THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE NO. 237 OF 2016

(ARISING FROM KCCA/NDC/C.B/198 OF 2016 KAMPALA)

CHANDIA CHRISTOPHER……..CLAIMANT

VERSUS

ABACUS PHARMA (AFRICA) LTD……..……RESPONDENT

BEFORE

1. HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE
2. HON. LADY JUSTICE LINDA TUMUSIIME MUGISHA

PANELISTS

1. MR. BWIRE JOHN ABRAHAM
2. MS. JULIAN NYACHWO
3. MR. MAVUNWA EDSON

AWARD

BRIEF FACTS:

By letter dated 14/4/2012, the claimant was offered employment by the respondent as security guard effective 15/4/2012. In his memorandum of claim, the claimant alleged that in January 2015, one Maani Joseph was employed as Supervisor who thereafter became abusive to all security guards. They raised a complaint against him and he was suspended after a hearing on 12/7/2016.

On 13/07/2016 the claimants (and others who had complained) were shocked with warning letters, which the claimant refused to acknowledge. According to the claimant, without any hearing he was issued with a termination letter on 28/7/2016.

By a written statement of defence the respondent denied the above allegation and insisted that the claimant was summarily dismissed for gross misconduct, insubordination and divulging internal information to the public, particularly the IGG and that this was after a fair hearing.

Mr. Geofrey Bwire of M/s. Candia Advocates appeared for the claimant while M/s. Salaama Nakasi of KMT Advocates appeared for the respondent.

The agreed issues were:

1) **Whether the termination of the claimant was unfair and unlawful.**
2) **Whether the claimant was entitled to the remedies sought**.

The claimant adduced evidence from himself and from one other witness, Kamugisha John, while the respondent adduced evidence from one Maseraka J. and one Maani J.

In his evidence in chief, the claimant testified that he diligently worked until a one Maani Joseph a relative to the Human Resource Manager, one Masereka, was deployed as his supervisor.

In his testimony, this supervisor became abusive not only to him but to all other security guards and despite informal complaints to the Human Resource Manager no action was taken.

Eventually on 4/7/2016 the claimant and others made a formal complaint that culminated into suspension of the said supervisor only a day after the suspension for the claimant to receive a warning letter and on 28/7/2016 a termination letter.

The evidence of one Kamugisha was to the effect that he worked together with the claimant till he resigned on 19/7/2016. In his testimony, the cause of his resignation was the harassment by the new supervisor, one Maani who used to abuse him. He was one of those who wrote a complaint against the said supervisor only to later on receive a warning letter which prompted him to resign. According to the witness, the supervisor used to harass and abuse the guards because they used to curtail his movements to steal the respondent's property.

In his testimony as respondent's witness, one Maani Joseph admitted having attended a disciplinary hearing as a result of complaints against him by security guards and having been reprimanded by suspension. He was however, later on exonerated. He denied ever abusing the guards and insisted he worked well with them while they were under his supervision.

The second respondent witness was one Masereka Joseph who testified that after the guards raised a complaint against their supervisor he was reprimanded but at the same time the guards including the claimant were warned to stop leaking sensitive security information.

According to the witness, the claimant declined to receive the warning letter but instead wrote to the IGG labelling the respondent discriminatory and thereafter started to cause internal conflicts for which he was summoned to attend a hearing which he refused to attend and then he was terminated.

Submissions

The court allowed both counsel to file written submissions but surprisingly the claimant did not file his until he was served with the respondent's submissions. Strange as it appears the respondent is the one who filed a rejoinder in the instant case.

Be that as it may, the respondent argued that the matter was prematurely brought before the industrial court the parties having not exhausted the mediation process before the labour officer.

The court record reveals that a complaint was raised to the labour officer by letter dated 5/08/2016 and received by the labour officer on 09/08/2016 and a reference to this court was written by the claimant to this court and received on 4/11/2016. Strictly speaking this was after 8 weeks of filling the complaint and before the labour officer made a decision. The claimant was therefore acting within **section 5 of the labour disputes (Arbitration and Settlement) Act**, when he referred the matter to this court. The preliminary objection is consequently overruled.

The respondent submitted on the first issue that the claimant was summarily terminated under **Section 69(1) of the employment Act** for failing to secure the property of the respondent as a security guard, this having been his core activity.

Counsel referred to **exhibit CEC at page 24-27 of the claimant's trial bundle** which according to counsel admitted that the properties of the respondent had been stolen without the claimant reporting the same indicating a fundamental breach on the part of the claimant.

Counsel argued strongly that when the claimant reported to the Inspectorate of Government the allegation that the respondent practiced nepotism, corruption and other issues as in **Exhibit RE 3 at page 12-13 of the respondent's trial bundle,** such act was in fundamental breach of the claimant's contract of service. Counsel argued that the claimant's refusal to receive a warning letter amounted to insubordination. According to counsel, the claimant was invited for a hearing as per **exhibit RE 1 at page 7-8 of the respondent's trial bundle** but the claimant refused to attend.

On remedies, counsel for the respondent argued that the respondent was always ready and willing to settle the terminal benefits of the claimant who never claimed the same. He however argued that since the claimant was terminated lawfully he was not entitled to the rest of the claims.

