

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO. 007 OF 2011

ATUHURA ARAJAB:

PLAINTIFF

VERSUS

KINYARA SUGAR WORKS LTD:

DEFENDANT

JUDGEMENT

The plaintiff Atuhura Arajab brought this suit against the Defendant Kinyara Sugar Works LTD for declaration that the plaintiff was unlawfully dismissed, recovery of UGX. 15, 635, 780 (fifteen million six hundred thirty five thousand seven hundred eighty shillings only), special damages and general damages for unlawful dismissal.

BRIEF FACTS

The plaintiff was an employee of the defendant from 1995 to 2010 where he exhibited diligence prompting the Defendant to promote him to higher positions. On 10th July 2010, the plaintiff was dismissed from employment by the Defendant for allegedly defrauding the defendant company by loading sand on a truck which taking out bagasse in order to increase its weight..... That during his time of employment the plaintiff contributed to the provident fund which had amassed colossal sums and that he was denied the benefits arising from the contribution to the provident on grounds of illegal and wrongful termination of his employment contract.

The defendant filed a defence and denied the allegations leveled against it by the plaintiff. It contends that the plaintiff was dismissed owing the fact that he participated in the scheme intended to defraud the defendant by loading sand on the truck which was supposed to strictly carry bagasse to the Defendant company. A thorough investigation was carried out and the plaintiff was found liable in the scheme. The defendant prays that the suit be dismissed with costs.

Scheduling Memorandum was orally made in court by both parties in which the following facts were agreed upon.

- a) The plaintiff was employed by the defendant company
- b) That the plaintiff was subsequently dismissed from employment by the defendant.
- c) The defendant operated provident funds.

The following were issues for determination

1. Whether the plaintiff's employment was lawfully and or wrongfully terminated.
2. Whether the plaintiff is entitled to the accrued contribution to the provident fund, if at all.
3. What remedies available.

The plaintiff adduced evidence of one witness to wit himself Atuhura Arajab as PW1. The Defendant also adduced evidence of 4 witnesses to wit Geria Fred DW1, Jude Mubuke DW2, Ravi Ramalingam DW3 and Moses Kabila Dw4. Mr. Mafabi Godfrey of Madibo Mafabi Advocates and Solicitors Represented the plaintiff while Mr. Mausio Andrew of Sebalu, Lule Advocates represented the Defendant. Both counsel filed written submission to argue their case which court put into account in arriving at a decision in this judgement.

It was the plaintiff's case that he was illegally dismissed from employment. On cross examination the plaintiff stated that he was never involved in the transportation of bagasse out of the factory. And that he was not in possession of truck involved in the transportation that it belonged to a one Kyagondeza who hired it from him. That when the incident happened he was on his duty and he was not apprehended by the Saracen security. He states that he was not accorded a fair hearing since he was not called to the disciplinary hearing. He stated that he was called for a disciplinary action but there was no fair hearing. That he was found at a place they prepare tea from and he was called by the factory manager and when went to his office he was only asked if he had a contract with the defendant concerning bagasse. That he did not admit and the factory manager was ordered to write a suspicion letter which he was given with orders that he should leave the factory. That he should go to his place and should not leave his home without the manager's notice and he was being guarded by Saracen only to receive a dismissal letter from home.

That there was no meeting and the procedure for the disciplinary hearing were not complied with. That he appealed because in the dismissal letter he was instructed to appeal to the general manager which I did but he did not respond. That in his appeal he endeavored to explain himself and he physically went to the factory seeking to be heard. That on the day of the incidence there were only 3 people at work and that he does not know how heavy a normal truck weighs since he has never been a trail wheel loader and that someone alleged that he was a trail wheel loader which is in the dismissal letter and in security report.

He stated that he was not employed as in the boiler section that he was employed in the reliability section and a reliability supervisor which is different from the boiler section. That he was not in charge of transportation of bagasse to the dumping site and insisted that he never operated a trail wheel loader.

That he had knowledge of the workers manual especially the disciplinary area and he stated that when an employee is dismissed he or she is entitled to his provident funds that it depends on the disciplinary committee during a fair hearing and in his case there was no fair hearing. He stated that he was never given his provident funds and that is why he is in court. That when he was

dismissed he was not paid anything and it is true that he had a loan with a SACCO in kinyara of which he had partly paid it but did not have the details to confirm the outstanding loan.

