**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE No. 050/2020**

**ARISING FROM MUKONO MC/LO/021/2020**

 **WUBO GERALD ………………….. CLAIMANT**

**VERSUS**

 **CENTURY BOTTLING COMPANY LTD ……………………RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. JULIAN NYACHWO**

**2. MR. MAVUNWA EDSON**

**3. MR. BWIRE ABRAHAM**

**AWARD**

**INTRODUCTION**

This claim is brought against the Respondent for Special damages, general damages, exemplary/punitive damages, interest and costs of the suit arising from the breach of a contract of employment and wrongful and unlawful dismissal.

**BRIEF FACTs**

The Claimant was employed as the Respondent’s Route to Market Manager under the sales and Marketing function, until 2019, when he was terminated. According to him, he was unfairly suspended for 2 weeks without pay on allegations of reckless driving by exceeding the recommended speed limit after he had already been reprimanded for the same offence. The Respondent dismissed the Claimant without giving him a fair hearing and based on false allegations of fraudulently/dishonestly obtaining company resources. The Respondent at the time of dismissing the claimant failed or refused to pay repatriation costs, allowances and salary entitlements owed to the Claimant causing him financial loss and damage to his reputation.

**ISSUES**

**1.Whether the Claimant was unlawfully and unfairly dismissed?**

**2. Whether the Claimant was unlawfully suspended for two weeks without pay?**

**3.What remedies are available to the Claimant?**

**REPRESENTATION**

The Claimant was represented by Mr. Peter Kauzi and Ms. Shiela Kasolo of TASKK Advocates, Kampala and the Respondent by Mr. Ernest Kalibala and Allan Katangaza of AF Mpanga Advocates, Kampala.

**RESOLUTION OF ISSUES**

**1.Whether the Claimant was unlawfully and unfairly dismissed?**

Counsel for the Claimant submitted that, contrary to section 66(1) and (2) of the Employment Act, the Claimant was unlawfully dismissed because he was not given a fair hearing before the dismissal. According to him the Claimant’s dismissal was based on false allegations, which were not clear and although the Claimant made several requests for clarification, he wasn’t given any. Counsel contended that the Respondent refused to share the findings of the investigation against the Claimant with him so that he could prepare his defence. It was Counsel’s submission that the Respondent’s witness Ruby Engena admitted that she had seen his requests for clarification but she ignored them.

It was further his submission that the Respondent chose to hear the matter in the absence of the Claimant, yet he had informed his superviser that, he was not given leave of absence to enable him attend the hearing and therefore he would attend it after work. He contended that by conducting the hearing in the Claimant’s absence the Respondent violated the principles of natural Justice. He relied on **Ebiju James Vs UMEME Ltd HCCS N0. 0133 of 2012,** where court laid emphasis on the need to clearly set out what allegations are being set against the plaintiff.

Citing **Irene Kharono vs Action Aid International LDC No. 196 of 2014**, where court emphasised the importance of adhering to the Human Resources Policy, Counsel argued that the Respondent violated its HR policy, when contrary to clause 5.2.2 of the Policy, the Appeals committee was comprised of only 1 person instead of 5.

Counsel also contended that the allegations of fraud and dishonesty made against the Claimant were false. According to Counsel, although the investigation established that the Claimant applied for Ugx. 1,333,000/- for accommodation and meals for the OCCDs visits scheduled for July 2019, but he slept at his home in Bulenga instead, this was because Mr. Jonah Wegoye, his supervisor gave him additional and divergent assignments to visit other OCCD’s in Kampala in addition to what he had initially planned. He contended that the investigation report actually revealed that the Claimant visited 47 OCCDs, instead of the 12 listed in his itinerary. And the Respondent did not question that the Claimant was given additional assignment by his superviser but he did not apply for additional funds over and above the Ugx.1,333,000/-, to cater for the additional assignments. He argued that in any case, the fact that the Claimant visited 47 OCCDs instead was of the 12 he had planned for was not controverted by the respondent and it explains why he did not sleep at the locations earlier planned. According to him, the Claimant was falsely accused of fraudulently and dishonestly using company’s resources for purposes for which they were not intended. He insisted that had the claimant been given a chance to defend himself at the hearing, or had he been interviewed by RW1 who investigated the matter, it would have been established that he was indeed assigned adhoc tasks, which increased the number of the OCCDs to be visited in the month of July to 47 instead of 12. It was his opinion that given that that it excluded the input Claimant and other witnesses, the investigative report which was the basis of the Claimant’s dismissal was unbalanced and unfair, thus rendering the dismissal unlawful.

