THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 20 of 2023

ARISING FROM NJERU NO.16 of 2023..

KYABONA WILLIAM ..... CLAIMANT

VERSUS

MODERN LAMINATS LTD ..... RESPONDENT

BEFORE:

THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MS. JULIAN NYACHWO

2.MR. PATRICK KATENDE

3. MR. BWIRE JOHN ABRAHAM

AWARD

BRIEF FACTS

The Claimant was employed by the Respondent Company from February 2022 to July 2023 when he was terminated. By the time of his termination, he was earning Ugx, 650,000/ per month. He claims he was terminated without notice and without being subjected to disciplinary proceedings and he was not paid for the month of June 2023 and 10 days of July 2023. He also contends that the Respondent kept remitting non-uniform contributions to his NSSF Account and he was not granted any annual leave. He also claims that he was not paid severance allowance, therefore his termination was unlawful. The Respondents on the other hand contend that he was lawfully terminated for misconduct, for which he was invited for a hearing and he failed to show up. Therefore Court should find that his termination was lawful.

Issues for determination

1. **Whether the Claimant was unfairly terminated from employment.**
2. **Whether the Claimant is entitled to the relief sought.**
3. **What remedies are available to the parties.**

RESOLUTION FOR THE ISSUES

1. Whether the Claimant was unfairly terminated from employment?

It was submitted for the Claimant that, he was an employee of the Respondent for 16 months having served from February 2022 until 10/07/2023, when he was unfairly terminated. According to Counsel for the Claimant, on 11/07/2023, the Claimant was terminated without notice or a hearing because the Respondent's security guards blocked him from entering the premises of the Respondent Company.

Citing Section 58(1) and **Uganda Local Association vs Kibira Vincent &4 others, Industrial Court LDA No. 26 of 2016 at page 7,** counsel stated that an

employer must give notice before terminating the services of an employee and the Claimant having worked for the Respondent for 16 months, in the instant case, was entitled to 1 months' notice or payment in lieu of the said Notice, but this was never given to him. He contested the notices purportedly issued to the Claimant on 3/07/2023 and 7/07/2023 because it was only 2 days' notice for the hearing contrary to the statutory requirements, and a one Wako Ronald the Assistant Human Resources Manager who purportedly signed the said notice was not called as a witness.

According to him RW1, Samuel Mukaya, only relied on hearsay evidence, therefore he was incompetent as a witness in that regard, especially given that he did not prove his appointment as Human Resource Manager of the Respondent Company and this was because the names which appeared on his National ID differed from those on his witness statement. Whereas the National Identity Card stated his name as Samuel Mii Mukaya the two names on the filed witness Statement were Samuel Mukaya and he did not adduce any evidence to explain the difference, therefore court should treat his evidence as being incompetent and unreliable.

He argued that a right to a fair hearing is a none-derogable right under Article 44(c) of the 1995 Constitution of the Republic of Uganda which cannot be dispensed with what ever the circumstances may be. Therefore, having not given notice to the claimant and having not accorded him a hearing, the Respondent violated section 66 of the Employment Act which rendered his termination unfair.

In reply citing section 2 which defines termination, section 69 on what amounts to summary termination and section 68(1) which requires an employer to prove the reason for dismissal, Counsel for the Respondent submitted that, the Claimant was lawfully dismissed in accordance with section 69(3) for committing verifiable misconduct, of stealing or losing Company property. This

is because on 30/05/2023, he was entrusted to deliver a consignment of paper weighing 4991 KGM and he delivered only 4380 KGM instead.

It was further his submission that, before terminating the Claimant the respondent complied with the legal requirements under section 66 of the Employment Act and as espoused in **Ebiju James vs UMEME Ltd.** He argued that Rex5 and REX 6 were evidence that the Claimant was served with notices for a hearing and his signature on the notices was proof that the did receive the notices. According to him, the claimant adamantly refused to show up for the hearing and when the keys were taken from him he refused to go to the Human Resources office and when he realised that the keys would not be returned to him he absconded from work rather than face the Human Resources Manager, to answer for his actions, because he knew he was guilty.

