



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 172 OF 2020
(Arising from Labour Dispute No. KCCA/NAK/LC/123/2020)

NAMBUYA SARAH:.....CLAIMANT

VERSUS

BAJABAR MILLERS LTD:.....RESPONDENT

Before.

Anthony Wabwire Musana J.

Panelists: Hon. Adrine Namara, Hon. Susan Nabirye & Hon. Michael Matovu.

Representation:

1. Mr. Madut Manfred of Lavoix Advocates for the Claimant.
2. Mr. Yesse Mugenyi of Mugenyi & Co Advocates for the Respondent.

Case Summary

Employment Law- Unfair and unlawful termination- Procedural and Substantive fairness: The Court distinguished between termination and dismissal, emphasising the procedural requirements for each. The Court found that the Claimant's termination was for economic reasons (low business), which was a valid reason but was not procedurally followed according to the Employment Act. The Respondent's attempt to justify the termination on grounds of absenteeism was found to be inconsistent and unsupported by evidence. The Court unequivocally ruled in favour of the Claimant, declaring that she was unlawfully terminated. The Court awarded leave pay, severance allowance and general damages. The judgment highlights the importance of following procedural requirements in employment terminations and the distinctions between termination and dismissal under the Employment Act Cap. 226.

AWARD

Introduction

- [1] On the 1st of May 2007, the Respondent employed the Claimant as a weighbridge officer under a fixed-term contract at a monthly salary of UGX 220,000/=. Her salary grew to UGX 695,384/=. On the 10th of June 2020, the Claimant's employment contract was terminated immediately. The Respondent indicated that the reason for termination was low business. The Respondent offered to pay the Claimant three months' salary in lieu of notice. Aggrieved,

the Claimant complained to the labour officer at the Directorate of Gender, Community Services and Production General Manager at Nakawa. Efforts to resolve the matter were futile, and the Labour Officer referred the matter to this Court on the 2nd of October 2020

The Claimant's case

- [2] In her claim before this Court, the Claimant sought a declaration for unfair termination, UGX 695,384/= as annual leave pay, Severance pay for more than ten years of service, compensation for unfair termination and any other remedy the Court deems fit. She contended that the Respondent did not prove her termination's reason for low business.

The Respondent's case

- [3] In its defence, the Respondent contended that it was entitled to terminate by giving one month's notice, which was duly given; therefore, the termination was lawful. The Respondent further argued that the Claimant was a habitual absentee, and at the time of her termination, she had not reported to work for over ninety days. She had absconded. The claim for leave pay was denied. In the alternative, the Respondent contended that the claimant was not entitled to severance allowance because she absconded for more than three days. She was fully paid, has no arrears, and only refused to pick up her termination dues.

The Rejoinder

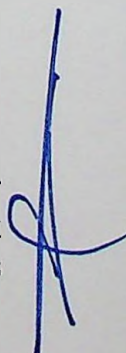
- [4] In rejoinder, the Claimant pleaded that the reply was filed out of time; she was never paid three months' notice or salary in lieu thereof, did not breach her employment contract and did not recover any warnings. She countered that absconding was not the reason for her termination. She contended that she always took leave in May of every year. When she returned to work in June 2020 after the partial lifting of the COVID-19 lockdown, she was terminated with immediate effect, which was not equitable and against natural justice. She repeated her claim for severance pay, arrears, and leave pay.

The proceedings and evidence.

- [5] The parties filed a joint scheduling memorandum(**the JSM**), and on 18th October 2022, the following issues were framed for determination:

- (i) *Whether the Claimant was unfairly or unlawfully terminated?*
- (ii) *Whether the Claimant is entitled to any remedies?*

The Claimant's evidence

- [6] The Claimant's witness statement, made on the 6th day of October 2021, was adopted as her evidence in chief. She testified that she started working as a receptionist for the Respondent in September 2006 and was transferred to the weighbridge in May 2007. Her salary was
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increased from UGX 220,000 to UGX 550,000/= per month. She told us that she had never been subjected to disciplinary action. She said that in May 2020, the Respondent's Human Resource Officer told her that the Respondent would not pay salaries for employees who did not turn up for work. She says that she informed the Human Resources Officer of the difficulties in transport following the COVID-19 Lockdowns and her health condition. She told us that she was paid for March and April 2020 but did not receive her May and June 2020 salaries. She told us that when she reported to work in June 2020, after the partial lifting of the lockdown, the Respondent's Human Resource Manager, Mr. Zain Muhammad, advised her to remain at home pending renovation of the office she used to occupy. When she returned to work after two days, she was handed a termination letter and paid UGX 1,650,000/= on the 10th of July 2020. She was told the termination was due to low business imposed by COVID-19 Lockdown. She said that given her good disciplinary record, her termination had caused her psychological and emotional suffering.