 In reply Counsel for the Respondent argued that the Claimant’s termination was based on a disciplinary hearing conducted on 2/09/2019. According to him, the Claimant was aware of the said meeting as shown in paragraph 25 of his own witness statement, and the e -mail at the bottom of page 28 of the Respondent’s trial bundle. Counsel also stated that during cross examination, the Claimant admitted that he was aware of the hearing date and time. He contested the Claimant’s assertion that on 2/9/2019, which was scheduled for the hearing, he was out on official business in Mityana, because the Claimant did not adduce any evidence to prove so. It was also Counsel’s submission that, on 2/9/2019, at 8.05 am, the Claimant sent an email to RW2, Ruby Engena, seeking clarification about the charges preferred against him, but he did not mention that he would be on duty in Mityana on that day nor did he mention the engagement in his email dated 3/9/2019 or in his appeal documents as a ground of appeal. Counsel insisted that the Claimant knew and he had been advised about the consequences of his absenting himself. Counsel insisted that the Claimant aware about the date and time of the hearing and he was given sufficient time to prepare for his defense and attendance to the disciplinary hearing.

Counsel further asserted that, the initial notification about the charges in the inquiry Notification sheet indicated that his non-attendance would not prevent the hearing from being held in his absence, therefore he was adequately cautioned about the repercussions of not attending the hearing. He insisted that the Claimant was also notified about the other rights available to him in the same Inquiry notification sheet, which he voluntarily forfeited to take advantage of, when he absented himself.

According to Counsel, even if Section 66 of the Employment Act 2006, requires notification and hearing before a decision to dismiss an employee is taken, it does not bar an employer from proceeding with a hearing in the absence of the accused employee, where the employee is aware of the date and time of the hearing and he or she was given adequate time to prepare for the hearing. He reiterated that the Claimant on his own volition, chose not to avail himself of the rights provided in the inquiry Notification Sheet, after being notified of the charges, the date and time of the hearing and after being given adequate time within which to prepare to defend himself at the hearing.

He argued that the Claimant was charged with 2 offences which were both included on the Inquiry Notification Sheet as defined under clause 1.2 of the Respondent’s code of conduct as “*… as Any form of dishonesty including bribery, alteration of documents or fraud.”* According to him, the conduct which becomes subject of 1.1 is dishonesty, which means deceitfulness. According **to Black’s law dictionary 8th Edition at 501 and 687** it is also termed as a fraudulent act, being conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude. It was his submission that the Claimant requested to be paid night out allowances for the month of July, which he admitted he received, but did not utilize as expected because he slept at his home instead of the locations for which the money was requested. He contended that clause 5.7 of the Respondent’s policy on accommodation and meals, provides that where one chose to stay with his friends or family, he would be entitled to only Ugx. 55,000/- per day and a breach of this would result in disciplinary action. He argued that the Claimant was aware that by receiving a night allowance and sleeping at home, he was being dishonest and he admitted as much.

He refuted the Claimant’s explanation that he was given additional assignments, hence his dishonest conduct because the Claimant did not adduce any evidence to prove that he actually received any additional assignments nor did he raise any complaint about the said additional assignments for which no additional facilitation was given. In counsel’s opinion there was sufficient evidence to prove the Claimant’s dishonesty and that is the reason he chose not to attend the hearing on 2/09/2019. Counsel insisted that the Claimant admitted that he took the night allowance but he did not sleep outside his home and this also amounted to fraud. He insisted the dishonesty was obtaining night allowances and not using them for the purpose for which they were requested, a fact which the Claimant admitted. Counsel argued that he should have refunded the money or the difference in accordance with the policy.

