

UGANDA / JUDGMENT

Kasasira v Yalelo Uganda Limited (Labour Dispute Reference 296 of 2022) [2024] UGIC 75 (13 December 2024) [2024] UGIC 75

COURT

Industrial Court of Uganda

BEFORE

Wabwire Musana, J, Musimbi, Panel Member,
Bigirimana penal member, Lapenga

CASE / FILE NUMBER

Labour Dispute Reference 296 of 2022

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THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA LABOUR DISPUTE REFERENCE NO. 296 OF 2022

(Arising from Labour Dispute No. KCCA/CEN/LC/408/2022)

MARTIN KASASIRA ::CLAIMANT**VERSUS****YALELO(U)LTD::RESPONDENT****Before: Anthony Wabwire Musana. J****Panelists:** Hon. Jimmy Musimbi, Hon. Emmanuel Bigirimana & Hon. Can Amos Lapenga***Representation:***

1. Mr. Pope Ahimbisibwe of M/S H&G Advocates for the Claimant.

2. *Mr. Bonny K. Ntanda of M/S Kampala Associated Advocates for the Respondent.*

Case Summary-

*Employment law- Unlawful dismissal- Oral hearing versus hearing by correspondence. The plaintiff was dismissed for poor performance. The defendant argues that the plaintiff was terminated for justifiable reasons, including poor performance, misconduct, and failure to prevent corrupt practices within the company. The Respondent anchored the dismissal on a

disciplinary hearing by email. The court found in favour of the claimant, declaring the dismissal unlawful and unfair, and awarded the claimant unpaid leave, compensatory pay, severance pay, general damages, and interest.*

Heard 3.07.2024 Delivered 13.12.2024

AWARD

Introduction

[1] On the 23rd of June 2022, the Respondent, an aquaculture firm, employed the Claimant as its Commercial Director on a four-year contract at a monthly salary of UGX 37,545,000/=. The Claimant was to serve probation for six months. On the 5th of January 2021, he was confirmed in service. On the 19th of November 2021, he was put on a two-month performance improvement. On the 20th of January 2021, Piers Mudd, the Respondent's

Chief Executive Officer, indicated that he was not satisfied with the Claimant's performance but that the Claimant was required to apply maximum attention to drive the Respondent's Commercial Division. By letter dated the 26th of May 2022, the Respondent terminated the Claimant for under-performance and performance shortfalls under the Performance Improvement Plan(PIP) from December 2021 to January 2022. The Claimant was paid UGX 49,596,774/= one month's salary in lieu of notice and 10 days leave. Aggrieved by his termination, the Claimant demanded an apology and payment of some UGX 398,761,851/= under various heads of claim. In its response letter, the Respondent contended that the Claimant's performance was dismal, and he was terminated for poor performance, justifiable reason and had been given a fair hearing.

- [2] The Claimant lodged a complaint with the Directorate of Gender Community Services and Production at the Kampala Labour Office on Seiwa Road. After a few sessions, by letter dated the 12th of October, H& G Advocates sought a reference to this Court.
- [3] On the 6th day of December 2022, Mr. Wilson Jingo forwarded the lower record to this Court.
- [4] In his memorandum of claim filed in Court on the 6th of December 2022, the Claimant impleaded unlawful termination and sought UGX 398,761,851/= being notice pay, payment in lieu of leave, severance pay, unpaid salary, compensatory damages, general damages, repatriation and unremitted social security fund contributions. He also sought a certificate of service.

- [5] In its reply, the Respondent contended that the Claimant's performance was poor and did not meet the required standards. The Claimant was issued warning letters and put on a PIP, but it did not make sufficient progress. It was contended that the Claimant admitted his poor performance and was terminated. These interactions lasted over 8 months. He was paid his terminal benefits and given a fair hearing consisting of a warning letter, PIP and emails and his responses were deemed unsatisfactory, for which he was terminated.
- [6] The parties filed a joint scheduling memorandum, which was adopted with two issues for determination, namely:
 - (i) Whether the Claimant was unlawfully and wrongfully terminated by the Respondent?
 - (ii) What remedies are available to the parties?
- [7] The parties called one witness each.

The Claimant's evidence

- [8] The Claimant's witness statement, dated 27th September 2023, was adopted as his evidence in Chief. He confirmed the terms of his employment. He said he executed his tasks diligently, increasing the Respondents' sales, and his PIP was without any basis. He told us that on the 26th of May 2022, the Respondent's CEO summarily and arbitrarily dismissed him on grounds of underperformance. He said he was embarrassed before his peers and staff, whom he had trained, mentored, and recruited, as well as customers, agents, service providers, and the general public. He told us that the dismissal breached the Respondent's Employee Handbook. He was not allowed to defend himself, and the email(AEX9) did not amount to a notification for a hearing. He said he suffered mental anguish, distress, low self-esteem, inconvenience and a feeling of betrayal. He asked that the Court grant him his prayers.
- [9] Under cross-examination, he told us there were zero sales when he joined the Respondent, and the CEO set his targets. He said the rolling average was 200 tons for 2020 and 400- 550 tons for 2021 and that in 2020, the sales were about 80% of the target, and in 2021, about 85%. He admitted receiving a warning letter in 2021. It was marked as AEX 3. He told us about an issue of dead stock, which was being sold to farmers, and someone in the Respondent's employment was earning a commission or kickbacks. He said there were some challenges, and sales were not reaching capacity. He also told us of episodes of inappropriate behaviour. It was his view that he was performing way above standard. He confirmed being placed on a PIP but felt it was not necessary. He said sales performance issues persisted and that he had apologised for some shortfalls. He said he was supposed to meet with the CEO on 23rd May 2022, but on 26th May 2022, he was issued a termination letter for underperformance. He said his employer did not follow the procedure and acknowledged receipt of one month's pay in ^I the issue of the notice.

