filed a complaint before the Labour officer in November 2018, outside the requisite 3 months provided under the Act. She contended that the labour officer extended time without hearing the opposition of the Respondents against the extension, contrary to the principle of the right to a for hearing as is enshrined in the constitution. According to her the application of section 71 of the Employment Act which gives the Labour officer discretion to extend time can only be invoked by meeting the judicial test which entails hearing both parties. She also cited **Cardinal Emmanuel Nsubuga vs Makula International [1982] HCB 11,** for the legal proposition that an illegality can be brought to the attention of court at any time and in this case the failure to grant the Respondent an opportunity to be heard before the labour officer extended time constituted an illegality. Therefore, court should dismiss the appeal and action arising therefrom, with costs.

In rejoinder Counsel for the Applicant contested the Preliminary objection on the grounds that the labour officer heard and disposed of it and the proper procedure would have been for the Respondent to appeal against it or file a cross appeal on the same and not raise it at this moment.

According to him the section only requires the employee to justify the filing of the matter out of time. The section is silent on the procedure to be followed in extending time within which to file a complaint out of time and in fact the claimant gave his justification by letter and in any case at the time he did so he was not represented by counsel.

Before we resolve this ground, we shall first resolve the Preliminary Objection.

**RESOLUTION OF THE PRELIMINARY OBJECTION**

**Whether it was an illegality for the labour officer to grant an extension of time to hear a matter as provided under section 71(1) and (2) of the Employment Act, without hearing both parties?** The section provides that;

*“ (1) An employee who has been continuously employed for at least thirteen weeks immediately before the date of termination, shall have the right to complain that he has been unfairly terminated.*

*(2) A complaint made under this section shall be made to the labour officer within three months of the date of dismissal or such later period as the employee shall show to be just and equitable in the circumstances.*

The Court of Appeal in **John Eric Mugenyi vs Uganda Electricity Generation Company CA No. 167 of 2018,** held that “*… that a limitation period is a bar to an action but section 71 (2) of the Employment Act just prescribes the period within which to lodge a complaint with the labour officer with the rights of a labour officer to allow the complaint outside the period of three months. It does not limit the powers of the labour officer as to when to allow the application. It only requires the complainant to justify the filing of the complaint outside the period of tree months. In this case the labour officer without making any note allowed the complaint to be filed. In any case he had the powers to abridge the time within which to allow the complaint to be filed…”*

In light of this decision, the labour officer does not have to hear the parties before exercising his or her discretion to extending time, the only requirement is for the labour officer to be satisfied with the justification given by the employee, for lodging the complaint outside the prescribed time. We therefore, associate ourselves with Counsel for the Appellant’s argument that, that section 71 of the Employment Act, does not prescribe any procedure which the Labour officer should follow before he or she can exercise his discretion to extend time. It only states that the labour officer can extend time if he or she is satisfied that the justification given by the complainant is just and equitable in the circumstances.

Therefore, given that he exercised his discretion to extend time in the instant case, it is not an illegality that he did so without hearing the parties. The Objection is therefore, over ruled.

In reply to ground 1, Counsel for the Respondent asserted that, the Labour Officer was correct in finding that the termination was lawful. She submitted that the parties contracted permitting either party to terminate the contract, with 3 months’ notice or 3 months payment in lieu of notice in accordance with clause 11.1 of the contract of service, at page 148 of the record.

According to Counsel the Appellant /claimant was terminated in accordance with the contract and the termination letter stated that he would be paid 3 months’ salary in lieu of 3 months’ notice. She also submitted that the claimant accepted the termination in his letter to the Respondent dated 26/06/2018 which was confirmation that the termination was contractual. It was also her submission that, according to the Vice chancellor’s testimony at the Labour office, it was the Appellant who actually suggested its invocations. It was also her submission that Respondent’s Vice chancellor, also testified that the Appellant accepted the termination even before the Vice chancellor wrote the termination letter.

She cited the **1st schedule of the Employment Act paragraph 3(6)**, which she stated legally permits payment in lieu of notice and section 27(2) of the same Act, which she submitted gave statutory weight to the provisions of the party’s contract. She asserted that the contractual notice was more favourable than what the Appellant was entitled to under the law. She also cited **Delaney vs Staples (1991/2) WLR 627,** in which Lord Brown Wilkinson listed among others, a situation where the contract is ended by mutual agreement of the employer as one of the circumstances where payment in lieu of notice may be made.