It was his submission that unfortunately the law is silent on instances where an employee has been served with notices of a hearing and he or she adamantly refuses to appear in the hope of using it as an excuse that he was not accorded a fair hearing and therefore as a basis of claiming unfair dismissal.

He prayed that Court finds that the claimant was served with the requisite notices for a hearing but on his own volition he refused to show up for the said hearings therefore he is estopped from claiming he was denied a fair hearing.

He also refuted the assertion that RW1 was incompetent and unreliable because his employment was never in contention and the fact that the Respondent presented him as a witness was sufficient proof that he was her employee. In any case counsel for the Claimant did not adduce any evidence to the contrary save for the variation in names, which he argued should not be an issue to be determined in a labour claim. He insisted that the claimant was summarily terminated because he committed verifiable misconduct.

DECISION OF COURT

1. Whether the Claimant was unfairly terminated from employment

The supreme Court in **Hilda Musinguzi vs Stanbic Bank (U) Ltd SCCA No.5 /2016,** settled the question regarding the employer's right to terminate an employee he or she no longer wants, to the effect that such a right could not be fettered by the courts so long as the employer follows the correct procedure of the law. This Court is of the legal proposition that sections 58, 65,66,68 and 70(6) of the Employment Act (read together), provide for the substantive and procedural fairness, and are the correct procedure to be followed by an employer before he or she can exercise the right to dismiss or terminate an employee, they are still good law. *In **Akeny Robert vs Uganda Communications Commission LDC No. 023/2015,*** this court cited **Prof G ilbert Baliseka Bukenya vs Attorney General Constitutional Petition No. 30 of 2011,** on the application of the literal rule of statutory interpretation stated that similarly, ***"... the interpretation of provisions of a Statute concerned with the same subject should be construed as a whole..."*** In the recent case of **Iga Bonny vs southern Range** ....this court emphasized that, "*Sections 58,65,66,68 69and 70(6) which are concerned with the same subject of termination or dismissal from employment should be construed as a whole. Whereas Section 58 provides for notice before dismissal or termination, 65 defines termination, Section 66 provides that the procedures to be followed before terminating or dismissing an employee irrespective of any other provision in that part, that is it provides for procedural justice, section 68 requires proof of the reason, which is providing for substantive justice and 69 circumstances under which summary termination is justified and 70(6) places the burden of justifying the dismissal on the employer.*"

The Claimant's contention as we understood it was that he was terminated from his employment without a reason and without being accorded a hearing, therefore the termination was unfair.

After carefully analyzing the evidence that was filed on the record and the one adduced in court in the instant case, we established that it was not in dispute that the Claimant was employed by the Respondent as its driver and that he was responsible for delivering various consignments of paper to various destinations. It was also not in dispute that on 10/07/2023, he reported to work, and he signed the attendance register/book and waited to be given keys to the vehicle he was assigned as was the usual practice in vain. It was his testimony that on that day, he was not given the vehicle keys as was the practice and he later learned from one of his colleagues, that his name was crossed out of the attendance register for that day. It was further his testimony that he sought audience with the Human Resources Manager(HRM) to find out why he was not given work on that day, in vain. When he returned the following day on 11/07/2023, the askari told him that he was not allowed to enter the Company premises. The askari then called the Human Resource Manager who informed him that he was ordered to dismiss him, because on a certain day, he delivered less products than he had been assigned. However, the Human Resource Manager did not specify the date on which he was alleged to have delivered less items than he had been assigned. He was warned not to return to the premises or else he would be arrested.

RW1 Samuel Mukaya the Human Resources Manager testified that, the Claimant was terminated around September and before his termination his Assistant a one Wako Ronald served him with notices for a disciplinary hearing on 3/7/2023, but he did not show up and subsequently with another notice on 7/7/2023 and still the claimant did not show up. When asked whether the Claimant received the said notices, he was not able to confirm that the claimant received the notices because he was not sure whether the signature appearing on the notices at page 5 and 6 of the Respondent's trial bundle belonged to the Claimant. It was also his testimony that the Claimant signed on copies which

the Respondent retained, but he did not adduce them in court. RW1 seemed unsure about what transpired regarding the service of the notices because he did not personally serve them on the Claimant and his Assistant Wako Ronald, who is said to have served them, was not called as a witness.

