

UGANDA / JUDGMENT

Ekemu v Stanbic Bank Uganda (Labour Dispute Claim 308 of 2014) [2020] UGIC 2 (14 February 2020) [2020] UGIC 2

COURT

Industrial Court of Uganda

BEFORE

Ruhinda-Ntengye, J, Tumusiime-Mugisha, J

CASE / FILE NUMBER

Labour Dispute Claim 308 of 2014

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**THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 308 OF 2014 [ARISING FROM HCT-CS NO. 309/2013]**

BETWEEN**EKEMU JIMMY CLAIMANT****VERSUS****STANBIC BANK UGANDA..... RESPONDENT****BEFORE**

- 1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2. Hon. Lady Justice Linda Lillian Tumusiime Mugisha

PANELISTS

- 1. Mr. Ebyau Fidel
- 2. Mr. F. X. Mubuke
- 3. Ms. Harriet Mugambwa Nganzi

AWARD

The claimant by memorandum of claim filed on 11/1/2017 alleged that having attended a disciplinary meeting that was marred with malice, threats, intimidation and forceful resignation with predetermined motive to terminate his contract, he was eventually terminated. It was alleged in the memorandum of claim that the hearing was not fair resulting into unlawful termination and calling for general, aggravated and exemplary damages.

In a memorandum in reply filed on 2/2/2017, the respondent stated that prior to termination of the claimant there was an investigation and subsequent disciplinary hearing that found the claimant guilty of gross negligence resulting in loss to the respondent. According to the respondent the termination of the claimant was lawful and therefore the claim out to be dismissed.

The facts as agreed by both parties are:

- 1. The claimant was an employee of the respondent Bank from 5/3/2007 – 24/4/2013.
- 2. On 15/3/2013 the claimant was summoned to appear before the respondent's disciplinary committee on 20/3/2013 which he did.
- 3. On 24/4/2013 the claimant's contract with the respondent was terminated.

Both counsel agreed in their joint scheduling memorandum that the issues for defamation would be:

(a) Whether the claimant's termination from the respondent's employment was lawful?

(b) Whether the claimant was entitled to the remedies sought.

The respondent was represented by Mr Bwogi Kalibala of MMAKS Advocates while the claimant was represented by M/s. Sheilla Ndomeirwe and Mr. Lukongwa Aubray of Kaggwa & Kaggwa Advocates.

EVIDENCE

The claimant adduced evidence from himself alone and also produced a number of documents in support of his case.

The respondent adduced evidence from one Kitutu Vincent, Manager of the respondent in support of the defense.

The evidence in chief of the claimant was by a sworn written statement in which he claimed that the disciplinary hearing that he attended was marred by malice and threats but even then it not find him guilty but informed him that he should resign to which he protested after which he was terminated contrary to the recommendation of the committee that he should be given a warning.

The evidence in chief of Mr. Kitutu Vincent was by a sworn written statement in which he claimed that having been summoned to attend a disciplinary hearing, the claimant attended the same on 20/3/2013 to discuss the charges on Uganda Fraud Pension Accounts held in various branches and he was found guilty of fraud and causing financial loss and given opportunity to resign or be terminated. He refused to resign and was terminated.

In cross-examination of the claimant it transpired that the termination arose from the fact that he authorized a transaction on an account of one Achom Agnes who had died and in whose name a fraudster had issued a withdraw slip and run away with 12,000,000/=. According to him he sought further authorization from the mother branch of the account and got a response that Achom was a pensioner before he authorized payment.

In cross-examination the respondent's witness testified that the charge against the claimant was gross negligence and that he was found guilty of the same. He insisted that the committee's recommendation was that the claimant was negligent.

In cross examination and referring to the investigation report at page 39, the respondent's witness admitted that one Achom Agnes had died and that her account had this information but had been tampered with.

SUBMISSIONS

For the claimant it was submitted that he was not given reasonable notice and details of the charge against him so as to be able to defend the same because he was not availed the investigation report. Counsel submitted that this was contrary to **Article 28 of the Constitution** as well as **Section 66(1) of the Employment Act**.

It was the submission of the claimant that the termination breached **Section 68 of the Employment Act** since the reason in the termination letter was negligence of duty leading to financial loss while the investigation report and the disciplinary committee minutes did not find the claimant guilty of the same nor culpable in anyway.

For the respondent it was submitted that by a notification of the **disciplinary hearing form (exhibit R2)** the claimant was given five days prior to his appearance and that exhibit R2 spelt out the allegations against the claimant with details and rights of the claimant. It was submitted that the claimant during the hearing accepted that he made a mistake and that the committee found him negligent. Relying on the authority of **Carolina Kariisa Gumisiriza Vs Hima Cement Limited Civil Suit 84/2015** Counsel for the respondent argued that strict adherence to procedures in courts of law need not be applied to disciplinary bodies especially when one admits to a mistake.

Decision of court

Whether the claimant's termination from the respondent's employment was lawful?

A lawful termination is said to have occurred if

- (a) An employee resigns
- (b) The contract lapses because of limitation in the contract or retirement of the employee or any other reason to which the employee is not a party through any misconduct.
- (c) An employee is dismissed as a result of his misconduct or non-performance and such employee has been informed of the misconduct or non-performance and has been given sufficient time to defend the same before an impartial tribunal.

The case for the claimant as we see it from the facts is that he was asked to appear before the disciplinary committee when he was not sufficiently informed about the infractions he had committed and that therefore he was not able to provide a defence to the same and that this infringed on his right to be heard in accordance with Article 28 of the **Constitution** and **Section 66(1) of the Employment Act**. It is also the case for the claimant that he was not found culpable by the disciplinary committee but the respondent went ahead to terminate him.

In dealing with a disciplinary issue, the disciplinary committee does not act like a court. Its mandate is to hear both sides after giving the employee sufficient time to prepare for his defence. The disciplinary committee should not be unnecessarily bogged down by certain technical procedures that are usually necessary before a court of law. It may be sufficient if the employee is aware of the infractions launched against him, within a reasonable time so as to prepare for defending the same and if the committee is apparently impartial in reaching its decision. This was the basis of the holdings in **CAROLINA KARIISA GUMISIRIZA VS HIMA CEMENT C. S.**

84/2014, GRACE MATOVU VS UMEME LTD, L. D. C. 004/2014 and GENERAL MEDICAL COUNCIL OR MEDICAL EDUCATION ARMY REGISTRATION VS SPACKMAN (1943) AR ER 340.

The claimant was notified of the charge of gross negligence on 15/03/2013 and by the same notification was informed that the hearing would be on 20/03/2013. The notification informed the claimant that the basis of the charge was that he failed to match one M/s. Achom Agnes with the photo in the system thus approving withdrawal of 12,000,000/- from the account against forged documents given that the customer had long died and this caused the bank loss.

The claimant in our view was by the above notification sufficiently informed of the infraction that he was expected to defend since the infraction and its basis was properly described in the notification.

The investigation report revealed that various accounts in the bank were defrauded and money fraudulently withdrawn. Many staff of various branches appeared before the disciplinary committee as a result of this investigation and some were terminated (including the claimant) and others were exonerated. On perusal of the investigation report, it was not a report targeted particularly to the case of the claimant but to the general fraud in the affected branches of the bank. The investigation revealed that the account in respect to which the claimant was questioned and eventually led to his termination was opened at Kumi branch and the account

holder one Achom Agnes was a retired teacher receiving her pension on the account which had a memo "deceased". One Mudeke Fred, an ex-staff was discovered to have fraudulently activated the account by amendment of "deceased" to read 'KYCED.... Activated account' and modified it to City branch instead of Kumi. The telephone member, 0775586735 at the time of account opening was also changed to read 0702297107. A forged voter's card attached to a withdrawal slip was used to withdraw the 12,000,000/=.

Before authorizing the transaction, the claimant sent an email to City Branch **"kindly to confirm the attached"** and indeed City Branch confirmed the account was held by a pensioner who regularly received pension by saying

"what are we confirming? Kindly advise, signature is on the system, Achom Agnes gets her pension every month."

The evidence does not expressly show what was attached and needed confirmation by City Branch but it is more probable that it was a withdraw slip of 12,000,000/=.

The claimant did not return to City branch to explain what he wanted confirmed but during the hearing he was clear that although there were spelling problems in the documentation, his inquiry from City branch was not about the identity of the person drawing the money but about the amount being withdrawn. When asked about the identity of the person who withdrew the money he agreed that he was conned but denied negligence although he admitted that it was an oversight on his part by failing to get the details of the identification of the person who withdraw the money.

It was argued strongly for the claimant that this court having held that five days in the case of **Wakabi Fred Versus Bank of Uganda & Anor LDC 041/2014** was such a short time to prepare for defence it followed naturally that 4 days in the instant case was likewise too short a time. The claimant contended that the revelation of the investigation that **"deceased"** had been amended by an ex-staff to read **"KYCED"** active account and that the customer home branch was modified to read City branch instead of Kumi branch all indicated that the superior officers of the

bank were aware of the information but failed to bring it to the attention of bank staff and therefore the respondent was only a victim of this laxity of the bank superior officials, a victim of the bank's loopholes, mistakes and short comings, for which he ought not be punished.

Whereas it is true that this court in **Wakabi Fred Versus Bank of Uganda & Anor** (supra) held that 6 days were short to allow preparation of the defense of the allegations, in the same case the particulars of the infractions as well as the rights of the claimant, unlike in the instant case, were not revealed to the claimant before he appeared. The facts of the two cases therefore are distinguishable as to how much time was necessary to prepare for defence in each case.

Whereas the time within which to prepare a defence in court of law is prescribed by the law, reasonable time within which to prepare a defence before disciplinary committees unless specifically prescribed in the Human Resource policy, will always depend on circumstances of

each case. In any case even if the time was declared by court not to be sufficient, this by itself may not be enough to lead to an unlawful termination especially so when evidence points to a fundamental breach of the duties of an employee (see *Kanyangoga Vs Bank of Uganda*, LDC 080/2014 and *Grace Matovu Vs Umeme* LDC004/2014).

It was argued for the claimant that having not been given the investigation report, he was not able to appreciate the charges and therefore properly defend himself. Whereas we appreciate the need for availability of an investigation report to an employee before he/she attends the disciplinary hearing, we from the opinion that failure to avail such a report by itself cannot be fatal to the case of the

employer/respondent, if the facts revealed in the report as implicating the employee were already put to the employee in the notification of hearing.

The investigation report, as far as the claimant was concerned, revealed that he **"failed to match the physical appearance of a customer, Ms. Achom Agnes with the photo in the system ... ended up improving 12.000.000 on the account for Achom Agnes against forged withdrawal vouchers, the customer had long died before the transaction took place..."**

The notification to the hearing in the instant case was cauched in the above exact words and our position is that none availability of the investigation report to the claimant did not prejudice him in anyway. Consequently the question this court needs to answer is whether the claimant was guilty of gross negligence and whether he was dismissed/terminated because he was found to have been grossly negligent.

In the celebrated case of **Donogue Vs Stevenson (1932) AC** it was held that negligence would be established where the claimant

- (a) Owed a duty of care to the respondent.
- (b) The claimant breached that duty
- (c) As a result of the breach the respondent suffered a loss.

We have no doubt that in the circumstance of this case, the claimant was sufficiently aware of the charge and that he appeared before an impartial tribunal for defending the charge. The evidence does not suggest that the claimant was aware of the fact that Kumi, the home account of Achom Agnes had been amended to read City branch which confirmed that the account in question was held by Achom Agnes who was getting her pension through the same account. City branch wanted to know exactly what the claimant was seeking from them. It seems to us that the claimant simply wanted to confirm the amount to be withdrawn and not the person who was withdrawing the money. This is the evidence from him during the disciplinary hearing. The question before this court is: why was the claimant not interested in the identity of the person? Was he satisfied that the person who had signed the voucher and who was to receive the money was the person in the system? Had he done everything necessary, a reasonable manager in the circumstance would have done?

This court in the case of **Anyango Beatrice Vs Kenya Commercial Bank L. D. C. 325/2015** agreed with counsel for the respondent that one of the roles of the claimant (as manager of the branch) was to keep the Bank's funds safe and avoid any kind of loss through fraud or otherwise. The court also noted that this role was a daunting task given the fraudulent minds of persons targeting personal enrichment. This means that a bank manager has to always be on his look out for any possibility of a fraud happening. In the above case this court rejected the submission of the claimant that the procedures and policies of the respondent bank did not require the manager to physically interface with a customer before authorizing payment, the requirement being bestowed upon the teller and the duty of the manager being only to check the technical correctness of documents brought to his attention.

Consequently one of the holdings in the above case was that the purpose of limiting cashiers to paying out certain amounts and giving power to higher officers (managers) to approve higher amounts was to double check and avoid loss through fraud and in verifying documents such authorizing officers must take as much care or even more care than the cashiers before authorizing payment.

The claimant in the instant case (just like in the **Beatrice Vs Kenya Commercial Bank (supra)** case) admitted during the hearing that it was an oversight on his part not to have checked the detail of the identity of the person withdrawing the money from Achom Agnes's account. By implication the detail of the person would be in physically comparing the physical person withdrawing the money with the picture in the system. It was the claimant's failure or oversight to do this (just like in the **Beatrice Vs Kenya Commercial Bank** case) that led to the loss of 12,000,000/= in the instant case.

In **Barclays Bank of Uganda Vs Godfrey Mubiru, Supreme Court Civil Appeal No. 1 of 1998**, which this court relied on in the **Beatrice Vs Kenya Commercial Bank** case (supra), the court had this to say

"Managers in the Banking Business have to be particularly careful and exercise a duty of care more diligently than managers of most businesses. This is because banks manage and control money belonging to other people and institutions, perhaps in their thousands and therefore are in a

fiduciary relationship with their customers whether actual or potential." Following this observation in the Godfrey Mubiru case, the probability that actions or omissions of a manager of a bank in given circumstances will be found to constitute negligence is higher than that where the same actions or omissions are originated by any other person in a different organizations.

Consequently the fact that the claimant had recognized and received confirmation from City Branch that the questioned account was of a pensioner should have raised a tickle in his mind that the person seeking to withdraw the money having been born in 1973 as the voter's card was reading, could not be a pensioner. This could have made him seek physical interference with the **"customer"** and this way the fraud would have been avoided. In our considered opinion, the fact that the home account of Achom Agnes had been made **"active"** and transferred from Kumi to

City branch fraudulently, could not in any way prevent the claimant from becoming suspicious and taking due care in the identification process of the customer given the age on the voters card and given that he knew that the account was of a pensioner.

In the light of **Godfrey Mubiru case** (supra) we find that the claimant was negligent in failing to physically identify the customer of the Bank. Was the claimant found guilty of the charge of negligence and terminated for the same reason?

It was strongly argued on behalf of the claimant that the disciplinary committee did not find the claimant guilty of the charge of negligence. After hearing of the claimant the committee recommended that **"Jimmy be given an opportunity to exit the bank on his own volition failing which he be terminated based on the probable cause that he was not fully honest and might cause the bank further loss"**.

Counsel for the claimant strongly submitted that the above statement portrayed the fact that the claimant was not found guilty of negligence and that his dismissal was on presumption that he might cause the bank further loss.

We respectfully disagree. The finding of the committee that there was a probability that the claimant could occasion further loss was based on the earlier finding of the committee that the omissions of the claimant had already caused loss of 12,000,000/=. Therefore the recommendation did not at all absolve the claimant of the charges of negligence by stating that his failure to exit on his own would result into a dismissal on the basis that he was not honest and would cause further loss.

We agree with the submission of counsel for the respondent that the claimant after being availed opportunity to exit the bank on his volition and after his refusal to take the option, the alternative was to terminate him having found elements of negligence in his actions/omissions.

Accordingly we do not fault the respondent for terminating the claimant since he was fairly charged, and given an opportunity to defend the charges. The first issue is answered in the affirmative.

The second and last issue is **whether the claimant is entitled to any damages**. Since we have found that there was a fair hearing of the claimant on the charges levelled against him and that the respondent found (on the balance of probabilities) that the claimant was negligent, there is no entitlement to any damages. The claimant having failed to prove the claim of unlawful termination, it is hereby dismissed with no orders as to costs.

Delivered and signed by:

- 1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2. Hon. Lady Justice Linda Lillian Tumusiime Mugisha

PANELISTS

| 1. | Mr. Ebyau Fidel | |

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| 2. | Mr. F. X. Mubuuke | |

| 3. | Ms. Harriet Mugambwa Nganzi | |

Dated: 14/02/2020

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