



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE No. 70 OF 2016
ARISING FROM KCCA/LD/CB/197/2015

NAMUFUMBA PENNINAH CLAIMANT

v

BARCLAYS BANK LTD RESPONDENT

Before:

The Hon. Ag Head Judge, Linda Lillian Tumusiime Mugisha

Panelists

1. Mr. Charles Wacha Angulo
2. Ms. Beatrice Aciro Okeny
3. Ms. Rose Gidongo

Representations

1. Mr. Kisaalu Henry of M/s. Kisaalu Advocates for the Claimant.
2. Mr. Allan Waniala of M/s. S & L Advocates for the Respondent.

AWARD

Background

- [1] The Claimant's claim against the Respondent, is for a declaration that her termination was wrongful, unfair, and unlawful, for general damages for wrongful and unlawful termination, exemplary and aggravated damages and costs of the suit.

Brief Facts

- [2] The Claimant was employed by the Respondent as a collection Officer B1, from 2008, earning a salary of Ugx.1,500,000/- per month. According to her, on 22/07/2015, she was summarily dismissed from employment with immediate effect. She contended that her dismissal was unlawful and illegal because she was not accorded a fair hearing.
- [3] The Respondent on the other hand contended that the Claimant was dismissed for theft of Bank airtime, from Bank phones held by one Enoth Mweitesie and Solome Nagujja both employees of the Respondent. Before her dismissal, she was subjected to a disciplinary hearing in which she admitted to "sharing" airtime from the 2 phones and sending it to telephone number: 0702612706 belonging to a one Hasifa Mpakibi, a former employee of the Respondent. She was informed about her right to Appeal but chose to report the matter to the Labour officer instead. Therefore, her dismissal was justified.

Issues

- 1. Whether the Claimant was accorded a fair hearing?**
- 2. Whether the Claimant was wrongfully dismissed?**
- 3. Whether the Respondent was justified in dismissing the Claimant?**

Submissions

- [4] It was submitted for the Claimant that the Respondent breached the Claimant's right to a fair hearing as enshrined in Articles 42 and 44 (c) of the Constitution of Uganda 1995 (as amended) and Section 66 of the Employment Act that provides for a right to a fair hearing. He also cited *Batwala Augustine v Madhvan Group* Labour Dispute No. 146 of 2019 and *Ebiju James v Umeme(U) Ltd* HCCS No. 0133 of 2012, which are of the same effect.
- [5] According to Counsel, the Minutes of the Disciplinary meeting marked Exhibit CE7 on the record, clearly show that Claimant participated in an investigation that took place in May 2015, in which she made a statement and she continued working with no interference until she was contacted by a one Emaju Peter to discuss issues relating to the loss of airtime. She also

received notification about a meeting scheduled for the following day, 19/06/2015, to discuss the same matter.

- [6] It was further his submission that the Claimant was only served with the notice for a hearing dated 16/06/2015, for a hearing scheduled for 19/06/2015 and she was only made aware that it was a disciplinary hearing, on the same day, therefore she did not get time to prepare her defence, or to get representation or to call the necessary witnesses as provided under Section 66 (1) (2) and (3) of the Employment Act. Counsel insisted that the tenets of a fair hearing were not complied with.
- [7] He further submitted that the Claimant was wrongfully dismissed, because in her testimony in chief, she stated that she only transferred airtime from her team leader's phone and line after seeking verbal permission, and in any case, the forensic expert's report, marked CE5, found that, there was no formal guide on airtime usage that would otherwise justify the alleged misconduct under circumstances. He also stated that, the report also found that it was the practice to share airtime between team leaders and their subordinates. He refuted the evidence of RW1 Emaju because the team leaders did not testify in court, therefore they did not make any rebuttals to the allegations, which rendered the Forensic report inconclusive. In any case, the report at page 6 indicated that no loss was occasioned.
- [8] In response Counsel for the Respondent did not dispute that the Claimant was employed by the Respondent from 2008 until 22/07/2015 when she was dismissed for theft of airtime from her team leader's phone.
According to Counsel Section 69(3) of the Employment Act entitles an employer to summarily dismiss an employee provided it is justified to do so. That is if the employer can demonstrate that the employee has fundamentally broken his or her obligations arising under the contract of service. He relied on *Lubwama Henry v Umeme Ltd* HCCS No.0101 Of 2011, in which Justice Musoke, as she then was, stated that a fundamental breach of the contract of employment is conduct which fundamentally breaks or disregards the essential conditions of the contract, therefore justifying summary dismissal. It was his submission that the Claimant broke the essential conditions of her employment contract when she stole airtime.

