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**THE REPUBLIC OF UGANDA**  
**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**  
**LABOUR DISPUTE REFERENCE No. 210 OF 2018**  
**ARISING FROM LD NO. 143/2018**

10 **JAMES ODONG :::::::::::::::::::::::::::::::::::::: CLAIMANT**

**VERSUS**

**AIRTEL UGANDA LTD :::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1. MR. CHARLES WACHA ANGULO**

**2. MS. BEATRICE ACIRO OKENY**

**3. MS. ROSE GIDONGO**

20 **BACKGROUND**

The Claimant's claim against the Respondent is for declaration that his termination was irregular, wrongful, unjustified, unfair and unlawful, an order directing the Respondent.

### **FACTS THE CASE**

25 On 1<sup>st</sup> of February 2016, the Respondent employed the Claimant on probation, as Regional Business Manager, in the sales and distribution Department. On 11<sup>th</sup> April 2017, he was confirmed in the position on permanent basis. According to him, he performed his obligations with utmost good faith and diligence. After his deployment in the Northern region, it registered constant growth and it was always  
30 in the lead of other competitors, in terms of share of growth adds , for which he constantly received congratulatory messages. He was however placed on a PIP effective January 2018. In February 2018, the Uganda Communications Commission issued directives to be followed by all Telecom Companies which greatly affected the northern region and led to a fall in sales. This affected the  
35 Claimant's performance of his PIP as the claimant's performance in the Performance improvement plan.

On 20/04/3028, he was invited for a feedback review session with the Human Resource Manager , where he was informed that the Respondent decided to terminate his employment for poor performance and he was handed a termination

40 letter dated 19/04/2018. He was also issued with a recommendation letter stating that his performance was satisfactory.

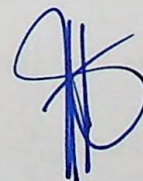
The Respondent's on the other had asserted that when then Claimant was moved to the Northern region he , struggled to achieve the key Performance indicators which led the Respondent to place him under a performance improvement plan with effect  
45 from 1/01/2018, as an intervention to enhance his performance. The PIP was mutually agreed and the assessment or review his performance was done monthly but this notwithstanding, he failed to meet his targets and only achieved an average of 72.5% to 82% as opposed to the set 100% during the PIP period. A final review was made at the end of the PIP plan and a decision was taken to terminate the  
50 Claimant's contract on grounds of poor performance.

## ISSUES

1. Whether the termination of the claimant's employment by the Respondent was illegal?
2. What are the available remedies?

## 55 REPRESENTATION

The Claimant was represented by Mr. Karoro Francis of AL Advocates Kampala, while the Respondent was represented by Mr. Thomas Ocaya(as he then was) of K&K Advocates, Kampala.



## SUBMISSIONS

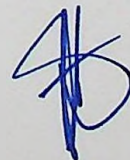
60 Mr. Karoro Francis, Counsel for the Claimant, submitted that the performance improvement plan was conducted in an unfair, illegal manner contrary to the principles of natural justice and fairness. He relied on section 69(1) of the Employment Act which provides for summary termination without notice or less notice than is what is statutorily provided for and **Samuel Cedric Maniala vs. Airtel**

65 **(U) Ltd Labour dispute No.209 of 2018**, in which this Court stated that a person should not be placed on a PIP without appraisal and submitted that the Claimant was not appraised or assessed before being placed on PIP and no evidence was adduced by the employer in this regard. He argued that the purpose of a PIP was to support an employee to improve performance as evidenced in the PIP guidelines at page 37

70 of the Claimant's trial bundle. According to him whereas the PIP rules provide that the maximum deliverables are 6, the Claimant was given more than 6 deliverables for the months of January and February. He also contended that the Claimant was not told the areas of his exact weakness so that the PIP could reflect what he needed to do to improve. He also contested the nomenclature of the deliverables as KRA's.

75 He contended that, it was unrealistic and unreasonable to expect the Claimant to achieve 100% in each of the deliverables and in any case he met between 76.50 97% and the Claimant' performance prior to the PIP was outstanding as shown by the emails under exhibit "G" at ages 39-42 of his trial bundle.