- [10] In re-examination, he said that the sale had grown from the time he joined the Respondent. At the time of his PIP, the sales were 356 Metric Tons, and by the time of his termination, the sales had reached 545 Metric Tons. He said the allegation of corrupt practices was not against him but against Paul Lukwago. He said his strong reservations on the PIP were because business was growing exceptionally. He said he did not receive any call from Human resources to discuss his performance in January 2022 and that the performance issue only resumed on 23rd May 2022 in an email from the CEO. He responded to the email and was terminated on 26th May 2022. He did not receive any other letter before termination, and had he done so, he would have made a more researched response. He acknowledged payment of certain sums after he had filed the labour complaint. He said he had a fixed contract, and the next 24 months were terrible, including failing to pay school fees for his children.

The Respondent's evidence.

- [11] The Respondent called Shivan Tandekwire Sebalu, who testified as Human Resources Manager during the Claimant's tenure at the Respondent. She said she oversaw recruitment and continuance from employment. She testified that the claimant was given a warning letter due to gross negligence and failure to prevail over corrupt practices and that he was put on a PIP for gross negligence and poor performance. The PIP addressed the non-adoption of company values, poor communication, an ineffective route to market strategy, gross neglect and mismanagement of retail sales, tolerance to corruption, and inappropriate conduct towards female members, among others. The PIP ended after two months, and the results were not satisfactory. She confirmed the 23rd of May 2022 email identifying gaps, which the Claimant is said to have admitted, after which the Claimant was terminated. He was paid his terminal dues, and the dismissal was justified. She said he had been accorded a fair hearing.
- [12] Under cross-examination, Ms. Tandekirwe conceded she had no specific training in Human resources. She also acknowledged that she had no report detailing the financial loss caused by the Claimant. She told us that the Claimant was not personally involved in the alleged corrupt practices. The corrupt practices were investigated, and she confirmed that Paul Lukwago was terminated. She confirmed that the Claimant was not given a letter explaining his performance. She conceded to improvement in sales during the period the claimant was under a PIP. Her evidence was that the Respondent felt the Claimant was not performing to the expected standards. She said she did not advise the Respondent to terminate the Claimant. She conceded to the existence of the Respondent's Human Resource Manual, which was admitted as AEX14. She said the Respondent did not arrange a hearing, and concerning AEX9, she confirmed that the Respondent's CEO had asked to meet the Claimant the following day. Regarding AEX 38, she said the email did not mean the person being talked about was a non-performer.

- [13] In re-examination, she said the respondent did not make money by failing to meet targets. Regarding corrupt practices, as head of about 60 people, the Claimant was held accountable. She said the claimant did not meet his targets after the PIP. She said because he was the 2nd Highest ranking officer at the Respondent, the HR department did not handle the Claimant's case. She said she copied in the emails between the CEO and the Claimant. It was her evidence that the emails were "^a performance hearing".
- [14] At the closure of the Respondent's case, we directed the filing of submissions, which we have summarised and considered together with the evidence in rendering this award.

Determination.

Issue ^I Whether the Claimant's employment was unlawfully or wrongfully terminated by the Respondent:

Claimant's submissions

- \$[15]\$ For the Claimant, it was submitted that the termination contravened Articles 28 and 42 of the 1995 Constitution and Sections 66, 68, 71 and 92 of the Employment Act. Counsel set the threshold for dismissal and termination on procedural and substantive fairness and referred us to the case of *Kabagambe v Post Bank Uganda Limited*¹. He submitted that there was no letter calling the claimant for a hearing. According to the termination letter (AEX11), the termination was immediately effective. The Claimant was not allowed to defend himself.
- \$[16]\$ On substantive fairness, it was submitted that there was no evidence to show that the Claimant was underperforming in his duties. Instead, the evidence showed that he was able to build and grow the Respondents' fish sales. The Respondent did not bring any evidence to show poor performance even before this Court.

Respondent's submissions

- \$[17]\$ Counsel for the Respondent made three broad points. First, it was submitted that good performance is a crucial aspect of the employee's contract, and failure to meet set performance standards may be sufficient grounds for disciplinary action. Counsel relied on Section 66EA and *Hilda Musinguzi v Stanbic Bank, Uganda Limited*.² It was submitted that the Claimant was terminated for poor performance and had been issued a warning letter on sexual harassment. This sexual harassment amounted to poor performance and formed a substantive ground for termination. For the definition of sexual harassment, we were referred to *Gashirabake v Mwesiqye*³.
- \$[18]\$ The second point was that the PIP had been fair and objective. Relying on **Odong v Airtel* Uganda Limited*⁴ It was submitted that the Respondent treated the Claimant fairly and objectively before his termination for poor performance. Counsel argued that acts of dishonesty and corruption had been revealed and that the Claimant had

admitted to this. As head of the department, he had failed to detect and stop corrupt practices, which caused loss to the respondent. Citing **Donoghue v Stevenson**⁵ it was suggested that the Claimant breached his duty of care to supervise his juniors, leading to losses and damages to the company's finances and image. Counsel relied on **Barclays Bank of Uganda v Godfrey Mubiru**⁶ where the court emphasised the role of bank managers in the banking industry.

