THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0100 OF 2011

1. **ODEKE FRANCIS**
2. **OPOLOT FRANCIS**
3. **ADOWA ROBERT** ..... **APPELLANTS**
4. **EWANGE PETER**
5. **AKOL JOHN**
6. **ODINYA MARTIN**

VERSUS

IBERO (U) LIMITED ..... **RESPONDENT**

(An appeal from a decision of Hon. Mr. Justice Joseph Murangira dated the 11th day of March, 2011 in High Court Civil Suit No. 0073 of 2004)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF THE COURT

This is an appeal arising from the decision of *Joseph Murangira J*, delivered on 11th March, 2011 in which he entered Judgment in favour of the respondent.

Brief background

The appellants were employees of the respondent working as security guards under the terms and conditions in their respective letters of appointment. On 10th December 2003, a bag sewing machine went missing at the respondent's premises, the appellants were asked verbally and later by letters dated 23rd March 2004 and 30th March 2004 to give an explanation on the loss of the machines but they refused to do so. They were accordingly dismissed summarily by the respondent on 1st April 2004. The appellants sued the respondent for unlawful dismissal and breach of contract claiming for both special and general damages and other remedies. The learned trial Judge found in favour of the respondent thereby dismissing the suit.

The appellants being dissatisfied with the decision of the learned trial Judge filed this appeal on the following grounds:-

1. *The learned trial Judge erred in law and fact when he held that the dismissal of the appellants was lawful.*
2. *The learned trial Judge erred in law and fact when he held that the appellants did not prove and were not entitled to over time payment and allowances for extra hours and public holidays worked respectively.*
3. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record given the peculiar circumstances of this case on the balance of probability applicable in civil cases thereby occasioning injustice to the appellants*

Representations

At the hearing of this appeal *Mr. Joseph Going* learned Counsel appeared for the appellants while *Mr. Alex Rezida* learned Counsel appeared for the respondent.

Appellants' case

Mr. Oging Counsel for the appellants submitted that, the learned trial Judge erred in law and fact when he held that dismissal of the appellants was lawful. He contended that the appellants were denied the opportunity to defend themselves against the charges imposed upon them, they were not given a hearing, but were instead served with letters of dismissal on 1st April, 2004 and as such the summary dismissal was unlawful and offended the principles of natural justice of *'audi alteram partem'* (the right of hearing).

Counsel argued that, summary dismissal is justifiable only in circumstances where a duty of the employee to the employer has been gravely breached. He submitted that the appellants did not breach any of the terms of their employment and were not expected to give any explanation or security reports regarding their department. For the above proposition he relied on *Eletu Vs Uganda Airlines Corporation (1984) HCB 40.*

He contended that, the appellants had made respective statements to the police about the disappearance of the machine and were accordingly arrested by the police. He argued that, the respondent had full information about the status quo of the lost sewing bag machine therefore the act of asking each one of them to make independent reports was really uncalled for. He further argued that, the appellants had demanded for arrears from the respondent and this was the main reason why they were summarily dismissed.

Counsel contended that the learned trial Judge heavily relied on the evidence of Dw2 a one Aisu Ignatius who was an employee of the respondent as the Head Security Supervisor. He testified that he personally handed over the letters dated 23rd and 30th March to each of the appellants. He argued that relying on such evidence was extremely dangerous on the part of the Judge, yet there was sufficient evidence

adduced by the appellants which was ignored by the learned trial Judge, thereby arriving at a wrong conclusion.

He asked Court to allow the appeal and grant the remedies sought by the appellants.

Respondent's reply

Mr. Rezida for the respondent submitted that, the learned trial Judge made proper findings, made a good analysis of the law applicable and arrived at the right decision. He contended that there was sufficient evidence to prove that the appellants were asked for an explanation, first orally and later by letter about the missing machine but they failed to comply. Dw2 testified that, he handed over the letters to the appellants requiring them to give explanations and the exhibits of the letters were tendered in to Court during the trial. He further argued that the evidence of Dw2 was never shaken or contradicted in cross examination therefore it was sufficient evidence to be relied on by the learned trial Judge.

