THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: KITUMBA, TUMWESIGYE, ARACH-AMOKO, JJ.SC; ODOKI, AND OKELLO AG. JJSC)

CIVIL APPEAL NO. 04 OF 2013

BETWEEN

IYAMULEMYE DAVID ::APPELLANT

AND

ATTORNEY GENERAL :: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Byamugisha and Kasule JJ. A) in Misc. Application No. 104 of 2010 dated 14 December 2012]

JUDGMENT OF ODOKI, AG JSC

This appeal arises from the decision of the Court of Appeal in which it reviewed its decision in Civil Appeal No. 104 of 2010 and allowed the application in part.

The background to the appeal is that on 16th July 1986, the appellant was recruited into the Public Service of Uganda as a graduate teacher on permanent and pensionable terms. Subsequently, he was redeployed in the Ministry of Education and Sports as an Education Officer on transfer of service, where he worked until January 1999, when he was disgracefully dismissed by the Public Service Commission.

The appellant immediately challenged his dismissal in the High Court which dismissed his suit.

The appellant appealed to the Court of Appeal under Civil Appeal No. 81 of 2006. On 20th August 2009, the Court of Appeal allowed the appeal, with the result that the appellant was awarded special damages, in form of his monthly salary as from October 1998 when he was interdicted, up to the time of judgment, general damages of Shs.20,000,000/-, interest on both the special and general damages from the date of judgment till payment in full, and costs in the Court of Appeal and in the High Court.

Subsequently, the appellant filed Miscellaneous Application No. 104 of 2010 under Section 82 of the Civil Procedure Act, and Rules 2(2), 36 and 43(1) and (2) of the Court of Appeal Rules. The appellant sought the following orders:

(a) That the appellant is entitled to pension;
(b) That the appellant is entitled to salary increment;
(c) That the appellant is entitled to ten months salary innocently omitted during the computation of his special damages.

The appellant's application succeeded in part, in that he was awarded annual salary increment as from 1998 to 2009, as well as Shs.3,667,980/- being salary for ten months which had been innocently omitted and an order that the appellant pays 2/3 of the costs to the respondent.

The appellant was dissatisfied with the ruling of the Court of Appeal, hence the instant appeal. The appeal is based on four grounds of appeal stated as follows:

> *"1. The learned Justices of the Court of Appeal failed to judiciously exercise their inherent discretionary powers vested in the Court under Rule 2(2) of the Judicature (Court of Appeal Rules) Directions when they went ahead to deny the appellant the remedy of pension gratuity reasoning that the same was highly speculative and that the appellant had not prayed for the same in the High Court let alone having not addressed the Court of Appeal on the issue.*
>
> *2. The learned Justices of the Court of Appeal erred in law and in fact when they refused to grant the appellant his pension having gone ahead to grant him all his salary and annual increments as from 1998 up to 2009, reasoning that there is no guarantee that the appellant would have continued in service until his retirement age, which decision went against the clear provisions of the Constitution and the Pensions Act.*
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> *3. The learned Justices of Appeal erred in law and in fact when they came to the conclusion that the appellant's application lacked grounds for review when there was an error apparent on the face of the record namely, the omission of the appellant's ten months' salary in the judgment as well as discovery of new matters of evidence namely, the documentary evidence relied upon by the appellant in his application to support his claim for salary increment.*
>
> *4. The learned Justices of Appeal misdirected themselves when they went ahead to award the*

respondent 2/3 of the costs when the appellant had substantively succeeded in his application, he having been awarded special damages in form of ten months' salary earlier omitted in the judgment as well as salary increment."

The appellant sought the following orders:

(a) The appeal be allowed with the result that the orders of the Court of Appeal complained against be set aside.

(b) The appellant is entitled to pension gratuity calculated in accordance with the Pensions Act and other relevant laws governing pension of public servants.

(c) The appellant is entitled to pension in accordance with the Constitution of Uganda and the Pensions Act.

(d) The appellant is awarded full costs of the appeal and those of Misc. Application No. 104 of 2010.

The appellant was represented by Mr. Elias Habakurama, while Mr. Wanyama Kodoli, Principal State Attorney, represented the respondent. Both parties filed written submissions.

Grounds 1 and 2: Failure to Grant Pension

Counsel for the appellant argued the first two grounds of appeal together. The gist of these grounds is the complaint that the Court of Appeal erred in law and fact when it refused to grant the appellant his pension. It is contended that in so doing, the Court of Appeal failed to

exercise its inherent discretionary powers under Rule 2(2) of the Rules of the Court of Appeal.