It further his submission that, the Claimant was not given adequate notice as  
80 provided under sections 58 and 69(2) of the Employment Act, nor was he paid in  
lieu of notice. He relied on **Okello Nymlord Vs Rift Valley Railway(U) Ltd**  
**HCCS No. 195 of 2009**, for the legal proposition that payment in lieu of notice did  
not make a termination lawful, therefore the Respondent's assertion that, the  
Claimant was paid in lieu of notice and there termination was lawful cannot hold.  
85 He invited court to take note that the termination was premeditated, because on  
19/04/2018, and the Sales Manager a one Ali Balunywa invited him by WhatsApp  
message, for a review session on 20/04/2018 and while at the meeting he was  
handed a termination letter dated 19/04/2018. He further contended that the  
Respondent did not follow its own Human Resources Manual, and in **Okello**  
90 **Nymlord**(supra), it was held that, failure to follow the Human resources Manual by  
the employer makes the termination unlawful. Counsel further stated that whereas  
RW1 and RW2 testified that the Claimant failure to score 100% amounted to general  
misconduct as provided paragraph 7.2.1(b)(9) of the terms and conditions of service,  
a reading of the paragraph does not list low performance as gross misconduct,  
95 therefore it does not amount to fundamental breach of contract. In any case under  
paragraph 7.2(a), the Respondent was expected to conduct a disciplinary process  
when general misconduct has been occasioned , which was not done. Paragraph  
7.2(f) required the Employer to issue a written invitation 2 days prior to the hearing,



but the Respondent did not do this, because the Claimant was only invited for a  
100 review session via WhatsApp and handed a termination letter, without a hearing as  
provided under section 66 and without notice, therefore the termination was  
unlawful.

He also contended that whereas Article 21(1) of the Constitution of Uganda as  
amended provides for equity before the law and sub Article (2) emphasizes non-  
105 discrimination, and that Section 73(2)(e) of Employment Act provides that the  
provides for the previous practice of the employer in dealing with the type of  
circumstances which led to the termination, and it was the testimony of RW1 and  
RW2 that, other employees such as Edward Atuhe, Carol Anabo, who were placed  
on PIPs did not meet 100%, but they were not dismissed, therefore the decision to  
110 terminate the Claimant was unfair, discriminatory and impartial.

He further contended that, the Claimant was never accorded a fair hearing in  
accordance with Section 66(2) of the Employment Act and what was constituted as  
a review session, was not a hearing. He argued that, the decision to terminate him  
was done before the review session, which was harsh, unfair, partial and  
115 discriminatory.

In reply it was submitted for Respondent that, the Claimant's employment was terminated in accordance with the terms of contract of employment and the law applicable and it was not a summary termination. He asserted that any employee  
120 could be put on PIP at any time during the performance cycle when a drop in his or her performance is noticed that the claimant was placed on a performance improvement plan according to the law and in line with his contract and the internal policies and process of the Respondent. He argued that, the Claimant was informed before being placed on a PIP that, after careful assessment of his performance, the  
125 minimum expectation for this period was 100% leading to the decision to activate PIP with the aim of getting the set-out business targets. He refuted the Claimant's reliance on Exhibit "F" of his trial bundle on grounds that, the said document was neither part of the Respondent's Policy or Human Resources Manual, therefore it was not authority for his claim and in any case, poor performance was ground for  
130 termination both under the law and under the Respondent's performance related policies.

He further submitted that, the letter that was issued to the Claimant in regard to his performance was not proof of satisfactory performance, and he was terminated because of poor performance. It was also his submission that, the even he requested  
135 for a recommendation letter, this did not negate the fact that, at the time of his termination, the Claimant was not performing up to the expected standard and that,

RW1 testified that, she did not disclose the reason for his termination in the recommendation because she wanted to assist him transition to get another employment. He asserted that, the Respondent was well within its rights to place an employee who, was under performing under PIP, and the PIP process in this case was transparent because the Claimant was consulted, assessed on a monthly basis, directed and fully supported to help him perform, however this did not happen. Therefore the Respondent cannot be faulted for terminating the services of the claimant who failed to meet his targets.

