THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 277 of 2021

ARISING FROM MGLSD/LC/433/2021

AGUSI FRANCO ..... CLAIMANT

VERSUS

INTERNATIONAL INSTITUTE OF

TROPICAL AGRICULTURE ..... RESPONDENT

BEFORE:

THE HON.AG.HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MS. JULIAN NYACHWO

2.MR. BWIRE ABRAHAM

3. MR. PATRICK KATENDE

AWARD

BACKGROUND

The Claimant brought this claim seeking inter alia: declaration that he was wrongfully terminated, payment in lieu of notice, leave days, overtime pay,

severance allowance, loss of expected employment, special and General Damages, punitive damages, aggravated damages, and cost of the suit.

BRIEF FACTS

According to the Claimant, he was orally employed by the Respondent Organization from 2003 and he was only issued a formal contract in 2014, as an Administrative Assistant, earning a gross salary of Ugx. 1,464,806/= per month. He was terminated on 31/08/2021, on grounds that he assaulted and sexually harassed a one Nabulya Madina who worked under his supervision. He contends that the termination was wrongful because the Respondent did not follow due process.

The Respondent on the other hand contends that the Claimant admitted that he assaulted and sexually harassed Madina, save that this happened outside working hours and that she was his wife, therefore it was a domestic matter that had been resolved by the LC1 chairman.

REPRESENTATION:

The Claimant was represented by Mr.Muhumuza Philip and Mr. Lumala Stephen of Tumuhimbise and Company Advocates, Kampala and the Respondent by Mr. Fredrick Samuel Ntende of Ntende Owor Company Advocates, Kampala.

ISSUES FOR RESOLUTION:

According to the Joint scheduling memorandum, the parties framed the following issues for resolution:

1. **Whether the Claimant was unlawfully and unfairly terminated?**
2. **Whether the Claimant is entitled to the remedies prayed for?**

Counsel for the Respondent prayed that Court in accordance with Order 15 rule 5 of the Civil Procedure rules, replaces issue 1, which in his view was wrongly framed, with the following issue:

1. Whether the claimant was unlawfully and or fairly dismissed/terminated?"

Counsel for the Respondent proposed that the issues are reframed in accordance with Order 15 rule 5 provides that:

"At the hearing of the suit the court shall, after reading the pleadings, if any and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall there upon proceed to frame and record the issues on which the right decision of the case appears to depend."

According to him the reframed issue: **Whether the claimant was unlawfully and or fairly dismissed/terminated?,** would enable this Court determine this case.

The identification and framing of issues for resolution in any matter before Court is done before the commencement of the hearing, because they are the questions in issue between the parties and on which the determination of a matter in controversy/dispute between the parties is resolved. The issues are drawn from the pleadings of both parties; therefore, they must be agreed upon before the commencement of the trial. Order 12 of the Civil Procedure rules provides for scheduling conference or case management conference where the parties among other things, identify the true issues for resolution. Although it has not been the practice in the Industrial Court to hold a full scheduling conference as envisaged under Order 12, nonetheless, court gives directions to parties to file a joint scheduling memorandum which sets out the points of agreement and disagreement and the issues for trial. This is intended to facilitate speedy and

efficient management of the case but also to avoid circumstances where a party intends to ambush another.

Counsel for the Respondent in the instant case, did not give any reason why Court should consider a new issue at this late hour, during submissions, moreover without giving the other party opportunity to appraise itself of the proposed issue.

In our understanding Order 15 is intended for the Court to exercise its discretion to reframe issues where it deems it necessary to do so, "*At the hearing of the suit, after reading the pleadings, if any and after such examination of the parties or their advocates,* therefore it is not the preserve to do so as Counsel for the Respondent is proposing to do in the instant case. In any case, both Parties were given sufficient time before the commencement of the trial, to consider the points of agreement and disagreement between them and to frame the issues in controversy between them but the Respondents did not do so and yet they participated in developing the Joint scheduling memorandum(JSM). We are of the considered view that the issues as framed under the JSM are sufficient therefore, it is necessary at this point to reframe any of the issues.

In the circumstances we shall resolve the issues as framed by the parties under the Joint scheduling Memorandum.

RESOLUTION OF ISSUES

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

It was submitted for the Claimant that, the Claimant's termination was unlawful and unfair because the Respondent flouted the Procedures laid down in its own Human Resources Policy Manual, the Sexual harassment and Discrimination Policy and the Disciplinary and Grievance Procedure Manual.

