



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA HOLDEN AT MBARARA
LABOUR DISPUTE REFERENCE NO. 01 OF 20209
(Arising from Labour Dispute No. 01/09/2020)

MUSASIZI REUBEN :::CLAIMANT

VERSUS

DAYSTAR SAVING AND CREDIT CO-OPERATIVE SOCIETY LTD:::::::::::::::::::::::::::::RESPONDENT

Before:

1. The Hon. Mr. Justice Anthony Wabwire Musana

Panelists:

1. Hon. Adrine Namara,
2. Hon. Robinah Kagoye &
3. Hon. Michael Matovu.

Representation:

1. Mr. Robert Mugarura of M/s Mugarura, Mwijusya & Co. Advocates for the Claimant.
2. M/S Daniel Mugisha & Co. Advocates for the Respondent.

Award

Introduction

- [1] The Claimant brought this action for general, aggravated, and exemplary damages for wrongful dismissal and breach of contract. He was employed by the Respondent as a Manager on a two-year contract effective 20th February 2019. He alleges that on the 28th of November 2019, he was suspended with no pay to permit an external audit. Despite a protest from his lawyers, the Respondent did not lift the suspension. The Claimant lodged a complaint with the Labour Officer at Mbarara, who referred the matter to this Court. Opposing the claim, the Respondent admitted that its Chairperson had asked the Claimant to step down but denied any forced suspension. It was contended that the Claimant was terminated for gross misconduct and was not entitled to any relief.

The Proceedings

- [2] On the 23rd day of November 2023, Mr. Mugarura, appearing for the Claimant, submitted that service had been effected on the Respondent's Chairperson as Messrs. Daniel Mugisha & Co. Advocates had indicated that they did not have instructions. We

directed Counsel for the Claimant to serve afresh, as we were not satisfied that the service was effective. On the 13th of December 2023, the Respondent was not in Court. Mr. Mugarura sought leave to proceed *ex parte*. Upon perusal of the affidavit of service sworn on 12th December 2023 by Mr. Calson Ikiriza, we were satisfied that the hearing notices had been affixed to the premises of the Respondent. We granted the Claimant leave to proceed *ex parte* under Order 9 Rule 20(1)(a) of the Civil Procedure Rules S.I 71-1(*from now CPR*).

[3] The Claimant's scheduling notes were adopted with two issues for determination viz:

(i) *Whether the Claimant was unlawfully terminated?*

(ii) *What remedies is the Claimant entitled to?*

The Claimant's testimony.

[4] The Claimant testified that he was employed as Manager on a two-year contract from 20th February 2019 to 19th February 2023. On the 28th of November 2019, he was asked to step aside from his duties for an external audit. The suspension was without pay. On the 10th of January 2020, Messrs. Ngaruye Ruhindi, Spencer & Co. Advocates, acting on the Claimant's behalf, protested the suspension. There was no response. On the 17th of August 2020, he lodged a complaint with the Labour Officer at Mbarara. He testified that he was not allowed to attend to any audit queries. He testified to having reported a case of theft to the Uganda Police by one Kusinga Antony. That the Respondent's Chairperson took issue and asked the Office of the Directorate of Public Prosecutions (*from now ODPP*) to charge the Claimant jointly with Mr. Kusinga. He obtained a copy of the audit report and wrote to the ODPP protesting his innocence. The charges against him were dropped. He testified that the suspension was not lifted, meaning his contract had been terminated unfairly. He opposed this suspension in writing and lodged a complaint with the Labour Officer. He also testified that he was earning a monthly salary of UGX 700,000/=, a monthly lunch allowance of UGX 100,000/=, and UGX 8,000 as fuel allowance, bringing his total take-home pay to UGX 808,000/=. It was his evidence that he was entitled to UGX 29,896,000/= as his total emoluments until the expiry of his contract on the 19th of February 2023. It was his testimony that the Respondent had been oppressive, egregious, and arbitrary, and he was therefore entitled to aggravated, punitive, and exemplary damages.

Analysis and Decision of the Court.