During submissions Counsel for the plaintiff referred PEX4 showing the plaintiff was suspended on duty with immediate effect and PEX5 was the dismissal letter dated 27th July 2010. Counsel referred to **Ojangole Patricia and 4 others Vs. Attorney General HCMC 303 of 2013** where it was held *that no person is to be condemned unless that person given prior notice of the allegation made against him*. He also referred to Article 28 of the 1995 constitution of Uganda as amended which provides for a right to be heard. That Basing on PEX4 and PEX5 it clearly shows that the plaintiff was not given a right to be heard. DW3 testified that DEX1 was the investigation report which was not signed. DW4 told court that no formal communication to the plaintiff to appear, no minutes of the disciplinary hearing exist on the plaintiff's file the decision to dismissal was based on the investigation report. PW1 states that he was never summoned for any disciplinary hearing. That the plaintiff was not given a right to be heard, the defendant made the dismissal decision in total disregard of the plaintiff's right to be heard.

Counsel relied on Onyango Oloo vs. Attorney General of Kenya (1986-1989) EA 456. *It was held that denial of the right to be heard renders any decision made null and void*. He further contends that the facts and evidence that the decision to dismiss the plaintiff was unlawful, null and void because the plaintiff was not accorded any hearing.

Further **section 66 of the Employment Act provides to the mandatory right to be heard for any form of dismissal and the employee to be given fair hearing**. Which the Defendant did not give the plaintiff counsel submitted that PEX7 shows the procedure to be used by the Defendant in disciplinary process. Under 7.1(d) Human Resource manual provides for the procedure handling cases before dismissal. DW3 under cross examination testified that there was no formal notification to the plaintiff notice of allegation of any offence was served on the plaintiff. DW4 testified that there was no formal notification to the plaintiff to appear before the disciplinary committee no minutes of the disciplinary hearing exists on the plaintiff's file. That PEX7 forms of the plaintiff's contract and termination of the plaintiff's employment service therefore without following PEX7 by granting the plaintiff a fair hearing and a right to be heard was unlawful. Both DW3 and DW4 confirms that the plaintiff was not notified to appear before a disciplinary committee and that there was no hearing leading to a conclusion that the plaintiff's employment was unlawful and wrongful terminated.

Counsel further contended that the plaintiff's dismissal was based on misconduct where the Defendant relied on DEX1 the security report which showed that the plaintiff loaded an abnormal weight on his truck UAM 761T which was hired by the company. PEX5 states that the plaintiff took part in the operation of the try wheel loader and ordered the other operator to gather sand from the boiler and load it on the truck UAM 761T however DW2 under cross examination conceded that Mani had a transport contract with the Defendant. He further told court that on 10/6/2010 the foreman's loading logbook did not show that sand was reported that day. DW3

stated that the defendant did not have a contract with the Plaintiff and truck no. UAM 761T was owned by a one Mani. Under Re-examination DW3 testified that the Plaintiff had no written contract with the Defendant for the transportation of bagasse and payment of tonnage was made to the contractor Mani. DW1 never testified that on that day 10/6/2010 he was ordered by the plaintiff to load both sand and bagasse. That PEX4 states that the plaintiff was suspended owing to an incidence that occurred on 10/6/2010 but DEX2 all showed that the owner of the truck UMA 761T was Mani and not the plaintiff. Counsel further submitted that the author of the unsigned security report (DEX1) which was based on to terminate the plaintiff was not brought to court to own his report.

That the termination of the plaintiff's employment service based on insufficient evidence and conjectured DEX1 was not only unlawful but also wrongful and he invited court to find so.

Counsel for the Defendant was of a different view on whether the plaintiff's employment was lawfully or wrongfully terminated he submitted that that section 68(2) of the Employment Act 2006 states that *the reason or reasons for dismissal shall be matters which the employer, at the time of dismissal genuinely believed to exist and which caused him or her to dismiss the employee.* Section 69 (3) of the Employment Act 2006 states *that the 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.* He referred to the case of **Laws versus Chronicles (1958) WLR 698**

Counsel submitted that evidence was led at the trial that there was abnormal weight recorded at the weigh bridge and he referred to receipt for 10/06/2010 which was marked as DE4 and DW2 testified to that effect and testified that the receipt was computer generated and he printed it from the computer. That the plaintiff's truck UAM 761T was flogged at the weighbridge and it was found to have an abnormal weight for bagasse which is a light material. DW2 further testified that when the truck was impounded it found out it had sand on the bottom covered with bagasse. That this was done to abnormally increase the weight of the truck since he and other transporters were paid according to tonnage. That when the truck was impounded it was taken to the factory and the contents were removed and when it was loaded with bagasse only it weighed 2.89 tunes that this was evidence of the fact that the earlier weight had been manipulated by mixing the light bagasse with the heavy sand. That DW1 stated that the Plaintiff ordered him to load the truck UAM 761T with sand and covered it with bagasse.

On allegations that the investigation report was not signed that the contents were provided by DW1 and DW2. DW1 testified that he was ordered to load truck UAM 761T with sand mixed with bagasse. He further testified that he made a statement to Saracen security and stated the same testimony. That DW2's evidence corroborated by DW3 who stated that the plaintiff's truck at the weighbridge on 10/06/2010. Therefore the investigation report was a summary of the testimonies

of DW1 and DW2 even though it was not signed since its contents were proved by a witness who made a statement to the investigating officials.

That the defendant established that the plaintiff fraudulently loaded sand to gain an unfair weight summoned the plaintiff to a disciplinary hearing which took place on the 8/07/2010. It was DW3's evidence that

“I called the plaintiff Atuhura Arajab. At this time, he was still working with us, he had not been suspended. He was called for a hearing. We called the plaintiff orally for a hearing because he still with the company. We advised him to come with a witness for a hearing. I participated in the hearing.”

On the allegation of the truck No. UAM 761T not belonging to the plaintiff counsel relied on the evidence of DW2 who stated that

“Arajab's truck was flagged on 10 June 2010. When truck No. UAM 761T reached the weighbridge, a clerk realized that its weight was abnormal...”

That even though DE2 showed that in the system the truck was registered in the name of a one Maani he insisted that to the best of his knowledge the truck belonged to the plaintiff. This was corroborated by the evidence of DW3 who stated that

“That particular truck was on contract by Atuhura Arajab. The same truck was being used by someone called Maani before and he transferred it to the plaintiff after making an agreement. It was Arajab operated the truck and he as a contractor for Kinyara.”

All these were corroborated by exhibit DE6 which was a letter written by the plaintiff to the factory manager on 29/07/2010 appealing against the dismissal and reference was made to paragraph 2 of the plaintiff's letter.

I have considered the submissions of learned counsel on either sides together with the law and authorities relied on. The termination of the plaintiff's employment commenced with suspension later on the 21/07/2010 his service was terminate which stated under paragraph 2

“Following your dismissal from duty

Referring to the above paragraph the dismissal letter did not mention that indeed it investigated and found out that the plaintiff was liable of the allegations alleged against him. Suspension and termination of employment is a very serious matter which an employer should take seriously because it renders an employee jobless with reduced or no income at all.

The plaintiff stated in his evidence that he was never involved in the transportation of bagasse out of the factory and he was not in possession of the truck that was impounded transporting bagasse that it belonged to Kyagondeze who had hired it from him he stated that he never had any contract with the defendant besides the employment contract. He further stated that he started working at

the Defendant's company in 1995 and he was promoted to higher positions due to his hardworking. Surely the management could have done something better than signing the plaintiff's Dismissal letter, a person who worked for the company for 15 years with no previous bad record.

The termination letter itself did not state that there was thorough investigation conducted it only relied on the security report which was not even signed and whose author never appeared in court to own it. The reason given in the dismissal letter is that *they critically reviewed the matter but could not find any fact to mitigate/refute the security report.*

DW1 Geria Fred in his statement told court he was called at the gate to make a statement and he could not recall the person who called him but he made a statement at the gate and he told court that the plaintiff told him to load the sand on his track which was mixed with bagasse. It was stated that the plaintiff was orally in called to appear before the disciplinary committee.

Whatever reason the Defendant had to terminate the plaintiff's employment, section 66 (supra) provides for mandatory right to be heard in such dismissals as in the present case. Section 68 (supra) provides for proof of reason for termination. Counsel for the defendant relied on the case of *Bank of Uganda versus Betty Tinkamanyire Civil Appeal No. 12 of 2007 Tsekooko Jsc* stated that *"indeed on 25th August 2002, the appellant sent the respondent to Germany to understudy the human Resource Department of the Germany bank which would imply she was still needed. Surprisingly, upon her return she was handed a letter dated 21/8/2002 retiring her. No reason was assigned for this premature retirement nor was she given opportunity to be heard before that retirement. The two courts below correctly found that this amounted to summary unlawful dismissal.*

Section 71 (1) of the Employment Act 2006 states that *an employee who has been continuously employed by his or her employer for at least thirteen weeks immediately before the date of termination, shall have the right to complain that he or she has been unfairly terminated.*

In *Jabi versus Mbale Municipal council (1975) HCB 191* it was held that *it is generally acceptable that a dismissal is wrongfully if it is made without justifiable cause and without reasonable notice.*