According to Counsel for the Claimant, the procedure for lodging a sexual harassment complaint was not followed by the alleged Victim Madina who

instead of reporting the matter to her immediate supervisor a one Jane Nalugya, as provided under clause 6 of the Sexual harassment and Discrimination Policy(SHD), reported the matter to the Country Director a one Dr. George Mahuka. He further argued that Dr. Mahuka did not document the complaint or follow the grievance procedure as provided under clause 4.5 of the SHD which required that the parties are accorded a hearing or that they undergo mediation, before escalating the matter to the Head of Human Resources based at the headquarters in Nigeria.

Counsel refuted the Country Director's constitution of a committee comprising of scientists to handle the matter moreover without authorization to do so. He further contended that the committee did not establish his culpability beyond reasonable doubt as provided under clause NRS 10.2 of the preamble. Citing **Rosemary Nalwadda Vs Uganda Aids Commission (Miscellaneous cause 45 of 2010,** and **Muhammed Zziwa Kizito & 3 others vs Spidiqa Umma Foundation (HCCS N0 0012 of 2008,** for the legal proposition that, acts done in excess of authority are ultra vires and therefore are null and void and every decision founded on it is incurably bad, Counsel further contended that the claimant was never accorded a fair hearing before his termination, as provided by the Human Resources Policy and Disciplinary and Grievance Policy Manual. He contended that, the Claimant's right to a fair hearing as enshrined under Articles 28, 42 and 44 of the Constitution of Uganda were violated. He further argued that, the principles of a fair hearing as elucidated in **Ebiju James vs Umeme Ltd HCCS No. 0133 of 2012,** and Section 66 of the Employment Act, which provide for notice of the reasons for termination, an opportunity for the employee to make a response to the reason/s in writing or orally before an impartial Disciplinary forum, accompanied by a person of his or her choice are also enshrined in the Respondent's policies, but they were not followed.

He insisted that RW1, the Country Director admitted during cross examination that, he did not give the Claimant an opportunity to defend himself and there was no disciplinary hearing accorded to him as provided under the Human Resource Policy Manual and the Disciplinary and Grievance Procedures Manuals. He also contested the termination of the Claimant for being based on an unsanctioned investigation. He relied on **Uganda Breweries Ltd vs Robert Kigula CACA No. 183/2016,** for the legal proposition that, when summarily dismissing an employee, the alleged misconduct must be more than just mere allegations which must be proved to a reasonable standard, and this can only be done through a disciplinary hearing. According to Counsel the Court of Appeal went further to state that where there was no hearing, the allegations remained unproved, therefore they cannot form the basis of a summary dismissal. Counsel concluded that the Claimant having not been subjected to a hearing, the allegations that he had broken into the Madina's house, assaulted, raped and sexually harassed her remained unproved. He further contended that, the Country Director lacked authority to terminate the Claimant, because clause 11.1.1 of the Respondent's Human Resource Policy Manual (CEX4), only gave such power to the Head of Human Resources. Therefore, the termination having been based on domestic violence which was perpetrated outside the course of employment and outside the Respondent's work premises and on unverified claims of assault and rape, rendered it unlawful. He argued that whereas the Claimant testified that on 15/07/2021, he had a domestic fight with Madina Nalugya, the complaint she filed against him contained 5 grave allegations of physical assault, sexual harassment, rape, and an alleged house breaking, which were purportedly committed by the Claimant at the Namulonge quarters which did not belong to the Respondent, but to NACCURI a separate umbrella organization from NARO. It was his submission that, RW1 and RW2 testified that, the HR Policy provided that, working hours were between 8am to 5pm and the definition of Assault in the Respondent's Disciplinary and grievance Policy Manual excluded assault that

happens outside the scope of employment and outside the Respondent's workplace and course of employment. He argued that, Courts have recognized that an employer should not regulate the private lives of his or her employees. He relied the Court of Appeal of England and Wales case of **Waters vs Commissioner of Police of Metropolis[2000]UKHL 50,** in which the Applicant who was a police officer who resided in accommodation provided by the police department known as a section house, was visited and raped by an officer described as "T", who did not reside in the section house but was an acquaintance of hers. The Court of Appeal found that the rape did not occur in the course of "T's" employment for reasons that T and the applicant were off duty at the time of the alleged offence. He also relied on **Sidhu vs Aerospace Composite Technology Ltds[2000] EWCA Civil 183,** in which an employee was involved in harassing a fellow employee during a picnic organized by the employer for its employee's family and friends and the English Court of Appeal was of the view that the actions were not done during the course of employment in so far as they did not occur during working hours.

In his view the offences leveled against the Claimant were criminal offences which were not prosecutable by the Respondent, therefore it could not purport to dismiss the Claimant based on unverified allegations.