In reply counsel for the claimant on the first issue argued strongly that the termination of his client was contrary to **sections 68, and 2 of the Employment Act** and the guiding principles in **Florence MufumbaVs UDB LDC 138/2014** and **Peter WasswaKityabaVs AFNET LDR 084/2016** since no reason was offered for the said termination.

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Counsel contended that the claimant was not afforded any hearing and that the alleged letter summoning him for the hearing was never served on him. He argued that even if it was to be believed that the claimant was summoned, the presence of one Maami and Masereka Joseph on the committee impeached the impartiality and independence of the committee since the claimant had lodged a complaint against them. On the issue of remedies, counsel, relying on **Peter WasswaKityaba**Vs AFNET (supra) prayed the court to award the claims of general damages, payment in lieu of notice, NSSF contribution, and salary arrears from date of termination to date of Award as well as aggravated damages, interest and costs of the claim.

Decision of court

The evidence on the record is clear that the claimant with the rest of the security guards had issues/complaints against one Maani Joseph and when the complaints were lodged to management the said Maani was reprimanded with a suspension.

The record is not clear on when or how the disciplinary proceedings involving the said Maani were constituted. It is however possible that it is as a result of the same proceedings that a warning letter dated 12/07/2016 was written to the claimant pointing out that it was wrong for the claimant to **"Jump protocol by giving the document to the highest authority and also circulating the document to parties that were less concerned about the issue that was taking place…"**

The warning letter also pointed out that management was concerned about the claimant's delay to report **"the ugly things that were taking place until he was**

“squeezed on the wall and then ….used this as a throwback weapon to your supervisor”.

The warning letter concluded

> **“Please be advised that management expected an immediate improvement in the above area, failure of which will call for an advanced disciplinary action.”.**.

According to the evidence of Maani Joseph, he was slammed with a one week’s suspension without pay after a disciplinary hearing. Logically this would have been after the letter of complaint from the security guards against him, dated 4/7/2016 (**Exhibit “C” at page 24, claimant’s trail bundle**). It follows that the suspension having been for only a week, was over on 11/07/2016 and he returned to office. This is to assume that the suspension was effected on the same date the document was written which is very doubtful since RW1, Maani Joseph himself testified that this was after a disciplinary hearing. It follows therefore that there were no disciplinary proceedings against Maani or any of the security guards before issuance of the warning letters since there is no record of such proceedings. It is clear therefore that the warning letter was written while Mr. Maani was in office and it is noted that while the warning letter is signed by one Rukumini Bonthala as Executive director, it shows its origin as Human Resources Department; which raises the question as to who exactly issued the warning letter and whether the said letter was genuine about its contents.

It is contended that the claimant was summarily dismissed under **section 69** for fundamentally breaching the contract of service. **Section 69 of the employment Act** provides

'69 Summary Termination

(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 employees is entitled by any statutory provision or contractual term.

(2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(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".

An employee is said to have fundamentally breached his contract of service once it is found that the alleged breach is in respect to the core activity that such employee is expected to perform. Whether a certain breach is of a fundamental nature as to occasion a Summary dismissal will always depend on circumstances of a given case. An example is where thieves or any other person finds a Security guard sleeping and takes away his gun causing a security risk to the owner of the promises being guarded. Or when a driver fails to inform the owner of the car about the servicing of the car and it knocks the engines as a result of failure to service it.

In the instant case it was the respondent's case that the claimant as security guard had failed to report previous cases of thefts of the respondent's property. We have perused **exhibit "C" at page 24 of the claimants trial bundle**.

It is a history of complaints against the former security heads and how they were relieved of their duties as a result of the report of the Security guards and how their current security head had followed in the footsteps of those relieved of

duty. It is about how the Security head was abusive of his juniors because they seemed to stop him from taking out property of the respondent without following proper procedure. We do not think that pointing out at the time the claimant and his colleagues did, instances when the Security head (RW1) had taken out property without following Procedures amounted to a fundamental breach of their duty.

It is note worthy that the complaint was signed by the claimant and five other people but only the claimant was terminated the other person having resigned because of what he perceived as an abusive and harassment character of RW 1. It is therefore not believable that the termination of the claimant was as a result of his having failed to report the **"ugly things"** taking place at the work place. It was stated in the evidence of RW2 that the claimant was summoned to attend a hearing but he refused to attend the same. However although the invitation is endorsed with the words **"served but refused to acknowledge the invitation as on today 18/7/2016"** It is not clear who served this invitation on the claimant since no one is on record saying that he/she served the invitation. We therefore do not accept the insinuation from RW2 that the claimant was served and did not attend the hearing. The truth according to the evidence on the record is that the claimant did not know about the hearing on 25/07/2016. The invitation to the hearing which contained allegations of insubordination and divulging information to third parties was not delivered to him and therefore he was not afforded any opportunity to counter/defend the said allegations. This was totally against the principle of a fair hearing as provided under **Section 66 of Employment Act.**

It is clear from the invitation to the hearing and from the minutes of the hearing that the termination of the claimant was not as a result of a fundamental breach of his duty but as a result of insubordination and divulging information to third parties which in our view constitute misconduct that calls for a fair hearing under **Section 66 of the Employment Act.** Although the claimant admitted having

refused to acknowledge the warning letter, we do not subscribe to the contention that such refusal constituted insubordination. Insubordination in our view depicts an act of defiance of authority or refusal to obey instructions. It involves acts of disobedience. It is a direct or indirect refusal of an employee to perform a reasonable directive from his employer or a mockery, insult or disrespect of an employer by an employee. Refusal to acknowledge a warning letter, in our view is short of this description and therefore not an act of insubordination.