She argued that the Appellant was always aware of the employer’s misgivings on his part and he was heard on the same. She further made reference to the termination letter, in which the Vice chancellor stated that he met with the Appellant concerning his performance and responses to audit queries and he was heard over the issue for days. According to Counsel the Appellant was therefore, always aware about the allegations against him. She cited **Grace Matovu vs UMEME LDC No. 04/2014***,* in which this court held that, *“An administrative hearing such as a disciplinary hearing does not conduct the hearing at the same standard as a court of law.”* She also cited **DFCU Bank Limited vs Donna Kamuli CA 121/2016, in** which Justice Baisakhi, in addition to the same legal proposition, stated that the hearing can be conducted either through correspondence or through face-to-face hearing. She insisted that for all intents and purposes the Appellant was always given a hearing. She had never been denied his rights and therefore based on his contract his termination was lawful.

**RESOLUTION OF THE APPEAL**

Section 94 of the Employment Act, 2006, gives a party who is dissatisfied with the decision of a labour officer a right to appeal to the Industrial Court, on points of law and with leave of court on points of fact. It is the duty of the appellate court to reappraise the entire evidence on the record in order to determine whether the conclusion arrived at based on that evidence should stand.

Section 94(3) provides that: *The Industrial Court shall have power to confirm, modify or over turn any decision from the which an appeal is taken and the decision of the Industrial court shall be final.*

 **GROUND 1.** **The Labour Officer erred in law when he held that the Respondent fairly and lawfully substantially terminated the Appellant’s contract.**

**The Appellant faults the labour officer for the finding that the procedure was flowed but the termination was substantively lawful and fair.**

It is trite the law that the right of an employer to terminate an employee cannot be fettered by the Courts, as long as the employer follows the procedure for termination/dismissal as provided under Sections 66, 68 and 70(6) of the Employment Act, 2006, which require that before making the decision to terminate or dismiss an employee, the employer must explain to the employee the reason he or she is contemplating the dismissal or termination, he or she must give the employee in issue an opportunity to respond to the reason/s, in the presence of a person of the employee’s choice, before the dismissal/termination occurs.

The employer is also required to prove the reason for dismissal/termination, although the proof is not expected to be beyond reasonable doubt, the employer need only be satisfied on a balance of probability. The employer is only required to act reasonably based on the facts known to him or her, at the time of the decision to dismiss /terminate the employee is made.

The Courts are therefore, required to establish that the employer honestly believed on reasonable grounds that, the employee was guilty, at the time the employer took the decision to terminate the employee. It is the expectation therefore, that the honest belief and reasonable grounds for dismissal/termination, will depend on the evidence available to the employer, after carrying out a reasonable investigation into the alleged infractions.

After a careful analysis of the record of proceedings, we found that, the labour officer in his award at page 70 of the record, cited the Claimant’s acceptance of the termination, section 27(2) of the employment Act and the fact that the Appellant’s contract provided that either party could terminate the contract by giving 3 months’ notice of termination in writing, held that in light of section 58(3) (b) the Appellants termination was substantively lawful. He went further to indicate at page 72 of the record that, the Respondent failed to prove that a disciplinary hearing was held in line with section 66 of the Employment Act. He stated that: *“… this was required to verify the internal audit findings against the claimant; therefore, we find the termination procedurally unfair and unlawful.”*

As already discussed above, an employer cannot terminate an employee without following the procedure for termination under sections 66, 68 and 70(6)of the Employment Act 2006, which prescribe 3 key steps which must be followed before termination:

1. The reason for dismissal/termination must be communicated to the employee in writing with sufficient detail for him or her to be able to prepare for the disciplinary hearing.
2. A disciplinary hearing/meeting should be held before any disciplinary action is taken against the employee and the employee has a right to be accompanied to the hearing by a person of his or her choice.
3. The employee has a right to appeal if his or her contract provides so.

Our re-evaluation of the evidence on the record at pages 45-61, indicates that the Vice chancellor in his testimony before the Labour officer, stated that the Appellant was terminated on grounds of his poor performance and conduct. He also admitted that he did not invite the Appellant for any meeting in writing nor did he produce any minutes of any disciplinary meetings. The termination letter at page 135 made reference to 2 meetings held on 23/06/2018 and 25/06/2018 in which the vice chancellor purportedly discussed the allegations with the Appellant , but there was no record of the minutes of the said meetings as evidence that the Respondent put the allegations to the Appellant, accorded him sufficient time to prepare to respond to the allegations and gave him an opportunity to actually make representations in response to the allegations, in the presences of a person of his choice. We found nothing on the record to show that the Appellant was actually subjected to any disciplinary proceedings.