- [7] Under cross-examination, she said she knew that the Respondent was a food manufacturing unit unaffected by the lockdown and continued to operate during the COVID-19 lockdowns. She testified that the President of Uganda had, on 20th March 2020, declared a complete lockdown for fourteen days and that the lockdown on food industries was lifted after one month. She told us she did not return to work, and her phones were always switched on. She told us that she was aware of the clause in her contract on termination for abscondment. She also told us that she did not write to the Respondent to explain her absence and denied absconding from work. She confirmed receipt of one month's salary payment in lieu of notice and two months salary for May and June 2020.
- [8] In re-examination, she confirmed the reason for termination as low business and that she was the front office manager at the time of termination.

The Respondent's evidence

- [9] Mr. Zain Mohammed, the Respondent's Human Resource Manager, testified that the Claimant had been issued a warning letter previously. At the time of her termination, she had no accumulated leave days. He said the lockdowns did not affect the Respondent, a food manufacturing industry that continued operating. He said transport was available to all staff. The staff who elected to stay at the company were provided food and accommodation. He said that since the Claimant was the only weighbridge operator when she refused to come to work, the Respondent chose another person to do this work. He denied telling the Claimant to stay home on 24th May 2021. He said the Claimant had previously been verbally on misconduct and given a warning letter. He also told us that the Claimant was not paid for May and June 2020, when she did not work but was paid for days worked after deducting the leave period. He said the Respondent was unaware of the Claimant's ill health and that she was terminated under the employment contract after absconding from work in March 2020.



- [10] Under cross-examination, he confirmed that the Claimant was serving at the reception at the time of her termination, and she was an essential worker. That there were times when her duties would be changed. He confirmed she was the only weighbridge officer and needed a written document to take leave. He also said that food and accommodation facilities had been extended to the Claimant. He told the Claimant had been subjected to a disciplinary process for misconduct and laziness and given a verbal and written warning. He confirmed absconding and absenteeism as grounds for termination. When he was shown "CEXH2", the termination letter, he confirmed the reason for termination as low business and that this had been explained to the Claimant. He also confirmed that the Claimant had been terminated for low business and abscondment.
- [11] In reexamination, he said that by March 2020, the Claimant had used up all her leave days. He also said the Claimant was a receptionist on temporary terms, and the Respondent tried to take her to the weighbridge during lockdown. The Claimant had not written any letter to explain her absence; he confirmed that the reasons for termination were low business and absenteeism.
- [12] At the closure of the Respondent's case, we invited the parties to address the Court through written submissions.

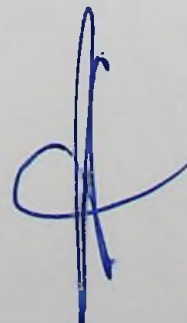
Analysis and Decision of the Court

Issue I Whether the Claimant was unfairly or unlawfully terminated?

Submissions of the Claimant.

- [13] Counsel for the Claimant submitted that the Respondent terminated the Claimant contrary to Sections 58(1),3(d) and 69(2) of the Employment Act, 2006(**from now EA**). It was argued that the Claimant was entitled to three months' notice prior to termination, having served the Respondent for fourteen years.
- [14] It was also argued that the termination was contrary to Section 68(1)EA because the Claimant did not prove the reason for termination. It was also submitted that the termination was unfair because the Respondent did not act with justice and equity under Section 73(1)EA because the Claimant was terminated while the world was grappling with the novel coronavirus. She had suffered financially and mentally and experienced economic hardship and mental distress.