In his written submissions, counsel for the appellant argues that the Court of Appeal erred in fact when it came to the conclusion that the appellant did not pray for pension gratuity and pension in his pleadings before the High Court and that the Court of Appeal was never addressed on the issue at the time the appeal was being heard. Counsel refers the appellant's amended plaint where he prays as follows:

> ***"(a) That the appellant is entitled to pension;***
>
> ***(b) That the appellant is entitled to salary increment;***
>
> **(c)** ***That the appellant is entitled to ten months' salary innocently omitted during computation of his special damages."***

On the question of whether the appellant never addressed the Court of Appeal on the relief of pension gratuity, counsel for the appellant refers to the written submissions where it is stated in prayer (b) that:

> ***"The appellant be awarded terminal benefits calculated in accordance with the current formulae used for officers in the category of the appellant."***

Counsel for the appellant further refers to the affidavit of the appellant in Misc. Application No. 104/2010 in which the appellant avers that he had been in the Public Service of Uganda for a continuous period of 19 years up to January 1999 when he was wrongfully dismissed from his employment and that at the time of his dismissal, he was aged 45

years and made 55 years at the time the Court of Appeal delivered its judgment.

It is therefore, the submission of counsel for the appellant that the moment the Court of Appeal made a finding in Civil Appeal No. 81 of 2006 to the effect that the appellant had been wrongfully dismissed and went ahead to award him special damages in form of monthly salary together with the salary increment awarded to him in the ruling in Misc. Application No. 104 of 2010 for the entire period he was out of actual service, this was a recognition by the Court of Appeal that de jure the applicant was working but de facto he was not because of the errors made by the Public Service Commission in dismissing him.

Counsel argued that as a result, of the above scenario, the Justices of the Court of Appeal misdirected themselves when they observed in their ruling that "***the appellant had served in the Public Service for 19 years and it is more than 10 years after his dismissal. There was no evidence adduced to show that he would have stayed with Public Service till the age of retirement. Clearly that argument is highly speculative.***"

It was counsel's submission that under the law, the appellant who had unbroken service of 19 years and was 45 years of age qualified for pension as his leaving the Public Service was not of his making but rather due to the wrongs committed by the Public Service Commission. Counsel contended that the appellant had legal entitlements to his pension and gratuity under Article 241(1) of the Constitution, Section 1(g)(1)(A) and (B), Sections 9, 10 and 15 of the Pensions Act, Sections

(L-a) (3)(a)(L-b) (2) (5) (6) of the Public Service Standing Orders of January 2010.

Counsel finally referred to the case of Bank of **Uganda Vs. Betty Tinkamanyire**, Civil Appeal No. 12 of 2007 (SC) and submitted that the case is not distinguishable from the instant case as the Court of Appeal reasoned, because that Court misapprehended the relevant Sections of the Constitution, the Pensions Act and the Public Service Standing Orders, as well as the reasoning of the Supreme Court in that case.

In reply, learned counsel of the respondent contended that the Justices of the Court of Appeal properly re-evaluated the evidence on record and arrived at the most appropriate decision.

The appellant brought this appeal against the ruling of the Court of Appeal in Misc. Application No. 104 of 2010 under Section 82 of the Civil Procedure Act, Rules 2(2) 36 and 43(1) and (2) of the Rules of the Court of Appeal. The application was for review of the Court of Appeal's decision in Civil Appeal No. 81 of 2006, against which no appeal has been filed.

Rule 2(2) of the Rules of the Court of Appeal provides for inherent powers of the Court of Appeal. Rule 36 deals with corrections of errors, and Rule 43 deals with form of application to the Court of Appeal.

In the first ground of appeal, the complaint is that the Court of Appeal erred in not exercising its inherent powers under Rule 2(2) of the Court of Appeal Rules to award the appellant the remedy of pension on the grounds that it was highly speculative and secondly, the appellant had not prayed for it or addressed the Court on the issue.

Rule 2(2) provides that:

> ***"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such Court and that power shall extend to setting aside judgments which have been proved null and void after they have been passed and shall be exercised to prevent abuse of the process of any Court caused by delay."***

The scope of this provision has received ample judicial interpretation in this Court and elsewhere. These decisions include **Livingstone M. Sewanyana Vs. Martin Aliker**, Misc. Application No. 40 of 1991, and **Orient Bank Vs. Fredrick Zaabwe and Another**, Civil Application No. 17 of 2001 and **Kakhamishi Brothers Ltd. Vs. R. Raja & Sons** (1960) EA 313.