It is settled that a termination can only be valid if the tenets of a disciplinary proceeding as stated under section 66,68 and 70(6)( supra) are followed and employer cannot base its decision to terminate/dismiss an employee on accusations which were not proved. Even if the standards of a disciplinary hearing are lower than those of a court trial and as stated in **DFCU Bank vs Donna Kamuli(supra),** it is not a mini court , the tenets of a fair hearing must be observed. In **Queenvelle Ateino Owala vs Centre for Corporate Governance Industrial cause number 81 of 2012,** It was held that:

*“It is insufficient that the employer had various discussions with the employee. It is immaterial that the employee was at one time appraised and found wanting. Appraisal and discussions held between employees and their employers touching on the employee’s work performance do not add up to a disciplinary hearing and can only be evidence in support of good or poor performance at a disciplinary hearing.*

Therefore, having established that the Respondent failed to prove that, it held a disciplinary hearing, the labour officer was wrong to hold that the dismissal/termination was substantively lawful, simply on the basis that the Appellant’s contract of service provided for either party to terminate it with 3months notice or payment of 3 months in lieu of notice in accordance with Section 58(3) of the Employment Act. We are persuaded by the holding of **Onyango J,** in the Kenyan case of **Bernard Ngugi vs G4S Security Services Kenya Limited Industrial cause number 11 of 2013,** which is to the effect that, any contractual provision on termination of employment by paying in lieu of notice must be construed to accrue and apply only where gross misconduct has been established, as envisaged under section 44 of the Employment Act, 2007of Kenya, which is in pare Materia with section 66 of the Employment Act 2006 of Uganda.

Before we take leave of this ground it is important to discuss the implications of the Appellant’s letter accepting the termination. It is a settled matter that the employers right to terminate cannot be fettered as long as he or she follows the correct procedure to terminate as provided by law. Therefore, once an employee is terminated the termination takes effect whether it is lawful or not. However, the acceptance of the termination by the employee as the Appellant in this case did, should not be construed as accepting its unlawfulness. The employee cannot fetter the employer’s right to terminate/dismiss him or her, therefore once dismissed he or she is expected to accept the dismissal/termination. However, the employee has a right under Article 42 and sections 66, 68, and 70(6) to challenge the dismissal/ termination or the procedure for dismissal/termination by the employer, if he or she believes it is unfair and or unlawful. Therefore, the labour officer erred to rely on the Appellant’s letter accepting the termination, as a basis for his finding that the termination was substantively lawful.

In the circumstances ground 1 succeeds it is allowed.

**2.The Labour Officer erred in law when held that the Appellant is not entitled to damages and costs.**

Counsel for the Appellant reiterated that the Appellants termination was unlawful and given that he held very senior positions of University Registrar and Acting university secretary earning Ugx. 6,500,000/- per month, he is entitled to general damages. According to Counsel, the University Council in its meeting held on 13/07/2017, the Appellant had shown exceptional and successful performance and commitment to the University. It was his submission that the council even recommended an increase of his emoluments. He argued that the Appellant was a good, hardworking, enterprising and exemplary employee. He was inconvenienced and humiliated by his termination because he was classified as incompetent and has not found alternative employment as his record was now tainted. He invited court to award him damages which reflect its disapproval of a wrongful dismissal of an employee, as was held in **Batuli George William vs Nakasongola District Local Council CS 372 of 2007** and **Issa Baluku vs SBI INT holdings (U) Ltd No. 792 of 2015.** He proposed Ugx. 400,000,000/ as general damages.

He also prayed for aggravated damages and was of a very strong view that this is a proper case for an award of aggravated damages, because the Appellant was treated in a very degrading manner.

In reply Counsel for the Respondent, cited **Storms vs Hutchinson (1905) C 515 ,** in which Court stated that general damages are direct natural or probable consequences of the wrongful act complained of and includes damages for pain, suffering, inconvenience and anticipated future loss. she contended that damages only apply when the termination is unlawful and given that, the termination of the Appellant was lawful the Appellant was not entitled to any damages.

Citing **Uganda Revenue Authority vs Wanume David Kitamirike CACA 43 /2010, s**he also refuted the claim for aggravated damages on the grounds that like general damages they are compensatory in nature and are awarded to reflect exceptional harm done to the plaintiff by the Defendant which was not the case in the instant case. She concluded that the Appellants termination was lawful, he was a given a more generous contractual offer on the termination, than is legally provided for and the Respondent has always exhibited good will and offered to pay him more than what he was entitled to.

**DECISION OF COURT**

It has long been settled that the only remedy for an employee who has been unlawfully terminated is general damages , in addition to other remedies pleaded for under the Employment Act 2006. (see **STANBIC BANK VS KAKOOZA MUTALE C.A No. 2 OF 2010).**

The Appellant prayed for the Appellant’s case file to be referred to the industrial Court for determination and assessment of general damages and aggravated damages. But the Labour officer did not discuss this claim at all. In any case the labour officer does not have did not have jurisdiction to award damages.