In reply Counsel for the Respondent submitted that, the Claimant was dismissed for misconduct, based on his admission that, he assaulted and sexually harassed Madina Nabulya, a fellow worker, save that this was a domestic matter, moreover which happened after 5 pm. Counsel refuted the assertion by the Claimant that, Madina was the Claimant's wife/lover because she was a subordinate staff residing in premises under the control of the Respondent. He cited section 7 of the Employment Act, which defined sexual harassment and argued that the Respondent had the responsibility of providing an environment that was free from general as well as sexual harassment and this was also provided for under the

Human Resource Policy, in respect of nationally recruited staff. He argued that Section 57 of the Evidence Act, is to the effect that, where a party agrees to admit they are deemed to have admitted and the Claimant under paragraph 4 of his memorandum of claim, admitted that, he committed the infractions leveled against him, save that the processes that were adopted leading to his dismissal were wrong. He argued that it was irrelevant that the alleged infractions occurred after 5 pm because they occurred between on-station employees, housed by the **Uganda Breweries Ltd vs Robert Kigula CACA No. 0183 of 2016, Waters vs Commissioner of Police for the Metropolis [2000] UKHL 50** and **Sidhu vs Aerospace Composite Technology Ltd [2000]EWCA Civ JO526-20,** because they are distinguishable. According to him, unlike the **Waters case** the Claimant and Madina were both resident at the staff quarters which was under the control of the Respondent and in **Sidhu's** case, the majority of the persons involved were friends and family as opposed to employees and in this case of **Sidhu vs Aerospace Composite Technology**(supra), Sidhu and Smith were found guilty of physically assaulting each other, and this was found to be a justifiable cause for their summary dismissal. Counsel insisted that, the Claimant was dismissed based on his own admission and he was given a fair hearing by the Country representative who was the representative of the DG in Uganda and 2 other members of staff, unlike in **Nalwadda Rosemary Vs Uganda Aids Commission H.C.M.A No. 0045 of 2010**, where the Applicant was dismissed without notice, a hearing. He asserted that, upon being summarily dismissed, he was erroneously paid terminal benefits.

He contested the claim that the Respondent flouted the procedure for dismissal, yet the Claimant also did not follow the procedure of the internally established Appeal procedure and instead filed his complaint before the labour officer. He insisted that once a person admits his wrongdoing there was no requirement to subject him to the processes and instead this called for punishment. It was his

submission that in this case, the Respondent complied with all the requirements under Sections 66, 68 and 69 of the Employment Act as well as its Human Resources Policy, therefore the Claimant was lawfully dismissed for verifiable reasons.

DECISION OF COURT

It is indeed trite law that, even if an employer's to dismiss an employee he or she may no longer want cannot be fettered by the Courts, the dismissal of such an employee must be based on a valid reason after following the correct process for termination or dismissal as provided under the Sections 66(1) and (2) and 68 of the Employment Act. The process is summarised as follows:

a) The Employee must be notified of the reasons

b) He or she must be given an opportunity to respond to the reasons in writing and or orally

c) The employer is expected to prove the reasons for dismissal or termination and whether they existed at the time the dismissal or termination occurred. Under Section 69, the employee must show by his or her conduct that he or she breached a fundamental term of his or her contract, before he or she can be summarily dismissed. In summary the employer is expected to justify termination or dismissal and must follow a fair procedure before terminating or dismissing an employee.

In the instant case, is not in dispute that, the Claimant's employment was terminated on grounds of his conduct and in particular on grounds that, he assaulted and sexually harassed a one Madina, who was said to be his lover and also a junior staff at the Respondent . The incident took at place at 5.00pm after working hours and it occurred at the staff quarters which were owned by the Respondent. This was confirmed by the Claimant when he testified that, *"... she was my lover...we were staying together at home.. she was resident of Nakkuri*

quarters in Namulonge...i was responsible for paying rent... Nakkuri was for community by the IITA was responsible ... if you can pay you can stay...I was paying 20k per month..." It was also his testimony that, the Respondent notified him about his infractions of assaulting and sexually harassing a subordinate staff. According to him, it "*...was a domestic issue , I was referred to LC and Police... it was at home in our house...fight was towards 7.opm... working was between 8.00am and 5pm... LC resolved the issue and Police asked us to separate...*"

His case as we understood it was that the matter having occurred outside the office and after working hours it was a domestic issue, therefore it did not constitute a valid reason for dismissal.