Counsel further submitted that, the Claimant was paid in lieu of notice and he did not contest the payment. He contended that, the case of **Okello Nymlord vs. Rift valley Railways** is distinguishable because the termination of the Claimant's contract was lawful and in accordance with the law the Respondent's policy. The Respondent in also chose to give the claimant payment in lieu of notice which he did not contest. Counsel further contended that the termination did not amount to summary dismissal because the Respondent complied with Clause 7.1 (e) of the terms and conditions that provides that, an employee may be terminated on the recommendations of a disciplinary committee or in accordance with the terms specified in the letter of appointment. The Claimant was not terminated for gross misconduct, and no reason is required to be given as was stated in **Bank of Uganda**

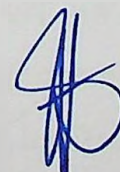


**vs. Joseph Kibuuka and others**, that not all cases of termination require the employer to give a reason.

Counsel further stated that, there was no proof that the Respondent dealt with the circumstances leading to the claimant's termination any differently from the rest of the employees. He insisted that the Claimant was invited for follow-up meetings and sessions which were duly held, following the session, he was duly notified that his contract had been terminated. He relied on **DFCU vs. Donna Kamuli Civil Appeal no. 121 of 2016** and submitted that, the claimant was given constant appraisals at the end of each month where he duly participated and it was noted that he continued to underperform. During the final review, it was agreed that the claimant and other employees be terminated for failing the PIP, he claimant attended the meeting and admitted to signing the minutes. According to him, it is immaterial that the claimant was invited for the feedback meeting via whatsapp as the purpose of the message was to inform him of the intended feedback review meeting and further, the recommendation letter that was issued to the claimant by the Respondent is proof that the claimant throughout his employment was an exceptional performer, that the termination stated that the claimant was a poor performer.

## **DECISION OF COURT**

***Issue 1; whether the termination of the claimant's employment by the Respondent was illegal?***



It is a settled position of the law that employers are at liberty to dismiss their employees for any reason including, grounds of poor performance so long as they follow the correct procedure for termination as laid down under sections 58,65,66,68 and 73(6) the Employment Act, 2006. (see **Hilda Musinguzi vs stanbic Bank (U) Ltd (SCCA 005/2016)**). However, the law is silent on what amounts to the management of the procedure to address poor performance, especially what court should consider when determining whether the process is fair and objective. It is the position of the law that an employment relationship is based on a contract of employment which sets out the rights and responsibilities of the employer and employee and particularizes the terms to be fulfilled by the employee. Therefore, performance management is premised on the contract of employment as agreed between the Parties. The court is therefore required to determine whether the process is fair, consistent, and objective.

In his book, **Employment Law, Guide for Employer, (Revised edition), La Africa,2017, at page 452**, Goerge Ogembo states that, "*Performance Management is an everyday human Resource routine function in the workplace. It is during this process that behaviors and outcomes are closely monitored and re-measured against present and past goals.*" This in our considered view is done by appraising the performance of an employee against the set terms of service in the contract. He cites the definition of Appraisal as defined under the Concise Oxford English Dictionary, 12<sup>th</sup> edition, as "*a formal assessment of the performance of an employee.*" According to him in conducting a performance Appraisal the elements of fairness, objectivity and consistency should be emphasized. The process must be credible and verifiable. The Performance standard set must be reasonable, understandable, verifiable, measurable, equitable and achievable and the appraisal must be done within a defined policy framework to ensure substantive participation of the

employee and when conducting the evaluation, there must be cooperation between the employer and the employee.