Respondent's submissions



- [15] It was submitted for the Respondent that it had proven that the Claimant was a habitual absentee from work. At the time of her termination, she had been away for more than ninety days without the consent of her superiors and contrary to the employment contract. Counsel distinguished termination and dismissal. Citing Section 69(3)EA, *Eletu v Uganda Airlines Corporation*¹ *Mugisha v Uganda Wildlife Authority*², *Okori v UEB*³, *Bholim v Car and General Ltd*⁴ and *Massa v National Housing Corporation*⁵, it was argued that the Respondent had adduced evidence of verifiable misconduct of abscondment dispensing with the need for notice. It was the Respondent's case that the Claimant had fundamentally breached the employment contract in terms of Section 69(3)EA, and therefore, the Respondent was not required to give any notice under Section 58(1)EA. Thus, the termination was justified.

Rejoinder

- [16] Mr. Madut countered that the Claimant had been terminated for low business and not abscondment. Absenteeism was not the reason for her termination; nothing in writing supported this. CEXH2 showed the reason for termination as low business. As such, the Claimant was unfairly and unlawfully terminated.

Determination

- [17] Under the EA, contracts of employment end in one of two ways: termination or dismissal. In the present case, it is necessary to examine the distinction between the two in brief detail because there is a conflation of issues. On the one hand, the Respondent argues that termination was justified because there was evidence of verifiable misconduct, giving it the right to dismiss. In contrast, the Claimant argues that termination was unlawful for want of notice.
- [18] In *Nabaterega v KCB Bank Uganda Limited*⁶ we observed the interchangeable use of termination and dismissal. We noted that under **Section 2EA**, dismissal from employment means the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct. The meaning ascribed to termination of employment is the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of the contract, attainment of retirement age and the circumstances set out in **Section 64EA**, which include termination by notice, non-renewal of a contract of service and resignation. The distinction is that where verifiable and justifiable misconduct is established, the sanction is dismissal, giving rise to a claim for unfair dismissal. All other forms of severance of the employment contract are categorised as termination. The distinction is important because, in each instance, a specific procedure is laid by statute that reads into procedural and substantive

¹(1984) HCB 40

²[2009] UGHC 139

³[1984] HCB 52

⁴[2004] UGSC 8

⁵[2002] UGHC 62

⁶[2024] UGIC 14

fairness. This means the threshold for a lawful termination is not necessarily the same as for a lawful dismissal.

- [19] In either dismissal or termination, it is trite that the Court cannot fetter an employer's right to terminate the employment contract provided the employer follows procedure (See *Musinguzi Vs Stanbic Bank (U) Ltd*⁷). In the present case, the Claimant's evidence is that following the COVID-19 lockdowns, she was unable to attend work and had some health challenges. She was served a termination letter when she returned to work after the lockdown had been partially lifted. The letter admitted as CEXH2 read that she had been terminated due to low business. In our view, this would be a termination under the provisions of Section 80(1) EA, which provides for termination for economic, technological, structural, or similar nature. In *Okumu & 2 Ors v Shreeji*⁸ we drew from Rule 23 (2) of the Tanzanian Code of Good Practice Rules, 2007 (*the Code*), to give meaning to economic reasons, which we suggested had an affinity to the employer's financial health as a business. The economic reasons relate to the enterprises' financial management. In the present case, therefore, we would find from the letter of termination that the Respondent terminated the Claimant for economic reasons, particularly low business. In *Okumu*, we also cited *Jackson Kabakire Mubangizi v Housing Finance Bank*⁹, where Justice Richard Wejuli Wabwire took judicial notice of the adverse effects of the COVID-19 pandemic and the lockdown on business. In the present case, we would be satisfied that the termination for low business was the reason for termination, and it was, on the strength of the authorities cited above a valid reason.
- [20] The other question would be whether it was procedurally correct. In *Uganda Telecom Limited (In Administration) v Abukhzam*,¹⁰ the Industrial Court held that Section 81EA¹¹ on collective termination applies to a single employee terminated for reasons that relate to reorganising the employer's business. The employee is to be given time of not less than four weeks. In *Okumu*, we emphasised that the employees, labour unions, and labour commissioners must be notified. These are the procedural requirements under Section 80EA. An employee must be given at least four weeks' notice, and the union (if unionised) and Commissioner for Labour must be notified. In the instant case, none of these procedural requirements was met, which renders the termination unlawful, and we so find.
- [21] We note that the Respondent sought to make the case for summary termination or dismissal for absenteeism at the hearing and in its submissions. This argument would be diametrically opposed to the Respondent's argument regarding a lawful termination. This opposition would be brought, perhaps by the legislative accident of the interchangeable use of termination and dismissal in the Employment Act and the conflation of issues raised above.
- [22] However, under Clause 11, bullet point seven of the employment contract, which was admitted as an exhibit, it is provided that the Respondent would be entitled to terminate the

⁷ Supreme Court Civil Appeal No. 05/2016.