- [9] According to him theft regardless of magnitude speaks of the integrity of an individual and the Claimant testified that she was called to the highest level of integrity and her job required her to be honest, and truthful, therefore theft could not be tolerated. He contested her testimony that she "shared" as opposed to taking of airtime because her actions amounted to petty theft. He cited Black's Law Dictionary (8th Edition) at page 1516 which defines petty theft as: "*As theft of a small quantity of cash or of low-value goods services*" He further stated that the Black's Law Dictionary also defines "*...theft as felonious taking and removing of another's personal property with intent of depriving the true owner of it.*" Citing RE 8, the minutes of the disciplinary meeting, and RE3, the forensics report, Counsel contended that, the Claimant admitted that she took airtime worth 30,000 from 2 team leaders whose value was Ugx.10,000/- and Ugx.20,000/- respectively and she also told the disciplinary panel that she initially denied taking airtime until the matter escalated to forensics when she admitted her conduct.
- [10] He further stated that, although she tried to sanitize the theft by referring to it as "sharing", she knew that what she had done was wrong and that is why during the investigation on 18/05/2015, she denied that she took the airtime but conceded that she had taken it on 20/05/2015 and even returned it. In his view had she not intended to deprive the leaders of the airtime, she would not have denied that she had taken it in the first place. He insisted that as a banker, she was aware that there was zero tolerance for theft regardless of whether it was petty or otherwise, therefore her dismissal was justified.
- [11] As to whether she was accorded a fair hearing as provided under section 66 of the Employment Act, he cited *Caroline Gumisirizza v Hima Cement HCCS No.84 of 2015*, and he submitted that it is settled law that a disciplinary process is not held to the standard of a Court trial, and in this case, the Claimant was aware of the charges preferred against her when she appeared for the hearing. He contested the assertion that she was not aware of the allegations against her because she did not state anywhere in her pleadings that she was unprepared or that she did not know the case against her. In any case by the time of the hearing she had already interfaced with the investigators and there were no new charges preferred against her at the hearing. Before the hearing, RW1 called her and notified her about the subject of the meeting and this evidence was not challenged, nor was there any evidence to indicate that she protested the purported inadequate time to prepare her

response. He also refuted the allegation that she was intimidated, because this was not stated anywhere in her pleadings. He cited *Interfriegt Forwarders (U) Ltd v East African Development Bank* SCCA No, 33 of 1992, for the legal proposition that, a party will not benefit from a case not set up by it. Therefore, the Claimant in the instant case should not benefit from such a belated allegation which she had not pleaded and was only intended to ambush the Respondent. He insisted that the Claimant was accorded a fair hearing which she did not deny, and she was informed about the allegations against her prior to the hearing date.

Resolution

We believe that the resolution of issue 2 will resolve issue 1.

2. Whether the Claimant was wrongfully dismissed?

- [13] It is not in dispute that the Claimant was summarily dismissed for gross misconduct. According to the dismissal letter, she admitted to "... *having sent airtime from your team leaders' phones amounting to Ugx.60,000 without permission to 0702612706, a number belonging to a one Hasifa Mpakibi which is tantamount to theft.*"

Section 69 (1) and (3) of the Employment Act provides that:

- 1) *Summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*
- 2) ...
- 3) *An employer is entitled to dismiss summarily, and the dismissal shall be termed justified', where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service."*

- [14] The Claimant contends that her dismissal was wrongful because she was not accorded a fair hearing in accordance with Section 66 of the Employment Act and the Respondent did not prove the reason why she was dismissed. It is trite that before an employer can make a decision to dismiss an employee on grounds of misconduct, the employer must demonstrate by credible evidence that the employee committed the misconduct alleged. Therefore, to resolve this issue Court must answer the question whether the Claimant took airtime from

her team leaders' phones without authorization? And if she did so whether this amounted to gross misconduct warranting summary dismissal.

[15] After carefully evaluating the evidence on the record, we established that the Claimant in her testimony stated that, in her work as a custodian of other people's money, she was required to exercise the highest level of integrity by being honest and truthful. It was also her testimony that the Respondent has zero tolerance for offenses such as theft and if found guilty of such an offense one would be dismissed. It was her evidence that: *"...I took airtime. I initially asked for permission but it was not available at the time. It surfaced later. My team leaders were not at the desk when I transferred airtime... I based on the first request to take the airtime..."* Based on her own evidence we concluded that she did take airtime from her team leaders' phones. Was she authorized to do so? It was her testimony she participated in the investigation which was commissioned against her and she admitted that she : *"..shared airtime with a former bank line in my possession but in the name of Hasifa Mpakibi...yes airtime went to a number which I had contact for me to use... yes I sent the airtime myself, I shared it myself for Bank purposes...yes when it came up I first denied.... Yes, I initially denied having taken the airtime..."*

[16] She referred to taking the airtime as "sharing." According to Black's Law Dictionary 11th edition, on page 1653, "share" is defined as: *"An allotted portion owned by, contributed by, or due to someone, a single portion distributed among several..."* In our understanding, this definition connotes that a person sharing anything must either own it, have contributed to it, or be entitled to it and must have voluntarily distributed it to others.

It was an agreed fact that the Bank did not have a particular procedure for the allotment of airtime but from the evidence on the record it was clear that the airtime was allocated to the team leaders' respective phones.