The question is whether the plaintiff was accorded such rights as are spelt out in the above provisions prior to dismissal. There was no summon calling the plaintiff to appear for disciplinary hearing. Although there was an investigation report which was not signed and whose author never appeared in court to own it, the plaintiff was not given an opportunity to enable him respond to the allegations at the hearing. Referring the Defendant's Human Resource Manual Appendix 7.1 (ii) *it talks about formal written warnings to a wide range "minor" misconduct situations a typical situation could involve a three warning with dismissal occurring following a fourth offence. Standard letters should normally be used by line managers to record the warning they consist*

of first or second formal warning then final warning. The defendant did not follow the procedure according to its human resource manual of issuing warning letters of first, second and third but instead opted for the forth one of dismissal which was a procedure against their manual the plaintiff had to be warned 3 times before his dismissal. *Appendix 7.1 (d) provides for procedure of handling disciplinary cases (i) check the facts thoroughly, (iv) give the employee a proper chance to present his case and (v) consider the employee's previous record* the defendant did not consider all this only referred to Appendix 7.1(iii) which looks at *dismissal is appropriate to either of the following situations where there has been a failure to respond to progressive formal warnings or serious (i.e. gross) misconduct is involved.* There is no evidence on record to show that the plaintiff failed to respond to any formal warning nor was he involved on a serious misconduct the defendant only relied on an investigation report which was not signed by the investigating officer. The report did not give conclusive evidence to find the plaintiff guilty of the offence alleged to have been committed. The right to a hearing is constitutional. *Article 42 of the constitution provides that right to just and fair treatment in administration. That any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.*

Isaac Nsereko Vs MTN HCCS No. 156 of 2012; that;

“..... It is an elementary principle in our system of the administration of justice that a fair hearing, within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had reasonable motion as to the time, place, and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a Lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter, so that he will be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence.”

Basing on the above I have found that the employer did not adhere to the basics of a fair hearing. Therefore looking at the events that led to the dismissal, the plaintiff was not accorded the right to a fair hearing leading to unlawful and wrongful termination of his employment.

Issue 2; Whether the plaintiff is entitled to the accrued contribution to the provident fund, if at all

Counsel for the plaintiff submitted that the law provides that pension from accrued contribution is the plaintiff's income. DW4 stated that the plaintiff was paid his provident fund. Meaning the Defendant was aware of the fact the plaintiff was entitled to the accrued contribution to the provident fund.

Counsel for the defendant on the other hand submitted that the defendant's Human Resource manual states that once an employee is dismissed for gross misconduct such employee is disentitled from receiving the employer's contribution to the fund. That payment of the provident scheme is a contribution of both the employee's contribution and employer's contribution. Therefore since the plaintiff was summarily dismissed meaning he is not entitled to the provident contribution because it was the employers contribution. That the plaintiff was paid UGX. 1,000,000/= but he had a loan with the SACCO so the rest of the money was used to pay the loan.

If the provident fund was contribution of both the employer and employee it means if the employee has been contributing towards the provident fund then that is his money. Appendix 6.2.4 (b) *it states that a member who is summarily dismissed from work on grounds of gross misconduct shall be entitled only to the member's portion as at the date of dismissal and shall forfeit the entire percentage of the employer's contribution* there is no evidence on record that the plaintiff was dismissed on gross misconduct and looking at the staff provident fund statement of account it shows by 9th April 2010 the plaintiff's net balance was 14,292,129.53 there is no evidence on the amount of a loan he allegedly obtained from the SACCO. Counsel for the defendant only stated that the plaintiff had obtained a loan from the SACCO and the defendant was not a guarantee meaning the plaintiff never had any loan. *Ridge Vs Baldwin [1964] AC 90 at page 80*, where it is held; *"..... a decision reached in violation of the principles of natural justice like the right to a fair hearing is no decision at all. It is void and unlawful. If the principles of natural justice are violated, it matters not that the same decision would have been arrived at if there was no violation. A person in a cause cannot be condemned unheard – audi alteram partem under*

S. 66 of the Employment Act 2006, an employer is obliged, prior to dismissal of an employment on grounds of misconduct or poor performance, to explain to the employee the reason for which the employee is considering dismissal and give the employee reasonable time within which to prepare the representations. The defendant contravened this provision in its entirety. I find that the plaintiff is entitled to the amount he has claimed as his provident fund since he was wrongfully dismissed without according him a fair trial the defendant decided to dismiss the plaintiff on mere allegations without properly investigating the matter meaning he was not dismissed for gross misconduct because there was no evidence to that effect. Therefore the plaintiff is entitled to his provident fund.

Issue 3: What remedies are available?

Special damages

The plaintiff prayed for special damages stating that he contributed to provident fund and that the defendant owed him Shs. 15,635,780/= at the time of the unlawful and wrongful dismissal. The defense did not dispute the amount but argued that since the provident fund was both their contribution, he was not entitled to the employer's contribution as the plaintiff had been dismissed regardless of whether the investigations did not find him guilty. The argument of the defendant is untenable since I have already found that the defendant unlawfully dismissed the plaintiff from employment. Therefore, since the defendant did not dispute the amount of the plaintiff's stake in the provident fund, it is my finding that the plaintiff has established that he is entitled to UGX 15,635,780 from the provident fund as special damages.

General damages

I have found that the plaintiff was unlawfully dismissed from his employment by the defendant and as such is entitled to compensation or specifically damages. Damages by their nature serve two major purposes. Firstly, to put the plaintiff in the condition he would have been if the wrong had not been committed against him or her and secondly, to compensate him or her for the injury he or she has suffered as a result of the defendant's action. In **Hall Brothers SS Co. Ltd versus Young** it was stated that "*damages to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation is imposed by contract or obligation is imposed is imposed by contract by the general law or*

legislation”. The position obtaining on damages is the same in Uganda, like the United Kingdom since we share the same historical legal roots. In this matter, the plaintiff will be entitled to two sets of damages. Firstly, the damages for being dismissed unlawfully and damages for the harm, embarrassment and injury that he suffered as a result of the defendant’s action.

With regard to damages for unlawfully dismissal; the plaintiff, who was employed as a permanent staff of the defendant will be entitled damages which are equal to the period of notice, he would have been entitled to, if the defendant dismissed him by either giving him notice or payment in lieu of notice, as provided for in the Staff Manual of the Defendant company. The relevant provision in the Human Resource Manual appendix 2.6 (b) *it states that notice periods for all permanent employees (at cessation of employment) can be by the company to the employee or by the employee to the company. The notice period by either party during probation will be 2 weeks and 3 months after probation.*

Likewise, in Barclays Bank of Uganda versus Godfrey Mubiiru Civil Appeal No. 1 of 1998, the Supreme Court held that *where there is a provision of notice before termination and there is a breach the employee is entitled to receive payment in lieu of notice and where no notice is provided, compensation will be given for reasonable notice depending on nature and duration of the contract*. In view of the guidance from the Staff Manual and the Supreme Court in Mubiru’s case, the plaintiff is entitled to general damages which are equal to three months’ salary since he was dismissed without notice.

In addition to these general damages the plaintiff will be entitled to general damages for the humiliation, embarrassment and injury he suffered at the hands of the defendant, who subjected him to a faulty disciplinary process, restricted his liberty during the time of investigations and put an end to his illustrious career in the company, a company he had served fairly well. These damages will also include compensation for a reasonable time the plaintiff should have spent looking alternative employment. See: Uganda Revenue Authority versus Wanume David Kitamirike CACR NO. 43 OF 2001, where the Supreme in assessing damages for wrongful dismissal took into account *the time which might reasonably be expected to lapse before the respondent (the dismissed employee) would in the ordinary course of things be likely to obtain similar employment to that which he/she lost by this wrongful dismissal.*

Given the status of the plaintiff and nature of his employment that was not at a very senior level, I consider an award of ten million shillings as sufficient general damages to cover for the items I have sent out above.

All the awards made except costs will attract interest at the court rest from the date of the decision till payment in full.

The plaintiff will be entitled to the costs of the suit.

Decision

Judgment is entered in favor of the plaintiff for the following:

- a. General damages equal to three months' salary for unlawful dismissal;
- b. General damages of ten million shillings for the embarrassment, inconvenience and psychological torture the plaintiff suffered as a result of the defendant's actions;
- c. Special damages of UGX 15,635,780/=;
- d. The awards in (a), (b) and (c) will attract interest at court rate from the date of this decision till payment in full.
- e. Costs of the suit.

It is so ordered.



Gadenya Paul Wolimbwa

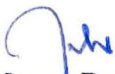
Judge

10/3/2020

Court;

Judgement read and delivered in chambers in the presence of Counsel Mausio Andrew for the Defendant and in absence of the plaintiff and his counsel.

Kamuhanda Robert Olinga- court clerk.



Gadenya Paul Wolimbwa

Judge

10/3/2020

*Gadenya Paul Wolimbwa
Judge*