- [19] Finally, it was submitted that the Claimant was afforded a fair hearing. He was sent an email regarding his poor performance. He was also invited to a meeting and requested to make a response. The Respondent's CEO informed him that the defence was not agreeable. He was terminated. Counsel suggested that this was not the first or second time the
- ³ [2022] UGIC 24
- 4 [2023] UGIC 24
- ⁵ [1932] AC 562
- [1999] UGSC 22
- [&]</sup>lt;sup>1</sup> [2023] UGIC 50
- [&]</sup>lt;sup>2</sup> SCCA 05 of 2016

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Claimant had been warned about poor performance. We were invited to consider the case of **DFCU Bank Limited v Donna Kamuli**⁷ where the Court of Appeal held that the hearing under section 66 of the Employment Act did not require the employer to hold a mini court and that the hearing could be conducted through correspondences or a face to face hearing. We were also directed **General Medical Council of Medical Education and Registration of the United Kingdom v Spackman**^[8](#page-5-0), *Caroline Karisa Gumisiriza v Hima Cement Limited*^[9](#page-5-1) 10*and **Isaiah Gikumu v Mengai Oil Refineries Ltd'*^⁰ for the proposition that the disciplinary committee need not follow the procedure applied in the courts of law. It was merely required that an employee appearing before it is allowed to defend himself. Counsel referred to Section 41 of the Kenyan Employment Act 2007 which he suggested was similar to Section 66(now 65) EA. Mr. Ntanda concluded that the Respondent was both procedurally and substantively fair.

Rejoinder

- [20] Mr. Ahimbisibwe took exception to the late filing of the Respondent's submissions and the unpleaded and uncanvassed allegations and accusations of sexual harassment. He was of the view that no evidence of sexual harassment was adduced. This was only intended to dent and damage the Claimant's character and reputation and mislead the Court. We were asked to condemn this in the strongest possible terms.

- [21] In the substantive rejoinder, it was argued that Respondent had been running for almost 2 years at the time the claimant was recruited and within just two months of his joining, he was able to turn the respondent's fish sales from one turn a month to 70. 146. 150 154. 156. One hundred ninety each tonne per month and more. It was suggested that the PIP was fictitious. It was also submitted that there was no evidence to show financial loss. Mr. Ahimbisibwe pressed the point that one person, the Respondent's CEO, constituted himself into the Claimant's accuser, prosecutor and judge.
- [22] Citing Section 65EA and the **Musinguzi** case, it was argued that there were no invitations, notifications, notice, or time to prepare any defence or an opportunity to appear with a person of his choice or cross-examine any witnesses. Therefore, there was no procedural or substantive fairness. Counsel argued that the e-mail of the 23rd of May 2022 could not be envisaged as a hearing. It was submitted that the Respondent breached its own provisions.

Decision

I20I9I UGCA 2088

⁸ (1943) ALLER 340

⁹HCCS No. 84 of2015

¹⁰ Cause No. 296 of 2014. This citation is for a different case.

- [23] This issue for determination was framed as the lawfulness of the termination. We think it necessary to clarify the issue. Employment contracts end in one of two ways: termination or dismissal.
- [24] Termination occurs under Section 64EA. It is the discharge of an employee from employment at the employer's initiative for justifiable reasons other than misconduct, such as expiry of the contract, attainment of retirement age, or the other reason in Section 64EA. Therefore, if there is no misconduct or poor performance, the discharge of employment is known as termination.[11](#page-6-0) Dismissal means removing an employee from employment at the employer's initiative when the employee has committed verifiable misconduct.[12](#page-6-1) In the case of **Akewa* v *Loving One by One Ministries** [13] (#page-6-2) this Court repeated the critical distinction between termination and dismissal, where we observed that termination is about a no-fault discharge. The employee's conduct does not cause the employer to discharge the contract. In contrast, for a dismissal, the employer is compelled to discharge the employee for reasons associated with the employee's conduct and performance. The distinction is important because, in either case, there is a specific procedure.

- [25] In the present case, AEX 11 was the termination letter. The letter, which neither party disputed, read that there had been numerous discussions regarding the Claimant's underperformance. It referred to a PIP and concluded that:

"Management is therefore left with no alternative but to terminate your employment contract with immediate effect."

- [26] In our view, a plain reading of this letter would lead to the conclusion that the Respondent decided to discharge the Claimant because he was underperforming. And indeed, this was the thrust of each party's cases. It was about performance. The Claimant made the case that he grew the fish sales of the Respondent from one metric tonne to 190 metric tonnes per month. For the Respondent, it was misconduct and performance, including failing to detect corrupt practices and gross negligence, for which were referred to Lord Atkins's dicta in *Donoghue*. \Ne* were also directed in the written submissions to sexual harassment. It is, therefore, a common and inescapable conclusion that the Respondent discharged the Claimant for misconduct and poor performance. This means that the Claimant was dismissed within the meaning of dismissal under Section 2EA.
- [27] If the Court is confronted, as we think it is, with a question of dismissal as opposed to termination, what is the law regarding a lawful dismissal? As pointed out by Mr. Ahimbisibwe, this is set out in Section 65EA(formerly Section 66). The section reads;

65. Notification and hearing before termination

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¹¹ See Section 2EA

¹² See Section 2 EA

(1)Notwithstanding any other provision of this Part, an employer shall, before reaching a decision to dismiss an employee on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.

^Notwithstanding any other provision of this Part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee under subsection (1) may make.

(3) The employer shall give the employee and the person, if any, chosen under subsection (1) a reasonable time within which to prepare the representations referred to in subsection (2).

(4) Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks' net pay.

⁵(5) A complaint alleging a failure on the part of the employer to comply with this section may be joined with any complaint alleging unjustified summary dismissal or unfair dismissal and may be made to a labour officer by an employee who has been dismissed. The labour officer shall have power to order payment of the sum mentioned in subsection (4) in addition to making an order in respect of any other award or decision reached in respect of the dismissal.*

⁶(6) A complaint under subsection (5) shall be made within three months after the date of dismissal*

[28] While we have reproduced the entire provision for emphasis, the Courts of Judicature have already pronounced themselves on what constitutes the lawfulness of a dismissal. Judicial consensus is that a lawful dismissal involves observing the right to a fair hearing. There is a wealth of authorities, including ¹⁴*Ebiju James versus Umeme Limited*¹⁴ for what constitutes the right to be heard, ¹⁵*Mugisa v Equity Bank Uganda Limited*¹⁵ for the twin tests in determining the lawfulness of a termination, i.e., whether the employer adhered to or followed the termination procedure and whether the termination was substantially fair,

[&]“H. C. C. S No. ¹³³ of ²⁰¹²

[&]“; [2023] UGIC 62

¹⁶*Wabwire v Experta General Supplies Limited* [16](#page-8-0) 17¹⁷ for a definition of procedural fairness, ¹⁷*Kabaqambe v Post Bank Uganda Limited*¹⁷ and ¹⁸*Kameqero v Marie Stopes Uganda Limited*¹⁸ for an exposition of a fair hearing in respect to allegations said to be in an investigation report. All these authorities are consistent on the principle considerations for a lawful dismissal, and that is:

- (a) There must be a notice of allegations against the employee is served on him or her in sufficient time to prepare a defence,
- (b) The notice should clearly state what the allegations against the employee are.
- (c) The notice should state the employee's rights at the hearing, including the right to respond to the allegations against him or her orally and or in writing, the right to be accompanied to the hearing and the right to cross-examine the Respondent's witness or call witnesses of his own.
- (d) The employee should appear before an impartial committee in charge of the employer's employment issues.
- (e) If there are any investigations and other reports, they should be given to the employee in due time before the hearing.
- [29] The above elements are what this Court placed within the procedural fairness test applied in ¹⁹*Mugisa*¹⁹ and other cases. So, the starting point in determining whether Mr. Kasasira was given a fair hearing is to consider whether he was invited to a disciplinary

proceeding. Mr. Ntanda suggested that there were numerous discussions regarding his performance and that the email "AEX 9" constituted a hearing. Mr. Ahimbisibwe disagrees, and rightly so because with tremendous respect to Mr. Ntanda's submissions, the idea that the email(AEX 9) constituted a fair hearing would be at polar opposites with the jurisprudence as we understand it. In his email, Mr. Mudd discussed the challenges of the Respondent's commercial operations. He said some of these challenges were brought in by external market forces and internally generated unforced errors. The lawn tennis analogy that Mr. Mudd employed was the Claimant inability to foresee, adapt or communicate, in effect, the Claimant's mistakes. He suggested a one-on-one discussion on the 24th of May 2022 to canvass recruitment, the exit of Mr. Peter Mugwaniya, mid-management requirements, farm gate sales, Kenya Stock and defaulters, Uganda domestic sales and reporting lines. In our estimation, this was a senior management meeting and could not be said to have been a communication by Mr. Mudd to the Claimant explaining the position that the Respondent was considering Mr. Kasisira's dismissal. It did not even mention Mr. Ntanda's bar statement on sexual harassment. The email cannot, by any stretch of legal ingenuity and juristic interpretation, be a notification of ^a disciplinary hearing. It was no such thing, and

- ¹⁷ [2023] UGIC 50
- " [2023] UGIC ⁵²

¹⁶ [2023] UGIC 75

we would be inclined to find that there was no invitation at all. We are fortified in this finding by our decision in *Musimenta v United Bank for Africa*[19](#page-9-0)* where the absence of a proper invitation to a disciplinary hearing constituted procedural unfairness.

