THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM NO. 56 OF 2014

(ARISING FROM H.C.C.SUIT NO. 27 OF 2014)

JACKSON ZIRUNGURA ::CLAIMANT

VERSUS

NAMIREMBE GUEST HOUSE ::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE:

THE HON. AG HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. HON. CHARLES WACHA ANGULO

2. HON. BEATRICE ACIRO OKENY

3. HON. ROSE GIDONGO

REPRESENTATIONS

The Claimant was represented by Counsel Godfrey Himbaza of M/S OSH Advocates. The Respondent was represented by Counsel Racheal Tumwebaze of M/S H & G Advocates.

AWARD

BACKGROUND

The Claimant's claim against the Respondent is for declaration that his suspension without half pay was unlawful, his summary dismissal was unjustified, unlawful and wrongful, he prayed for compensation order for every month's pay under category III from the date of dismissal until determination of claim, compensation for unpaid service fees, interest, gratuity, payment of salary in lieu of notice , repatriation, order for payment of salary of Ugx.400,000/- special damages of Ugx.33,600.000/- General damages, aggravated damages, severance pay and costs

BRIEF FACTS

The Claimant was employed by the Respondent from 17/09/2001 as a security guard. On the 1/11/2001, he was appointed as a laundry attendant and later promoted to storekeeper on the 1/8/2003. He contends that he was elevated from employee category IV to category III, for which his remuneration should have increased but was not. He further contends that, on the 14/10/2011, he was suspended on grounds of absenteeism from work without half pay and on 18/6/2013, he was dismissed without a hearing.

The Respondent on the other hand contends that the Claimant was terminated because he absconded from duty. At the time of his termination, he was offered 3 months payment in lieu of notice, service fee, outstanding leave pay and outstanding salary. That his demands for gratuity, repatriation and interest are baseless. That he received part of the settlement offered by the Respondent totaling Ugx. 466,336/- and the Respondent is always ready to pay the balance owing but the Claimant has rejected the same.

The Parties framed the following issues for resolution.

ISSUES

1. **Whether the Claimant was summarily dismissed from employment?**

2. **Whether the summary dismissal was unjustified and unlawful?**

3. **Whether the claimant is entitled to the remedies sought?**

Resolution of issues

1. **Whether the claimant was summarily dismissed from employment and the summary dismissal was unjustified and unlawful?**

Counsel for the Claimant made submissions on issue 1 and 2 concurrently and stated that it was CW1's testimony that even though he used the address of Mulago, he was a resident of Kisoro. This is because the Respondent required him to provide a recommendation letter, and he got it from where he studied, in Mulago. In any case RW1 testified that the Respondent did not know where the Claimant resided.

Counsel further submitted that, between 2003 and 2009, the Claimant was elevated from employee category IV to category III, which was subject to increased remuneration, but it was not paid to him. He refuted the assertions by RW1 wo testified that the Claimant was employed in various positions in order to accommodate his shortcomings, because she did not adduce any proof to that effect and NG2 and NG3 which were attached to her witness statement, did not specify any of shortcomings, or evidence of acceptance of the terms and conditions of the purported job description, respectively.

He further contended that the Claimant was not issued with warning letters for absconding from duty. It was further his submission that, NG4 was not a warning letter but rather a communication which had no relationship with absconding from duty. Counsel also refuted RW1's testimony that, the Claimant was subjected to a disciplinary hearing because R15 which was adduced as evidence of the hearing was not a copy of minutes of a disciplinary hearing but rather an apology by the Claimant. Counsel contended that, the Claimant's suspension without half pay and without

carrying out an investigation was unlawful. This is because the Claimant was suspended on 3/10/2011, for an incident cited in a letter dated 16/08/2007, 4 years earlier. She also contested the Respondent's reliance on a timetable for employees, indicating check in and check out time of 6.00 am and 3.00pm, dated, 2013, in respect of an incident in a letter dated 20/01/2010,.