Counsel submitted that the appellants' refusal to give explanations as requested by the respondent amounted to disobedience of orders of the master which justified the summary dismissal. He contended that the learned trial Judge was alive to the law regarding summary dismissal and that the conduct of the appellants warranted the same. Further that, the appellants breached their duty as security guards when they failed to safeguard the respondent's property.

Counsel contended that, the appellants were given an opportunity to be heard by the respondent's but they waived the same when they refused to reply to the letters which had been issued to them. Counsel for appellant's submission that asking each of the appellants to make a written response was uncalled is in actually sense a contradiction to his contention that the principles of natural justice were violated, because the opportunity to be heard was availed to the appellants.

Counsel further submitted that, the issue of arrears was never raised by the appellants during their tenure of employment, it only arose after the case was filed, the respondent's office manager testified that she had never received any letter from the appellants claiming for arrears, this is also further corroborated by the evidence of DW2 to the same effect none of the appellants ever claimed about any increment of salary or any allowances. Further that, there was evidence on record which showed that some of the appellants applied for and were granted leave and that there was no way the appellants could have worked for 365 days including the public holidays. Therefore the learned trial Judge's finding that no single term of condition of employment contract was breached by the respondent was well founded.

Resolution

This Court is required under *Rule 30* of the Rules of this Court to re-appraise the evidence of the trial Court and come to its own decision. *Rule 30 (1) (a)* provides as follows:-

> *"Power to reappraise evidence and to take additional evidence.*
>
> *(1) on any appeal from a decision of the High Court acting in its original jurisdiction, the court may-*
>
> *(a) reappraise the evidence and draw inferences of fact"*

In the case of *Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002,* Mulenga JSC in his lead Judgment put this obligation of the first appellate Court in the following words:-

> *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due*

allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows -

> *"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong ... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."*

In *Pandya vs R (1957) EA 336,* the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. See: *Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry vs Uganda, Supreme Court Criminal No. 10 of 1997.*

We shall keep the above principles in mind while resolving the grounds of appeal. We have listened to the submissions of Counsel and carefully perused the Court record. We now proceed with our duty of evaluating the evidence.

In respect of ground 1, the appellants fault the learned trial for finding that their dismissal was lawful. At trial, they contended that their dismissal was unlawful, arbitrary, irregular, wanton and illegal as it contravened the principals of natural justice of *'audi alteram partem'* and amounted to a breach of the contract of employment further that, there was no justification for the summary dismissal.

The term summary dismissal is defined in *Barclays Bank of Uganda Ltd Vs Godfrey Mubiru Supreme Court Civil Appeal No. 1 of 199*, per Kanyeihamba JSC as follows;

> *"...Summary dismissal is without notice and dismissal without notice also implies dismissal without a right to be heard first."*

An employer is entitled to dismiss summarily, and the dismissal is justified, where the employee has fundamentally broken his or her obligations arising under the contract of service.

According to Halsbury's LAWS OF ENGLAND 4th Ed Vol. 16 Par 447; an employer has a common law right to dismiss an employee without reasonable notice on the grounds that the employee's gross misconduct, and such a dismissal is not wrongful. Originally this right was explained as a legal incident of the status of master and servant but, in line with the modern contractual analysis of the employment relationship, is now explained in contractual terms, as the acceptance by the employer of a repudiation of the contract by the employee. Alternatively, gross misconduct justifying summary dismissal may be seen as conduct so undermining the trust and confidence, which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

Furthermore, in *John Eletu vs Uganda Airlines Corporation (1984) HCB 40*, the court found that while a summary dismissal was dismissal without notice, to justify such dismissal at common law, the breach of duty by an employee must be a very serious one. It must be such a breach as amounting in effect to repudiation by the employee of his or her obligations under the contract of employment such as disobedience of lawful orders, misconduct, drunkenness, immorality, assaulting fellow workers, incompetence or neglect.