[30] Mr. Ntanda's other hypothesis was that the email constituted a hearing because the Claimant responded by admitting to the allegations of poor performance. Again, with great respect, we disagree. First, in *Stanbic Bank (Uganda) Limited v Nassanga*[20](#page-9-1)* it was held that where an employer gives reasons for termination, then a hearing must be held. Gashirabake JA was emphatic. His Lordship held that the purpose of the hearing was to establish whether the allegations advanced against the employee were true. In *Rwambale v Garfield Institute of Technology*[21](#page-9-2)* we held

> *"To prove the allegations, the employer must hold a hearing to put the allegations and evidence to the employee. This is the essence of Section 66EA. It is entitled "Notification and hearing before termination." The section provides for notification, which is covered well in Ebiju. It also stresses the requirement of ^a hearing. In definitive terms, a hearing is a judicial session usually open to the public and held to decide issues of fact or law with witnesses testifying.[22](#page-9-3) In our view and drawing from the definition of a hearing, it must be oral or at least a physical interaction between the employer and employee. At this interaction, the reasons are explained to the employee in the presence of a person of his or her choice. In our view, the framers of the EA intended that a physical hearing be conducted under Section 66(2)*

EA, where the employer hears and considers any representations the employee wishes to make. With the developments in technology, audio-visual links, and Internet Voice Over Protocols such as Zoom and Microsoft Teams, it is envisaged that such a hearing over the Internet may be permissible once duly recorded. However, a hearing must take place. There must be evidence of the allegations put to the employee for an opportunity to answer the allegations. That is a cornerstone of the labour justice system and the legal system. The Industrial Court has held that allegations of gross misconduct must be provable to a reasonable standard.[23](#page-9-4)*

[31] Unpackaged, this lengthy extract means that a disciplinary hearing must be oral, for serious allegations. Mr. Ntanda suggested, on the authorities of **Kamuli** and **Gikumu**, that it needn't be, nor should it be a mini court. Counsel referred us to Section 41 of the Kenyan Employment Act 2007. This section provides as follows:

"Hearing before termination on the grounds of misconduct.

¹⁹ [2024] UGIC 53

²⁰ [2023] UGCA 342

²¹ [2024] UGIC 24

²² **Black's Law Dictionary 11th Edn Bryan Garner Thomson Reuters 865**

²³ *Kamegero v Marie Stopes Uganda Limited* [2023] UGIC 52

41. (1). Subject to section 42(1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance, or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

^Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4), hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.²⁴

[32] Mr. Ntanda correctly said the section is worded in **pari materia** with Section 65EA. Counsel proposed that the hearing under Section 41 of the Kenya Employment Act 2007 (KEA) need not be oral and cited **Gikumu**. Our research led us to **Isaiah Gituku Gitimu v Menengai Oil Refineries Ltd* [25](#page-10-0)* which bore the same citation as **Gikumu**, Cause No. 296 of 2014. In **Gitimu**, Radido J. held that a disciplinary hearing can be conducted by correspondence or face-to-face hearing. In that case, the Claimant had been accused of theft and was issued ^a notification to attend a disciplinary hearing. In a later decision of **Kenya Revenue Authority v Reuwel Waithaka Githai & 2 Others* [26](#page-10-1)* the

Court of Appeal of Kenya[27](#page-10-2) held that a hearing under Section 41KEA need not be oral but is determined case-by-case. The Court arrived at this conclusion based on **Postal Corporation of Kenya v Andrew K. Tanui*,[28](#page-10-3)* where the Appeals Court held that a case-by-case basis determination of whether to hold an oral hearing or not was not good law in respect of a hearing before termination as envisaged under **Section 41** of the Act. In **Tanui**, the trial judge had an elaborate discourse on ^adisciplinary hearing, and we find it relevant to quote the same verbatim;

> *" This procedure was flawed. It does not show that the Claimant was advised of his right to be accompanied to the Board hearing. No significant hearing took place. An Employer should not merely recite the grounds listed in a letter to show cause and then ask the Employee if there is anything to add or subtract; the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers' Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the**

- ²⁵ [2015] eKLR
- ²⁶ i2019l KECA 300 (KLR)
- 27 Wakiaga, Warsame and Sichale JJA
- ²⁸ (2019| KECA 489 (KLR)

²' Microsoft Word - THE EMPLOYMENT ACT 2007

**hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical appearance before a Disciplinary Panel; the opportunity to be heard means much more than being asked to add, or subtract, any answers that may have been given in responding to the letter to show cause. The Respondent failed the procedural test on these grounds."*

The Kenya Court of Appeal left Rika J's dicta undisturbed. Therefore, Mr. Ntanda's reliance on **Gikumu** or, indeed, **Gitimu** would not be well grounded as the position of the law in Kenya, on Section 41 of their Employment Act, the equivalent of our Section 65EA, requires an oral hearing. The standard is expressed by our own Court of Appeal in **Hot Loaf Bakery Ltd v Ndungutse and 28 Others** ^which decision is binding on this Court, where Musota JA, with Bamugemereire JAs **she then was)** and Butera DCJ concurring, held, in respect of Section 66EA(hoiv **65)**, that the Employment Act requires the employer to hear and consider any representations made by workers. This means that nothing should be done to prejudice an employee without giving him or her an opportunity to defend himself or herself.