According to the impugned notices, the Claimant is alleged to have lost/stolen part of a consignment of wastepaper meant to be delivered to Print and Curton Uganda Ltd, on 29/05/2023, but the notice for the theft hearing was purportedly issued to him on 3/7/2023 for a hearing on 5/7/2023. We found it peculiar that having not attended the hearing as alleged, the Claimant was allowed to continue working until 10/7/2023, when he was denied access to the vehicle keys. It was also not believable that the Claimant could not be apprehended yet he reported to work every day until 10/7/2023, when he was denied access to the keys of the vehicle and yet according to the report at page 14 of the Respondent's trial bundle it was also alleged that some of the notices were served onto him personally.

We further found it strange that a theft which is alleged to have occurred in May 2023 was only reported to Police in August 2023! RW1 testified in chief under paragraph 14 of his witness statement that, the Company reported the offence of theft to the police. During cross-examination he stated thus;*"... The case was reported to Police and its now Police's work...*when asked when the case was reported he stated that *"... Around the month of August... yes we made the statement, and I was told summons were given to Kyabona to appear before Police. The case has not yet started and we haven't got response from Police.*

Section 66 of the Employment Act which provides for procedural justice, provides as follows:

"66. Notification and hearing before termination

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

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

(3) The employer shall give the employee and the person, if any, chosen under subsection (1) a reasonable time within which to prepare the representations referred to subsection (2).

(4) Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks' net pay...

This section makes it mandatory for an employer to give an employee a reason before reaching a decision to terminate or dismiss him or her and an opportunity for the employee to respond to the reasons in writing or orally, accompanied by a person of his or her choice. We found it hard to believe RW1 when he testified that the Claimant received the notices for hearing because he did not adduce any evidence to show that the Claimant actually received these notices because he did not adduce the copies on which the Claimant is alleged to have signed acknowledging receipt. It is his role as Human Resources Manager to

keep safe custody of all document relating to and pertaining to all the staff of the Respondent Company and as the Respondent's key witness he was expected to adduce the necessary evidence to prove the Respondent's case and in particular, to prove that the Respondent initiated disciplinary proceedings against the Claimant, in compliance with section 66(supra) and the Claimant failed and or refused to avail himself for the said proceedings, but respectfully he failed to do so.

The evidence on the record as already discussed seems to suggest that the notices were not served and were only an afterthought. We are fortified by the fact that had the offence of theft which is very serious actually occurred on 29/05/2023, it would have been reported to the Police immediately and any disciplinary proceedings would have been commenced against the suspects at the time and not after almost 2 months in July 2023.

Section 68 of the Employment Act requires an employer to prove the allegations leveled against an employee he or she wishes to terminate or dismiss and the allegations must exist at the time of termination. In the circumstances the alleged theft should have been investigated at the time it occurred and he should have been subjected to disciplinary proceedings at the time it occurred and not two months later. As already discussed, no evidence was adduced to indicate that the allegations leveled against the Claimant were investigated and verified at the time they were alleged to exist because notice for a hearing was only purported to have been issued in July 2023, almost 2 months later and the matter was only reported to the Police, more than 2 months later in August 2023. We believe that when drafting section 68(2) of the employment Act which requires the employer to prove that the reason for dismissal exits at the time of the dismissal, the legislature was alive to the fact that a long wait between the date of discovery of the commission of the offence and the decision to take disciplinary action could give inference that the employment relationship

has not been rendered intolerable to warrant any disciplinary penalties being imposed, as was done in the instant case. In addition, no minutes were adduced on the record as proof that a hearing took place even in the absence of the Claimant or what evidence was relied on by the committee to decide to dismiss him. The Report of the final internal hearing at page 14 of the Respondent's trial bundle is instructive on this. The report provides:

"...REPORT

Date:9/8/2023

FINAL INTERNAL HEARING

Many notices have been served to Mr. Kyabona William concerning theft hearing and abscondment of work.

There is no single notice that Mr. Kyabona William Responded to, yet some of them were given to him personally.

