THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE NO. 12 OF 2017

ARISING FROM LD. NO.082 of 2016

OKULONYO JULIUS .....CLAIMANT

VERSUS

KAMPALA SERENA HOTEL ..... RESPONDENT

BEFORE:

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

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI

2.MR. EBYAU FIDEL

3.MR.FX MUBUUKE

AWARD

FACTS

On 1/06/2006, the Clamant was employed by the Respondent, as an Electronic Technician under an open-ended contract. According to him, he faithfully executed his role and on several occasions he was awarded appreciation letters for his handwork and commitment. His contract was however terminated without him being

accorded a fair hearing and he claims he was coerced to sign for less benefits than he was entitled to. He contends that the Respondent's actions were unlawful and or unfair therefore, he was entitled to an award of damages.

The Respondent refuted his allegations and contended that he was lawfully terminated for committing acts of insubordination.

ISSUES

1. **Whether the termination of the Claimant's employment was unlawful and/ or unfair?**

2. **Whether the Claimant is entitled to the remedies sought?**

RESOLUTIONS

Counsel for the Respondent raised a preliminary objection to the effect that, the Respondent has no legal personality at law and therefore it cannot be sued. It was his submission that, there is a wealth of jurisprudence in support of the position that a suit cannot be filed against a non-entity and a non-entity cannot be subjected to Court orders or costs, therefore, the instant suit is a nullity because it is a suit against nobody. she relied on **V.G Keshwala & Sons V M.M Sheikh Dawood CS No 43 of 2010** in support of this assertion. Further relying on **Megha Industries (U) Ltd v Conform Uganda Limited HCMA 21/2014,** he submitted that, it is trite law that Court does not issue orders in vain and in **Sempebwa & Anor V Ndibalekera Misc Application No.176 of 2019,** the learned Judge stated that:

> *" ... the principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders by the court through the set judicial*

process, in the normal functioning of courts are not complied with in full by those targeted and /or called upon to give due to compliance..... "

According to her, the Respondent lacks capacity to enforce/implement any Court orders because it has no legal presence at law, therefore, to issue any orders against it would be for this to act in vain. she prayed that, this preliminary objection is upheld and the suit against the Respondent is dismissed with costs.

In reply Counsel for the Claimant contested the Preliminary Objection, on grounds that apart from stating that the Respondent would raise it, she fell short of actually raising it and belatedly did so in her submissions. Citing **Yaya Farajallah vs Oburi Ronald & 3 Others CA No. 0081 of 2018**, Counsel contended that it was the position of the law that even if Preliminary points of law could be raised at any time, given that they were meant to enable the resolution of a matter before litigation commenced, they ought to be set out in a defendant's written statement of defense. He also relied on **Gyavira Mutabyoba vs Four ways Group of Companies LDC No.21 of 2016,** in which this court interpreted the definition of employer under section 2, to mean any institution whether registered or not as long as the employee worked for the same institution or organisation under a contract of employment and in **Nyinakizza Loy Rhina vs Elgon Terrace Hotel Ltd & Protea Hotel Kampala and Protea Hotel Kampala(U) Ltd Misc Apppn. No.146 of 2018,** where Court held that, Order 30 rule 10 of the Civil Procedure Rules(CPR) , expressly permits a Claimant to sue a Defendant in a Business name which name is not the Defendants name. He further contended that the issue of the non-legal entity did not arise at any point during the hearing nor was any evidence led in this regard and yet Counsel for the Respondent always had instructions to represent the Respondent Serena Hotel Kamapala from the beginning and she even stated so during cross examination of the Claimant.Therefore, the only interpretation of this impasse should be that the

Respondent was operating the business of an "undisclosed employer" and was merely trying to avoid liability, therefore the objection should be overruled.

RESOLUTION OF PRELIMINARY OBJECTION

We found it prudent to resolve the Preliminary objection before considering the Respondent's submissions in reply and address it as follows:

Indeed, there is a wealth of jurisprudence on the issue, regarding legal standing of parties especially when suits are commenced against organizations or business entities. This is because such organisations have multiple layers of insulating personalities, corporate and individual to avoid regulatory burdens. The Employment Act 2006 in its definition of employer and employee, did not distinguish the corporate nature of such insulations when addressing Labour and employment rights, which are protected under Article 40 of the Constitution of Uganda 1995 (as Amended).