- [33] Returning to the instant case, the trigger to the Claimant's dismissal was that on the 23rd of May 2022, the Respondent's CEO, Piers Mudd, sent the Claimant an email listing various discussion points. Mr. Mudd suggested a meeting on the 24th of May 2022. In an email reply sent at 23:18hrs, the Claimant shared some brief responses to the CEO's concerns. There was no indication in this email that the Respondent was considering dismissal on any grounds, including the grave allegations of sexual harassment which Mr. Ntanda brought up in the submissions. As already pointed out, this trigger could not amount to a hearing. Therefore, we must conclude that no hearing was held, even if we agreed with Mr. Ntanda that a hearing could be held by correspondence, which we do not, because of the gravity of the allegations against the Claimant.
- [34] The final procedural point raised by the Respondent was that there had been warnings and an ongoing fair and objective PIP. For this proposition, Mr. Ntanda cited *Odong*. In *Odong*, the Claimant was placed on a PIP and later dismissed for poor performance. Citing George Ogembo in **Employment Law, Guide for Employer**, Tumusiime Mugisha J. found that the process of a PIP must be fair, reasonable, consistent and objective and that the Court may make an analysis of the process to check for compliance with these principles. In the present case, on 19th November 2021, the Claimant was put on a PIP for two months(AEX4). The plan listed eight areas of improvement(AEX5). The Claimant signed up for the PIP. On the 20th of January 2022, the Respondent's CEO communicated the outcome of the PIP with a score sheet attached(AEX 6 and AEX7). According to the score sheet, there was a definite improvement in core values with some difficulty of the senior retail manager in grasping leadership focus; there was improvement in communication but poor speed in response *

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and transparency, poor performance in route to market strategy and retail sales execution, solid engagement in anti-corruption drive, improvements in professional conduct, poor performance in divisional manpower restructure and non-implementation of sales incentive scheme. In the CEO's estimation, there was insufficient progress in commercial performance, but the Claimant's broader leadership role remained important. He concluded that there would be no further short-term action in a follow-up to the PIP. The score sheet on page 28 of the Joint Trial Bundle indicated that some scores ranged from 1-10 but did not indicate what the score meant. The Claimant did not sign the score sheet. There was also a breakdown of sales showing a steady increase in sales from 356 metric tonnes in November 2021 to 549 metric tonnes in February 2022. While the Respondent submitted that the Claimant's poor performance caused losses, we were not shown any audited books of accounts that would support that view. Given these competing considerations of poor performance on the one hand and broader leadership role on the other, including improved sales. If the Respondent considered that the Claimant had not improved, what was expected of the Respondent?

- [35] According to the *Odong* case, where the Court cited *Tamale Musisi Rita vs Airtel Uganda Limited*[30](#page-12-0)* the employer must demonstrate that the employee in issue is appraised and notified about his or her failure to perform, after which he or she is allowed

to improve by either being placed on a PIP or any other means the employer deems appropriate, and finally, the employee is subjected to disciplinary proceedings before the termination or dismissal can be effected. In the present case, in January 2022, the Respondent's CEO noted the outcome of the PIP. Then, on 23rd May 2022 at 20:58, the CEO sent the Claimant an email outlining several issues and suggesting a meeting on the 24th of May 2022. There was no such meeting except that on the 25th of May 2022, the Respondent terminated the Claimant. In our view, that termination went against the provisions of Section 65EA and would, on the authority of **Tamale**, be procedurally unfair. There was no hearing before the dismissal was effected. Therefore, we cannot accept the Respondent's hypothesis that the PIP was procedurally fair.

- [36] That brings us to the question of substantive fairness. Mr. Ahimbisibwe submitted that substantive fairness relates to the reason for termination. That is correct. Mr. Ntanda suggested that the Respondent was justified in terminating the Claimant for poor performance. That would be a legally correct argument if the Respondent had followed the procedure. This is because the grain of authorities is that a justifiable reason for dismissal is proven at a disciplinary hearing. The absence of a hearing compounds the employer's difficulty in proving substantive fairness where procedural unfairness exists. Ms. Tandekwire conceded under cross-examination that there was no hearing. Mr. Kasasira, in his cross-examination and re-examination, told us that if he had known that his performance was leading to a dismissal, he would have made a better-researched and detailed response. That is the essence of what the framers of the EA had in mind when they enacted Section 65 EA. The employee must be in the know of the reason that the employer

³⁰ LDC 183 of 2017

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is considering dismissal. In other words, absent of a hearing at which the allegations of poor performance could have been placed before Mr. Kasasira, at which he would have had an opportunity to respond to these allegations, it would be impossible to find that there was substantive fairness. In **Engineer Frederick Mubiru v Engineers Registration Board*[31] (#page-13-0)* Nambayo J. observes the right to be heard as a valued right and found the Appellant's suspension without a hearing on a 3rd allegation was a violation of his constitutional rights. We are also fortified by the dicta of Tuhaise JSC in **Stanbic Bank Uganda Limited v Deogratus Asiimwe**[32](#page-13-1) where Her Lordship holds that,

"To the contrary, however, the termination letter exhibit P3 explicitly stated that the reason for terminating the contract of employment was the respondent's unsatisfactory performance which put the respondent's performance in the issue. Under such circumstances, it would only have been fair, in line with the principles of natural justice, to avail the respondent a hearing, to allow him to defend himself before his dismissal since the termination was expressly stated to be fault based against the respondent-"

- [37] It is our finding that the email correspondence did not amount to ^a fair hearing. While the Respondent may have had, in its view, justifiable cause to summarily sever its contract with the Claimant on the grounds of poor performance, such cause inexplicably invited the provisions of Sections 65EA and 67EA. The Respondent was statutorily required to subject the Claimant to a hearing, and despite the Respondent's strenuous arguments, the email did not suffice as a fair hearing, in our view. And these contraventions are compounded by the Respondent's breach of its own human resources manual AEX14. According to the procedure for formal investigation, the respondent was required to investigate and share ^a copy of its report with the individual concerned. This provision would render the accusations of sexual harassment unsustainable. It has been held that an employer failing to follow its own internal procedure is an unfair labour practice.[33](#page-13-2)
- [38] After an objective evaluation of the evidence before us and having considered the parties' respective submissions and the law, we must conclude that the Claimant's dismissal from employment by the Respondent was procedurally and substantively unfair. It would, therefore, be unlawful. Pursuant to Order 15 rule 5 of the Civil Procedure Rules S.1 71-1 and for the reasons spelt out in paragraph [24] above, we would substitute termination with dismissal and answer issue one in the affirmative. As a result, it would be our finding that the Claimant was unlawfully and unfairly dismissed.

Issue II. What remedies are available to the parties?

³¹ High Court Civil Appeal No. 087 of 2024

³² [2020] UGSC 37

³³ See Charles Ochieng Opiyo v Lake Basin Development Authority [2021] eKLR

Declaratory relief

- [39] The Claimant is entitled to a declaration that he was unlawfully and unfairly dismissed from his employment with the Respondent. Having found as we have on Issue One, it is hereby declared that the Claimant was unlawfully and unfairly dismissed from employment by the Respondent.

Issuance of a certificate of service

- [40] The Claimant sought a certificate of service under Section 61 (now 60)EA. Under this provision, an employee who is unlawfully terminated is entitled to a certificate of service if they request. In the circumstances that we have found that the Claimant was unlawfully dismissed, and he has asked for the same, the respondent is directed to issue a certificate of service within 15 days of the date of this award.

Payment in lieu of notice

[41] The Claimant sought UGX 37,545,000/= being one month's pay in lieu of notice. Counsel for the Claimant cited Section 58EA in support of this claim. For the Respondent, it was argued that the Claimant had already been paid UGX 28,981,064 as payment in lieu of notice. Under Section 57(3)(b)EA, an employee who has served more than one year but less than five years is entitled to payment in lieu of notice. In the present case, the Claimant had served from the 13th of July 2020 until the 25th of May 2022, being a period of ¹ year and 10 months and 12 days; he would be entitled to one month's pay in lieu of notice. He conceded to having received UGX 28,981,064/=. The payslip was admitted as AEX 12, being the Claimant's terminal benefits. Accounting for PAYE, we would consider that the Respondent has paid the one month's pay in lieu of notice, and this claim would be denied.

Outstanding Leave

[42] The sum of UGX 12,096,774/= was captured in the termination letter "AEX 11". The Respondent did not provide proof that it was paid. As this is the Respondent's document, the Claimant is awarded the sum of UGX 12,096,774/= as outstanding leave days.

Compensatory sum of UGX 37,545,000/=

[43] Under Section 65(4)EA, an employee dismissed without a hearing is entitled to four weeks' net pay. In the circumstances, we award the Claimant four weeks' net pay. The Respondent is directed to make tax and other statutory deductions to arrive at the computation of four weeks' net pay.

Severance pay

- [44] The Claimant sought UGX 75,090,000/= as severance pay. The circumstances under which severance pay becomes due are provided in Section 87EA, including where an employee is unlawfully dismissed. Having found as we have, the Claimant was unlawfully dismissed, and he is entitled to severance pay. In **Kamuli v DFCU Bank³⁴** it was held that severance calculation shall be at the monthly pay rate for each year worked. As the Claimant was earning a gross salary of UGX 37,545,000/= per month and had worked from the 13th of July 2020 until the 25th of May 2022, it is ¹ year and 10 months and 12 days, and he is entitled to UGX 70,084,300/= in severance pay which we hereby award.

Repatriation

[45] The Claimant sought UGX 5,000,000/= in repatriation, arguing that the distance between where he was recruited and where he worked was 119.5Km and not 70Km as indicated by the Respondent. Under Section 38(1) EA, an employee recruited from a place more than 100 kilometres from his home is entitled to repatriation. The evidence did not show that the Claimant was recruited from his home in Bulindo. According to Google Maps[35] (#page-15-0) 36According to Google Maps, the road distance from Bulindo to Butembe

Village, where the Yalelo Fish Farm is located, is 82.8 kilometres via the A109 Highway, the main Kampala-Jinja Highway. The road distance via Buikwe is 94.5 km. Therefore, we are not persuaded that the Claimant is entitled to repatriation, and we decline to award it.