With regard to the arguments about the appeal, Counsel submitted that although the Respondent’s Human Resources policy provided for Appeals, the Director Human Resources reserved the discretion to decide whether to form a committee to consider an appeal or not. He argued that in this case, she was did not constitute an Appeals committee because the Claimant had chosen to absent himself from the hearing before the disciplinary committee. She evaluated the evidence instead and decided to uphold the decision to terminate the Claimant. It was further his submission that even if the HR Director did not follow the procedure as laid down, the fact that she was dressed with authority to determine the Appeal was sufficient and in any case Courts of law have been found to summarily dismiss appeals where there was no plausible complaint. He concluded that in the circumstances the Claimants termination was lawful.

**DECISION OF COURT**

**1.Whether the Claimant was unlawfully and unfairly dismissed?**

It is now the position of 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 and an opportunity to respond to the reason/s 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 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. Therefore, what is required is, for the Courts 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.

A careful perusal of the record in the instant case, indicated that, the Claimant received an “Inquiry Notification Sheet”, from his superviser a one Wegoye Jonah, informing him that, he was expected to report for a disciplinary inquiry on 20/08/2019. The copy of the same Notification of Inquiry sheet which was attached on the record was not very clear, therefore we could not clearly discern the grounds set there in. However, the record contained a the trail of emails at pages 30-33, which showed that, following the receipt of the notification, the Claimant made many request seeking clarification about the charges preferred against him. In response to the requests, Mr. Wegoye in an email dated Thursday 25/08/2019 at 5.53 am, clarified that, the charges on the “Inquiry notification sheet” were “*being charged for dishonesty and breach of trust*” and specifically that the he received money for night out allowances which he did not use for the authorised purpose. Subsequently, the Claimant was required to appear before a disciplinary Committee, on the 2/9/2019. Although the Claimant insisted by e-mail that he was not yet appraised about the actual charges against him, up until 8.05 am, on the 2/9/2019, Mr. Chris Anguria, one of the Respondent’s witnesses advised him to attend the hearing so that he could prove whether the charges preferred against him could not stand the

*“…scrutiny of your defense. The charges as they are normally based on the code of conduct that is currently being used, I highly recommend that you come for the hearing and put your defense against the charges ..”*

The Claimant did not attend the hearing notwithstanding.

This Court, following the holding in **Ebiju James vs UMEME Ltd**(supra) and the provisions undder sections 66, 68 and 70(6)of the Employment Act 2006, has resolved that, a disciplinary procedure must have the following key steps:

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.

The Claimant in the instant case was the charged with being dishonest and for breach of trust and specifically that, he received money for night out allowances which he did not use for the authorised purpose. As already seen, he was notified about the infractions in an “Inquiry notification sheet”, he was invited to attend a disciplinary hearing, which he did not attend. In his testimony in chief and in court, he admitted that he applied for and received Ugx. 1333,000/- to enable him visit various OCCDs, but he did not sleep at the various locations he had indicated in his planned itinerary. It was his testimony that he slept at his house in Bulenga, instead. It was also his testimony, that his superviser Mr. Wegoye increased his work load from the planned 12 OCCDs, to a total of 47 OCCDs but he did not request for more money. It was further his testimony that, although the charges were initially not clear, they were later clarified to him, but he was unable to attend the hearing on 2/9/2019, because he was in engaged with a distributor in Mityana. According to Counsel the Claimant orally notified Mr. Wegoye, his superviser about his inability to attend because of work.

We therefore have no doubt in our minds that the Claimant was aware of the Charges leveled against him. He was also aware of the date on which he was supposed to appear for the disciplinary hearing so that he could make representations about the charges but he chose to attend to a distributor in Mityana.