These decisions emphasise that while the Court has inherent powers to recall its judgments in order to make orders as are necessary to achieve the ends of justice, it cannot use its power to reverse its decisions. In other words, the Court will not sit in an appeal on its judgment otherwise the principle of finality of judgments will be jeopardized. Therefore, the Court of Appeal will only review its

judgments in instances where the law and rules of the Court allow it to do so in the interest of justice.

In its decision in Civil Appeal No. 81 of 2006, the Court of Appeal held that the dismissal of the applicant was unlawful as it contravened the laid down procedures. The Court noted that the trial judge did not assess the reliefs he would have awarded had the applicant's suit succeeded.

The Court then went ahead to assess the compensation the applicant was entitled to. The Court stated that the legal principles under which a person wrongfully dismissed is entitled to be compensated were set out in the case of **Southern High Lands Tobacco Vs. Mc Queen** [1960] EA 490 where the Court said,

> ***"A person wrongfully dismissed is entitled to be compensated fully for the financial loss he has suffered subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation."***

The Court also referred to the case of **East African Airways Vs. Knight** [1975] EA 165 and **Bank of Uganda Vs. Fred Masaba & Others** SCCA No. 3/98. The Court of Appeal then assessed the compensation on the basis of the appellant's amended plaint where he had prayed for payment of his salary of Shs.366,998/- per month from the date of interdiction, i.e. from 20th October 1998 until the date of judgment and also prayed for general damages.

The Court calculated the amount of special damages and arrived at the figure of Shs.44,039,760/-. The Court assessed general damages at Shs.20,000,000/-. The appellant was also awarded costs both in the Court of Appeal and the High Court.

The Court of Appeal did not address itself to the other reliefs prayed for in the plaint. The relief which was omitted in the consideration of the Court of Appeal was the relief of terminal benefits which was contained in prayer (b) of his plaint as follows:

> ***"(b) A declaration that the plaintiff is entitled to terminal benefits."***

As the appellant argues, this prayer was also repeated in his written submissions to the application for review. It was therefore, an oversight on the part of the Court of Appeal when hearing the appeal not to address itself to the relief of terminal benefits. When considering the application for review on the issue of grant of pension, the Court of Appeal stated,

> ***"The issue of pension and gratuity was never addressed by the appellate Court because it was never brought up by the applicant. However, given the nature of this case and the decision reached by the appellate Court, plus the awards given, it seems that the issue of pension is one that should have been argued at the time of appeal."***

This was a misdirection by the Court of Appeal as it is clear from the submissions of the appellant during the appeal that the award of terminal benefits was one of the orders prayed for. Secondly, the

Court of Appeal having acknowledged that there was an omission to consider terminal benefits or pension and having found that the appellant was entitled to appropriate compensation for termination of his appointment, the Court should have corrected the error as a consequential remedy.

The Court went ahead and misdirected itself on the authority of **Bank of Uganda Vs. Betty Tinkamanyire** SCCA No. 12 of 2007, where this Court said, (per Kanyeihamba JSC)

> ***"From the facts and evidence as well as the submissions of counsel in this case, the respondent was only four years from the age of retiring with full pensions rights. The evidence showed that she would have continued to serve the appellant faithfully, diligently and in an exemplary manner. In my opinion therefore it would be iniquitous for her to lose any of her pension rights."***

The Court of Appeal went on to distinguish the case of **Betty Tinkamanyire** (supra) as follows:

> ***"In our view this case is distinguishable from the instant application. The applicant here had served in the Public Service for 19 years and it is more than 10 years after his dismissal. There was no evidence adduced to show that he would have stayed with the Public Service till the age of retirement. Clearly that argument is highly speculative. Whereas the argument for salary increment is sustainable, the idea of demanding for contemplated pension and gratuity more than 10 years to the time of retirement is not convincing."***

The Court of Appeal then concluded that the applicant could be awarded salary increment for the time he was unlawfully dismissed till judgment and not pension and gratuity because there is no guarantee that he would have stayed on the job till then or even dismissed rightly.

Clearly, this case is not distinguishable from the case of **Betty Tinkamanyire** (supra). The appellant would have qualified for pension on serving for 20 years. He had served 19 years and 11 months when he was dismissed. It cannot be said that it was highly speculative that the applicant would have served until he qualified for pension which was only a few months away.

Counsel for the appellant sought to rely on Section (L-a)(3)(a) of the Uganda Public Service Standing Orders of January 2010 which provides,

> ***"A Pensionable Public Officer may retire early from the Public Service in accordance with the provisions of the Pensions Act when he or she has***
>
> (a) ***Attained his or her forty fifth (45th) birthday and served for a continuous period of ten (10) years."***

It is not clear whether the above provision was obtaining in 1999 when the applicant was dismissed from the Public Service. In 1994, the Pension Act was amended by the Pension Act (Amendment) Statute 1994 to provide in Section 6(2) as follows:

> ***"Notwithstanding subsection (1) Pension, gratuity or other allowance shall be paid to an officer who retires***

on attainment of the age of forty five years and on having served for a continuous period of ten years."