We have already established that the Appellant was unlawfully terminated therefore, he is entitled to an award of general damages. Indeed, he held senior positions of Registrar, Acting University Secretary and Acting Vice Chancellor, at the university earning Ugx. 6,500,000/- per month. By the time of his unlawful termination, he had served the Respondent from 2/01/2016 to 02/7/2018, which is 2 year and 6 months. According to the Respondent’s University Council he was an exceptional performer and there was no evidence to the contrary. We think an award of **50,000,000/=** as general damages are sufficient.

We found no aggravating circumstances to warrant an ward of aggravated damages, they are therefore denied.

**3.The Labour Officer erred in law when held that the Appellant is not entitled to Severance allowance.**

Counsel argued that section 87(a) entitles an employee who has worked for a period of six months or more and has been unfairly dismissed to severance allowance. Having submitted that the Appellant was unlawfully terminated/ dismissed he was entitled to severance allowance calculated in accordance with the calculation adopted by this Court in **Okiidi Geald vs Delaru Construction Ltd. L.D 156/2015**. He worked for more than 2 years therefore, he should be paid 2 months salary as severance pay amounting **Ugx. 13,000,000/-**

In reply Counsel for the Respondent submitted that the Appellant was terminated lawfully, therefore he was not entitled to payment of severance pay.

The Labour officer in his decision at page 77 of the record, declined to award payment of severance allowance on the basis that the Appellant’s termination was substantively lawful. We already established that the Appellant was unlawfully terminated and He pleaded for severance allowance. He is therefore entitled to it.

Indeed, Section 87(a) of the Employment Act, entitles an employee who has been in an employer’s continuous service for a period of 6 months or more and has been unlawfully dismissed to severance pay. Section 89 of the Act provides that severance allowance should be negotiable between the employer and employee and does not provide for a formula for its calculation. This court in **Donna Kamuli vs DFCU Bank LDC 002 OF 2015, Okidii Gerald(supra),** held that where the parties had not established a formula for calculating severance pay, the reasonable method shall be payment of 1 month’s salary for every year the employee has served. In the instant case the Claimant served the Respondent for more than 2 years. However, he prayed for severance Allowance equivalent to 2 months salary. We have no reason to deny him this prayer. An award of **Ugx. 13,000,000/-** equivalent to 2 months’ salary is awarded to him as severance allowance.

**4.The Labour Officer erred in law when he held that Appellant is not entitled to basic compensatory order and additional compensation.**

Having established that the Appellant was unlawfully dismissed, the Labour officer had discretion to award him a compensatory order under section 78(1). He did not award it to him because he found that the Appellant was lawfully dismissed.

This court in **Edace Micheal vs Watoto Child Care Ministries LD Appeal No.016/2015,** this court held that section 78 of the Employment Act, 2006, *“… covers whatever damages that could have arisen from illegal termination although section 78(3) provides for maximum amount of additional compensation which in our view is equivalent to damages. Unlike the Industrial Court, the discretion of the Labour officer to award such damages under section 78(3) is limited to 3 months wages of the dismissed employee’s salary…”*  It was settled in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017** that: “***….the Industrial Court, can determine any dispute which can be filed in the high court .In that respect it has unlimited jurisdiction on the question of remedies that it can lawfully order…”.*** In the circumstances, this court cannot make an award for compensation under section 78 which is the preserve of the labour officer, It is our considered view however, that the award of general damages we have already made above, is sufficient as compensation.

**5.The Labour Officer erred in law when he held that Appellant is not entitled to basic compensatory order and additional compensation.**

This ground drafted too generally. And although counsel argues it with reference to the arguments in support of grounds 1-4, We have already resolved these grounds. We think it is too general to be considered as a stand-alone ground of Appeal. It is therefore, disallowed.

In accordance with section 93() of the Employment Act 2006, the labour officers award is therefore, modified as follows:

1. Declaration that the Appellant was unlawfully dismissed.
2. An award of Ugx. 50,000,000/- as general damages for unlawful dismissal
3. An award of Ugx. 13,000,000/= as severance allowance

In addition, save for the award of 1 months’ salary of Ugx.6,500,000/- as salary for the month of June and the award of 3 months’ salary in lieu of notice amounting to Ugx. 19,500,000/-, the rest of the labour officer’s award is set aside.

Interest of 15% per annum shall accrue on all the pecuniary awards from the date of this award until payment in full.

This Appeal therefore, succeeds. 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. ADRINE NAMARA ……………..**

**2.MS. SUSAN NABIRYE ……………..**

**3. MR. MICHEAL MATOVU …………….**

**DATE: 12/02/2021**