Where there is disagreement the employee must be given opportunity to present his or her views and supervisor must justify his or her conclusions regarding the employee's performance, otherwise the performance appraisal would be considered unfair. He cited **Jane Wairimu Machira Vs Mugo Waweru and Associates ELRC Cause No. 621 of 2012, Cited by Ogembo(supra)** in which **Nzioki, J** held that: "*...the performance of an employee must involve active participation of the employee. A credible performance appraisal process must evidently be participatory. A comment made by the supervisor without the participation of an employee cannot pass for performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that the appraisal did indeed take place...*" and **John Retemo Ondieki vs Islamic Relief World widew, RLRC, cause No. 1422 of 2012** where **Ndolo J**, held that, *if the employer decides to take the side of the supervisor without affording the employee an opportunity not only to present their view but also to question the basis of the supervisor's conclusions then the appraisals process is compromised and its results cannot be used as a basis for disciplinary action against the employee. To rule otherwise would be to hand performance appraisal as a blunt weapon in the hands of overzealous supervisors against employees they do not like...*(emphasis ours) He concluded that: Performance Improvement Plan(PIP "*Is a tool for progressive and consistent monitoring of employee's performance once found to be below expectations with the aim of addressing unsatisfactory performance issues. It also provides avenues through which struggling employees can engage with the management in developing strategies aimed at improving performance. ...hence if upon the conclusion of a*



performance appraisal, process an employer is of the view that an employee's performance ought to be closely monitored for improvement, it should document  
230 performance issues and proceed to place the employee on a PIP(emphasis ours).  
A PIP is a corrective action tool, ...the primary aim is of improving and not as a veil or conduit to dismiss an employee. According to him an objective PIP must have the following elements:

- a) Explain the deficient performance and why it needs to be corrected,
- 235 b) Provide specific expectations and describe the desired performance I either quantitative or qualitative terms; the standard should be S.M.A.R.T(Specific, Measurable ,attainable, Relevant and Timely)
- c) Develop an action plan that also follows S.M.A.R.T guidelines. Timelines shall be set based on areas of improvement cited and v=severity of  
240 performance deficits (PIP timelines are usually 30,60, 90 days in duration.
- d) Allow reasonable time to resolve the deficient performance and establish periodic review dates.
- e) Describe the resources available to assist the employee including coaching or training where necessary to meet objectives.
- 245 f) Allow for an objective periodic performance review of performance will be monitored or reviewed.
- g) Notify the consequences of continued deficient performance. Example :  
"Further disciplinary action up to and including termination, will be necessary if performance does not improve or if performance does not  
250 improve or if performance issues arise."

In summary the process must be fair, reasonable, consistent and objective. This court in **Tamale Musisi Rita vs Airtel Uganda Limited LDR No. 183/2017** and **Martin Imakit vs Vivo Energy (U) Lttd LDC No. 034 of 2017**, emphasized that an

255 employer must have justifiable cause for subjecting an employee to a PIP process,  
and before doing so, there ought to be adequate preparation, including conducting  
face to face meetings between the concerned employee and his or supervisor to  
explain the process. Both the employee and his or her supervisor should sign the  
PIP agreement and it must provide for consistent and timely feedback to the  
employee regarding his or her progress. It should indicate the source of additional  
260 support or resources necessary for the employee to meet the objectives of the PIP  
and most importantly it must clearly document the areas which require improvement,  
and the expected outcomes. It must therefore clearly state the targets to be achieved  
within the PIP period. Although this court in **Stanbic Bank V Twinomuhangi  
Labour Dispute Appeal 21 of 2020**, was of the proposition that the court should  
265 not delve so much on the assessment process that was undertaken during a PIP  
process, we believe that it important to make an analysis of the process in order to  
determine that the PIP complied with the elements of fairness, reasonableness,  
objectivity and consistency.

It is not in dispute that the Claimant was deployed as Regional Business Manager  
270 Northern Uganda with the responsibility of ensuring that the Respondent maintained  
a constant lead in growth and competitive daily share growth adds against other  
Mobile Communication Service providers in the Northern Region. Together with  
his direct reports, he was placed on a PIP effective January 2018. Although RW1  
Flavia Ntambi the Human Resource Manager and RW2 Ali Balunywa the  
275 Claimant's direct supervisor both testified that the Claimant was assessed before  
being placed on the PIP, they did not adduce any evidence of the pre- assessment. It  
was also their testimony that, the PIP was intended for the Claimant to improve his  
performance and he was required to score 100% on all the targets and he signed the  
PIP form. It was the submission of Counsel for the Respondent that, the Claimant