⁸ [2023] UGIC 10

⁹ [2021] UGCommC 19

¹⁰ [2021] UGIC 46

¹¹ Now Section 80 EA

contract without notice if the employee has repeatedly absented themselves from duty without cause. As Mr. Mugenyi said, absenteeism would be justifiable grounds for dismissal. However, did the Respondent follow the procedure? In other words, what is expected of an employer seeking to dismiss an employee for absenteeism? In *Mugisa v Equity Bank Ltd*¹², we held that a dismissal must be procedurally, substantively fair, and lawful to justify it. The procedural requirement would be to have a hearing by Section 65EA, which the Respondent did not do and did not provide evidence of such a hearing. The High Court in *Mugisha*, cited by Counsel for the Respondent, found the absence of a hearing to have flouted the rules of natural justice. The authority does not support the Respondent's case in the manner that it sought. We think the Respondent's case and evidence, even if believable, is irreconcilable with our findings of unlawful termination in paragraphs [19] and [20] above. And even if it were to be believed as a plausible account of the dismissal of the Claimant, it would still fall short of the principles of a fair hearing, as there was none. That, too, would be unlawful and unfair.

- [23] There was also no clear evidence that the Respondent made any effort to contact the Claimant and failed to reach him. The reason for termination was clearly stated to be low business and not abscondment, as Mr. Madut rightly pointed out. By attempting to justify a no-fault termination of low business on habitual absenteeism, the Respondent is trying to square a circle, trying to fit procedural defects of failing to abide by Section 80EA and transforming by statutory ingenuity, the termination into a dismissal that is substituting the reason of low business with absenteeism. That was not the legislature's intention in providing for termination as distinct from dismissal. Such an approach would be unfair within the provisions of Section 65EA, which mandates that an employer hold a hearing if the employer is considering a dismissal on grounds of misconduct or poor performance. Employers cannot be permitted to sanitise procedural defects in the no-fault termination by shifting the goalposts into the arena of a dismissal. This Court cannot countenance such an approach.
- [24] Therefore, on a balance of probabilities, we are not satisfied that the Claimant was dismissed. We find and declare that the Claimant was unlawfully terminated for the reasons above. In the circumstances, issue number one would be answered in the affirmative.

Issue II Whether the Claimant is entitled to any remedies?

- [25] Having found that the Claimant was unfairly terminated, she would be entitled to the following remedies sought.

Annual leave pay

- [26] Under Section 53(1)(a)EA, Mr. Madut sought annual leave pay, arguing that the Claimant took leave every year in May. Mr. Mugenyi submitted that the Claimant took leave during the

¹² [2023] UGIC 62

first month of lockdown. This submission was unsupported by any evidence. Leave is a statutory entitlement under Section 53 EA with a statutory minimum of 21 days. In the circumstances of a termination at the half-year mark, we would be inclined to award the Claimant 10.5 days of leave. As she was earning UGX 695,384/= per month at the time of her termination, we award the sum of UGX 347,692/=

Severance Allowance

- [27] The Claimant sought severance allowance under Section 86EA for fourteen years of continuous service. It was common cause that the Claimant joined the Respondent in September 2006 and was terminated on 10th June 2020. This is thirteen years and nine months. In *Donna Kamuli v DFCU Bank Ltd*¹³, the Court held severance pay to be one month's pay for each year of service. In the circumstances of her length of service at a pay of UGX 695,385/=, the Claimant is awarded **UGX 9,271,955/=** as severance pay.

Compensation for unfair termination

- [28] On the authority of *Ben Kimuli v Sanyu FM*¹⁴ Mr. Madut contended for **UGX 40,000,000/=**, arguing that the Claimant was 43 years old with slim prospects of getting new employment. That she is a single mother and sole breadwinner for her daughter, has health complications and is currently unemployed. For these reasons, Counsel sought that quantum of damages. In *Uganda Post Limited v Mukadisi*¹⁵ it was held that General damages are not tied to specific financial losses. General damages are assessed by the court and are not restricted to the salary or pecuniary benefit stipulated in the employment contract. They are awarded to compensate the employee for non-economic harm and distress caused by the wrongful dismissal. These damages include compensation for emotional distress, mental anguish, damage to reputation, and any other non-monetary harm suffered due to the dismissal. It is also trite that general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of per *Stroms v Hutchinson*¹⁶. Further, in *Stanbic Bank (U) Ltd v Constant Okou*¹⁷ Madrama JA (*as he then was*) held that general damages are based on the common law principle of *restitutio in integrum*. In the case before us, the Claimant did not show us any evidence of any job application to demonstrate any mitigation on employment prospects. We were not given actual evidence of her health complications, and she did not testify to being a single parent. These were statements made in her final submissions; therefore, we do not think they would form a firm foundation for an award of compensation or general damages. However, we note the difficulties associated with a post-COVID-19 termination, the attendant psychological and emotional suffering, and the inconvenience caused by loss of employment in the immediate post-lockdown period. We think that a rash termination at that time was grossly unfair. The manner of termination

¹³ [2015] UGIC 10

¹⁴ [2019] UGIC 3

¹⁵ [2023] UGSC 58

¹⁶ [1950] A.C 515

¹⁷ [2023] UGCA 100

did not consider the Claimant's general well-being. Considering all circumstances and the period of her service, we would grant the Claimant the sum of **UGX 8,344,620/=** in general damages.

Payment in lieu of notice.

- [29] Going by the principle in *Mukadisi*, the Claimant would be entitled to payment in lieu of notice. Pursuant to Section 57EA, Mr. Madut sought two months' salary in lieu of notice. Section 57(3)(d) EA provides that an employee is entitled to three months' notice if they have served for ten years or more. In the present case, the Claimant had served for thirteen years, nine months and ten days. Her termination letter also indicated that she would be paid three months in lieu of notice. According to her acknowledgement, she received UGX 1,650,000/= payment of one month's salary in lieu of notice and two months' salary for service. The Respondent argued that she was paid three months' notice pay. According to CEXH7, the National Social Security Fund Statement in July 2020, the Respondent paid the Claimant's NSSF account UGX 358,154/= on a wage basis of UGX 2,387,695/=. If the wage basis were divided by the monthly salary, it represents four months' salary. The last of the Claimant's salary was remitted in April 2020. In the circumstances that she was paid UGX 1,650,000/=, which represents a payment of UGX 550,000/=, we are inclined to grant the Claimant the sum of **UGX 1,390,768/=** as payment in lieu of notice.

Final Orders

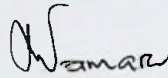
- [30] In the final analysis, we make the following orders
- (i) We declare that the Claimant was unfairly and unlawfully terminated from employment by the Respondent.
 - (ii) We order the Respondent to pay the Claimant the following sums:
 - (a) UGX 347,692/= as leave pay;
 - (b) UGX 9,271,955/= as severance pay;
 - (c) UGX 8,344,620/= in general damages; and
 - (d) UGX 1,390,768/= as payment in lieu of notice.
 - (iii) The sums above shall carry interest at 15% p.a. from the date of this award until payment in full.
 - (iv) As neither party sought any order of costs, there shall be none.

Dated, signed and delivered at Kampala this 6th day of September 2024

Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

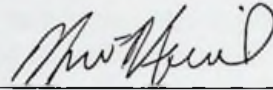
1. Hon. Adrine Namara,



2. Hon. Susan Nabirye &



3. Hon. Michael Matovu.



6th September 2024

9:56 a.m.

Appearances

1. For the Claimant:

Mr. Manfred Madut

2. For the Respondent:

Mr. Yesse Mugenyi

Parties absent

Court Clerk:

Mr. Samuel Mukiza.

Mr. Madut:

Matter is for award, and we are ready to receive it.

Mr. Mugenyi:

That is the position.

Court:

The award of this matter was cause-listed for delivery on the 28th of August 2024, but the parties did not attend court on that day. The award is now delivered in open Court.



10:47 a;m

**Anthony Wabwire Musana,
Judge, Industrial Court**