He relied on **Ebiju james vs. Umeme Ltd CS No. 133 of 2012 and Carolyne Turyatemba and others vs. AG Constitutional Petition No. 15 of 2006** and submitted RW1 did not adduce any evidence to indicate that the Claimant was accorded any disciplinary hearing or that he was given an opportunity to be heard or proof that that he absconded from duty. Therefore, Court should find that, the Claimant's dismissal was unlawful and unjustified.

In reply Counsel for the Respondent submitted that whereas the Claimant testified that, on 16/06/2013, he requested the head of department for 4 days leave to attend to a family emergency, it was RW1 testimony that according to R3, the permission was denied but he insisted on taking the leave. She refuted the Claimant's assertion that he had swapped his leave days with a workmate in the Kitchen and was terminated instead, on grounds that the Claimant did not adduce any evidence to show that he was granted permission by the Head of department. She also disputed that at the time of his appointment he was a resident of Kisoro.

She further submitted that exhibits R5, R6, R8, R9, R16, R17, R19, R22, NG3,NG4, NG5,N7 and NG8, showed that on several occasions the Claimant was warned about his continuous late coming, absenteeism without permission, negligence of duty and general misconduct and on 16/05/2013, he was issued with a last warning regarding continuous absenteeism. According to Counsel exhibits R6, R7, R11, R12, R13, R14, R15, R18 and R21, are evidence of the Claimant's admissions to the various allegations leveled against him and how he undertook to improve and the chances

he was given to improve. According to Counsel his admission was proof of a pattern of gross misconduct that led to his eventual termination.

Regarding whether the Claimant's summary dismissal was unjustified and unlawful, Counsel cited Section 69(1) of the Employment Act and submitted that he was not summarily dismissed, but he was dismissed and paid in lieu of 3 months' notice in accordance with Section 58(3)and (5) he was offered payment in lieu of 3 months' notice and this was not controverted by the Claimant. Therefore, having accorded him due notice as provided by the law, the question of summary termination did not arise.

Counsel reiterated that, the Claimant applied for leave on 17/6/2013, which was denied, but he insisted and did not show up for work from the date of application, prompting the Respondent to terminate his employment for abscondment from duty. It was further her submission that the Claimant admitted to having been absent on the said dates, therefore he admitted to the commission of the infractions leveled against him, which justified his termination. She cited **Kabojja International School vs. Godfrey Oyesigire LDA 03/2015,** in which this court held that, where an employee admits to misconduct alleged against him or her, the employer need not conduct a disciplinary hearing prior to the dismissal/termination.

She insisted that the Claimant did not adduce evidence to prove that the head of department authorized him to take 4 days leave, therefore when he insisted on taking leave without permission this amounted to absconding from duty. She argued by failing to obtain authorization from his employer, the Claimant's absence amounted to a fundamental breach of his employment relationship with the Respondent which rendered his termination lawful.

Decision of Court

In **Eva Nazziwa Lubowa vs NSSF LDR No. 001 of 2019,** this court stated that, *"...it is trite that an employment relationship is based on a contract of employment, whether for services or of services and the contract may be express or implied, it may be oral or in writing. The Employment Act under section 2 defines contract of service to mean any contract, whether oral or in writing, whether express or implied, where a person agrees in return for renumeration, to work for an employer and includes a contract of apprenticeship" The definition connotes that, the employment contract must be consensual, and it should be reciprocal..."*

It is not in dispute that the Claimant was employed by the Respondent as a security guard, storekeeper, Kitchen attendant, stores keeper and by the time of his termination on 18/06/2013, he had been placed in the position of compound attendant, however it seems that he did not accept this position because there was no evidence of acceptance. His terms and conditions remained the same. It was the evidence of RW1 that, his placement in different positions was orchestrated by misconduct on his part and in particular was because of his failure to keep time and concentrate at work which resulted in him making mistakes, especially regarding the management of the stores. He was also continuously absent from duty. RW1 adduced R5, R6, R8, R9, R16, R17, R19, R22, NG3,NG4, NG5,N7 and NG8, as evidence of the various infractions the Claimant had committed over time and R6, R7, R11, R12, R13, R14, R15, R18 and R21,as evidence of his admissions to the commission of these infractions, which according to her justified the various transfers.