280 submitted himself to the PIP and underwent the monthly reviews/appraisals and on each occasion his performance was found wanting and this was not disputed by the Claimant, therefore he cannot deny it now. **What is in dispute as we understand it is that the PIP was conducted in an unfair, illegal manner contrary to the principles of natural Justice.**

285 We had an opportunity to peruse the evidence on the record and established that in December 2017, the Claimant and his direct reports were placed on a PIP effective January 2018. Exhibit "G" at pages 39-42 of the Claimant's trial bundle indicated that the Respondent informed the Claimant that he had been placed on a PIP for 3 months, with the expectation that he would score 100% on the PIP deliverables/  
290 KPIs. On 22/12/2017, he also received an email on which he was issued with a PIP guide document to enable him develop PIPs for any underperforming teams. His PIP form at page 41-42 listed more than 6 deliverables and it was not signed by both the Claimant and his supervisor, however there was no indication that he contested it. In fact he did submit himself to the PIP and he underwent monthly assessments  
295 as evidenced by the February assessment at page 43 which indicated 11 Key Results Areas(KRAs)/Deliverables as opposed to the maximum 6 deliverables. The footnote on each assessment form however, indicated that the "*... minimum deliverables were 3 and maximum were 6 and the PIP deliverables should be based on the KRA set for the individual during the annual KRA setting cycle. Measures and targets should be assigned for each milestone and be signed off by the reviewer...*"  
300 Although he did not score 100% in all the deliverables he scored 109%, 115%, 104% in 3 of the deliverables and between 73%-115% in the remainder of the deliverables. The final review/assessment at page 45 of the claimant's trial bundle indicated that he scored between 88% and 100% in 4 deliverables and below 100% in the  
305 remaining deliverables. When we critically analysed this form, we established that

Reporting Manager's remarks(the Claimant) provided the reasons for the scores as follows:

1. On number of active MM agents: 2,481, was achieved at 91% and it was based on the Agent base at the time. He noted that 476 agents were placed in reconciliation while others were deactivated as per UCC directives.
2. S&D special projects Delivery (mini shops Kiosks , Distribution centres were scores a mini shops106-100%, Active kiosks 303-95%, AM branch shops6-67% - RMs comment: Updated report should place kiosks and mini shops at 100%
3. AM Net float Billing, 2,580,605,696 -47% Rms comment – affected by REFASU ADJ capital pull out &Link isnssoys low capital.
4. Primary Revenue Billing 1,307,072,613- 88% Rms comments Arua Lira and Gulu crossed in March with lots of stock from January and this affected billing cycle.
5. The supervisor's overall comment was that, *James has some improvements in*
6. *some areas especially as regards team drive and performance. However, many gaps remain to be met as all the KPIs as set at the beginning of the PIP were not achieved to 100% as required by the PIP process. As a result he did not sucefully pass the PIP(sic)*

We noted that this comment ignored the Claimant's comments regarding the extraneous circumstances that affected his performance after the implemntroduction of the resulting from the directives of UCC. The Supervisor' comments did not report did not attribute the failure to make the 100% on these gaps to the Claimant's failure to perform and he did not refute the reasons that had been advance by the Claimant as the reasons for his none achievement of 100%.



It is not in dispute that in February 2018 Uganda Communication Commission (UCC) established directives which included new guideline on sim card replacement, application of electronic ID card readers, prohibition of street vending /hawking scratch card among many other, that greatly affected all mobile communications Service providers. This greatly affected the market model and it impacted the performance of the Respondent and was confirmed by RW1 when she testified that, the UCC intervention affected performance. In fact all the Supervisor's comments did not attribute the achievement below 100% to the Claimant but rather to the market environment pertaining at the time. RW1 testified that: *"yes bar by UCC .. would affect the PIP, yes there was a deadline in the PIP."*

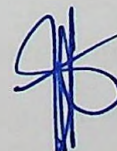
The Claimant having attributed the performance below 100% to the UCC directives and not to himself as an employee(see pages 56-62 of the Claimant's trial bundle) the Respondent should have provided evidence to the contrary, but there was none. There was nothing on the record to indicate that the Claimant's performance below 100% was due to his lack of capacity and it was not a result of the extraneous circumstances created by the UCC intervention in the market. We reiterate that, even if the employer has managerial prerogative to set performance standards the standards set must be reasonable and he or she must prove that the non- performance is due to the employees lack of capacity or negligence. It is our considered view that the test of reasonableness must be applied before an employee can be faulted for non-performance. It is our considered opinion that it was unreasonable for the Respondent to expect the Claimant in the instant case to perform at 100% amidst extraneous factors that affected the market model, which he had no control over. Moreover, without any visible support from the Respondent.

We are not satisfied that, the Respondent explained the deficiency on the part of the Claimant that needed correction, even if the KPI's had been set at 100%, it would



be unreasonable to expect the Claimant to achieve 100% given the circumstances resulting from the introduction of the UCC directives, which not only changed the market model but also greatly impacted the Respondent's business base. Apart from  
360 availing himself to the Claimant, the Claimant's supervisor did not indicate what support was being rendered to him to enable him navigate the challenges that were occasioned by the intervention of UCC. We have no doubt in our mind that the Respondent fell short in showing what the Claimant had not done to warrant his  
365 termination on grounds of his poor performance. There is no evidence on the record to indicate that, the Respondent supported the Claimant to achieve the 100% and he failed notwithstanding the support. In any case, the foot note guidelines indicated that the PIP should have a minimum of 3KPIs/deliverables and maximum of 6 deliverables/KPIs and as already discussed he met the threshold in each assessment  
370 period. This is confirmed by the recommendation letter marked Exhibit "P" that was issued to him by RW1 Flavia Ntambi the Respondent's Human Resources Director. The recommendation stated that while he was in the employ of the Respondent, his performance was satisfactory! It would be an absurdity for this court to associate itself with the Respondent's misrepresentation of the Claimant's performance as  
375 stated in the PIP report given the Recommendation letter. In fact it would amount to condoning open dishonesty on the part of the Respondent, which is a considered to be one of the reputable Mobile communications service providers. We also found it very dishonest of the Respondent to unleash a purported nonperformer on the unsuspecting public under the guise that, it was merely facilitating his transition into  
380 new employment, as testified by RW1 Ntambi Flavia!

To compound it all the process lacked procedural propriety. It was not in dispute that, the Claimant was invited for a final review meeting on 20/04/2018 and issued a termination letter dated 19/04/2018, indicating that, the termination would take



effect on 20/04/2018. Based on the principles of a fair, reasonable, consistent and  
385 objective PIP as elucidated by Ogembo(Supra). Having found the Claimant's  
performance wanting as claimed, the Respondent ought to have subjected him to  
disciplinary proceedings in accordance with section 66 of the Employment Act, 2006  
which provides as follows:

“66. Notification and hearing before termination (1) Notwithstanding any other  
390 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  
395 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.

400 We have already established that the claimant was invited for the last review meeting  
scheduled for 20/04/2018 and while at the meeting he was handed a termination  
letter dated 19/04/2018, stating that the termination was effective 20/04/2018, the  
day on which the meeting was taking place! This was in total breach of section  
66(supra) and it left us no choice but to agree with Counsel Karoro that, indeed the  
405 termination was premeditated and therefore it was a summary termination. It is clear  
to us that in this case, that the PIP was used as a tool to get rid of the Claimant and  
not as a tool to enable him improve his performance. In **Rita Tamale**(supra) this  
court emphasised that: “... Where the employee fails to meet the PIP, he or she must  
be given an opportunity to explain through a fair hearing, before taking

410 *disciplinary action including termination...”.This was not the case in the instant*  
case. It should be remembered that, a PIP is intended to assist the employee to  
improve therefore the Employer must be seen to make every effort to assist and not  
fail or frustrate the employee in pursuit of improving performance and where he or  
she fails to meet the PIP, it is mandatory that the employee is subjected to a  
415 *disciplinary hearing which clearly explains the areas of failure and as provided*  
under section 68, the employer “... *shall prove the reason or reasons for the*  
*dismissal, and where the employer fails to do so the dismissal shall be deemed to*  
*have been unfair within the meaning of section 71*

(2) *The reason or reasons for dismissal shall be matters, which the employer, at the*  
420 *time of dismissal, genuinely believed to exist and which caused him or her to dismiss*  
*the employee....”*

It was not sufficient that the Respondent adduced handwritten minutes on a  
purported disciplinary meeting. The minutes clearly indicate that the decision to  
terminate the claimant was arrived at before he was given an opportunity to be heard.  
425 Even if the Respondent was within its rights to place the claimant on a PIP, we not  
satisfied that the PIP in this case was fair, reasonable, consistent, and objective. As  
discussed the PIP process was substantively and procedurally flawed and it did not  
meet the test of a fair, reasonable, consistent, and objective PIP. Therefore, the  
Claimant’s termination based on a flawed PIP process was unlawful and illegal.  
430 This issue is answered in the affirmative.

## **2.What are the available remedies?**

Having found that the Claimant’s termination was unlawful he is entitled to some  
remedies. He prayed for the following:



435 a) A declaration that the Claimant's termination from employment by the Respondent was summary unlawful, unfair and discriminatory, It is so declared.

440 b) Payment of salary arrears of Ugx. 6,175, 500/= from the date of termination until date of award and payment for loss of earnings. This court has already established the legal principle that a claim for future earnings is speculative given that it is not a guarantee that an employee will serve the contract to the end given intervening circumstances such as possibility of death of the employee, resignation of the employee lawful dismissal or termination among many scenarios. In the circumstances this claim has no basis it is denied.

c) Payment in lieu of leave

445 "Section 54(1) (a)

1) *Subject to the provisions of this section-*

450 (a) ***"An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months' service to be taken at such time during such calendar year as may be agreed between the parties. (Our emphasis).***

(b) ***An employee shall be entitled to a day's holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day's holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work.***

455

2) ***where an employee who works on a public holiday receives, in respect of work, pay at not less than double the rate payable for work on a day that is not a public holiday, that employee shall not be entitled to a day's holiday with full pay or payment in lieu of the public holiday.***

- 460 3) *Subject to subsection (2), any agreement to relinquish the right to the minimum annual holidays as prescribed in this section, or to forgo such a holiday, for compensation or otherwise, shall be null and void.*
- 4) *This Section shall only to employees-*
- 465 a) *Who have performed continuous service for their employer for a minimum period of six months*
- b) *Who normally work under a contract of service for sixteen hours a week or more.*
- 470 5) *An employee is entitled to receive, upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.*

475 It is our interpretation that although section 54 entitles an employee to leave as of right, he or she cannot exercise it absolutely. The employer reserves managerial prerogative, therefore he or she has the mandate to determine when an employee should take leave. Section 54(1)(a) provides that it shall “...***be taken at such time during such calendar year as may be agreed between the parties.***”

480 Although an employee would be entitled to leave pay in the event of termination before the same is taken, he or she has the obligation of proving that he or she applied for leave and it was denied. This because the employer as the determinant of his or her organisation operational requirements, and as the controller of capital he or she has the right to organize his organisation to ensure continuity and orderliness hence the requirement for the parties to agree on the dates on which the leave must be taken. Although in Mbika it was this court’ s view that once the leave falls due and it is taken even without the express agreement

485 between the parties, it was still emphasized that for such an employee to succeed,



in a claim for leave pay, he or she must prove that he or she did apply for the leave and it was denied by the employer. The Claimant in the instant case did not adduce any evidence to show that he applied for leave and it was denied. In the circumstances we had no basis to award him pay for leave untaken. This claim is denied.

**Special Damages of Ugx. 90,000,000 comprising the loan with standard Chartered Bank. In In Stanbic Bank (U) Limited v on R. Constant CA No.60 of 2020, Christopher Madrama Izama, stated that:**

*" ... The underlying principle is that where a loan is secured on the salary earnings of the employee and the employer unlawfully terminates the employment, and further makes the employee liable to pay for the loan from any other sources not envisaged at the time of the entering into a salary loan agreement, any failure of the employee to service to the loan would be a foreseeable and necessary consequence of the unlawful termination of his or her employment. **Which would mean that the liability would shift to the employer. (emphasis ours)***