Issue 1. *Whether the Claimant was unlawfully terminated?*

Submissions of the Claimant

[5] On the authority of **Sam Kaggwa v Beatrice Nakityo**¹, it was submitted that where a party is allowed to challenge or rebut the evidence of the opposite party through

¹ [2001-2005] HCB Vol.2 pg 118

cross-examination, and if it fails to do so, that evidence is taken as the truth. Relying on **Sections 63 and 64 of the Employment Act, 2006**(from now EA), it was submitted that the Claimant's suspension was supposed to last 14 days and should have lapsed on 13th December 2012 and ended on 26th December 2019. On the authority of **Namatome Annet v Great Seas (U)Ltd H.C.C.S No 103 of 2009**, it was submitted that since the suspension was never lifted, the Claimant was entitled to treat the contract as terminated.

- [6] It was also submitted that **Sections 66 and 68EA** require the employer to give reasons for termination, a hearing, and to prove the reason for termination. The Claimant was suspended, an audit was conducted, and the Claimant was not given a hearing after the report was issued. For the above reasons, Counsel invited us to find the termination unlawful.

Resolution of issue one

- [7] It is very well settled that an employer has an unfettered right to terminate an employment relationship, provided the employer follows the procedure.² In the case of **Mariam Akiror v International Food Policy Research Institute**³ we examined **Sections 65, 66, 68, 69, and 70(6) EA** which relate to termination of employment contracts. We revisited these provisions briefly and noted that:

"

(i) **Section 65EA** provides for circumstances where termination shall be deemed to take place, which include (a) where the employer ends the contract without notice, (b) by expiry or effluxion of time or non-renewal, (c) where an employee ends the contract for unreasonable conduct of the employer or (d) where the employee receives notice but before the expiry of the notice period. **Section 65(2) EA** delineates the time or date of termination in each of the above circumstances.

(ii) **Section 66 EA** provides for notice and a hearing before termination for misconduct or poor performance. It also spells out employee rights in a disciplinary hearing. The right to be heard in employment disputes has been very well articulated in the case of **Ebiju James v Umeme Ltd**⁴

(iii) **Section 68 EA** requires an employer to prove the reason for termination. The onus is on an employer to justify the termination or dismissal.

(iv) **Section 69 EA** proscribes summarily dismissal, which occurs without notice or less statutory notice when the employee has, by his or her

² Per Mwangushya J.S.C(as he then was) in **Hilda Musinguzi v Stanbic Bank(U)Ltd SCCA 05 of 2016**

³ LDR 235 of 2019

⁴ H.C.C.S No. 133 of 2012

conduct, indicated that he has fundamentally broken his or her obligations under the contract.

(v) And finally, under **Section 70(6) EA**, the employee has the onus probandi or burden to prove that a dismissal has occurred while the employer must justify the grounds of dismissal.⁵

- [8] We observed that the above provisions give effect to the Supreme Court's dictum in the **Musinguzi** case and set the procedure for termination of an employment contract.
- [9] The Claimant's evidence of the facts leading up to his exit from the Respondent's employment was unchallenged. The position of the law, as rightly put by Mr. Mugarura, is that where evidence is unrebutted or unchallenged, it is to be taken as true. It is deemed admitted as inherently credible and probably true. In **Geoffrey Brown v Ojijo Pascal**,⁶ the Honourable Mr. Justice Musa Ssekaana observed that the Court must evaluate the evidence to give it quality and value.
- [10] In that regard, the unchallenged evidence is that the Claimant was suspended on the 28th of November 2019. The suspension letter was admitted as "CEX2". He was suspended for 14 days, effective 29th November 2019. The purpose of the suspension was for the auditor to carry out an independent audit. It was the Claimant's testimony that the suspension was without pay. The memorandum in reply filed for the Respondent conceded to the suspension. For a fuller appreciation of this suspension, we think it both useful and necessary to reproduce the letter verbatim:

"DAYSTAR SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD
P. O. Box 159-Mbarara-Uganda Reg No. 10,217/RCS
Tel: 0703 504248
0774 127999

Our ref 10

Date 28/11/2019

The Manager-Daystar Sacco
The Accountant- Daystar Sacco
P.O. Box 159,
Mbarara

RE: STEPPING DOWN FROM OFFICE

Subsequent to the Auditing that is being carried out by External Auditor and in Consultation with the Principal Commercial Officer Mbarara Municipality, you are here by advised to step down from office for 14 Days effective tomorrow 29th November,

⁵ LDR 235 of 2019 at page 12

⁶ Per Ssekaana J in Geoffrey Brown v Ojijo Pascal H.C.C.S No. 228 of 2017

2019 In order for the Auditor to carry out his Investigations Independently.

You are asked to handover whatever was handed over to you on Inception of your office to the Board of the Sacco.