Section 69 of the Employment Act 2006 provides for summary dismissal. It stipulates as follows:-

> *"(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 contract term.*
>
> *(2) .....*
>
> *(3) An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employer has, by his or her conduct indicated that he or she has fundamentally broken his or her obligations arising under the contract of service."*

It is the appellants' contention that they were wrongfully dismissed, because they were not given the right to a hearing and there was no justifiable ground for summary dismissal. The respondent submitted that, the appellants were employed to provide security, however, a bag sewing machine went missing and when asked to give explanations as to the lost machine the appellants refused to comply therefore the summary dismissal was justified.

The appellants in this case signed contract agreements that provided for summary dismissal for a lawful cause as quoted from their letters of confirmation attached to the plaint and marked annexture 'A'. For termination of employment to be unlawful, emphasis has to be placed on the terms of the agreement between the employer and employee.

In *Bank of Uganda Vs Betty Tinkamanyire, Supreme Court Civil Appeal No.12 of 2007,* Court stated that 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.The Supreme Court re-echoed *Section 69 (3) of the Employment* Act on conditions that justifysummary dismissal.

The learned trial Judge referred to the job descriptions of all the appellants but we shall quote a few that run through for all the appellants for purposes of this appeal. In the job descriptions of the first appellant, Odeke Francis, he was an Assistant Guard/Security supervisor; Opolot Francis was a guard and amongst his duties was *'safe keep all company assets from damage or theft'*. This duty was included in all the job descriptions of the rest of the appellants including Adowa Robert, Akol John, Ewange Peter and Odinya Martin. This in essence means the appellants had amongst their duties to safe guard all company assets from damage or theft.

The case for the respondent at trial was that on 10th December 2003, a bag sewing machine went missing from the respondent's premises at Plot 44/50 7th Street Industrial Area when all the appellants were on duty as evidenced from the clock-in cards of the appellants. As security guards stationed at the office entrance, security office, the intake and one for patrol, they failed to ensure that the company asset was safe at the company premises.

DW2, the head of security, testified on oath that he personally handed over the letters dated 23rd March and 30th March to the appellants. The trial Judge found him a truthful witness and found no reasons to disbelieve him. We would like to recall that this is a first appeal and as such, this Court has a duty to carefully and exhaustively re-evaluate the evidence as a whole and make its own decision on the facts, bearing in mind that it has not had the opportunity to see or hear the witnesses, especially if the demeanor of the witnesses is key to the findings made. Even where the demeanor of witnesses is relevant, this Court may reverse the decision of a trial Judge if it is of the view that considering all the circumstances, the decision made cannot stand. Where the question is one of drawing inferences from the facts adduced, this Court is free to reverse the findings of the trial Judge, if after reviewing the evidence, it is of the view that the findings of the trial Judge were wrong. See: *Rwakashaija Azarious & Others Vs Uganda Revenue Authority, Supreme Court Civil Appeal No. 08 of 2009*

The appellant, in their submissions argued that the bag sewing machine was never stolen and that the trial Judge erred in holding that the appellants were lawfully dismissed whereas, the asset alleged to have been stolen was never stolen. Annexture'B' to the written statement of defence is a letter to one of the appellants, Martin Odinya, to explain the whereabouts of the bag sewing machine. DW2 testified that the appellants personally received a copy of the letter to explain the whereabouts of the bag sewing machine. At this point, the appellants should have raised the issue of the bag sewing machine's presence in the store. The appellants did not produce any evidence to prove this fact at the trial.

The learned trial Judge referred to *Barclays Bank of Uganda Ltd Vs Godfrey Mubiru* (Supra)in which Tsekooko JSC (as he then was) referred to Chitty on Contracts 265th Edition in which it was stated that, "where the employee is guilty of sufficient misconduct in his capacity as an employee, he may be dismissed summarily." The

learned trial Judge also made reference to the letters which summarily dismissed the appellants and stated that the reason for the summary dismissal was '*refusal to give an explanation on the loss of the bag sewing machine belonging to the company*' Ibero (U) Limited (the company).

Considering the above, we find no reason to fault the trial Judge on his finding that the summary dismissal of the appellants being lawful. We hold that the summary dismissal was lawful as they breached their duty to safe guard the respondent's premises leading to loss of the bag sewing machine. Ground 1 as a result fails.