As already discussed above, an employer has the power to appoint and also power to take disciplinary action or to terminate or dismiss an employee. However, the employer cannot terminate/dismiss any employee before subjecting him or her to a disciplinary process/hearing. Therefore, once an employee is subject of disciplinary action, he or she is expected to avail him or herself for disciplinary mechanisms/hearing. We are persuaded by the holding in the Kenyan case of **Mathew Lucy vs Poverelle Sisters of Begamo t/a Blessed Louis Palazzalo health Centre, Industrial Cause number 1845 of 2011,** whose holding is to the effect that an employee who squanders the internal grievance handling mechanisms provided by the employer cannot come to court and claim he or she was not heard. This courts holding in **Akeny Robert vs Uganda Communications Commission LDC 023 of 2015,** is also to the effect that, it is not the role of the court to supervise the disciplinary mechanisms of the employer but to ensure that such disciplinary mechanisms are carried out in accordance with the law.

The Claimant in the instant case was aware that he was expected to appear for a hearing on 2/9/2019, but he chose to meet with one of the respondent’s distributors in Mityana instead. It is the Respondent who employed the Claimant, and therefore it is the Respondent which assigned him work. It is the same Respondent who leveled infractions against him and asked him to appear for a disciplinary hearing to defend himself, well aware that he was its employee. The Claimant was therefore, expected to follow the Respondent’s instruction and appear for the hearing, especially given that the infractions which had been leveled against him, could lead to his dismissal. The excuse that, he could not attend the hearing because he was engaged with the Respondent’s distributor in Mitiyana, is to say the least, lame and unacceptable.

An employee facing disciplinary action cannot be allowed to take the employer at ransom by choosing to attend the disciplinary proceedings at his or her convenience as the Claimant in this case did. Therefore, as stated in **Mathew Lucy** (supra), having locked himself out of the Respondent’s disciplinary proceedings/mechanism, the Claimant cannot now come to Court and claim he was condemned unheard. As counsel for the Respondent stated, nothing in the law bars an employer from proceeding in the absence of the employee who was notified about the infracts against him and given sufficient time to respond to the infractions. The Claimant on his own volition chose not to appear for the hearing and in any case, he admitted to applying for night out allowances which he admitted he did not use as requested, amounting to dishonesty and breach of trust as provided under the Respondent’s Code of conduct. In **Kabojja international School versus Godfrey Oyesigye, LDA No.0003/2015,** in which the Claimant admitted to wrong doing, this court held that the admission was enough to entitle the employer to summarily terminate him and having made an admission he was not entitled to a hearing. In **Nyakahuma Allan Paul Versus Umeme Ltd LDR No. 22 0r 2014, t**his Court found that, failure to abide by the Employers regulations amounted to a fundamental breach of his employment contract and warranted summary dismissal.

Therefore, even if the Claimant in the instant case claimed he was given extra work, he admitted that he slept at his home instead of sleeping at the locations for which the night allowance was meant for. He therefore admitted that he did not use the night allowance for the purpose for which it was requested. This was a breach of clause 5.7 of the Respondent’s travel policy and the penalty prescribed thereunder is dismissal. Even if he claimed he did not apply for more money, after he was given the extra work, he did not adduce any evidence to show that he either requested to use the night allowance as a day allowance for the extra work as provided under clause 5.7.4 of the Respondent’s Travel policy at page 57 of the Respondent’s trial bundle. This policy on accommodation and meals, entitles an employee who opts to stay with family/ friends to Ugx. 55,000/- per day regardless of his or her grade. In **Hilda Musinguzi v Stanbic Bank (U) Ltd Civil Appeal No. 5 of 2016,** Mwangusya JSC as he then was held that:

*“…while the law protects employee from unlawful terminations of their employment, they are accountable to their employees for acts which may compromise the interests of their employers*….” And in **LAWS VS LONDON CHRONICLE (1959) WLR 698** it was observed that one isolated misconduct was sufficient to justify summary dismissal. The test is:***“Whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”***

Having admitted that he applied for and received a night allowance to sleep in at various locations outside his home, but slept at home instead and he did not refund it or apply to use it elsewhere, we have no reason to fault the Respondent for considering the actions as dishonesty and breach of trust, as provided under the Respondent’s Code of conduct, for which he could be dismissed.