A letter dated 2/8/2023 from Njeru Municipal Council Labour office, was received on 7/8/2023 inviting us to go for mediation. This wasn't possible since we are still waiting Mr. Kyabona William for his appearance before the committee.

Therefore, the committee concluded that it has been proved that Mr. kyabona William absconded from duty and also failed to present himself before the committee for a fair hearing to give clarification about the lost company property even after issuing him several notices opportunities to present himself.

In conclusion, we are suggesting that let the management give Mr. Kyabona last chance to present himself before the committee in one weeks' time.

Yours truly,

Manager, human Resources."(sic)

The report is not addressed to any person in particular and no evidence was adduced to indicate that the Claimant was aware that he was formally charged with any infraction and he had an opportunity to exculpate himself.

We are not convinced that the Claimant received any of the alleged notices, and especially those that were purportedly issued after the 11/07/2023 when he was told not to return to the Company premises or else he would be arrested. Nothing in the final hearing report(supra) indicates that the allegations leveled against the claimant were verified and he was found culpable.

We found it absurd that, the Respondent did not take advantage of the Labour officer's invitation for mediation, to demonstrate that it followed the correct procedure to subject the claimant to disciplinary procedures, but the Claimant had refused to avail himself for the same. Instead, the final internal report stated that the Respondent's disciplinary Committee could not appear before the labour officer because it was still waiting for him to appear before them.

With due respect, we do not associate ourselves with the submission of counsel for the Respondent that it followed due process before terminating the claimant, because the evidence as already discussed demonstrates that, the Respondent did not give the Claimant a justifiable reason/allegation for withholding the vehicle keys from him and for stopping him from reporting to work nor did it not prove that the reason/allegation actually existed at the time he was stopped from reporting to work, and the reason/allegation was verified, and linked to him before he was terminated, therefore, therefore the Respondent violated the requirements under Sections 66 and 68 of the Employment Act, which provide for procedural and substantive justice therefore rendering the termination substantively and procedurally unlawful. This issue is therefore determined in the affirmative.

2.Whether the Claimant is entitled to the relief sought?

Having established that the claimant was unlawfully terminated, he is entitled to some remedies. According to the memorandum of claim, the claimant prayed for the following:

1. A declaration that he was unlawfully and unfairly terminated from employment. We have already established that his termination was substantively and procedurally unlawful. It is thus declared.
2. **Payment in Lieu of Notice**

Section 58 of the Employment Act is to the effect that an employer must give notice to employee before terminating or dismissing him or her. Section 58(3) provides for the notice periods as follows:

> *"(3) The notice required to be given by an employer or employee under this section shall be-*
> *(a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;*
> *(b) not less than one month, where the employee has been employed for a period of more than twelve months, but less than five years;*
> *(c) not less than two months, where the employee has been employed for period of five, but less than ten years; and*
> *(d) not less than three months where the service is ten years or more".*

The evidence on the record clearly demonstrates that the claimant was dismissed without notice. By the time of his dismissal, he had served the Respondent for 16 months, therefore he was entitled to 1 months' notice or 1 month's salary in lieu of notice. He was earning Ugx. 650,000/- per month and this was not controverted by the Respondent. Therefore the Respondent is therefor ordered to pay **Ugx. 650,000/-.**

3. **An order for payment of his withheld salary for the month of June and 10 days of July.**

Section 41 of the Employment Act entitles an employee to wages for work done. We have already established that the claimant continued to render his services to the Respondent after the alleged discovery of the theft on 29/05/2023 until 10/7/2023 when he was denied the keys to his vehicle and there is no evidence on the record to indicate that he was paid for this period. In the circumstances, the Respondent is ordered to pay the Claimant 1 month and 10 days salary amounting to **Ugx. 866, 667/-**

4. **Payment of non-remitted NSSF contribution.**

Counsel submitted that according to the Claimants NSSF statement marked CAX03, dated 13/09/2023, the Respondent remitted unequal monthly contributions. We had an opportunity to peruse this statement and indeed established that the contributions were unequal for various months. According to section 12 of the NSSF Act, the employee is supposed to contribute 5% and the employer 10% which in the instant case amounts to 32,500 by the Claimant and 65,000 by the Respondent totaling to **Ugx. 97,500/-** per month. Like we already stated the contributions were unequal for various months. This court in **Aijukye Stanley vs Barclays (U) Ltd LDC No. 243 of 2014,** held that an employee's NSSF contributions are personal property which one has a right to claim. Therefore, where it is established that an employer has failed and or refused to remit such contributions or where it is not remitted in full the Employer is obligated to remit the same to the fund. We have already established that the Respondent remitted unequal contributions in different months.