In respect of ground 2, the appellants fault the learned trial Judge for finding that they did not prove and were not entitled to over time payment and allowances for extra hours and public holidays worked respectively.

Theappellants prayed for special damages in the plaint at the trial courtand pleaded accrued and unpaid overtime, public holidaysfor all the appellants on various dates. The appellants gave evidence in support of their respective special damages. Counsel for the appellants at the trial submitted that the public holidays, Saturdays and Sundays on which the appellants were on leave were included in the pleadings in error. Counsel then stated that his was a mistake of counsel that should not be visited on the innocent litigant. The trial Judge rejected this claim and held that each party is bound by its pleadings. The respondents argued that the appellants did not work on the days that were not indicated in the clock in cards.

As stated by the learned trial Judge, the law on special damages is very clear, they must be pleaded and strictly proved by the party claiming them.

From the analysis of the clock in cards as admitted into evidence at the trial court as Exhibit DW1A and DW1B, the 1st appellant did not work on 8th March 2002, women's day, 1st January 2003 and 26th January 2003. The 1st appellant also took leave in 2002 between 20th May 2002 and 7th June 2002. He also did not work on

3rdJune Martyrs' day. The clock in cards as admitted in evidence show that the 1st appellant did not report to work until 10th June 2002. The 1st appellant also claimed for overtime for the time he worked processing coffee from Masaka and Jinja for 27 days amounting to 330,752/=.

The 2nd appellant claims accrued and unpaid overtime for 1,095 hours amounting to 9,569,205/= for having worked on various public holidays and weekends as laid out in the plaint. The clock in cards as admitted into evidence show that the 2nd appellant did not work on a number of days for instance, he did not work on 1st January 2003 (New Year), 1st May 2003 (Labour Day), 1st May 2002, 3rd June and 9th June 2003 among others. He did not clock in on these days but clocked in on other days that he worked. The evidence on record at the trial court shows that the 2nd appellant actually took sick leave from 12th February 2002 to 12th April 2002 as shown on document 2(d) of the respondent's amended list of documents. He also took official leave from 10th October to 30th October 2000.

The 3rd, 4th, 5th and 6th appellants also had similar claims for having worked on several public holidays and weekends and were each responded to by the respondents at the trial court. Regarding overtime, the respondent contended that the appellants' appointment letters which were duly signed by the appellants clearly stated that each of them would be required to work extra hours and it was not stated that they would be paid for the extra hours worked. The clock in cards were never contested by the appellants at the trial and yet they held the evidence of the various days they did not work. The trial Judge rightly held that the appellants were employed as security guards and the nature of their work required them to work at any time and they worked in accordance to the terms spelt out in their letters of employment.

From the evidence on the record, the appellants' work schedule was monitored by the clock in cards that were signed on each day they were present at work. These

clock in cards were admitted into evidence and were never contested by the appellants. The clock in cards of all the appellants showed various days they were absent either on leave or on public holiday. We therefore find that the appellant's claims for entitlements for working on public holidays are unfounded. Each of the appellants signed an employment contract and these contracts are in the list of documents of the respondents on the record. Each contract had a clause on working hours and it is stated that '*you may be required to work extra hours.*' The appellants did read the contents of their respective contacts and there is no stipulation of extra allowances for the extra hours required. We therefore uphold the learned trial Judge's finding in this respect and consequently, this ground also fails.

In respect of ground 3, it is the appellants'contention that the learned trial Judge failed to properly evaluate the evidence on record given the peculiar circumstances of this case on the balance of probability applicable in civil cases thereby occasioning injustice to the appellants.

Having subjected the evidence on record to fresh and exhaustive scrutiny and having resolved the first two grounds in the way we have, ground 3 also fails.

This appeal therefore fails and is hereby dismissed with costs to the respondent.

Dated at **Kampala** this ..16th.... day of ..November 2018.

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Kenneth Kakuru
JUSTICE OF APPEAL

.....

Geoffrey Kiryabwire
JUSTICE OF APPEAL

.....

Christopher Madrama
JUSTICE OF APPEAL

22/11/18