*His Lordship went on to state that, "... that each loan has to be considered on the basis of the contractual provisions that govern it and therefore there cannot be any blanket principle affecting that. ...Each contract has to be examined on the basis of its terms..."*

The Claimant had the obligation of proving that, his loan was premised on the salary for its repayment and not from any other sources. (Also see **Irene Rebecca Nassuna**

**Vs Equity Bank LDC 06/2014**). Counsel relied on the letter of undertaking which was issued in favor of the Claimant's application for a facility of Ugx. 90,000,000/- from DFCU Bank. The letter stated that, the Respondent would assist

the bank to recover the outstanding balance on the loan in case of termination of the Claimants employment it however did not assume liability for the loan nor did it guarantee its repayment. At the time of his termination on 20/04/2018 there was an outstanding balance of Ugx. 40,000,000/- Although no evidence was adduced to indicate whether the Claimant's benefits were offset towards the repayment of the loan facility, section 70 of the Uganda Retirement Benefits Regulatory Authority Act, 2011, protects a person's contribution to a retirement scheme. The section provides as follows:

520 " ... Notwithstanding anything to contrary contained in any other written law, where a judgement or order against a member of a retirement benefits scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member" .

Given this provision, the undertaking by the Respondent to pay the Claimant's terminal benefits towards the repayment of the loan cannot stand. It is clear from the letter of undertaking that the Loan's repayment was based on salary and nothing elase therefore as stated by the Court of Appeal in Okuo(supra) having established that the Respondent unlawfully terminated the Claimant, and having established "... any failure of the employee to service the loan is a ...foreseeable and necessary consequence of the unlawful termination of the Claimant's employment. **Which would mean that the liability would shift to the employer. (emphasis ours).** The Respondent is therefore ordered to pay the outstanding loan balance with interest.

#### e)General damages

It is a settled position of the law that, any person who is unlawfully terminated or dismissed is entitled to an award of damages in addition to statutory remedies provided for under the Employment Act as prayed for. General Damages are

compensatory in nature and intended to return the aggrieved person to as near as possible in monetary terms to the position he or she was before the injury occasioned by the Respondent. The Claimant was employed as the Respondent's Regional Business Manager Agent deployed in the Northern Region. We have already established that he was unlawfully terminated from his employment after serving with a good record for 2 years, earning a salary of Ugx. 6,175,500 per month. We take cognizance of the fact that the loss of employment, in this error of scarcity of employment was an inconvenience to him and his family and that for which he would be entitled to an award of General damages.. We think that an award of Ugx 40,000,000/- is sufficient as general damages.

**f) Punitive damages**

We found no aggravating circumstances to warrant this award it is denied.

**g) Gratuity**

There was no provision for the payment of gratuity in his contract attached as exhibit "A" on the Claimants trial bundle. It is denied.

**h) Severance allowance**

Section 87 and 89 of the Employment Act and **Blanche Byarugaba Kaira vs Africa Field Epidemiology Network LDR No. 131 of 2018**, are of the legal proposition that, an employee that was unlawfully terminated from employment was entitled to payment of severance allowance amounting to 1 month's salary for every year worked, where there was no agreed formula for calculating severance. The Claimant was employed on the 02/02/2016 until his unlawful termination on 20/04/2018, therefore he worked for 2 year and 2 months earning Ugx.6,175,500- per month. He is therefore entitled to payment of Ugx.12,351,000/= as severance pay. We have no reason to deny this claim. It is granted.



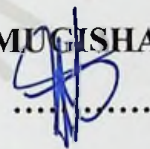
Interest.

An interest rate of 10% per annum shall apply to all the pecuniary awards made above from the date of filing this matter at the Industrial Court until payment in full.

565 No order as to costs is made.

Delivered and signed by:

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

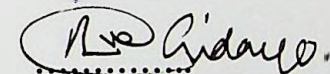
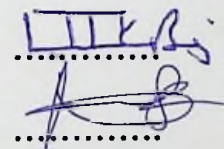


**PANELISTS**

570 **1. MR. CHARLES WACHA ANGULO**

**2. MS. BEATRICE ACIRO OKENY**

**3. MS. ROSE GIDONGO**



**DATE:24/10/2023**