Section 62 of the Employment Act provides for the imposition of disciplinary penalties other than dismissal, on an employee who was negligent, who failed or was alleged to have failed to carry out his or her duties under the contract of services.

Section 62 (2) and (3) in particular, provide that:

(2) "Displinary Penalty for purposes of this part includes

a) a written warning

b) reprimand and

c) suspension from work

(3) An employer is entitled to impose a disciplinary penalty only where it is reasonable to do so in the circumstances and what is reasonable shall be decided by considering –

a) the nature of the neglect, failure or alleged failure on the part of the employee, the penalty imposed by the employer, the procedure followed by the employer in imposing the penalty, the reformed conduct of the employee and if any the personal circumstances of the employee and

b) Code of discipline set out in schedule 1

After carefully analyzing R5, R6, R8, R9, R16, R17, R19, R22, NG3,NG4, NG5,N7 and NG8,(supra) which outlined various infractions leveled agains the claimant over a period of time, and R5, R6, R8, R9, R16, R17, R19, R22, NG3,NG4, NG5,N7 and NG8, (supra) in which he variously admitted to the commission of some of the allegations and sought apologies for the same, we established that, following his admission to committing most of the alleged infractions, the Respondent imposed disciplinary penalties in form of warning letters and reprimands. The predominant infraction leveled against him was continuous absenteeism for which he was eventually placed on 1 month's suspension without pay. The Claimant did not adduce any evidence to controvert his admissions and apologies as evidenced under R5, R6, R8, R9, R16, R17, R19, R22, NG3,NG4, NG5,N7 and NG8. In the circumstances we found no reason to fault the Respondent for imposing disciplinary

penalties against him in accordance with section 62(2) and (3) of the Employment Act(supra).

Regarding his suspension without half pay, we established that the suspension in this case, was not an investigative suspension as provided under section 63 of the Employment Act, but rather a disciplinary penalty provided for under section62(2) (c) which the Respondent was entitled to impose. We therefore, respectfully do not associate ourselves with the Claimant's assertion that his suspension ought to have been with half pay, because it was not an investigative suspension. In the circumstances, having imposed it as a disciplinary penalty, the suspension was lawful. We had an opportunity to scrutinise the internal memo which imposed the suspension which read in part as follows:

The internal Memo regarding the suspension read in part as follows:

"....

DATE: 3rd October 2011

SUBJECT: ONE MONTHS SUSPENSION FROM DUTY WITHOUT PAY FOR CONTINOUS ABSENCE WITHOUT NOTICE

This is to inform you that you have been suspended from duty effective 4th October to 4th November 2011. You have a habit of continuously absenting yourself from duty without prior notice or communication. Besides that you have a tendency of hanging around the work premises when you should have signed off. Your conduct has raised serious concern fro me and your fellow work mates .(sic) Several letters have been written to you regarding a number of discipline issues to no avail. You have also benefitted from verbal cautions and warnings before.

I have no alternative but to send you away for a month on suspension without pay to give you a chance to put your house in order this period should help you to reflect on yourself and reform accordingly. You will not be given another chance after this. Take this disciplinary action seriously. (emphasis ours).

By copy of this the accounts section is asked to take note."

This memo clearly shows that the suspension was intended as a disciplinary penalty and not an investigative suspension which entitled an employee to half pay pending the outcome of the investigation. The internal memo further suggests that it was a last opportunity for him to reform and therefore it was a last warning. However, he was subsequently terminated for negligence of duties.

The termination letter stated in part as follows:

"... Jackson,

TERMINATION DUE TO NEGLIGENCE OF DUTIES

You are relieved of your duties effective 18/06/13.

This follows your none adherence to a directive in relation to staying on duty after you sought permission to take leave between 17th and 20th June 2013 which was turned down due to staffing issues in your department but you instead went ahead and left.(sic)

I would like to remind you that have continuously absented yourself from duty on several occasions giving lame excuses regarding your absence having no consideration for the job and your colleagues you work with. Beside this, lateness has also been a habit on your part.

Reference is made to the letter I wrote to you on the 16/05/13 that intimated a last warning. You were suspended from duty in October 2011, over absence related issues for a month. We thought then that this would help you reform.

Not only have you been written to but communicated verbally on several occasions.

Your conduct leave me no alternative but to relieve you of your duties accordingly..."

It was the Claimant's evidence that on 16/06/2013, he sought permission from the head of department, to take leave from 17/06/2013 to 20/06/2013 to attend to an urgent family matter at home in Kisoro. This is evidenced by a handwritten request to the F/Manager and Ag. Kitchen supervisor marked R3 on the Respondent's trial Bundle. In response, a one Hellen the F/B Manager declined to grant him his request and the decline was handwritten on the same request, on 16/06/13. It was further his testimony that he received verbal permission, therefore the response on his request was backdated. We respectfully found it hard to believe that the Claimant was given verbal permission, because his request for permission to take leave form 17/06/2013, was in writing and even the request was not dated, the permission sought was before the 7/06/2013, therefore if he was granted any permission in whatever form it had to be before 17/06/2013. Therefore, the allegation that the response was backdated in the absence of evidence to prove it cannot stand. In any case it was also his testimony that did not get written authorization to take leave, which was a clear demonstration that, he left without authorization.

Even if the letter of termination referred to some of the infractions for which he had already received disciplinary penalties in the form of warnings and 1 months' suspension, the reason for his termination was specifically related to misconduct

regarding taking leave without authorization. Section 75(b) provides that the fact that an employee took or proposed to take leave to which he or she was entitled to under the law or under a contract shall not constitute a fair reason for dismissal.

We had an opportunity to peruse the Claimant's contract to determine whether he was entitled to take leave to attend to personal/family emergencies and found provision to that effect. In the circumstances, taking leave to attend to personal/family emergencies did not warrant consideration under section 75(b) supra. We were further fortified by the lack of evidence to prove the urgent family emergency, to enable us to determine whether they should be considered as a reliable ground for his absence from duty within the meaning of section 75(i) of the Employment Act which allows an employee to be temporarily absent from duty for a period of up to 3 months on "reliable grounds."

We are therefore inclined to agree with Counsel for the Respondent that, by taking leave without authorization, the Claimant disobeyed lawful orders of the Respondent , thus committing a fundament breach of his contract, for which the Respondent was entitled to dismiss him in accordance with clause 9.4 (b) of Its Human Resource manual, which provides that the Respondent can summarily dismiss an employee who is found guilty of one or more of the following acts of misconduct;

a. *Willful neglect of company interest leading to loss or damage of company property, revenues and/or image*

b. *Willful insubordination or disobedience of lawful orders*

c. *Negligently or wrongly performing of company duties by an employee who can ably exhibit a much better performance*

d. *Drunkenness at work*

e. Assault or fighting

The Employment Act under section 69(3), provides for summary dismissal of an employe who by his or her conduct has indicated that he or she has fundamentally broken his or her obligation arising under the contract of employment. The Claimant in his testimony admitted that he took leave to attend to a family emergency without written authorization and he did not prove the alleged verbal permission. As already discussed no evidence was adduced to exonerate him under section 75 (c) and (i) (ibid), to justify his actions. We reiterate that, his insistence on taking leave after his request was declined amounted to disobedience of lawful orders, which entitled the Respondent to dismiss him from employment in accordance with clause 9.4(b) of its Human Resources and section 69(3) of the Employment Act, 2006.

The Respondent insisted that the Claimant was terminated with payment of 3 months' salary in lieu of notice in accordance with section 58(3), therefore he was not dismissed. We respectfully disagree. This is because it is clear from the letter of termination that, he was terminated for misconduct, as opposed to termination where the employer need not give a reason for the termination as long as he or she gives the employee requisite notice or pay in lieu of notice. However the recent case of **Edite Stephen vs Berkeley Energy Uganda LDR No.55 of 2020,** this court emphasized that, where the employer gives a reason for termination and the reason is related to an employee's misconduct or poor performance, the employer is under an obligation to subject the employee to disciplinary proceedings as provided under section 66 of the Employment Act, that is to notify the employee of the reasons for the dismissal /termination and to give him or her an opportunity to be heard, and in accordance with section 68 of the same Act, the reasons must be justifiable. Further section 66(4) of the Act, provides that, even where a summary dismissal is justifiable, the provisions under section 66 must be complied with. It is clear from

the analysis that the Claimant was terminated without a hearing on grounds of misconduct, for taking leave without authorization therefore, he was summarily dismissed and not terminated.

This notwithstanding, the Claimant in his testimony admitted that he left without written authorization and having not proved that he was issued verbal permission, as he claimed, his admission rendered it unnecessary for the Respondent to subject him to a hearing as provided under section 66 of the Employment Act(supra). Therefore, the holding in **Kabojja International School vs. Godfrey Oyesigire LDA 03/2015, (supra),** to the effect that, where an employee admits to misconduct alleged against him or her, the employer need not conduct a disciplinary hearing prior to the dismissal/termination, is applicable to this case.

In conclusion it is our finding that the Claimant's summary dismissal was lawful. Therefore issue 1 is resolved in the affirmative and 2 in the negative.

3.Whether the claimant is entitled to the remedies sought in the claim?

The Claimant prayed for the following remedies:

a)**A declaratory order that the summary dismissal and subsequent dismissal for misconduct of the Claimant was unlawful and unjustified.**

We have established that by his own admission, the Respondent was justified to summarily dismiss him from employment and the summary dismissal was lawful.

b)Declaratory order that the Claimant's suspension without half pay was unjustified.

We have established that the suspension was a disciplinary penalty under section 62(c) of the Employment Act which did not entitle him to half pay and not an investigative suspension provided for under section 63 of the same Act, therefore

the suspension in this case was lawful. Therefore, the claim for compensation for unpaid half cannot stand it is denied.

c) Compensatory order for every month's pay commensurate to the prevailing salary for category III employees of the Respondent from the date of termination.

We had an opportunity to consider the basic salary scales under the various categories of employment provided under the Respondent's HR manual and established that the basic salary scale for category iv ranged between Ugx.30,000-Ugx.90,000/- and category III was Ugx.20,000/ -Ugx.150,000/=. We established that the position the Claimant held at the time of his dismissal was that of Cook. This is because on the request for the impugned leave, he signed as Cook, which fell under **category iv**. We also established that, when he was transferred to the different departments notwithstanding the different categories under which they were, the terms and conditions which he assumed when he was promoted to the position of storekeeper did not change and his salary of Ugx.210,000/- per month also remained unchanged. This salary was above the maximum threshold of Ugx.150,000/- under category III. Therefore, the claim that he was underpaid is baseless. It is therefore denied.

d)Payment of severance allowance arising out of unfair termination of Ugx. 4,800,000.

Having found that he was lawfully dismissed he is not entitled to an award for Severance pay. It is denied.

e)Gratuity of UGX 12,960,000.

It is a settled position of the law that gratuity is not a statutory entitlement. It is a handshake that is extended to an employee at the discretion of an employer, therefore

it must be provided for in the contract of employment or granted to the employee at the time of his exit at the discretion of the employer. It was the Claimant's own evidence that his contract did not provide for payment of gratuity. We had an opportunity to peruse the contract as well, and found no provisions on gratuity. We therefore had no basis to grant this claim, it is therefore denied.

f)Repatriation

Counsel for the Claimant prayed that the claimant is paid repatriation allowance of Ugx. 2,000,000/=.

Section 39. of the Employment Act provides for Repatriation as follows:

" *(1)An employee recruited for employment at a place which is more than one hundred kilometres from his or her home shall have the right to be repatriated at the expense of the employer to the place of engagement in the following cases—*

(a)

on the expiry of the period of service stipulated in the contract.

(b)

on the termination of the contract by reason of the employee's sickness or accident;

(c)

on the termination of the contract by agreement between the parties, unless the contract contains a written provision to the contrary; and

(d)

on the termination of the contract by order of the Labour officer, the Industrial Court or any other court..."

The section as we understand it applies to employees who are employed 100 kilometers away from the workstation. It was the Claimant's evidence that he was resident of Kisoro, even if in his application he indicated he was from Mulago.

It is trite that, an employee owes an employer an implied duty of "good faith' which connotes honesty in all dealings with the employer. Therefore, where the employer requests information from the employee regarding his qualifications or personal information, the employee is under a duty to give the employer authentic information. Where the employee gives false information this would in our considered opinion, amount to a breach of the duty of good faith. Which is a fundamental breach.

It was the Claimant's own evidence that at the time of his employment when he was requested to provide references, and information regarding his place of residence, he the references he submitted indicated that, he was resident in Mulago Katale Zone II, from where he studied and not Kisoro where he hailed from because it was near to the workplace. As already discussed, he had the duty of good faith to tell the employer truth. It is clear from the evidence he adduced that he was not resident in Kisoro, at the time of his appointment. This is because, the LC1's reference marked R24 of the RTB, clearly stated that he was resident in Mulago Katale and he sought the LC1's reference for purposes of getting employment from the Respondent. The reference did not state that he was resident in Kisosro or that it was issued on the basis that he studied from Mulago as a he claimed. In the absence of evidence to the contrary, we are not convinced that the claimant was resident in Kisoro at the time of his employment.

In the circumstances, it is our finding that he does not qualify to be paid repatriation allowance which is based on the distance of his residence being more than 100 kilometers from the workplace. In addition, having found that he was lawfully

summarily dismissed, he would not be entitled to payment of repatriation as provided under section 39(3) of the Employment Act which entitles an employee who has served an employer for over 10 years to repatriation, irrespective of his or her place of recruitment. In the circumstances this claim fails.

g)Payment of service fee

It was the RW1's evidence that the claimant was entitled to payment of a service fee which applied to the Hotel Industry and the Respondent paid 5% of the amount earned in a month per employee. According to RW1the Claimant was entitled to payment of service fee. The Claimant prayed for Ugx.4,800,000/- as service fee. However, he did not adduce evidence on how computed the same. The Respondent's did not dispute that he was entitled to payment of service fee, which was computed at Ugx.2,923,794/-. In the absence of evidence on how the claimant arrived at his computation he is awarded a service fee of **Ugx.2,923,794/-** as computed by the Respondent.

h) Payment in lieu of notice.

The Respondent undertook to pay the Claimant 3 months' salary in lieu of notice, amounting to **Ugx.1,108,674/-,** we have no reason to deny it. The respondent is therefore directed to pay it to him.

i) Overtime pay

Although clause 7.4 of the Respondent's Human Resources provides for the payment of overtime where it was absolutely necessary to do so, and at a rate of 59% on top of basic hourly rate, that Claimant did not adduce any evidence to indicate that he worked overtime or how he computed overtime pay to Ugx.30,000,000/- in the circumstances we had no basis to grant this claim. It is denied.

j) Special damages of Ugx.33,600,000/-

It is trite that special damages must be pleaded and proved. Although the Claimant attempted to particularize the special damages he did not prove them. It is insufficient to write down the particulars of special damages without proof. In the circumstances, this claim fails,

k) General damages

Having found that he was lawfully terminated, therefore no loss was occasioned to him by the Respondent, he is not entitled to an award of general damages.

l) Aggravated/ punitive damages

We found no aggravating circumstances to warrant an award for aggravated damages. This claim fails.

In conclusion, save for the award of service fee and 3 month's salary in lieu of notice, the rest of the claim fails.

No order as to costs is made.

Delivered and signed by:

THE HON. AG HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. HON. CHARLES WACHA ANGULO

2. HON. BEATRICE ACIRO OKENY

3. HON. ROSE GIDONGO

DATE:17/05/2024