The Respondents on the other hand argued that the incident having occurred between 2 of their on-station employees and it happened at the Respondent's staff quarters, it related to the Respondent. **Therefore the question for determination in this case, is whether an employee's misconduct outside their working hours can be a valid or justifiable reason for dismissal or termination by an employer?**

We found Vice President Ross's holding in the Australian case of **B.Rose vs Telstra Corporation Limited (Uno.20564 of 1998),** very instructive and persuasive. In this case, on 11/11/1997, the Applicant Mr. Rose was assigned duties to work off station in Armidale for 4 days. He met a friend of his a one Mr. Mitchel who offered him accommodation in his room. On. 13/11/1997, the duo went to a nightclub and had dinner. Both men drunk throughout the evening. While at the Club Mr. Rose noticed that Mr. Mitchel was missing and went to look for him. He found him in the bar having an argument with a person they both knew. He tried to stop him but Mitchell rudely brushed him off. He ripped his shirt off and growled at him, which made the Applicant think, that he wanted to fight him. To avoid a scene the Applicant tried to cool him down and told him they would speak about it later. When he went back to the room, they had a fight,

broke the Hotel window. Mitchel was arrested and Rose who was due to start his off-station duties could not do so due to the injuries he had sustained during the in the fight and for which a medical certificate was issued indicting he was unfit to work. His employer asked him for and explanation which he rendered and later found him guilty of improper conduct and his employment was terminated.

Vice President Ross, emphasized that, in determining the extent to which out of work conduct may constitute justifiable reason for dismissal, *it was important to recognize that the legal basis of the employment relationship has changed over time. ... The emergence of modern law of employment can be seen as a movement from status to contract. .... The shift in employment relationship has implications for an employer's capacity to discipline an employee in respect of out of work conduct. In earlier times the relationship of master and servant was pervasive.*

....

But this is no longer the case. The modern Law of Employment has its basis on contract not status. An employees' behavior outside of working hours will only have an impact on their employment to the extent that it can be <u>said to breach an express or implied term of his or her contract of employment.(emphasis ours)</u>

He cited the High Court's decision in ***Commissioner for Railways(NSW) vs O'Donnell(1938) 60 CLR 681 at 689, Rich J 691-692 per DixonJ and 698 per McternanJ*** which clearly illustrated the consequent limitations on **an emp*loyer's right to discipline an employee in respect of out of hours misconduct***. Court held that: "... *that the fact that an employee had been arrested and charged with an offence did not in itself constitute misconduct warranting termination of employment. Nor is the conviction of a criminal offence, of itself sufficient to warrant termination. The misconduct in question must have* ***a relevant connection*** *to the employment ...*" He also cited ***Hussein vs Westpac Banking Corporation*** in which *Staindl JR expressed the same view that*

"...an appropriate test is whether or not the conduct has a relevant connection to the employment ...". In this case, Hussein *"... was employed as a migrant liaison officer, in particular giving advice to members of the Turkish community. The court held that there was a sufficient connection between his work with Westpac and the conviction for credit card fraud on another bank. He was in a position of responsibility, honesty and trust. In those circumstances his conduct was sufficient to justify the dismissal.*

According to President Ross, the conduct must be such that, *"...viewed objectively it is likely to cause serious damage to the relationship between the ...employer or the conduct damages the employer's interests, or the conduct is incompatible with the employee's duty as an employee. In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.*

Citing Finn J in **Mcmanus v Scott-Charlton,** He noted that the test had to be applied cautiously and should be fully justified and it should be a case by case basis. He also relied on ***Henry vs Ryan[1963]Tas Sr 90,*** for the legl proposition that: *"...Misconduct in his private life of a person discharging public or professional duties may be destructive of his authority and influence and thus unfit him to continue in his office or profession."*

From the analysis in this case, we concluded that, the contractual right of an employer to dismiss an employee on the grounds of serious and willful misconduct committed outside working hours, is limited to cases where the misconduct has a relevant connection with the performance of his work as an employee and the misconduct must be incompatible with the employee's duty as an employee or it is likely to cause serious damage to the employment relationship. We were further persuaded by EI Skyes and HJ Glasbeek, in their book, Labour Law in Australia , Butterworths, Sydney 1972, in which they stated that, the questions to be answered were:

"...First did the employee do the things which are alleged against him? Second did the action have any relevant connection to the performance of his duties as an employee? We strongly believe that, these questions will resolve this claim.

We established from the evidence on the record that, the Claimant was employed by the Respondent as an Administrative Assistant and one of his roles was to supervise subordinate staff. It was alleged that he assaulted and sexually harassed a one Madina Nalugya, who testified as RW2, in this case. It was not disputed that she was a subordinate staff at the same organisation and that the Claimant was her supervisor. Although the Respondent fell short of proving that the Claimant sexually harassed Madina, he did not deny that, he assaulted her, although this was out of work hours and off the Respondent's work premises. It was also his testimony that it was domestic issue which was resolved by the Police and the LCs. In our considered opinion, his admission that, he assaulted Madina, answers the first question, whether he committed the acts alleged, against him, in the affirmative.

2. ***Did the action have any relevant connection to the performance of his duties as an employee?***

Clause 2.8.4 (b) of the Respondent's Human Resource Policy provided that:

> *b) Every staff is responsible for maintaining a work environment that respects the dignity of the individual and that is free from harassment and discrimination. In this context the term "individual" applies not only to IITA staff but to all people with whom staff interact while carrying out their work, including partners, collaborators, farmers, customers, vendors and visitors..."*

We have already established that, the Claimant was an Administrative Assistant and supervisor of Madina, therefore, he was in a position of responsibility over her. In light of clause 2.8.4 of the HR Policy(supra), he had an obligation as her

supervisor, to exercise a standard of responsibility higher than any other staff to ensure that the clause was complied with. He admitted that he assaulted Madina, although it was after work hours. There was no evidence on the record to indicate that at the time of the incident he was not her supervisor or that she was not staff under his supervision. In the absence of evidence to the contrary we are convinced that when he assaulted her he was after still her supervisor, and he remained her supervisor even after the assault, therefore he had an obligation to ensure she was protected, but he was the very perpetrator of the harassment he was expected to protect her from.

We are of the considered opinion that, in the circumstances of this case, it is immaterial that the Claimant assaulted Madina out of work hours, and outside the work environment, it is also immaterial that the assault occurred in the staff quarters that were under the control of the Respondent, what we find relevant is that, the Claimant's misconduct was willful, it was reprehensible and it has committed against a person whom he supervised and therefore he had a responsibility to protect her from the very harassment he perpetrated, in complete violation of Clause 2.8.4(supra), and breach of a fundamental and express term of his contract. Therefore, his misconduct had a relevant connection with the performance of his duties as an Administrative Assistant and as already stated. a breach of the trust and confidence the Respondent had placed in him.

It is therefore our finding that, the Claimant's misconduct was willful, reprehensible, and even if it was committed out of work hours, it had a relevant connection, with his employment as Administrative Assistant, therefore it was a sufficient and valid reason for the Respondent to dismiss him.

He however contended that, he was not given a fair hearing before the termination. Indeed Section 66 of the Employment Act, provides:

"66. Notification and hearing before termination

*(1) Notwithstanding any other provision of this part, an employer shall before (*our emphasis) *reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal (emphasis ours) and the employee is entitled to have another person of his or her choice present during this explanation,*

(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.

Citing Hilda Musinguzi vs Stanbic Bank Ltd, SCCA No. 05/2016, in **Eva Nazziwa Lubowa vs National Social Security Fund LDR No. 001 of 2019,** this Court observed that, it is settled law that, an employer's right to terminate an employee cannot be fettered by Courts of law, as long as the employer follows the correct procedure before exercising the right to terminate or dismiss as laid down in the Employment Act.

However, as an exception, where an employee admits that he or she committed the infractions leveled against him or her by the employer, the admission vitiates the employer's obligation to subject him or her to disciplinary procedures for termination or dismissal. This is because the procedure is intended to provide the employee an opportunity to defend him or herself and for the employer prove that the infractions or the reasons for termination or dismissal are justifiable. This Court's holding in **Kabojja International School vs Godfrey Oyesigire Labour Dispute Appeal 003/2015,** is to the effect that, an admission by the employee renders a disciplinary process redundant.

We have already established that the Claimant in the instant case, admitted that he assaulted Madina, thus breaching clause 2.8.4 of the Respondent's Human Resources Policy, which was an express and fundamental term of his contract as Administrative Assistant. Having admitted to committing this infraction, there was no requirement for the Respondent to subject him any disciplinary processes including a hearing. Therefore, the contention that he was not heard before his dismissal cannot hold.

In conclusion, the Claimant's willful misconduct albeit committed outside work hours had a relevant connection with the performance of his duties as an Administrative Assistant, and it was sufficient and valid reason for the Respondent to dismiss him. It is therefore, our finding that the dismissal was lawful.

2.Whether the Claimant is entitled to the remedies prayed for?

Having established that the Claimant was lawfully terminated, he is not entitled to the remedies sought.

In conclusion, this claim fails. No order as to costs is made.

THE HON.AG.HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA .....

PANELISTS

1.MS. JULIAN NYACHWO .....

2.MR. BWIRE ABRAHAM .....

3. MR. PATRICK KATENDE .....

DATE: 10/10/2023