The Employment Act 2006 defines an "employee" under section 2 as "*...any person who has entered into a contract of service or an apprenticeship contract, including and without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Police Service, a local authority or parastatal organization but excludes a member of the Uganda people's forces...* and "employer" is defined as; "*....any person or group of persons including a company or corporation, a public, regional or local authority, a governing body of an un incorporated association, a partnership, or parastatal organization or other institution or organization whatsoever for whom an employee works or last worked, or normally worked or sought to work, under a contract of service, and includes the heirs, successor, assignees and, transferors of any person or group of person for whom an employee work, has worked or normally works"*

According to Du Pless and Fouche in their book **A Practical Guide to labor Law(2006)** which this Court cited with approval, in **Gyavira Mutabyoba vs Four ways Group of Companies LDC No.21 of 2016,** thus:

> *"A contract of employment is a reciprocal contract in terms of which an employee places his services at the disposal of another person or organization, as employer, at a determined or determinable renumeration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee's services."*

Given these definitions and the expansive definition of "employer" under section 2 of the Employment Act in particular, we are of the considered opinion that the Employment Act, is intended to enable an employee to apportion liability to any of the decision makers or persons clothed with authority in an organisation or business enterprises notwithstanding any insulations around the organisation or business entity. This is because the law does not explicitly provide that, the doctrine of corporate separateness is not inviolable as long as there exists an employment relationship between the employee and the organisation or business entity. We are further persuaded by the holding in the Kenyan case of **Laban Awando Kanyo vs susan Larsen t/a Utamaduni Craft Center Industrial cause number 259/2012,** cited in **the Digest on Industrial Court Case law by Goerge Ogembo 2014, law Africa**, in which Court stated that: "*The doctrine of legal separateness is of limited utility in employment and Labour relations, where employers frequently devise multi-layered legal and business entities, all with the objective of avoiding regulatory burdens such as labour standards and taxation.*

Employer- legal forms may not necessarily coincide with the employer-business forms. There is a frequent mismatch between the enterprise's control structure and the legal structure through which the enterprise is sought to be regulated. The

Business form of the enterprise reflects that market strategy taken by it. The form adopted aims at the most effective accommodation between the enterprise and the regulatory requirements to which it is subject..." And **Daniel Mutisya Masesi vs Romy Madan and another Industrial cause number 691 (N) of 2009**, where the court was of the same opinion but went further to state that;

> "*... The law aims to assist the lesser of the parties in the bargaining equation, by making it possible for a weaker- party to proceed and apportion liability to any of the decision-making component in the economic enterprise.*"

Considering the expansive definition of "employer" under section 2 of the Employment Act, 2006(supra) and the 2 Kenyan cases(supra), It is our considered opinion that, when addressing employment wrongs, this Court must look at the whole economic enterprise and not the legal or business reincarnations behind the enterprise, for as long as the Employee worked for the same enterprise under a contract of service.

In the circumstances, the claim that Respondent's lack of legal standing as argued by Counsel Kusiima argued, is not sufficient to bar it from being sued. An analysis of the Claimant's contract however indicates that he was engaged by TPS... and deployed to work at the Respondent. Although the wording of the contract seemed to indicate that the TPS was independent of the Respondent, all the letters of TPS bore the logo of the Respondent Serena Hotels which suggests that the two were associates and clearly after his deployment at the Respondent, the Respondent's management took over the role of assigning him duties, appreciating him and disciplining him, all roles of an employer. We therefore have no doubt in our minds that although he was recruited by TPS, he was an employee of the Respondent who in addition to supervising him, and paid for his services, also undertook the role of disciplining him, otherwise she would have referred him back to TPS for supervision

and disciplinary action. We are convinced that the Respondent was the Claimant's employer, therefore she was correctly sued. The Preliminary Objection is therefore overruled.

RESOLUTION OF ISSUES

Issue 1: Whether the Respondent's termination of the Claimant's employment was unlawful and/ or unfair?

It was submitted for the Claimant that, despite serving the Respondent for about 10 years, he was terminated without being accorded a hearing as provided under the law. According to him, the Respondent did not give him a formal notice for disciplinary hearing, and he was not accorded an opportunity to cross examine his accuser or to call any witnesses of his own and he was not allowed to come with legal representation. Counsel further contended that the Claimant was not given a copy of the allegations that were leveled against him, which was contrary to disciplinary procedures laid down under the Respondent's Employee handbook, at page 18 of the Claimant's trial bundle and the principles of a fair hearing that are laid down in ***Ebinju James vs UMEME Ltd Civil Suit n0.0133 of 2012,*** Article 42 of the Constitution of Uganda and Section 66 section of the Employment Act, which are to the effect that, where an employer contemplates the termination or dismissal of an employee on grounds of misconduct or poor performance, the employer is obliged to explain to the employee the reason for the dismissal and to allow the employee to explain him or herself. He insisted that the employer must institute a disciplinary hearing at which the charges are explained to the employee who is given sufficient time to respond to them before the dismissal or termination is made. He further submitted that, even if section **69 of the Employment Act**, entitles an employer to dismiss the employee summarily without any notice where it is found that the

employee has fundamentally breached his/her obligations under the contract of employment, but the employer in this case is still required to accord the said employee, a hearing as stipulated in **Section 66(4)** of the same Act. He relied on **Ochwo John vs Appliance World Limited Labour Dispute Reference No.327 of 2015 and Uganda Breweries Limited vs Kigula Robert Civil Appeal No.0183 of 2016,** for the same legal proposition.