[17] It was the Claimant's testimony, that in order to access this airtime one had to ask for it. Therefore, one had to be granted permission to access it. It was very clear that she was not entitled to any particular share or amount of airtime as of right but she could seek permission for an allotment of airtime. In the circumstances, she was not at liberty to "share" or apportion herself any airtime moreover from any of the leaders' phones. We are fortified by her testimony when she said, that she initially asked for airtime and it was not available and *"... it*

surfaced later... my team leaders were not on the desk then I transferred the airtime.. I based on the first request to take airtime..." It was it peculiar that when the 2 leaders found out that they had lost airtime she denied transferring the airtime and she only admitted when the matter was escalated to forensics, yet she believed she was only "sharing":

To compound it all, she sent the airtime to a number which was in the possession of a person who was no longer a staff member of the Bank. If indeed the airtime was intended for Bank purposes why send it to a number that was no longer in use by the Bank? Why send it to a 3rd party? By her own testimony the Claimant left no doubt in our minds that she was not being honest and truthful.

- [18] One of the fundamental duties of an employee is the duty to good faith/fidelity, in the interest of the employer. It consists of being loyal and giving faithful service to the employer, to be trustworthy and honest. On 20/05/2015 the Claimant in her statement, admitted that she transferred airtime from her team leader's one Enoth and Solome's numbers without authorization. According to her this was because Enoth was scheduled to take leave and it would be very difficult to call customers abroad. She also stated that she felt guilty about what she had done and she apologized for it. Clearly, by her own admission, she demonstrated that she committed an infraction by transferring airtime from the phones without express permission.
- [19] In *Pearce v Foster* [1886] 17QBD 536, Lopes LJ stated thus:
"if a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in carrying out the service or the business, it is sufficient if it is conduct that is prejudicial or is likely to be prejudicial to the interests or the reputation of the master and the master will be justified, not only if he discovered at the time, but also if he discovers it afterward in dismissing the servant."
- [20] Also in *Laws v London Chronicles* (1959) WLR 698, it was observed that one isolated misconduct was sufficient to justify summary dismissal. The test is: *"Whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."*

During cross-examination, the Claimant said that: "...yes I sent airtime to myself, I shared with myself for bank purposes.. yes when it first came up I denied... When she was referred to RE7, her statement dated 20/05/2015, she admitted that: "...yes I conceded to having transferred airtime from the team leader's phone to Hasifa..yes I initially denied having taken airtime...yes, I was dismissed for transferring airtime.

- [21] Based on this testimony we concluded that, she did transfer airtime from her team leaders' phones without authorization and she was aware that what she had done amounted to misconduct. By her own admission it was clear that she had committed a wrong, and according to this Court's holding in *Kabojja International School v Godfrey Oyesigire Labour Dispute Appeal 003/2015*, which is to the effect that, where an employee admits to the commission of an infraction leveled against him or her, he or she would not be entitled to a hearing or the formalities of such hearings as provided under section 66 (1) and (2) and Section 68 of the Employment Act 2006. This is because of the obvious reason that, the by admitting to committing the infractions leveled against him or her the Employee has dispenses with the requirement for the Employer to prove the commission of the infraction as provided by law.
- [22] Having admitted that she transferred airtime from her team leaders' phones, without authorization, moreover to a third party, a former staff member, the Claimant breached a fundamental term of her contract of employment as a banker who was called to the highest form of honesty and integrity, which entitled the Respondent to summarily dismiss her in accordance with Section 69(3) of the Employment Act. The subsection provides that:
(3) An employer is entitled to dismiss summarily and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he/she has fundamentally broken his or her obligations arising under the contract of service."
- [23] Although section 66(4) would entitle her to a hearing, having admitted to the commission of the infraction, there was no requirement to do so. This notwithstanding, the Human Resources officer called her to discuss issues regarding airtime in her department and although she claims that she was not aware that she was being called for a disciplinary hearing, and that she only received the notice for a hearing dated 16/06/2015 for a hearing on 19/06/2015 and when she appeared for the hearing, she did render any responses. As

already discussed, having admitted that she committed the alleged transfer of airtime from her team leaders' phone without authorization, she was not entitled to a hearing. It is therefore our finding that her dismissal was justified, and it was not wrongful.

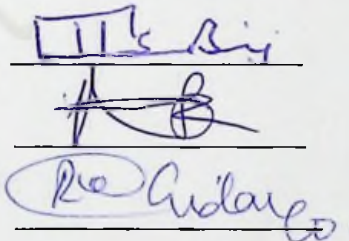
[24] In conclusion, this claim fails. The Claimants dismissal was justified and therefore her dismissal was not wrongful. No order as to costs is made.

Signed in Chambers at Kampala this **18th** day of **August 2023**.

Hon. Justice Linda Lillian Tumusiime Mugisha,
Ag. Head Judge

The Panelists Agree:

1. Hon. Charles Wacha Angulo,
2. Hon. Beatrice Aciro Okeny &
3. Ms. Rose Gidongo.



18th August 2023

9:30 am

Appearances

1. The Claimant: - Ms. Namufumba Penninah.
2. For the Respondent: - Mr. Ferdinand Musimenta holding brief for Allan Waniala.
3. Court Clerk: - Mr. Christopher Lwebuga.

Delivered and signed by:

Hon. Justice Linda Lillian Tumusiime Mugisha,
Ag. Head Judge, Industrial Court