The Inspectorate of Government is a government institution with a responsibility of eliminating corruption and abuse of authority from public institutions and so we do not agree with the argument that lodging a complaint to the same office would constitute divulging information to third parties as if one had to ask for permission before one lodges a complaint to an authorized institution. Even then as already stated the claimant was not afforded an opportunity to defend this alleged infraction in the same way he was not allowed to defend the insubordination allegations .

Having observed that the termination was not in accordance with **Section 69** as a summary termination for failure to prove fundamental breach and having said that the said termination was devoid of a fair hearing in accordance with **Section 66(1) of the Employment Act** it follows that it was unlawful. The first issue is in the positive.

The 2nd issue is **what remedies are available?**

(a) General damages

The claimant was terminated unlawfully. He was earning 486,550/= per month. As a result of the unlawful termination, he could no longer cater

for his needs and the needs of other people dependant on him. We agree with the submission of counsel that his client suffered psychological anguish. However, 60,000,000 as general damages is a bit too high in the circumstances. We think 5,000,000/= is sufficient for general damages.

(b) Severance allowance

In accordance with **Section 87 of the Employment act,** since the claimant was unlawfully terminated he is entitled to severance allowance. In the absence of any method of calculation propagated by the respondent in accordance with **Section 89 Of the Employment Act** this court will apply the method enunciated in the case of **Donna KamuliVs DFCU LDC 002/2015** to the effect that a claimant will be entitled to net pay per month for each of the years he/she worked. Accordingly the claimant having started work on 15/4/2012 and having been unlawfully terminated on 28/7/2016 will be paid **2,066,200**/= for the 4 years and 3 months.

(c) Salary for month of July 2016

The claimant was terminated on 25/7/2016. He had worked for this month. He therefore will be paid **486,500/=.**

(d) Leave days and overtime

There was no evidence adduced to prove that the claimant sought for leave and that he was denied the leave by the respondent. The duty is upon the employee to show that he/she is interested in taking leave and payment in lieu of leave can only be allowed if the employer is found to have denied the said leave. (See the case of **Mbiika DenisVs centenary Bank**, **LDC 023/2014**. However the salary slip exhibited at page 15 of the respondent's

trial bundle shows clearly that the respondent owed the claimant **116,772/=** as overtime. This amount will therefore be payable as an admitted figure for overtime in July.

(e) Payment in lieu of notice

As already discussed above, the termination in the instant case did not qualify as a summary termination for fundamental breach in accordance with **Section 69 of the Employment Act.** The claimant was therefore entitled to notice in accordance with **Section 58 of the Employment Act** which was not done. He will therefore be paid **1,459,650**/= as in lieu of 3 months' notice**.**

(f) Salary arrears from date of termination to date of Award

Whereas this court in Florence **MufumbaVs UDBLDC 138/2014** and **Peter Wasswa KityabaVs AFNET LDC 084/2016** this court granted salary arrears up to the date of the Award, the subsequent cases of **Simon Kapiyo Vs Centenary Bank** LDC 300/2015, **Equity Bank VsMusimentaMugisha Rogers** L.D.Appeal 26/2007 and **Blanche ByarugabaKairaVs AFNET** LDR 131/2018 were of the position that the earlier cases were decided in ***per incurium*** having not taken into account **Section 41 of the Employment Act** that provides for salary to employees for only the work done in the course of employment. Accordingly this prayer is denied.

(g) NSSF Payment

The authority of **Aijukye Stanley Vs Barclays Bank LDC 243/2014** is for the legal proposition that although NSSF contribution is property of the employee and recoverable by the employee, it can only be payable into the NSSF fund as provided for under the **NSSF Act.** On perusal of the salary slip

at page 15 of the respondent's trial bundle, it is discovered that the respondent admitted owing the claimant **78,821/= as NSSF payment** for July 2016. Accordingly it is ordered that the said money be paid into the account of the claimant at NSSF.

(h) Aggravated damages

We have not found the conduct of the respondent calling for aggravated damages. This claim is therefore denied.

(i) Interest

Because of the inflationary nature of the currency, we hereby grant the claimant an interest of 20% per year on the awarded sums from the date of the Award till payment in full.

(j) No order as to costs is made.

DELIVERED AND SIGNED BY:

1. HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE ……

2. HON. LADY JUSTICE LINDA TUMUSIIME MUGISHA ……

PANELISTS

1. MR. BWIRE JOHN ABRAHAM ……
2. MS. JULIAN NYACHWO ……
3. MR. MAVUNWA EDSON ……

Dated: 02/08/2019