Counsel contested the Respondent's assertion that, the Claimant having been given notice of the infractions that were the subject of the disciplinary hearing, the particulars of the incident/allegations were well within his knowledge. He argued that, whereas this Court is not bound to apply rules of evidence as stringently as provided under the Evidence Act, the uncontroverted evidence on the record clearly shows that, the Respondent had no reason justifiable enough to deny the Claimant his right to a fair hearing before the termination of his employment. According to him RW1 Jude Tumwine, the Human Resource Manager, testified that, the Claimant was not asked to call any witness because it was not necessary and he was also not availed a copy of the complaint nor was he given formal notice or any invitation for a disciplinary hearing, because he was verbally informed. He relied on **Tumusiime Richard and 5 others Vs Mukwano Personal Care Products, LDR No. 022 of 2014,** for the proposition that, even if the Claimant's actions impacted the Respondent in terms of losses, the procedural requirements had to be complied with before terminating him or her. He further contested the unsigned minutes on which RW1 relied on to claim that, a fair hearing was conducted and insisted that the Minutes were an afterthought because, in **AAHAKACEM PLC vs Mubashshurun Inv. Ltd (2018) 77 NSCQR 109**, and **G. S. & D. Ind. Ltd v. NAFDAC (2012) 5 NWLR (Pt.1294) 511 at 538 para H** it was held that, unsigned documents are worthless pieces of paper with no evidential value in law. He contended that, the

minutes had glaring inconsistencies especially with regard to the signatures, and RWI Jude Tumwine admitted that, it was his signature which was inscribed on the upper left-hand side of the minutes marked Annexture 8 under the comment "Dismiss for Gross insubordination, at page 10 of the Claimants Trial Bundle and the words overleaf at the bottom left, that,: *"...Meeting held on 11" April 2016... verdict..."*, were in was his handwriting. Counsel further contended that the purported minutes were inscribed onto the complaint in handwriting, therefore they were an afterthought and were not a correct reflection of what transpired during the "sham" disciplinary hearing. He prayed that Court disregards the purported minutes. He also contested the Appeal process on grounds that, fresh investigations were not carried out and there were no minutes of the appeal session to show that the requirement to re-evaluate the evidence of the lower disciplinary meeting was undertaken. He contended that, in the absence of any minutes there was no proof of what transpired during the appeal process, or that the Claimant agreed to be fired as alleged. Therefore, Court should find that, the Respondent violated the law thus rendering the Claimant's dismissal unlawful.

In reply Counsel Kusiima for the Respondent submitted that, the Claimant committed disciplinary infractions for which he was subjected to a disciplinary hearing, which followed due process. It was her submission that the Claimant was afforded an opportunity to defend himself, thereafter a decision was made to dismiss him from the services of the Respondent. She stated that the Claimant made it clear that he was unable / unwilling to continue working with his supervisor and he was more interested in receiving his terminal dues. According to Counsel the wording of section 66 of the employment Act did not suggest that the notice had to be made in writing , therefore, verbal notice was sufficient. According to her, the requirement for notice must be *"reviewed against the operations of the business of the employer to determine what type of notice was appropriate without derogating from the*

intention of the legislators which was that the employee should not be surprised of learning about the loss of his/her job but rather should be aware that it is a likely outcome of his/her acts." It was her submission that, RW2 Jude Tumwine testified that, the Claimant recorded a statement on 11/04/2016, in response to the allegations against him and he later appeared before an impartial committee where he admitted that he received a call from the Technical Services Manager whom he told him to *"Be Serious"*. It was further her submission that, the Claimant's presence at the hearing on 11/04/2016, was confirmation that he was aware of the reason for which he was appearing before the Committee and that he was afforded an opportunity to defend himself. She insisted that, the Claimant was aware that his was a case of Gross subordination, and his statement at pages 1-3 of the Respondent's trial bundle was evidence that, he was aware that the matter had been adjourned to the "next day." She argued that the matter had to be expedited and handled efficiently in order to maintain efficiency with the systems and service delivery in a hotel business and that was the reason the complaint was escalated to a one Mr. Chemisto the General Manager who upon listening to both parties adjourned it to the next day. She contended that there was prejudice suffered by the Claimant merely because he did not cross examine anyone and that, **Ochwo John V Appliance World Limited, Labour Dispute Reference No 327/2015,** was not applicable in as far as it emphasizes that, the Claimant did not Cross examine his accuser, call any witnesses of his own, have legal representation and a copy of the complaint statement or allegation that were leveled against him. According to her this is because, this court has held severally that, the standard of a disciplinary hearing is not to be held to the standard of Court. She also relied on the Kenyan case of **Johnstone Jadhan othino Okumu V Pwani Oil Products Limited Industrial cause No 155 of 2013; {2013} LLR 281, ICK Radido J on 8 November, 2013**, in which it was held with the reference to Section 41 of the Employment Act, 2007 which is similar to Section 66