Yours faithfully,

Birikwija Edith
Chairperson- Daystar Sacco

CC: The Principal Commercial Officer
Mbarara Municipality
The Chairperson
Supervisory Committee-Daystar Sacco
The Patron
Daystar Sacco"

It is beyond dispute that this letter was a suspension letter. The letter did not have any other effect than suspending the Claimant for 14 days, effective 29th November 2019. It follows that the suspension period would lapse on the 12th of December 2019. It was the Claimant's undisputed evidence that his suspension was not and has not been lifted to date. The procedure for suspension set out in Section 63EA is twofold:

- (i) An employee may be suspended at half pay where there is reason to believe an inquiry will reveal a cause for dismissal.
- (ii) A suspension shall not exceed four weeks or the duration of the inquiry, whichever is shorter.

[11] We have already observed that an employer's right to terminate or discipline employees is not to be fettered if he or she follows procedure. Suspension is a form of disciplinary procedure which the employer is entitled to impose. Under **Section 62(2)(a) EA**, "Disciplinary Penalty" includes suspension from work. Regarding **Section 63EA**, suspension is a precursor to a disciplinary hearing. It is an integral part of the disciplinary process. It provides the employer an opportunity to carry out an investigation or complete an audit. The audit findings or investigation report form a basis for proving the allegations against the employee and would be the foundation for the employee to justify the reasons for dismissal as required under **Section 68EA**. For this reason, adherence to the suspension procedure set out in **Section 63EA** is critical because procedural fairness is one-half of fairness in the employment sphere. Therefore, when an employer suspends an employee for purposes of an inquiry, such as the audit in the present case, the employer must pay the employee half salary for the duration of the suspension. The employer must also conclude the inquiry before the expiry of four weeks from the date of suspension.

- [12] In the case before us, the Respondent suspended the Claimant on the 29th of November 2018 for four weeks, with no pay. There was also no evidence to show that the suspension was lifted. In the circumstances, we would find as a fact that the Respondent suspended the Claimant without pay for more than four weeks.
- [13] Following our finding in paragraph 14 above, we conclude that the Claimant's indefinite suspension, without pay, was unlawful and contravened **Section 63(1) and (2) EA**. Upon conclusion of the audit process, the Respondent would be required to subject the Claimant to a disciplinary process in accordance with **Section 66EA** if the audit report had revealed any findings of misconduct. This view would be consistent with the Industrial Court's holding in **Mudoma Charles v Kenfreight(U) Ltd**,⁷ where their Lordships found that the conduct of the respondent (*in suspending the claimant and failing to conduct an investigation culminating in a disciplinary hearing*) was not fair. We also find the Industrial Court of Kenya's decision in **Paul Mwaura Mbugua v Kagwe Tea Factory and Another I.C No. 78 of 2011 [2011] LLR 243(ICK)** quite persuasive. Ndolo, J observed that keeping an employee on suspension without pay for over seven months, waiting for him to blink first, is not only unlawful but inhumane.
- [14] Given the dicta in the above cases, we would find that the Respondent unlawfully and unfairly suspended the Claimant from employment. This finding would bring us to the primary issue before the Court regarding whether the termination was unlawful.
- [15] While there is no evidence of a formal letter of termination, Counsel for the Claimant invited us to find that the Claimant was entitled to treat the contract as terminated following the Respondent's non-response. Under **Section 65(1)(c) EA**, termination shall be deemed to take place when the employee ends the contract of service with or without notice as a consequence of unreasonable conduct on the employer's part towards the employee. In the case before us, by letter dated 10th January 2020(CEX8), the Claimant's Advocates protested the indefinite suspension, contending that the same should have been lifted. In reply, the Respondent's Advocates claimed that the Claimant had been subjected to a criminal inquiry and that the Respondent would await the outcome of the criminal case. It appears that the ODPP, in a letter dated the 19th day of February 2020(CEX7), did not find the charges against the Claimant sustainable.
- [16] In the case of **Muyingo Abdulkarim v Sogea Satom**⁸, this Court determined that **Section 95 EA** does not exempt any person from being proceeded against, convicted, or punished for a criminal offense where a disciplinary penalty has been imposed. We held the view that an employer can decide whether to impose a disciplinary penalty or report and pursue a criminal complaint. In terms, disciplinary proceedings may

⁷ Per Ntengye C.J, Tumusiime Mugisha J et al in LDR 042 of 2015

⁸ LDR 111 of 2018

precede criminal proceedings, or both proceedings may take place contemporaneously. It follows that where an employer reports a criminal complaint against the employee, the employer must either follow up the criminal complaint to its conclusion or complete the internal disciplinary proceedings. If the employer wishes to rely on the outcome of the criminal case, then the employer shall be liable to compensate the employee should he or she be discharged of the criminal charges.

- [17] In the case before us, it is not established that the Respondent followed up the criminal case. The Claimant lodged a complaint of unfair suspension and termination with the Labour Officer on the 17th of August 2020. The letter was admitted as CEX10. This was about eight and a half (8^{1/2}) months after his suspension. We have already found that an indefinite suspension is unlawful. We would agree, then, with the dicta in the case of **Namatome**(supra), where Mwangusya J (*as he then was*) found that an employee on suspension without pay for a period longer than permitted by statute would be entitled to interpret the unlawful suspension as termination of the contract. Similarly, in the **Mudoma** case(supra), the Industrial Court was of the persuasion that once a suspension is beyond four weeks without any communication from the employer as to the status of investigations or whether the employee would be due for a disciplinary hearing, such duration of suspension would be illegal and amounts to unlawful termination of employment.
- [18] We are fortified in taking the view above by comparative jurisprudence from the **Mbugua** case(supra) on the function of suspension. In that case, Ndolo J. opines that suspension itself is not a form of termination, and upon completion of the investigation, further action needs to be taken. During the suspension, the suspended employee remains an employer's employee, with or without pay, until a termination letter is issued. Further, an employee on suspension has a legitimate expectation that, at the very least, he or she will be allowed to defend himself or herself. This dicta is consistent with the provisions of **Section 66EA**, where an employer must conduct a hearing whenever it contemplates dismissal for misconduct or poor performance. The holding of a hearing affords adherence to the rule of natural justice, upholds the right to a fair hearing, and maintains fairness in labour practices.
- [19] We, therefore, find that following an indefinite suspension, the Claimant was entitled to treat the termination as unlawful. Issue one would be answered in the affirmative.

Issue Two: What remedies is the Claimant entitled to?

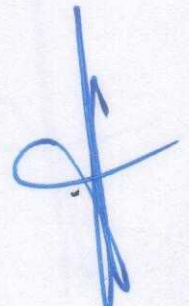
- [20] Having found that the termination was unlawful, the Claimant would be entitled to remedies.



- [21] Citing the case of **Godfrey Kamukama v Makerere University Business School LDR No. 147 of 2019**, Counsel for the Claimant sought the sum of UGX 12,800,000/= as damages. He premised this on the Claimant's earnings of UGX 800,000 per month on a two-year contract on which he had served only eight months. We agree with the Claimant that the Claimant is entitled to damages. The question is, what is the quantum of damages?
- [22] In the case, **Stanbic Bank (U) Ltd v Constant Okou**,⁹ the Court held that general damages are based on the common law principle of *restituto in integrum*. The Court of Appeal guided that appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects. Applying these principles of the case to the matter before us, the Claimant was earning UGX 800,000 per month and was on a four-year contract. This was in paragraph two of CEX 1 despite the submissions suggesting a two-year contract. He was placed on indefinite suspension without pay from 28th November 2019 and his contract expired on the 20th of January 2023 while he was still on suspension. He had forty months to serve on his contract. Mr. Mugarura, prayed for UGX 12,800,000/=. Considering all the circumstances, we think the sum of UGX 16,000,000 as general damages would suffice, which sum we hereby award.
- [23] On aggravated damages, on the authority of **Godfrey Kamukama (ibid)** and **Rookes v Bernard [1964] ALLER**, we were asked to grant aggravated damages in the sum of UGX 5,000,000/=. Counsel submitted that aggravated damages are awardable where there has been oppressive, arbitrary, or unconstitutional action by servants of government, where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff and where some law for the time being in force authorizes the award of exemplary damages. Lord Devlin's dicta in **Rookes v Barnard**¹⁰ concerns the conduct and motive of the tortfeasor, which 'aggravates' the injury done to the plaintiff and, therefore, warrants a greater or additional compensatory sum. Lord Delvin held that aggravated damages are awardable to teach the Defendant that tort does not pay. It follows that aggravating circumstances must be pleaded.
- [24] In the matter before us, the Claimant has not demonstrated the profit that might have accrued to the Respondent by its action in suspending him. The Employment Act 2006

⁹ Stanbic Bank (U) Ltd v Constant Okou Civil Appeal No. 60 of 2020

¹⁰ 1964(AC) 1129



does make provision for aggravated damages in the present case, and we do not find any aggravating circumstances to warrant an award of aggravated damages.

- [25] On punitive damages, on the authority of the **Kamukama** case, we were invited to grant an award of punitive damages to punish the Respondent for the outrageous conduct as a measure to deter them from conducting themselves in a similar manner. In the Kamukama case, the Industrial Court found that the Claimant was unlawfully terminated. He was not subjected to a disciplinary hearing. The Court did not find any evidence on the record to support an award of punitive damages. In the case of **Augustine Kamagero v Marie Stopes Uganda Ltd**¹¹ we cited the case of **DFCU Bank Ltd v Donna Kamuli**,¹² where the Court of Appeal held that punitive damages are awardable in employment disputes but with restraint as punishment is not for the civil and contract law. In the case before us, we have not found any circumstances that would invite an award of punitive damages and decline to grant the claim for punitive damages.
- [26] On interest, we were asked to grant interest at the rate of 24% per annum from the date of judgment until payment in full. Under S.26 (2) Civil Procedure Act, the court can award interest. It is an exercise of discretion. As this is an award of general damages, it shall attract interest at 16% per annum from the date of award until payment in full.
- [27] On costs, we have held that the grant of costs to the successful party is an exception on account of the nature of the employment relationship except where it is established that the unsuccessful party has filed a frivolous action or is guilty of some form of misconduct.¹³ We find that the Respondent filed a memorandum in reply and, despite service, did not attend Court to assist in the disposition of the dispute. For this reason, we grant the Claimant costs of the claim.
- [28] In the final analysis, we make the following orders:
- (i) We declare that the Claimant was unfairly terminated.
 - (ii) We direct and order the Respondent to pay the Claimant the sum of UGX 16,000,000/= in general damages.
 - (iii) The sum in (ii) above shall attract interest at 16% p.a from the date of award until payment in full.
 - (iii) The Claimant is awarded costs of the claim.

¹¹ LDR 36 of 2018

¹² Ibid

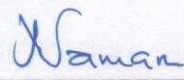


¹³ Joseph Kalule Vs Giz LDR 109/2020(Unreported)

Signed in chambers at Mbarara this 18th day of December 2023


Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

- 1. Hon. Adrine Namara,
- 2. Hon. Robinah Kagoye &
- 3. Hon. Michael Matovu.

18th December 2023
9.42 a.m.

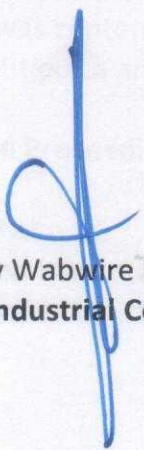
Representations:

- 1. The Claimant
- 2. The Respondent is absent.

Court Clerk: Mr. Samuel Mukiza

The Claimant: Matter is for award. We are ready to receive it.

Court: Award delivered in open Court.


Anthony Wabwire Musana,
Judge, Industrial Court