**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE APPEAL NO. 046 OF 2018**

**[ARISING FROM LABOUR COMPLAINT KCCA/CENT/LC/185/2018)**

**BETWEEN**

**KIBOKO ENTERPRISES LIMITED ……………….….……..…..APPELLAN**

**VERSUS**

**ASABA ESTHER…..………………...……………..…….……..RESPONDENT**

**BEFORE**

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

**PANELISTS**

1. Ms. Adrine Namara
2. Ms. Suzan Nabirye
3. Mr. Michael Matovu

**AWARD**

**Brief facts**

The respondent was employed by the appellant as a cash and credit officer and according to the appellant she was supposed to receive money from the appellant’s vans, record the sales in a cashbook, receive the payment vouchers, make payouts on the payment vouchers and make deposits in the bank. According to the appellant between 21stand23rd February 2017 the respondent collected cash of over 78 million but did not deposit it in the bank. She was then suspended on 27/3/2017 and later on invited to a disciplinary hearing for 18/5/2017 which was rescheduled for 08/6/2017. On this date the respondent asked for her own audit of the accounts and she was allowed in the interest of justice. However, according to the appellant she did not appoint the said auditors despite being reminded by the appellant to do so. She was then invited to a final disciplinary hearing on 26/10/2017 but she failed to turn up and the disciplinary committee went on in her absence and after deliberations dismissed her.

However, according to the respondent, after allowing her to appoint her own auditors, the appellant subsequently rejected the idea of an independent audit but informed her that she could audit the books with the guidance of the internal auditor. This was on 19/7/2017. Although eventually on 14/8/2017, the respondent agreed to the appellant’s request to appoint independent auditors the respondent instead lodged a complaint to the labour officer on 18/8/2017 and after proceeding without her attendance the disciplinary committee decided to dismiss her.

The appellant was not satisfied with the decision of the labour officer who decided that the dismissal was unlawful and ordered payment of certain monies in compensation for unlawful dismissal, and therefore appealed against the decision to this court raising 7 grounds of appeal as follows:

* 1. **That the Labour Officer erred in law when he held that the respondent was unlawfully and wrongly dismissed by the Applicant.**
  2. **That the Labour Officer erred in law when he held that the Applicant did not accord the Respondent a right to a fair hearing.**
  3. **That the Labour Officer erred in law when he held that the respondent was unlawfully and wrongly dismissed.**
  4. **That the Labour Officer erred in law when he equated the suspension of the respondent by the applicant for causing it financial loss in the region of over Ugx. 78,000,000/= to “mob justice”.**
  5. **That the Labour Officer erred in law when he awarded the respondent exorbitant allowances and fines that she neither proved nor deserved.**
  6. **That the Labour Officer erred in law when he gave the Applicant only seven (7) days within which o pay the respondent the sums of monies awarded.**
  7. **That the labour officer erred in law when he failed to properly evaluate the evidence on record.**

**SUBMISSIONS**

On ground No. 1 and No. 3 of the memorandum of appeal, the appellant argued that the labour officer erred in law to have decided the issue of **dismissal** of the respondent rather than the **suspension** since it was the latter that was before him by way of a complaint lodged to him. He relied on **Order 6 Rule 6 of the Civil Procedure Rules.**

Relying on the authority of **Florence Mufumba Vs Uganda Development Bank LDC** **No. 138/2014**, counsel for the appellant submitted that the respondent misappropriated company funds to the tune of 78,000,000/= and that this constituted misconduct.

It was his submission that the respondent was informed of the nature of the infraction and subsequently invited to a hearing which she snubbed and therefore the appellant complied with **Section 66 of the Employment Act** stipulating a right of the employee to be heard and she cannot claim that the dismissal was unlawful. According to counsel the respondent did not offer any defense to the charge of loss of 78,000,000/=.

On ground No. 2, the appellant citing **Grace Matovu Vs Umeme LDC 004/2014,** submitted that the respondent could not challenge disciplinary proceedings that she deliberately chose not to attend when invited.

He argued that both **Article 28 of the Constitution** and **Section 66 of the Employment Act** were complied with by the appellant and that the labour offer erred in holding that the respondent was not accorded a fair hearing.

On ground 5, counsel for the appellant reiterated that **Section 63 of the Employment Act** provided for suspension and therefore the suspension could not be equated to mob justice.

On ground 6, the submission of counsel for appellant was that the respondent was not entitled to any remedies since the dismissal was lawful.

On ground 7, the appellant’s counsel argued that the respondent having acknowledged receipt of the monies from 21/2/2017 – 23/2/2017 was sufficient evidence that the respondent received the cash and the appellant was entitled to know the whereabouts of the money.

In reply the respondent opted not to argue ground 3. He argued that all the witness statements and submissions before the labour officer pointed to a complaint of dismissal and that there was no element of surprising the appellant with a complaint of dismissal other than of suspension by the decision of the labour officer.

It was the contention of counsel for the respondent that ground one should be answered in the affirmative because the evidence as to the money alleged to have been embezzled was contradicting, since each of the witnesses claimed a different figure from each other.

He argued that the external audit report did not show any cash receipts, petty cash expenses, and bank deposit slips. He submitted that the external audit return of ALINES AND Co. was only meant to cover up the appellant’s mess and that it looked suspect for failure to disclose its date and reference.

According to counsel for the respondent, the audit reports were concocted as they were made in the absence for the respondent and when she requested for an independent audit the appellant was hesitant and refused.

On ground 2, counsel for respondent argued strongly that the respondent was not accorded a fair hearing because of what he termed as grave irregularities in the process: - the contradiction in the actual figure allegedly misappropriated, the refusal of the appellant to allow the respondent get an independent auditor, allowing the respondent to audit with guidance of the internal auditor well knowing she would not play the role of an auditor, and ambushing the respondent with two audit report during the first hearing when she demanded for an independent audit.

On ground No. 4, it was submitted for the respondent that the ground was fuzzy and unfounded since it was apparent that the respondent after suspension was not paid half of the salary.

On ground 5, it was submitted by counsel that since the respondent was dismissed unlawfully she was entitled to the remedies prayed for and granted by the labour officer.

Counsel for the respondent argued that the sixth ground of appeal was unsubstantiated because giving 7 days within which to pay would not by itself constitute bias.

On ground 7 it was submitted for the respondent that the labour officer properly evaluated evidence in relation to the charge brought against the respondent which was failure to account for 78,785,850/= as opposed to the witness statements that revealed the case of embezzlement.

**DECISION OF COURT**

On perusal of the memorandum of appeal, we think that ground 1, ground 2, and ground 3 as well as ground 7 could be decided together since the failure of the labour officer to evaluate evidence would necessarily resolve grounds 1, 2 and 3. In our view the contention in these four grounds is that the labour officer failed to properly evaluation evidence on the record and as a result held that the respondent was unlawfully terminated without being given a fair hearing.

The complaint lodged to the labour officer read as follows from Kasumba, Kugonza & Co. Advocates: -

**“....That in 2013, our client Asaba Esther was employed by KIBOKO ENTERPRISES LTD. a company located on Plot 28B-32B-34B, UMA show Grounds in Nakawa Division, Kampala district, sometime on the 27th March 2017, the said company wrote to our client suspending her services for half pay. Our client therefore complains as follows:**

1. **That ever since her suspension, she has never been paid wages for the month of March 2017 which amounts to Ug. Shs. 947,800/= and according to the suspension letter she is entitled to a half pay of her wages which the company has failed to pay to date which amounts to Ugx. 2,369,500/=.**
2. **Our client is entitled to school fees contribution by the company of Ugx. 300,000/= each term to which for the last two school terms the company has not paid it amounting to Ugx. 600,000/=.**
3. **That our client further was called for a disciplinary action which has been subjected to unfair terms and conditions which do not promote a fair hearing.**
4. **On addition to that, some of her remittances are not paid to NSSF.**
5. **That our client had a salary loan with Stambic which has not been serviced by non-payment of salary by the company which has accrued interest to the bank to our client’s detriment.**
6. **That the suspension was to last till 20th day of April 2017 which elapsed and the fate of our client is at stake to which the fate of her future with the company worries her greatly.**

**In accordance with the Employment act and the Labour Dispute (Arbitration and Settlement) Act, we request your office to handle this complaint.**

The notification of the above complaint to the appellant was in the following terms:

**The Managing director**

**KIBOKO ENTERPRISES LTD.**

**P. O. Box 313176**

**Kampala.**

**Re: NOTIFICATION OF COMPLAINT (1) ALLEGED UNJUSTIFIED**

**DISCIPLINRY ACTION AGAINST ASABA ESTHER**

**I have to bring to your notice the substance of a complaint made to me by your above named former employee hereby attached and marked as “Annexure A”. It is her statement that you have unlawfully suspended her since 23rd March 2017, contrary to the provisions of Section 63 of the employment Act No. 6 of 2006, in addition to other violations of her right to a fair hearing, wages earned, allowances and social security.**

**You are required to file your defense on the issues raised above latest 8th September 2017.**

It is apparent that while the respondent reported the case of embezzlement at police against the respondent, the latter was at the same time suspended. The police bond on page 20 of the record of appeal reveals that the respondent was released on police bond on 23/3/2017 and the suspension letter on page 21 reveals that pursuant to a meeting between Human Resource and the respondent on 22/3/2017, she, the respondent, was to be on suspension from 27/3/2017 – 20/4/2017.

By letter dated 15/5/2017 the respondent was informed to attend a disciplinary hearing on 18/5/2017 to which by letter dated 10/3/2017(which we think this was a wrong date) counsel for the respondent replied to say it was short time and proposed 7th or 8th June at 10.00am.

**Section 63 of the Employment Act** provides

1. **Whenever an employer is conducting an inquiry which he or she has reason to believe may reveal a cause for dismissal of an employee, the employer may suspend that employee with half pay.**
2. **Any suspension under sub-section (1) shall not exceed four weeks or the duration of the inquiry, whichever is shorter**.

The implication and gist of the above section is that after 4 weeks of suspension, the employee, if the investigation reveals a case to answer, should be called to appear before a disciplinary committee and if no case is made, should be called back to work.

In the instant case the respondent was informed of a disciplinary hearing by letter of 15/5/2017 after a suspension on 27/3/2017 and this took 45 days which was contrary to the above law.

Once both the complaint and the notification of the complaint are read together it is clear that it was all about the suspension and failure to offer a hearing to the respondent. Consequently the labour officer should have pronounced himself on the issue whether the suspension contravened the law.

However; by the time the labour officer heard the matter and subsequently delivered his Award, the respondent had filed a witness statement to which the appellant had filed witness statements in reply. Both statements referred to the dismissal and in submissions both counsel referred to dismissal. This being the case we do not find any merits in the submission of counsel for the appellant that the labour officer’s determination of the issue of the dismissal was contrary to **Order 6 rule 6 of the Civil Procedure Rules** since the respondent was aware of the same. Both the complaint and notification talked about violation of a right to be heard and therefore constituted pleadings which the labour officer was right to handle. In any case as was held in **ERICK MUGYENYI VS UEDCL CIVIL** **Appeal 167/2018( COURT OF APPEAL)** the Civil Procedure Rules do not apply to proceedings before the labour officer.

The position of the law is that a lawful termination of employment can only occur when:

1. An employer discharges from employment the employee by giving such employee notice and for justifiable reasons not being the fault of the employee.
2. The contract is for a fixed term or fixed purpose and such fixed term or fixed purpose is obtained and the contract is not renewed for one week from expiry of such fixed term or from the completion of the specific purpose under terms favorable to the employee.
3. The employee stops working as a result of unreasonable conduct of the employer that fundamentally affects negatively the work of the employee.
4. After an alleged transgression of established rules by the employee or after alleged acts of incompetence or misconduct, the employee is informed of the same, he/she is given time to respond to the same, he/she is allowed to appear before an impartial tribunal with evidence if any, and the tribunal considers both the allegation and the response and makes a decision to terminate the employment.

Paragraph (d) above covers what is considered a fair hearing within the context of **Section 66 of the Employment Act.**

Our opinion of the law as above mentioned is reinforced by the provisions of **Section 2 of the Employment Act** which defines a “**termination of employment”** as

**“Discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct such as expiry of contract. Attainment of retirement age, etc;”**

And **dismissal** as

**“Discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct.**

Our opinion is further reinforced by the decision of Supreme Court in **HILDA MUSINGUZI Vs STANBIC BANK (U) LTD. SCCA 05/2016** to the effect that if an employer terminated a contract of service at his own whims without any reason as contained in **Section 68 of the Employment Act,** the employee would be entitled to damages or compensation.

In the instant case the evidence before the labour officer was that the respondent was suspected to have embezzled funds belonging to the appellant and a case was reported to the police. The respondent was then suspended on allegations of embezzling/causing financial loss of 78,291,250/=. She was invited for a disciplinary hearing for failure to account for 78,291,250. In the written statement of the Human Resource manager of the appellant, it was disclosed that the respondent failed to account for 78,000,000/=. Evidence of the Internal Auditor revealed loss of 78,785,850. The dismissal letter provided occasioning loss of 78,785,880 as a reason for dismissal.

In addressing these contradictions in the figures the labour officer said at page 5 and 6 of the Award:

**“After careful analysis of the evidence on the record, I am left wondering whether it was because of Ugx. 78,291,250 or Ugx. 78,000,000/=, Ugx. 78,785,850 of Ugx. 78,785,880 for which the claimant was subjected to the disciplinary process and finally dismissed.**

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**If these reasons actually did exist, why wasn’t the claimant subjected to a fair hearing? The answer is that there was foul play and that the respondent’s agents had to find any reason to ensure the claimant was dismissed.”**

In evaluation of evidence it is trite that minor contradictions that do not go to the root of the case will always be resolved in favor of opposite party while major and fundamental contradictions will always destroy the case of the opposite party.

The fact that both the suspension letter and the letter inviting the respondent to a hearing were alleging embezzlement of 78,291,250/= as opposed to the Audit report revealing loss 78,785,850 in our considered opinion did not prejudice the respondent in the process of being able to defend the same. The difference in the figures was a minor contradiction for the purpose.

As the labour officer considered what was contained in the dismissal letter he concluded that:

**“actual reason for which the claimant was invited for the disciplinary hearing in the letter dated 15/5/2017 which was failure to account for company money worth Ugx. 78,291,250 lost in the period between 21st, 23rd February 2017 was not the reason for the dismissal”.**

The dismissal letter stated that among other reasons of dismissal, the claimant had directly or indirectly caused loss in the region of 78,785,880/=, had failed to offer any explanation even after being given time to do so and deliberately failed to honor the final invitation to be heard, amounting to insubordination.

As stated above, the contradictions in the figures could not be reason enough for the labour officer to conclude the way he did. The contradiction did not amount to foul play as the labour office concluded. On the contrary there is evidence which is not denied by the respondent, that having been invited to a disciplinary hearing on 18/5/2017, the same hearing was re-adjusted to 8/6/2017 at the request of counsel for the respondent. On 8/6/2017 both counsel and the respondent attended the proceedings which show at **page 123-127 of the record of appeal (in ink)** that after looking at the audit reports both counsel and the respondent requested to get an independent auditor which was accepted.

In his submission counsel for the respondent agreed that an independent audit report was first denied the respondent but later on the appellant agreed to the same. However **“the respondent felt suspicious and couldn’t continue in those gimmicks that’s why she sought redress from the labour officer.”**

In other words she decided not to take up her own request to get an independent auditor so as to verify or disapprove the two audit reports that she and her client had looked at during the proceedings on 8/6/2017. When she was reminded by letters of 5/9/2017 and 19/10/2017 that the disciplinary proceedings were delayed because of her laxity to get an independent audit her advocates endorsed on one of the letters that her client was frustrated and had lodged a complaint. The letter of 5/09/2017 invited her for the last time to attend the hearing on 2/10/2017.

In our considered opinion, the respondent having been allowed to engage an independent auditor should have done so. Her failure to do this and subsequently snub the hearing amounted to locking herself from the proceedings of the disciplinary committee hearing.

In the case of **ACTION AID UGANDA VERSUS DAVID MBAREKYE TIBEKINGA LABOUR DISPUTE APPEAL 028/2016** where the claimant snubbed the disciplinary committee hearing on the ground that it would be biased and would not offer a fair hearing this court had this to say

‘**It is therefore proper and perfect for any party appearing before such a tribunal to express his/her reservations and his/her feelings about the prospective outcome of the proceedings, It is not acceptable that….. he/she marches out of the proceedings because she/he believes the outcome will be biased about the impartiality of the tribunal”** This court overturned the decision of the labour officer that the appellant had been denied a fair hearing and therefore his termination was unlawful. In the instant case just like in the above case the respondent locked herself from the proceedings of the disciplinary committee and consequently she had no locus to plead that she was not accorded a fair hearing and that the audit reports presented before the disciplinary committee were not good enough since there was no denial that they showed a loss of over 78,000,000/=. The fact that there was reported a criminal case at police involving the respondent could not stop the disciplinary proceedings and neither court the non-prosecution or even the acquittal of the respondent before the courts of law. It was therefore irrelevant whether the respondent appeared at the anti-corruption court or not and this submission from counsel for the respondent had no bearing on the matter before the disciplinary committee or before the labour officer.

Initially the appellant was hesitant to allow an independent auditor but later this was allowed. Unlike in criminal matters (like the charge of embezzlement reported at police in the instant case) where the burden is on the prosecution to prove the charge beyond reasonable doubt, in Employment matters the burden on the employer is on a balance of probability, to prove that the employee committed a certain infraction to the detriment of the employer and such a burden shifts from employer to employee and vice versa. As such, the appellant having produced reports showing loss of over 78,000,000/= and having allowed the respondent to engage an independent auditor, the burden shifted on the respondent to prove that in fact there was no such loss and that if there was, the respondent was not responsible. And this she failed to do.

Accordingly we find that the labour officer did not evaluate the evidence before him properly and as such reached a wrong decision that the respondent was not accorded a fair hearing and that the termination of the respondent was unlawful. This disposes off ground 1, 2, 3 and 7.

We do not find ground 4 relevant to the proceedings and therefore we offer no comment.

Ground No. 5 is about the remedies that the labour officer granted to the respondent. As earlier on in this Award stated, the suspension of the respondent was illegal for contravening **Section 63 of the Employment Act.** The appellant did not deny having failed to pay the respondent the ½ salary during the suspension as the suspension letter and the law provides. The respondent will therefore be paid ½ salary from the date she was suspended to the date she was terminated.

While arguing ground No. 6. The appellant did not show how the labour officer erred by giving 7 days within which to pay the adjudged sums of money. Counsel did not point to court the law that stops the labour officer from granting time within which his decision should be complied with. In any case the decision has been over tuned and the ground of appeal is therefore irrelevant.

In conclusion the appeal succeeds .The labour officer’s Award is set aside and substituted with an order that the appellant pays the respondent ½ salary from the date of suspension to the date of termination. No order as to costs is made.

**Delivered & Signed:**

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

**PANELISTS**

1. Ms. Adrine Namara …………………..
2. Ms. Suzan Nabirye …………………..
3. Mr. Michael Matovu …………………..

Dated: 28/2/2020