On the basis of the law, and on the authority of **Betty Tinkamanyire's** case, the applicant was entitled to the grant of the relief of gratuity and pension as prayed.

In my view, therefore, the Court of Appeal erred in not reviewing its decision and granting the declaration the applicant sought. There can be no dispute that by praying for grant of terminal benefits, he was referring to the payment of pension and gratuity which he would have been entitled to, save for the unlawful and premature termination of his appointment.

Accordingly, I would allow both grounds 1 and 2.

Ground 3: Grounds for Review

In the third ground of appeal, the appellant complains that the Court of Appeal erred in holding that the appellant's application lacked grounds for review when there was an error apparent on the face of the record namely the omission of the appellant's ten months salary as well as discovery of new matters of evidence namely the documentary evidence relied upon by the appellant in his application to support his claim for salary increment.

Counsel for the appellant submitted that the issue of salary increment was never raised at all during the hearing of the appeal and the same was never addressed in the judgment of the Court in Civil Appeal No.

81 of 2006. He further submitted that when the appellant filed Misc. Application No. 104 of 2010, he supported the same with an affidavit deponed on 11th May 2010 and attached Annextures "D" and "K" which contained Circular Standing Instructions of salary structure for different financial years. It was therefore, counsel's contention that the moment the Court of Appeal went ahead to award the appellant salary increment on the basis of the affidavit and annextures "D" and "K", they were exercising their powers of review as envisioned under Section 82 of the Civil Procedure Act, which is based on the discovery of new evidence.

Counsel for the appellant further contends that the Court of Appeal erred in finding that there was no apparent error on the face of the record, arguing that the omission of the appellant's ten months' salary was an error which the Court later corrected in its ruling. He also maintained that in granting the relief, the Court relied heavily on the provisions of Rule 2(2) of the Rules of the Court of Appeal.

On the other hand, counsel for the respondent contended that the Court of Appeal properly evaluated the evidence on record as a whole when it found that there was no apparent error on the face of the record.

In its ruling, the Court of Appeal did acknowledge that the applicant did receive special damages in Civil Appeal No. 81 of 2010 by less than ten (10) months as reflected in their decision where they said,

> ***"In our humble opinion, the applicant is entitled to the salary of ten months which ought to have been***

included in the special damages, the sum of Ug. Shs.3,669,980/-. The final figure ought to be Ug.Shs.47,709,740/- as special damages."

The appellant brought the above application under Section 82 of the Civil Procedure Act, and Rules 36, 2(2) and 43(1) (2) of the Court of Appeal Rules. Section 82(a) of the Civil Procedure Act provides:

"Any person considering himself or herself aggrieved, -

(a) by a decree or order from which an appeal is allowed by this Act,

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of a judgment to the Court which passed the decree or made the order, and the Court may make such order on the decree or order as it thinks fit."

The conditions for granting an applicant a review are set out in Order XLV1 Rule (1) of the Civil Procedure Rules as:

"The discovery of new important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

Counsel for the appellant relied on the decision of this Court in **Kanyabwera Vs. Tumwebaze** [2005] 2 E.A. 87 where the Court explained the meaning of "an error or mistake apparent on the face of

the record" by referring to the AIR Commentaries: **The Code of Civil Procedure** by Mohar and Chitaley Vol. 5, (1998) where it is stated:

> ***"In order that error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact, but it is not limited to matters of fact and includes error of law."***

The appellant also relied on Rule 36 of the Rules of the Court of Appeal which provides as follows:

> ***"A clerical or arithmetical mistake in any judgment of the Court or any error arising in it from an accidental slip or omission may at any time whether before or after judgment has been embodied in a decree be corrected by the Court concerned, either on its own motion or on an application of any interested person so as to give effect to the intention of the Court when judgment was given."***

With regard to the applicability of Rule 36 to the application, the Court of Appeal stated:

> ***"In the instant case, the Court of Appeal found that the applicant deserved the salary for the period he was unlawfully dismissed Rule 36 of the Court of Appeal Rules cited by the applicant is not relevant in this case because there was no arithmetical error whatsoever."***

In my opinion, the Court of Appeal erred in so holding because there was clearly a mathematical error which the Court indeed corrected.