General Damages

- [46] Relying on **Kabagambe, Wabwire v Experta General Supplies Limited*[35](#page-15-0)* and **Ebiju,** Counsel for the Claimant sought UGX 450,540,000/= as general damages. Counsel justified this figure because the Claimant had grown the Respondent's business to UGX 5,700,000,000/= per month. No evidence of this growth was laid before us.
- [47] Opposing the claim for general damages, the Respondent Counsel took the common law view that general damages are the direct probable consequence of the act complained of. Because he had caused loss, it was argued that the Claimant was not entitled to any general damages.
- [48] In employment disputes, we are now guided by the Supreme Court dicta in **Uganda Post Limited v Mukadisi*[37](#page-15-1)* where general damages are awardable for breach of the employment contract and for the non-economic harm and distress caused by the wrongful dismissal, including compensation for emotional distress, mental anguish, damage to reputation, and any other non-monetary harm suffered due to the dismissal. Having found the Respondent unlawfully dismissed the Claimant, he would be entitled to general damages. In **Stanbic Bank (U) Limited v Okou**[38](#page-15-2) Madrama, Jafas **he then was)** held that general damages should

M [2015] UGIC 10

³⁵ [https://www.google.com/maps/dir/Bulindo/Yalelo+Uganda+Head+Office+Butembe+village/@0.4614389,\]\(http://www.google.com/maps/dir/Bulindo/Yalelo+Uganda+Head+Office+Butembe+village/@0.4614389,32.5942636\)32.5942636](https://www.google.com/maps/dir/Bulindo/Yalelo+Uganda+Head+Office+Butembe+village/@0.4614389,](http://www.google.com/maps/dir/Bulindo/Yalelo+Uganda+Head+Office+Butembe+village/@0.4614389,32.5942636)32.5942636)

³⁶ [2023] UGIC 75

³⁷ [2023] UGSC 58

³⁸ [2023] UGCA100

be assessed based on the prospect of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects.

- [49] The Claimant did not demonstrate evidence of his employability. In **Kabagambe,** we granted a Claimant who was unlawfully dismissed and had worked for 5 years and 6 months an equivalent of six months' pay. In **Kamuli v DFCU Bank*³⁹ the factors determining an appropriate quantum of damages in an employment dispute were held to be the Claimant's earnings, age, position of responsibility, and contract duration.⁴⁰ Mr. Ahimbisibwe asked us to grant twelve months' pay in general damages. The Claimant had

worked for about two years. Considering all the circumstances and his monthly salary of UGX 37,545,000/=, we award Claimant UGX 56,317,500/= in general damages.

Interest

[50] Counsel for the Claimant sought 16% interest on the monetary awards. He argued that the Respondent did not object to this. Under Section 26(2) of the Civil Procedure Act, Cap 282, the grant and interest rate is at the discretion of the Court. (See **Mukankusi v Uganda Revenue Authority*[41](#page-16-0)).* In **Musimenta v United Bank for Africa* [42] (#page-16-1), we* awarded the Claimant interest at 14% per annum from the award date until payment in full. We think it is proper to award interest at 14% per annum from the date of this award until payment in full.

Costs

[51] Mr. Ahimbisibwe sought costs for the unfair and unjust circumstances of this termination. This Court has held that costs in employment disputes are the exception on account of the employment relationship except where the losing party has been guilty of some misconduct. [43](#page-16-2) From the evidence before us, the Respondent anchored its termination of the Claimant on his poor performance. It was procedurally wrong and failed to prove the reason for termination substantively. We do not think it has misconducted itself, so we should award the Claimant's costs. There is, therefore, no order as to costs.

Final Orders

[52] In the final analysis, we make the following declarations and orders

- (i) It is hereby declared that the Claimant was unlawfully and unfairly dismissed from employment by the Respondent.

⁴¹ [2019] UGCA2027

³⁹ [20151 UGIC 10

⁴⁰ [20151 UGIC 10

⁴²[20241 UGIC 53

⁴³ See *Kalule v Pensions Gesellschaft Fuer Internationale Zusammenarbeit (GIZ) GMBH* [2023] UGIC 89

- (ii) The Respondent is directed to issue a certificate of service within 15 days from the date of this award.
- (iii) The Respondent is ordered to pay the Claimant the following sums:
 - (a) UGX 12,096,774/= as outstanding leave.

- (b) UGX 37,545,000/= as compensatory four weeks' pay. The Respondent is directed to make statutory deductions to this figure and arrive at net pay.
- (c) UGX 70,084,300/= as severance pay
- (b) UGX 56,317,500/= in general damages.
- (c) The sums above shall attract interest at 14% per annum from the award dated until payment in full.
- (iv) There is to be no order as to costs.

It is so ordered.

Signed, dated and delivered at Kampala this 13th day of December 2024.

THE PANELISTS AGREE:

- 1. Hon. Jimmy Musimbi,
- 2. Hon. Emmanuel Bigirmana &
- 3. Hon. Can Amos Lapenga

13th of December 2024

9:45 am

Appearances

- 1. For the Claimant:
- 2. For the Respondent: Court clerk:

Mr. Pope Ahimbisibwe Claimant in Court. Mr. Boniface Ntanda Mr. Samuel Mukiza

Mr. Ahimbisibwe Matter is for award, and we are ready to receive it.

Award handed down in open court.

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Prepared on 14 October 2026 · Esheria