We are satisfied that this was a substantial reason to justify the Respondent’s loss of trust and confidence in the claimant to warrant disciplinary action and dismissal. We are also satisfied that the Claimant was availed an opportunity to make representations about the infractions leveled against him in a disciplinary hearing, but on his own volition he chose not to avail himself for the hearing. It is our finding therefore that his dismissal was lawful.

**2.Whether the Claimant was unlawfully suspended for two weeks without pay?**

Counsel submitted that, on 25/03/2019, the Claimant was invited for a disciplinary hearing to answer to allegations of unlawful driving and non-adherence to safety procedures. According to him this was 7 days after he received a warning letter on 18/03/2019, reprimanding him for the over speeding and notifying him that a repeat offence would lead to his termination. According to Counsel, when the Claimant inquired with the HR Manager, he was referred to an e- mail trail and over speeding report from the transport office dated 6/03/2019, which showed that he had 24 counts of over speeding. Counsel contended that the disciplinary hearing did not produce a report outside the one he had already been reprimanded for and Joseph Wembabazi who was the Respondent’s key witness at the hearing admitted that the hearing was based on the earlier 24 counts for which he had already been reprimanded. It was counsel’s submission that Ruby Engena RW2 also admitted that the hearing was based on the same counts, and the claimant could only have been suspended for 2 weeks without pay if there was a repeat of the offence which was not the case. Counsel contended that the suspension for 2 weeks was unfair, therefore court should award him the 2 weeks that was unfairly deducted.

In reply, Counsel for the Respondent, admitted that the Claimant was subjected to a disciplinary process involving over speeding and he was suspended for 2 weeks without pay. According to him, whereas the RW1 in the circumstances could have dismissed the Claimant, he took into account mitigating factors and chose to penalize him with a suspension for 2 weeks at half pay, instead. Counsel argued that whereas the Claimant acknowledged 2 earlier warnings as shown at pages 35-46 on the Respondent’s trial Bundle and note ii at page 27 of the Claimant’s trial bundle, it was RW1’s testimony under para 9(a) of his evidence in chief that, the hearing of 29/03/2019 was in respect of 11 counts of over speeding which occurred in March 2019 and the letter dated 3/03/2019, which the Claimant received on 18/03/2019, was in respect of the offences he committed in February 2019. He insisted that nothing in the policies barred the Respondent from addressing continued similar erring. In any case the Claimant did not adduce any evidence that he appealed against the decision to suspend him and only raised the matter in this court after his termination.

**DECISION OF COURT**

It was the Claimants testimony that the reprimand he received was with regard to the acts of over speeding, which he committed in February 2019 and not March 2019. He also admitted that the disciplinary procedure for March 2019, found him guilty and he did not lodge any appeal against it.

The reprimand letter at page 21 of the Claimant’s trial bundle is a reprimand against 24 counts of over speeding. Given that the letter is dated 3/3/2019, it is not farfetched for us to agree with Counsel for the Respondent that this reprimand related to commissions in February 2019. According to the Claimant, he was heard on 29/03/2019 and found guilty and he did not appeal. In the circumstances we find no basis for this claim and in any case, the suspension was not a subject of his dismissal. This claim therefore, fails.

**3.What remedies are available to the Claimant?**

Having found that the Claimant was lawfully terminated he is not entitled to any of the remedies claimed.

In conclusion this claim fails.

With no order as to costs.

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

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

**PANELISTS**

**1.MS. JULIAN NYACHWO …………….**

**2. MR. MAVUNWA EDSON …………….**

**3. MR. BWIRE ABRAHAM …………….**

**DATE: 9/02/2021**