of the Employment Act, 2006 that, *even though the above section requires an employer to comply with certain dictates of natural justice before termination of employment of an employee, the same should not amount to an employer holding a sort of mini court hearing..*" and on **DFCU Bank v Donna Kamuli Civil Appeal No 121 of 2016**, for the same legal proposition. She argued that to hold otherwise would be to transform a simple disciplinary process presided over by lay men into a court room with a prosecutor/defender and a judge. Therefore, to fault the Respondent for the absence of a lawyer at an internal disciplinary process would be to occasion a grave miscarriage of justice. She insisted that, that it was not in dispute that, the incident which formed the subject of the disciplinary hearing which occurred on 10/04/2016, was handled and concluded by the 11/04/2016, thus rendering it unnecessary for a copy of the complaint to be provided to the claimant. Therefore, this could not be the basis upon which the entire process should be faulted. In any case the minutes did not indicate that, he objected to attending the hearing without a lawyer, or that he raised any interest in calling witnesses and or having a copy of the statement or that he requested to cross examine his supervisor, the Technical Services Manager. She argued that, the absence of these reservations was clear demonstration that, they were a belated attempt to fault an otherwise straight forward case of sanctioning an errant employee in response to fundamental breach by way of gross insubordination. She insisted that, the Claimant would have raised these issues on appeal if indeed he believed them to be true or to the MD in Kenya. She also contested the grounds of appeal which Claimant lodged on 14/04/2016, because they were unsubstantiated allegations against the Respondent. She also contested the allegations that, the matter was not investigated in accordance with the Employees handbook guidelines and that the Claimant was denied notice, the right to cross examine and call witnesses, or have legal representation or a copy of the complaint.

She further contended that, whereas the Claimant points to the disciplinary hearing and dismissal having been communicated within 48 hours as evidence of lack of a fair hearing, the Employment Act, does not provide a timeframe within which an employee should be notified of a hearing and or when the hearing should take place. According to her this Court has never issued any such timelines because each case has to be decided on its merits. She insisted that a hotel business being a 24/7 business, there was no need to delay an incident which could be investigated and concluded in an expeditious manner was the case. He further stated that, the investigations were conducted by both the Claimant and the supervisor recording, statements. Although she cited the reasoning of Lord Bridge in *Lloyd v McMahon*, he did not cite the case, in which this reasoning was made therefore court disregarded the same.

She further insisted that Section 68 of the Employment Act, provides that, what is key is that, the reasons for dismissal were genuinely believed to exist and were the cause for the dismissal and the employer need only be satisfied on the balance of probability. According to her, the instant case was one of gross insubordination, and the Claimant's recorded statement, the minutes of the hearing and the dismissal letter make a clear reference to it and the Appeal response also shows the insolent behavior of the Claimant. She also submitted that according to RW2's testimony, this was a repeat offence, following a warning letter that had been issued to him on 16/03/2016, in which he was put on notice for being discourteous and particularly for refusing to pick calls. According to Counsel, the warning also indicated that in the event of further acts of misconduct, the Claimant would be subjected to more severe disciplinary measures. Therefore, the dismissal was lawful and any shortcomings (if any) in the disciplinary process leading up to termination do not

take away the fact that the reason for termination remains valid, thereby making the termination lawful and fair.

She further refuted the allegation that there was bias, because no evidence was adduced to prove so. It was her submission that, the Claimant himself admitted that he mentioned the words which were the subject of the disciplinary offence of insubordination and the mere fact that ,Mr. Chemisto the General Manager and Jude Tumwine, RW2, sat in the hearing and the Claimant did not call witnesses did not mean there was bias on the part of the Respondent. In any case, the other staff who witnessed the Claimant's failure to apologize /exhibit any remorsefulness were within the context of the disciplinary hearing and the Appeal hearing and this did not in any way support bias as is being alleged. She relied on **GM Combined Ltd v AK Detergents (U) Ltd Susreme Court Civil Appeal No. 19 0 1998** in which Justice Oder expounded on the issue of bias as follows:

> *"There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may would think it likely or probable that the court will not inquire whether he did in fact favor one side unfairly. Suffice is that reasonable people might think he did."*

She also refuted the assertion that, the minutes were forged because they are not signed off and were an afterthought. According to her the Claimant's reliance on **ASHAKACEM PLC V Mubashsurun Inv Ltd (2018) 77 NSCQR 109,** for the position that, an unsigned document is a worthless piece of paper was misleading and it was distinguishable because in that case reference was being made to unsigned pleadings, which was not the case in the instant matter. Counsel insisted that the Claimant did not adduce any evidence to prove this allegation and there was no legal provision in the law or HR Policy or in the Claimant's contract that made it

mandatory for the minutes of a disciplinary hearing of a private entity such as the Respondent to be signed off for them to be authentic. She argued that, the absence of signatures on the minutes did not render the minutes unauthentic and in any case 2 members of the 4 persons committee testified that the hearing took place. She insisted that, it is settled that a disciplinary hearing is not expected to be a mini court, therefore the absence of signatures on minutes where there is no statutory or contractual provision that mandates this, does not make unsigned minutes unauthentic.

It was further her submission that, the Claimant did not point this court to the provisions in the HR Policy which require investigations to be carried out prior to the entertaining of an appeal or that the absence of minutes of the appeal was proof that the purported response he made during the appeal were falsehoods. She prayed for Court to disregard the submissions by the Claimant because he failed to prove these allegations as is required by section 103 of the Evidence Act.

DECISION OF COURT

It is a settled principle of law that, an employer's right to terminate an employee cannot be fettered by courts of law, so long as the employer follows the correct procedure for termination, before exercising the right to terminate or dismiss. In ***Hilda Musinguzi Vs Stanbic Bank (U) Ltd SCCA 05/2016, Justice Mangutsya JSC****, as he then was, held that.*

"....the right of the employer to terminate a contract cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employee's contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation..."(emphasis ours)

Section 66 of the Employment Act 2006, makes it mandatory for the employer to give his or her employee a reason or reasons for termination or dismissal and an

opportunity for the employee to respond to the reason or reasons before, the termination or dismissal occurs. Therefore, before an employer can terminate or dismiss an employee, he or she must follow the correct procedure for termination or dismissal as laid down under **Section 58, 65, 66, 68, 69 and 70 (6) of the Employment Act.** The sections require an employer to follow the principles of natural justice which were well laid down by Lady Justice Elizabeth Musoke as she then was, in **Ebiju vs Umeme(CSNo.133 of 2012[2015]UGHCCD15**, that,

On the right to be heard, it is now trite that the defendant would have complied if the following was done:

1) *Notice of allegations against the plaintiff was served on him and a sufficient time allowed for the plaintiff to prepare a defence.*

2) *The notice should set out clearly what the allegations against the plaintiff and his rights at the oral hearing were. Such rights would include the right to respond to the allegations against him orally and/or in writing, the right to be accompanied at the hearing, and the right to cross-examine the defendant's witnesses or call witnesses of his own.*

3) *The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant.*

After carefully analyzing the evidence on the record, we established that the Technical Manager a one Patrick Kigozi, the Claimant's supervisor made a written complaint to the Respondent's Human Resources Manager about the Claimant. He alleged that the Claimant was discourteous, rude, and particularly that he refused to pick his calls, and that this was not the first time he had misconducted himself. As a result, he sent him home and escalated the matter.

The Claimant's case as we understood it is that he was not accorded a fair hearing because the complaint against him was not shared with him. In addition, he was not given an opportunity to cross examine any witnesses. The Respondent's on the other hand insisted that he was aware of the infractions leveled against him, because he responded to the allegations in a written statement, and he was appraised of the same on the 10/04/2016 and he was given a hearing on the 11/04/2016 . However, the only evidence adduced to support the Respondent's assertion that the Claimant was heard were unsigned minutes dated 11/04/2016. This court has pronounced itself on the reliance on unsigned minutes and stated that an organisation cannot base its decision to dismiss an employee on unapproved and unsigned minutes. In **Kapio Simon vs Centenary Bank LDC No.003 of 2015,** this court stated thus:

> *"...In our view approval meant signing the minutes as a true record and formal adoption by Management. The Respondent did not adduce any other evidence to show that, there was any other mechanism, that the Management used to approve the Disciplinary findings or to verify the allegations against the claimant..."*

The instant case is on all fours with Kapio(supra). Even if it is a settled matter that a disciplinary hearing cannot be held to the standard of a court hearing, the disciplinary as already discussed, the hearing must conform to the principles of natural justice and the only evidence that the disciplinary process was carried out in accordance with the principles of natural justice, is an authentic record of the proceedings of the process, in form of minutes of the disciplinary hearing. This position was confirmed by the Court of Appeal in **Uganda Breweries Limited vs Robert Kigula and others CA no 0183 of 2016,** whose holding is to the effect that, the alleged misconduct must be verifiable, there must be proof of its existence, and it must be more than just mere allegation. In essence, there must be both substantive and procedural fairness in the

process, as provided under Section 66 of the Employment Act 2006 which provides for the minimum procedural fairness requirements before an employee can be dismissed or terminated from employment.