The Court had originally calculated the special damages on the basis of 10 years and 10 months at a monthly salary of Shs.366,998/- but arrived at an erroneous figure of Shs.44,039,760/- instead of Shs.47,709,740/- thus leaving out a sum of Shs.3,669,980/- which it eventually awarded. This was clearly an arithmetical error in calculating the special damages. It was also an error apparent on the face of the record.

The Court of Appeal agreed with the submissions of counsel for the appellant that the application was wrongly brought under Section 82 of the Civil Procedure Act because none of the requirements for review existed in the application. It held that there was no discovery of new evidence and that clearly there was no error apparent on the face of the record.

I am of the considered view that the miscalculation of the special damages was an error apparent on the face of the record which satisfied the requirement of Section 82 of Civil Procedure Act. There was also discovery of new evidence which was not available at the time of hearing which proved that public servants had benefited from salary increments over the years. The Court of Appeal accepted this evidence and used it to award the appellant additional damages. Therefore, the Court of Appeal appears to have involved itself in contradictions and misdirections in arriving at its decision. I would allow the third ground of appeal.

Ground 4: Award of Costs

In this ground of appeal, the appellant complains that the Court of Appeal misdirected itself when it awarded the respondent 2/3 of the costs, when the appellant had substantially succeeded in the application, he having been awarded special damages in form of ten months' salary earlier omitted in the judgment, as well as salary increment.

Learned counsel for the appellant submitted that out of the three reliefs the appellant sought namely pension/gratuity, payment of ten months' salary, and salary increment prayed for in Misc. Application No. 204 of 2010, the appellant was granted two of the reliefs namely the ten months' salary and salary increment. It was therefore, counsel's contention that the Court of Appeal should have made an order awarding the appellant 2/3 of the costs of the application, and not vice versa.

The respondents' counsel submitted that the award of costs is discretionary and that the Court of Appeal exercised its discretion judiciously in awarding the costs in the application.

While it is trite law that the award of costs is on the discretion of the Court, the award of costs must follow the event unless the Court, for good reasons orders otherwise, according to Section 27 of the Civil Procedure Act.

In the present case, the appellant succeeded on two out of three grounds raised in his application, and therefore, he should have been

awarded at least 2/3 of the costs of the application unless there were other good reasons which were not stated. Therefore, this ground of appeal should succeed.

Conclusion

In the result, I would allow this appeal and make the following orders:

(a) The appellant is granted a declaration that he is entitled to terminal benefits in the form of pension and gratuity, in accordance with the Constitution of Uganda and the Pensions Act.

(b) The Appellant is awarded costs in this Court and Courts below.

Dated at Kampala this 20th day of June 2014.

B J Odoki
AG JUSTICE OF THE SUPREME COURT

CIVIL APPEAL NO. 04 OF 2013

BETWEEN

IYAMULEMYE DAVID.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Byamugisha and Kasule JJA) in Misc. Application No. 104 of 2010 dated 14th December 2012

JUDGMENT OF OKELLO, AG. JSC

I have had the benefit of reading in draft the judgment of my learned brother, Odoki Ag. JSC and I agree with his reasoning, conclusion and the orders he proposed therein.

Dated at Kampala this 20th day of June .....2014.

G.M. OKELLO

AG. JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAQMPALA

[Coram: Kitumba, Tumwesigye, Arach-Amoko, JJ.S.C. ; Odoki, Okello; Ag JJ.S.C]

CIVIL APPEAL NO.04 OF 2013

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IYAMULEMYE DAVID::APPELLANT

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ATTORNEY GENERAL::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Byamugisha and Kasule, JJ.A) in Misc. Application No.104 of 2010 dated 14th December, 2011]

JUDGMENT OF ARACH-AMOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, his Lordship Odoki, Ag. JSC. I agree with the judgment and the orders he has proposed.

Dated at Kampala this ....20th....day of....June....2014.

M. S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

CORAM: ***KITUMBA, TUMWESIGYE, ARACH – AMOKO, JJ.S.C, ODOKI, OKELLO, AG. JJ.S.C.***

CIVIL APPEAL NO.04 OF 2013

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[Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Byamugisha, and Kasule JJ.A) in Misc. Application No.104 of 2010 dated 14th December, 2011]

JUDGMENT OF KITUMBA, JSC

I have had the benefit of reading in draft the judgment of my learned senior brother, Odoki Ag. JSC. I concur with his judgment and the orders proposed therein.

As the other members of the Court also agree, this appeal is allowed with orders as proposed by the learned Justice of the Supreme Court.

Dated at Kampala, this ..20th.... day of ......June...................... 2014.

C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT