



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 035 OF 2021
(Arising from Labour Complaint No. KCCA/NDC/LC/084/2020)

JASPER OGWAL.....**CLAIMANT**

VERSUS

KAMPALA PHARMACEUTICAL INDUSTRIES LTD.....**RESPONDENT**

BEFORE:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,

PANELISTS:

1. HON. JIMMY MUSIMBI,
2. HON. ROBINA KAGOYE &
3. HON. CAN AMOS LAPENGA.

AWARD

Introduction

- [1] Mr. Jasper Ogwal (*the claimant*) was employed as a Maintenance Mechanical Technician for a period of 5 years from 29th of May 2018 earning a monthly salary of UGX 825,000/= . It was alleged that on the 8th day of February, 2020, he was seen on Closed Circuit Television (CCTV) damaging an ointment filling machine. On 11th February 2020, he was invited to a disciplinary hearing which was held on 19th February 2020. Following the hearing, he was terminated on 21st February 2020. He contends that his termination was unlawful. By a memorandum of claim dated 15th February 2021, he sought a declaration that his termination from employment was wrongful and unlawful, in total disregard of the principles of natural

justice and equity, terminal benefits, general and punitive damages and costs of the claim.

- [2] The Respondent opposed the claim. The Respondent's case was that the Claimant was notified of the allegations of tampering with the tube filling machine. He was invited for a disciplinary hearing and refused to acknowledge receipt of the letters or attend to a viewing of the CCTV footage implicating him in the damage of the machines. A disciplinary hearing was held on 19th February 2020 and the Claimant was terminated on 21st February 2020 with an entitlement to payment in lieu of notice. The Respondent contended that the Claimant has declined to clear with the finance department to access his benefits.

Issues for determination by Court

- [3] At the scheduling conference held on the 13th of February 2023, two issues were framed for determination viz:
- (i) Whether the Claimant was wrongfully and unlawfully terminated?
 - (ii) Whether the Claimant is entitled to the remedies sought?

Analysis and Decision of the Court.

Issue 1. Whether the Claimant was wrongfully and unlawfully terminated?

The Claimant's Evidence

- [4] The Claimant testified that he was summoned to attend a disciplinary hearing on 11th February 2020 on allegations of spoiling a tube filing machine. A copy of the invitation letter was admitted as CEXH3. In his defence, the Claimant stated that he was ill and undergoing treatment at the time of the alleged incident. Despite asking for it, he was not shown the CCTV footage. He was also not shown the register book to prove that he was at the premises during the incident. He testified that he had provided all accountabilities as per CEXH14 (i) to CEXH14 (iv).

- [5] During cross-examination, the Claimant was shown his medical reports dated 12th February 2020 which showed that he had been treated with azithromycin having reported to hospital on 7th February 2020. He confirmed that he did not go to hospital on the 8th of February 2020 and that he had obtained the report to process sick pay. He also confirmed that in his complaint to the labour officer, he had not asked for the CCTV footage.
- [6] In re-examination, he stated that when he went for treatment for a penile discharge, he was advised to go back to work and that his condition worsened at about 11:00 pm on the night of the 7th February 2020. He contacted his supervisor, who permitted him to go home and he signed a gate pass. He confirmed that he picked the medical report because the Respondent had asked for it. It was his testimony that the CCTV footage was important because it would have shown him destroying the machine.

The Respondent's Evidence

- [7] **Mr. Robert Kelly Obur (RW1)** testified that on the 7th of February 2020 at 10:00 pm he was informed by the group leader of the night shift that the ointment filling machine needed repair. He asked the Claimant to look into it and the Claimant informed him that the issue was minor. That the machine worked smoothly until 3:00am when the shift ended. Under cross-examination, he testified that he did not see the Claimant interfering with the ointment filling machine. He also confirmed that he was aware that the Claimant was terminated after a disciplinary hearing. Further, that he did not know if the Claimant was shown the CCTV footage.
- [8] **Ms. Alice Namugawe (RW2)** testified that on 8th February 2020 she received a phone call from the production manager about a faulty tube filling machine and she instructed the head of security to investigate the matter. That the Claimant was not at work and she tried to reach him on phone. She testified that her assistant received a message from the Claimant that he was sick. He was informed of the disciplinary hearing scheduled for 14th February 2020. That the Claimant produced a medical report dated 12th February 2020. That the Claimant was invited to review the CCTV footage but declined. The same was reviewed by head of security, members of the Maintenance Department and Operations Department which showed the Claimant entering the room and damaging the ointment

filing machine. A disciplinary hearing was held and a decision to terminate the Claimant was reached. Upon receipt of the termination notice, the Claimant did not complete the exit procedure.

- [9] In cross-examination, RW2 testified that the information relating to the faulty ointment machine was given to her by Mr. Patrick Owi. She confirmed that the grounds of termination were sabotage and deliberately spoiling a machine but she could not confirm if these grounds were in the Human Resource Manual. She confirmed that she did not work the night shift and was not present at the time of the alleged sabotage. She did not list the names of the people who gave her the information. In her review of the CCTV footage, it was the Claimant who was last to leave the room. That the footage of 7th February 2020 had now been overwritten. She confirmed that the CCTV footage was not shown to the Claimant on the day of the disciplinary hearing. She confirmed that the Claimant was not paid some terminal benefits.

Submissions of the Claimant

- [10] Mr. Paul Musiitwa, appearing for the Claimant, submitted that wrongful termination is a question of fact while unlawful termination is a question of law. In regard to wrongful termination, Counsel submitted that the CCTV footage had not been shown to the Claimant despite attending a hearing before the Respondent's officials on 19th February 2020. Counsel submitted that the Claimant was unwell on the date of the alleged incident. The CCTV footage was not availed to Court. The evidence in respect of the alleged incident was therefore hearsay. Relying on the case of **Eseza Catherine Byakika v NSSF C.A.C.A No. 193 of 2017**, Counsel advanced the view that none of the witnesses called saw the alleged tampering of the ointment machine. Citing **Mbonyi Julius v Appliance World Ltd LDR 103 of 2016**, Counsel contended that an employee cannot be terminated unless there is a valid reason. For these reasons, the termination was wrongful.
- [11] In respect of unlawful termination, the Claimant was terminated without notice and contrary to **Section 66 of the Employment Act, 2006** (*from now EA*). In support of this proposition, Counsel cited the case of **Nantayi Lois v Marie Stopes Uganda LDC No. 193 of 2014**, **Magala Olive v Umeme Ltd H.C.C.S No 39 of 2010** and **Ebina James v Umeme H.C.C.S No 0133 of 2010**. Counsel asked the Court to find that the Claimant was not accorded a fair hearing.

Submissions of the Respondent

- [12] Mr. Brian Emurwon, appearing for the Respondent, submitted that the Claimant's cause of action was wrongful dismissal and his entitlements had been catered for. That the Respondent had complied with S66EA in CEXH3. The Claimant was invited to attend a disciplinary hearing on the 14th of February 2020 but informed the Respondent that he could not attend on that date. The disciplinary hearing was rescheduled to the 19th of February 2020. The Claimant was invited to review the CCTV footage but he declined so to do. He did not challenge this evidence in cross examination. He did not produce any letter protesting the denial of CCTV footage or put this complaint to the labour officer. His defence at the hearing was that he was not at work. After damaging the machine, the Claimant disappeared. He explained his absence due to illness. Mr. Emurwon submitted that the documents supporting the illness were taken into consideration. RW1 confirmed seeing the Claimant during the night shift of 7th February 2020 and the Claimant confirmed being at work on the same day but did not finish the shift. As regards illness, it was submitted that the visit to the health facility was before the incident and during cross examination the Claimant admitted that he did not return to the facility for further treatment on the 8th of February 2020. It was Mr. Emurwon's submission that on the balance of probabilities, the Claimant damaged the machine. As such, the termination was lawful.

Submissions in Rejoinder

- [13] In rejoinder, Mr. Musiitwa submitted that during a disciplinary hearing, it is the duty of the employer to set out the case against the employee and it was the duty of Respondent to show the CCTV footage either at the disciplinary hearing, before the Labour Officer or before this Court. The evidence of damage to the machine was speculation. It was Counsel's view that the witnesses who allegedly saw the Claimant damage the machine did not come to Court. RW1 admitted to being in a different department. That the Claimant was consistent about his illness. Counsel closed his submissions on the note that there was no valid reason for termination of the Claimant.

Determination

- [14] It was common to both parties that the reason adduced for the Claimant's termination was the damage to a tube or ointment filing machine. The evidence before us demonstrates that the genesis of

the Claimant's exit from the Respondent's employment are the events on the night of the 7th of February 2020. What is key and common to the parties is that disciplinary proceedings were commenced and concluded leading to the Claimant's termination from employment with the Respondent.

- [15] Counsel for the Claimant made two assertions: First, that the termination or dismissal was wrongful on a matter of fact viz the reason for termination and unlawful on a question of law on the failure to adhere to the tenets of a fair hearing. It is important, in our view, to set out the relevant principles of law in respect of the Claimant's claim.
- [16] Part VII of the Employment Act (EA) provides for discipline and termination. To determine whether the Claimant's termination is lawful, this Court would have to test whether the employer has proven that the employee has fundamentally broken the contract of employment and whether the process and procedure leading up to the termination was in compliance with the provisions of the Employment Act, 2006. This Court, in the case of **Airtel Uganda Ltd v Peter Katongole**¹, cited Labour Dispute Reference No. 6/2018 **Kanyonga Sarah v Lively Minds Uganda**, which extracted passage from the case of **Laws Vs London Chronicle Ltd CA 1959**², Lord Evershed in discussing the justification of summary dismissal stated that

“... it follows that the question must be – if summary dismissal; is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. One act of disobedience or conduct can justify dismissal only if it is of the nature which goes to show that the servant has repudiated the contract or one of the essential conditions and for the reason therefore, I think what one finds in the passages which I have read that the disobedience must at least have a quality that is willful. In other words it connotes the flouting of the essential contractual terms.”

The principle that emerges from the Kanyonga case, is that an employer has to show that the employee had repudiated the contract

¹ Labour Dispute Appeal No. 13 of 2022

² [1959] 1 WLR 698

or any of its essential conditions to warrant summary dismissal. This test is the substantive test on whether summary dismissal is justified. The Court of Appeal of Uganda has in the case of **Uganda Breweries Ltd v Robert Kigula**³ ruled that for summary dismissal, the gross and fundamental misconduct must be verified. Mere allegations do not suffice. An employer is legally mandated to ensure that the disciplinary process is both procedurally and substantively fair. To put it simply, there are two tests:

- (i) A test of procedural fairness and;
- (ii) A test of substantive fairness.

[17] Procedural fairness is provided for under Section 66EA to the effect that before reaching a decision to dismiss an employee on grounds of misconduct, the employer shall explain to the employee the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation. The employer is required to give the employee an opportunity and reasonable time to prepare to present his or her defence. This enshrines the tenets of a fair hearing with the right to be heard very well laid out in the case of **Ebiju James vs Umeme Ltd**⁴ where it was held:

“On the right to be heard, it is now trite that the Respondent would have complied if the following was done.

- 1) Notice of Allegations against the plaintiff was served on him and a sufficient time allowed for the plaintiff to prepare a defence.*
- 2) The notice should set out clearly what the allegations against the plaintiff and his rights at the hearing where such rights would include the right to respond to the allegations against him orally and or in writing, the right to be accompanied to the hearing and the right to cross examine the Respondent’s witness or call witnesses of his own.*
- 3) The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the Respondent.”*

³ Civil Appeal No. 36 of 2016

⁴ H.C.C.S No. 0133 of 2012

- [18] The evidence as was noted to be common between the parties is that there was damage to the ointment or tube filing machine. The Respondent invited the Claimant to a disciplinary meeting. The letter of invitation which was an agreed document, was largely in conformity with the requirements of S66 EA and as laid out in the Ebiju case (supra). This letter CEX3 made reference to the allegations against the Claimant, stated the date of the alleged incident and the manner in which the Claimant was connected to the incident, the evidence being video footage. The letter also required the Claimant to provide a written statement by 13th February 2020 and attend a hearing on 14th February 2020. It informed the Claimant that the offence could constitute gross misconduct leading to termination.
- [19] As to his rights, the Claimant was assured that his explanations would be given due consideration and that he could be accompanied by any person of his choice. The disciplinary hearing was adjourned and eventually conducted on the 19th of February 2020. To this extent, we would find that the preliminary requirements under S66EA were met. In terms, there was procedural fairness leading up to the disciplinary hearing. We are minded that the right of an employer to terminate an employee cannot be fettered as long as the employer follows procedure. For this reason, procedural fairness is key. We find that the Respondent followed the procedure.
- [20] The question would be whether there was substantive fairness. To pass the test on substantive fairness, the provisions of S68EA set the conditions. Under this section, the employer is required to prove the reason or reasons for the dismissal. It is in this regard that the second test of substantive fairness arises. In our view and as spelt out in the **Uganda Breweries Ltd vs Kigula case** (supra), substantive fairness subsists when a valid and substantive reason for dismissal exists. The Court of Appeal regarded this as verifiable misconduct. The reasons why the employer dismisses an employee must be good and well-grounded and not based on the suppositions or whims of the employer. The employer must demonstrate that the employee was actually guilty of misconduct. It is not that the standard of proof is akin to a civil trial before a court of law, but that there should be some reasonable grounds. ⁵
- [21] S68 (2) EA provides that the reason or reasons for the dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which cause him or her to dismiss the employee.

⁵ Uganda Breweries Ltd vs Robert Kigula(supra)

Mr. Emurwon submitted that such reason should not be a concern of this Court. But, on the substantive fairness test, the primary concern of the Court is whether there was fairness. In the present case, the evidence relating to CCTV footage was central. It featured prominently in the disciplinary proceedings. In the invitation to a disciplinary hearing, the Respondent's Head of Human Resource and Administration referred to the allegations of deliberate spoiling of a Tube Filling Machine as per video footage captured in the morning of the 8th of Feb 2020. It was suggested to us that the Claimant refused to view the footage when he was invited. Mr. Emurwon submitted that RW2' testimony on this point was unchallenged. Mr. Musiitwa was of the view that the CCTV footage ought to have been produced at the disciplinary hearing, before the Labour Officer or before this Court. We think that the video footage being the crux upon which the Respondent chose to dismiss the Claimant, this evidence was critical, crucial in proving the reason for dismissal.

- [22] The omission of this footage at any stage of the proceedings in this employment dispute was an event of significance. In the Airtel vs Katongole (supra) case, the allegations leading up to the termination of the employee were contained in an investigation report in respect of substantial sums of money lost. The report was not placed on the record before the Labour Officer or produced before the Industrial Court. In that case, we found that the failure to include an investigation report which contained critical aspects of the allegations did not amount to substantive fairness. We opined that by leaving out the investigation report, the Appellant could not be said to have set out clearly the allegations of gross misconduct to enable the Respondent adequately prepare a defence. Similarly, in the matter now before us, we think the omissions to adduce the CCTV footage did not amount to substantive fairness. We are therefore unable to agree with Mr. Emurwon. In our view, the Respondent conducted a procedurally fair hearing but did not meet the substantive fairness test in the Uganda Breweries Ltd case.
- [23] The CCTV footage would have, in our view, dispelled the Claimant's defence that he was not at work on the date of the alleged incident, his medical documents notwithstanding. In the result, while we would find that the Respondent passes the procedural fairness test as set out in the Ebiju case⁶ the failure to furnish critical evidence contained in the CCTV footage would lead to the inevitable

⁶ This test has been applied in various cases including Caroline Kalisa Gumisiriza Vs Hima Cement Limited HCCS 84/2015, Grace Matovu vs Umeme LDC 004/2014 and Okao v Kampala Pharmaceuticals Ltd(supra)

conclusion of substantive unfairness. The CCTV footage was pivotal to the decision to terminate. In terms, the Respondent, while genuinely believing the Claimant to be responsible for the damage to the ointment/tube filing machine, has not proven the reason for dismissal.

- [24] Accordingly and in conformity with the provisions of Section 73(1) (b) EA, we find that the termination of the Claimant was unfair and unlawful. The Respondent while procedurally fair, did not act justly or equitably. The CCTV footage ought to have been played at the disciplinary hearing at the least, to prove the reason for termination. We, therefore, declare that the Claimant's termination from employment with the Respondent was unfair and unlawful. Issue No. 1 is answered in the affirmative.

Issue II. What remedies are available to the parties?

- [25] The claimant sought various remedies which we propose to dispose of individually.

Payment of terminal benefits

- [26] Following our findings of unlawful and unfair termination, the Claimant is entitled to terminal benefits. The Respondent conceded that payment in lieu of notice was available as soon as the Claimant completes the exit process. The Claimant was (1) first employed on 24th November 2016, confirmed on 29th May 2018 and terminated on 11th May 2020. He had served 1 year and 8 months (2) after confirmation and a total of 4 year and 5 months. Mr. Musiitwa was contending for an award under S58 (3)(c)EA. This provision relates to a work period in excess of 5 years. The applicable provision is under Section 58(3)(b)EA which provides that where an employee has been in employment for a period of more than twelve months but less than five years, the employee would be entitled to not less than one month's notice. In the result, we award the sum of **UGX 825,000/=** in lieu of notice.

Severance Allowance

- [27] Under **Section 87(a) of the Employment Act**, an employee who is unfairly dismissed is entitled to severance allowance. Having found that the claimant was unfairly and unlawfully terminated, we grant the Claimant severance pay and adopt this Court's reasoning in

Donna Kamuli Vs DFCU Bank Ltd⁷ where the calculation of severance was established at a rate of one month pay for each year worked. In the case before us, the Claimant was first employed from 24th November 2016 and terminated on 11th May 2020. This is a period of 4 years, 5 months and 11 days. At a monthly pay of 825,000/=, the Claimant is entitled to and awarded the sum of **UGX 3,712,500/=** as severance allowance.

Untaken Leave days

- [28] Counsel for the Claimant prayed for untaken leave for the period 2016 to 2020. The jurisprudence of the Industrial Court in respect of untaken leave is that the employee must prove that he or she applied for leave and it was rejected.⁸ In the result the claims for annual leave for the years 2016-2019 will be denied. Section 54(1) (a) EA sets a statutory minimum number of annual leave days is twenty-eight days. The Claimant would be entitled to take paid annual leave for the year 2020. We, therefore, award the sum **UGX 825,000/=** as leave entitlement.

General Damages

- [29] The principles on the award of general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of⁹. Recent precedent from the Court of Appeal in the case of **Stanbic Bank (U) Ltd v Constant Okou**¹⁰ confirms that general damages are based on the common law principle of *restituto in integrum*. The Court held that the appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability, the manner in which the services were terminated, the inconvenience and uncertainty of future prospects of employment. The Industrial Court has applied the principles in the Stanbic Bank case. In the case of **Dr. Omona Kizito v Marie Stopes Uganda**,¹¹ this Court observed that damages are assessed depending on the circumstances of a given case and at the Court's discretion. In assessing an appropriate quantum of damages in an employment dispute, in the case of **Donna Kamuli v DFCU**¹² the Industrial Court considered the earnings of the Claimant, the age, the position of responsibility, and

⁷ The Court of Appeal maintained this position in DFCU Bank Ltd vs Donna Kamuli C.A.C.A No 121 of 2016.

⁸ See Eva Nazziwa Lubowa v NSSF LDR 001/2019

⁹ Stoms v Hutchinson[1950]A.C 515

¹⁰ Civil Appeal No. 60 of 2020

¹¹ LDC No.33 of 2015

¹² LDC No. 002 of 2015



the duration of the contract. In the case before us, we think that the Claimant is entitled to damages. Counsel for the Claimant suggested a figure of UGX 250,000,000/=in general damages without placing any particular basis, context, ground or reason for this contention. In our assessment, the Claimant was earning UGX 825,000 per month. He had worked for the Respondent for about four years and his contract was due to expire in November 2021. Taking all circumstances into consideration, it is our determination that the sum of **UGX 10,000,000/=** as general damages will suffice.

- [30] In respect of aggravated damages, the Court of Appeal, in the Stanbic case (supra) held that humiliating and unacceptable conduct of the Employer would be a basis for an award of aggravated damages. We do not find that the circumstances in the present case were 'particularly egregious' as submitted by Mr. Musiitwa, to warrant any award of aggravated damages. We decline to award any such damages.

Orders of the Court

- [31] In the final analysis, the orders of this Court are as follows:
- (i) It is declared that the Claimant was unfairly and unlawfully terminated from employment with the Respondent.
 - (ii) The Respondent is ordered to pay to the Claimant the following sums:
 - (a) **UGX 3,712,500/=** as severance allowance.
 - (b) **UGX 825,000/=** being one month's salary in lieu of notice.
 - (c) **UGX 825,000/=** as leave entitlement.
 - (d) **UGX 10,000,000/=** in general damages and;
 - (iii) Regarding costs of the claim, we have ruled in the case of **Joseph Kalule v GIZ**¹³ that whereas costs follow the event, in labour disputes, the award of costs is the exception rather than the rule.

¹³ LDR No. 109/2020(Unreported)

The exceptions include some form of misconduct by the unsuccessful party. In the matter before us, the Respondent would have aided all processes by providing the CCTV footage. We find the present case to be deserving of an order for costs. As such, the Claimant shall have taxed costs of the claim.

It is so ordered.

Delivered at Kampala this th 11 day of April 2023

SIGNED BY:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,
JUDGE, INDUSTRIAL COURT

THE PANELISTS AGREE:

1. HON. CAN AMOS LAPENGA,
2. HON. ROBINA KAGOYE &
3. HON. JIMMY MUSIMBI.

Delivered in open Court in the presence of:

1. For the Claimant: **Mr. Muzamil Ndhedo**
2. For the Respondent: **Mr. Brian Emurwon**

Court Clerk: **Ms. Matilda Nakibinge.**