We respectfully do not associate ourselves with the argument by Counsel for the Respondent that, it was not necessary for a private entity such as the Respondent to produce authentic minutes, which as discussed before, are proof that the procedural minimum under Section 66 was complied with. In any case, section 68 of the same Act makes it mandatory for the employer to prove the reason for dismissal. In the circumstances, the unsigned minutes relied on by the Respondent cannot be considered as an authentic record of the hearing.

Be that as it may, when we analyzed the Respondents' evidence we established that, save for restating the allegations as relayed by the Claimant's Supervisor, none of them adduced any evidence to substantiate the allegations leveled against him. We found that apart from the warning letter that was issued to the Claimant prior to the incident that led to his termination, the witnesses fell short of demonstrating that the Claimant committed the said infractions and that he was subjected to disciplinary procedures as provided under the Employment Act or under the Respondent's disciplinary procedures as laid down under Section C of its Employee handbook. The handbook in summary provides that where an employee has committed a gross misconduct, he or she may be suspended with or without pay by the Hotel Human Resource Manager, for not more than 14 days within which investigations will be carried out. It also provides for the reporting of all suspensions to the General Manager, and for affected the employee to be notified about the findings of the investigations within a period of 14 days, both in person and in writing. It also lays down the procedure for carrying out investigations, including the requirement for the accused employee to submit a written explanation, for on spot written and signed

statements of witnesses if any, which should be submitted to Human Resources, followed by a recommendation for appropriate disciplinary action, which could result in a warning, termination, or dismissal. Therefore, even if the law does not prescribe the time within which a disciplinary process must be conducted, section 66(3) of the Employment Act provides that :

The employer shall give the employee and the person, if any chosen reasonable time within which to prepare the representations referred to in subsection(2)" We are persuaded by the holding in the Kenyan case of **Makau Mbondo vs Crown Industries Limited Industrial cause number 669 of 2012[2012]LLR 242(ICK)** cited in the Digest on Industrial Court case Law by Gearge Ogembo, where Ndolo J, stated that: *"...the litmus test is whether the employee facing disciplinary action has been given adequate opportunity to respond to the charges leveled against him before action is taken. This becomes even more critical when loss of employment is in view.*

A guillotine type procedure where the employee is taken through some form of whirlwind at the end of which he finds himself jobless will not suffice..."

In the instant case, Mr. Jude Tumwine who held the role of Human Resources Manager, did not adduce any evidence to indicate that the disciplinary committee followed the procedure as laid down in the Respondent's Employee handbook or that the allegations against the Claimant were investigated and verified. It was his testimony that the Claimant committed gross insubordination. He said that; *".. yes I got the report on 10/04/2016, had a meeting on 11th and he was dismissed on 12th... yes he was dismissed on 11/04/2016 with effect from 12t... once all the facts were clear can dismiss him immediately and in this case he was dismissed on 11.* which insubordination is defined by Black's law dictionary as *"... A willful disregard of an employer's instructions esp. behavior that gives the employer cause to terminate a*

worker's employment.... An act of disobedience to proper authority esp. refusal to obey an order that a superior officer is authorized to give...".

In our considered opinion, the Respondent fell short of demonstrating with credible evidence that the Claimant was guilty of the offence of insubordination. We are fortified by the wording of the dismissal letter which reads in part as follows:

> *"... Reference is made to your actions on 10th April, 2016 where you are alleged to have shouted at your HOD- Mr. Patrick Kigozi. It's also noted that your tone and attitude towards the manager was not only abusive but also violent. You have also taken the manager's follow-up on work issues to be personal by showing a very bad attitude to both work and HOD which is unacceptable and constitute gross misconduct.*
>
> *It is also said that on several occasions you have been refusing to pick the HOD's calls whenever there is work to accomplished for example when you were called on the above date, you refused to pick calls but was able to answer calls from another staff(Musoke). Please note that, your behaviour is against company interests and affects guests experience since on the stated dates there were buldbs to be replaced at the pearl of Africa Restaurant terrace that needed your attention. Futher still, when your Manager found you in office seated and tried to ask you why you were not picking calls from him but others, you blasted /shouted at him saying that he should be "serious" with things. You repeated this threat during a meeting with deputy General Manager , HR, Manager and Technical Services Manager. Please note that the company does not accept such attitudes and language/threats towards managers and even fellow staff.*

Through a disciplinary meeting held with you, Mr. Jude Tumwine – The Human Resources Manager, Mr. Patrick Kigozi – Technical Services and Mr. Edwin Chemisto- Deputy General manager, today 11th April 2016, you sounded very unapologetic and determined to prove a point against the Manager which proves you guilty of gross insubordination.

Please note that this is a clear case of flouting orders, disobedience and high level of misbehavior which cannot be tolerated by Management...".

The wording of this letter seems to suggest that, by the time of the dismissal, the allegations leveled against the Claimant had not been substantiated. This is because the letter not only states that Claimant was abusive but he was also violent. Violence is defined by Blacks laws dictionary as: *"...the use of physical force accompanied by fury, vehemence or outrage especially physical force unlawfully exercised with the intent to harm. Some courts have held that violence in Labour disputes is not limited to physical contact or injury but may include picketing conducted with misleading signs, false statements erroneous publicity and veiled threats by words and acts."* Save for the allegation that the Claimant told his supervisor to be "serious," there was nothing to demonstrate any outrage, fury or vehemence for this behaviour to construed as threatening. We were not convinced that, merely stating that the Claimant was "sounding unapologetic", was sufficient for the Respondent to impute guilt on the part of the Claimant, without credibly demonstrating that he made abusive statements and or he was violent.

We reiterate that, an Employer must explicitly state the reasons for dismissal or termination of an employee and he or she must explain the reasons to the employee in a language the employee understands. The employer is also expected to demonstrate with credible evidence that the reason or reasons for dismissal or termination existed at the time of the dismissal or termination. Even if the

allegations against the Claimant in the instant case amounted to acts of gross misconduct, in the absence of any evidence to demonstrate that he committed the said allegations, we found no basis upon which to fault him or to find that his actions warranted a dismissal. We are also not satisfied that the Respondent accorded him a fair hearing, as provided under section 66 of the Employment, the Respondent's Employee Handbook and as elucidated in **Ebiju and Hilda Musinguzi(supra),** thus rendering the dismissal also procedurally flawed.

In conclusion, having not explained the reason for his dismissal to him and having not granted him an opportunity to defend himself and in the absence of evidence to demonstrate that he was guilty of the infractions leveled against him, it was our finding that the Claimant's dismissal was substantively and procedurally flawed therefore it was unlawful.

Issue 2: Whether the Claimant is entitled to the remedies sought.

Having established that the Claimant was wrongfully and unlawfully dismissed he is entitled to some remedies. He claimed he was entitled to all the remedies prayed for under Paragraph 6 of his Memorandum of Claim. He relied on **Uganda Breweries Limited vs Kigula Robert**, in which the court of Appeal held that:

"..Where, a person is wrongfully dismissed from employment by his employer, the Court may, after making a finding to that effect proceed to award adequate compensation. This compensation shall consist of; a) compensation in lieu of notice; and b) an assessment of the damages, whether general or aggravated, as are deserving in the circumstances..."

He prayed for the following:

a)**Payment in Lieu of Notice.**

It was submitted for him that, whereas he was entitled to 3 months' notice or payment of 3 months' pay in lieu thereof, the computation of his final dues at page 12 of the Respondent's trial bundle indicates that he was not paid in lieu of notice. Having earned a basic pay of **Ugx.748,465**/-at the time of his dismissal, he was entitled to payment of 3 months' salary in lieu of notice, amounting to ***UGX. 2,245,395/-.*** Section 58 of the Employment Act, entitles an employee to notice before termination *as follows:*

> *a) A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-*
>
> *(a) where the contract of employment is terminated summarily in accordance with section 69; or (b) where the reason for termination, is attainment of retirement age.*
>
> *(2) The notice referred to in this section shall be in writing and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.*
>
> *(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.*

We had an opportunity to review the computation referred to by Counsel and established that, indeed, the respondent did not pay him in lieu of notice. It is not in dispute that the Claimant worked for the Claimant for about 9 years and 10 months, therefore, his entitlement fell under section 58(3)(c), which provides for 2 months' notice or 2 months' payment in lieu of notice. In the circumstances we award him 2 month's in lieu of notice amounting to **Ugx. 1,496,930/=.**

b)Salary allowance /Arrears

According to Counsel for the Claimant, the Claimant was entitled to payment for 11 days worked in the Month of April 2016 as computed by the Respondent at page 12 of her trial bundle, amounting to **Ugx.274, 437/-**. We have no reason to deny it. It is hereby awarded.

c)Public holiday allowances

The Claimant prayed for the leave days not taken and was not paid during his employment with the Respondent. According to Counsel, the computation by the Respondent at Page 12 of her trial bundle, indicates that he worked for 24 public holidays (off days) without pay, amounting to **Ugx. 598,772/-**. We have no reason not to award it, it is hereby awarded.

d)**Severance Allowance**.

We established that the Claimant did not plead this claim and as guided by the Supreme Court of Appeal in **Ms. Fang Min vs Belex Tours and Travel Limited SCCA No. 6 of 2013 consolidated with Civil Appeal No. 1 of 2014, Crane Bank Limited vs Belex Tours and Travel Limited,** which is to the effect that a party cannot be granted relief which it has not pleaded or claimed, having not claimed this

relief of severance pay, in his memorandum of Claim we found no basis to grant this claim. It is therefore denied.

e)**General Damages.**

Citing **Ebiju James vs UMEME Ltd CS No.0133 of 2012** in which court noted that *".... Courts where appropriate, in exercise of their discretion, may award damages which reflect courts disapproval of a wrongful dismissal of an employee. The sum that may be awarded under this principle is not confined to an amount equivalent to the employees' wages..."* Counsel submitted that, the Claimant having been unfairly terminated by the Respondent who had dedicated close to 10 years of his service to, with three appreciation letters issued to him during the course of his employment, and was unlawfully deprived of the right to work which was the means of sustaining his own livelihood and that of his family and given that as a result he also suffered psychological distress especially when he was denied his terminal benefits, this kind of injustice should be penalized with damages.

It is a settled position of the law that general damages are presumed to be the direct natural or probable consequence of the act complained of by a complainant as having been occasioned by the Respondent. They 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.

It is not in dispute that the Claimant was employed by the Respondent for close to 9 years and save for a warning letter about his late coming issued to him in 2016, he was always commended for his diligence at work. We have already established that his dismissal was unlawful. Therefore he is entitled to an award of damages. At the time of the dismissal, he was earning Ugx.748,465/- per month. We think that an award of **Ugx.28,000,000/-** is sufficient as general Damages.

f) Repatriation Allowance

Counsel for the Claimant cited Section 39 in support of the argument that he was entitled to payment of repatriation allowance. Section 39 provides as follows:

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

(a) on the expiry of the period of service stipulated in the contract.

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

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

(d) on the termination of the contract by order of the labour officer, Industrial Court or any other court.

(1) Where the family of the employee has been brought to the place of employment by the employer, the family shall be repatriated at the expense of the employer, in the event of the employee's repatriation or death.

(2) Where an employee has been in employment for at least ten years he or she shall be repatriated at the expense of the employer, irrespective of his or her place of recruitment. [Emphasis added]

(3) A labour officer may, notwithstanding anything in this section, exempt an employer from the obligation to repatriate in circumstances where the labour offer is satisfied that it is just and equitable to do so, having regard to any agreement between the parties or in the case of the summary dismissal of an employee for serious misconduct.

Although It was argued that the Claimant had worked for at 10 years, we established that by the time of his dismissal he had worked for 9 years and 10 months' therefore his claim under Subsection (3) of section 39(supra), cannot succeed. He also did not adduce any other evidence to indicate that his recruitment took place in Kaberamaido, and he was subsequently deployed in Kampala, to entitle him to repatriation as provided under this section. In the circumstances the claim for repatriation fails, it is denied.

g) **Interest at 40% per annum from the date of dismissal till payment in full.**

It was submitted for the Claimant that **Section 26(2) of the Civil Procedure Act** provides inter alia that, court may order interest at such a rate as it deems reasonable to be paid on the principal sum from the date of filing the suit to the date of the decree in addition to any interest on such principal sum for any period prior to the institution of the suit, therefore he Claimant's prayer for the interest on the general damages at the commercial rates of 40% per annum from the date of dismissal until payment in full is fair and sufficient to insulate the Claimant.

Indeed, Courts are dressed with discretion to make an award of interest where it is warranted. We believe that the Claimant in this case is entitled to an award of interest at a rate of 12% per annum on all the pecuniary awards made already from the date of filing the claim in the Industrial Court in 2017 until payment in full.

h) Costs

It was the submission of Counsel for the Respondent that since some of the reliefs sought were already made available to the Claimant even before he took court action, he should be award ½ the costs taking into consideration that the claim filed before

the Court was in some respects unnecessary. We have no reason therefore not award the Claimant half the costs. The Claimant is hereby awarded half the costs.

In conclusion this claim succeeds in the above terms.

Delivered and signed by :

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

.....

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI .....

2.MR. EBYAU FIDEL .....

3.MR.FX MUBUUKE .....

DATE; 27/09/2023