In the circumstances, the Respondent is ordered to remit to the fund the unremitted contribution as calculated by Counsel for the claimant amounting to

Ugx. 359,180/- with a penalty of 10%, applying, in accordance with section 14 of the NSSF Act.

5. Payment of compensation under section77 and 78 of the Employment Act.

We do not agree with the argument by Counsel for the Claimant that the Claimant should be awarded compensatory damages under Section 78 because the provision is intended for awards rendered by Labour officers. The Industrial Court has powers of a high court; therefore it has powers and discretion to award damages, the quantum of which is dependent on the merits of each case. In the circumstances this claim is denied.

6. General damages of Ugx. 50,000,000/-

It is a settled position of the law that the only remedy available to an employee who was unlawfully dismissed in addition to the remedies provided for under the Employment Act is damages and he or she must do everything reasonably possible to mitigate the loss. In **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** by Chief Justice Katureebe, Emeritus, on the award of General Damages when he stated that:

> *"... Having found that the appellant was wrongfully terminated, the Court should have proceeded to make an award of general damages which are always in the discretion of the court to determine. ...*
>
> *In my view, that adequate compensation would have been a payment in lieu of notice, a measure of general damages for wrongful dismissal (emphasis ours)...".*

Damages are awarded at the discretion of Court and are intended to return an aggrieved party to the position he or she was in before the injury caused by the Respondent. Having established that the Claimant worked for the Respondent

for 16 months with a clean track record and he was performing very well until he was redesignated. He is entitled to an award of general damages for unlawful dismissal. We think **Ugx. 5,000,000/-** is sufficient as general damages.

7. Severance allowance

Section 87(a) of the Employment Act entitles an employee who has been in an employer's continuous service for a period of 6 months and is unlawfully dismissed to severance pay. Section 89 of the same Act provides that; severance allowance should be negotiable between the employer and employee. In **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017,** the Court of Appeal upheld this Court's decision in **Donna Kamuli vs DFCU Bank LDC No. 002 of 2015,** to the effect that where there was no agreed calculation of severance between the employer and the employee, the employee would be entitled to 1 months' salary for every year served.

Having already established that the Claimant served the Respondent for 16 months and he was earning Ugx. 650,000/- per month. He is entitled to an award of severance of 1.5 months amounting to **Ugx. 975,000/-.**

8. Untaken leave

In **Muyomba George vs Pan African Carriers (U) Ltd LDR No. 052 of 2020,** this Court was of the considered opinion that although Section 54 of the Employment Act entitles and employee to rest days, they cannot not be taken at the whims of the employee. Section 54(1) (a) provides that the period when leave shall be taken must be agreed between the parties. Therefore, for an employee to succeed in a claim for untaken leave he or she must prove that he or she applied to take leave during a particular period, and it was it was denied. The claimant in the instant case did not adduce any evidence to indicated that he

applied for leave during his employment and it was denied. Therefore, his claim for Ugx. 606,648/-, has no basis, it is therefore denied.

9. Issuance of a certificate of service

Section 61 of the Employment Act provides that, if so requested the employer shall issue an employee whose contract was terminated a certificate of service. Although there was nothing on the record to indicate that the Claimant requested for and was not granted the certificate of service, there is no reason it should not be granted to him. In the circumstances, the Respondent is ordered to issue the Claimant with a certificate of service.

10. Interest

Interest of 12% per annum shall accrue on all the pecuniary awards above, from the date of this award until payment in full.

11.Costs

No Order as to costs is made.

Delivered and signed by:

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

PANELISTS

1. MS. JULIAN NYACHWO

2. MR. PATRICK KATENDE

3. MR. BWIRE JOHN ABRAHAM

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DATE: 14/12/2023