

UGANDA / JUDGMENT

Kwagala v Soliton Telmec Uganda (Labour Dispute Claim No. 13 of 2017) [2020] UGIC 42 (30 October 2020) [2020] UGIC 42

COURT

Industrial Court of Uganda

BEFORE

Mavunwa, Panel Member, Ruhinda-Ntengye, J,
Tumusiime-Mugisha, J, Bwire, Panel Member,
Nyacho, Panel Member

CASE / FILE NUMBER

Labour Dispute Claim No. 13 of 2017

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THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE CLAIM No.13/2017

ARISING FROM HCCS 0233/2017

ALLAN KWAGALA BALESE CLAIMANT

VERSUS

SOLITON TELMEC UGANDA RESPONDENT

BEFORE:

- 1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
- 2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

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

AWARD

BRIEF FACTS

According to the memorandum of claim, the claimant commenced employment with the Respondent Company on 1/08/2015, as a Planning and Survey Officer, earning Ugx.900,000/-. According to him his salary was increased to Ugx. 1,200,000/- in recognition of his good performance. He was summarily dismissed on 1/05/2017, on grounds that he was engaged in making abusive and disrespectful comments on social media platform that boarded on incitement, threatening harmonious working relations and breach of peace, at the Respondent Company. He denied these allegations. He contended that his dismissal was unlawful because he did not make these comment and he was condemned unheard.

ISSUES

1. Whether the Respondent was entitled to dismiss the claimant.
2. Whether the Claimants dismissal was unlawful and or unfair.
3. Whether the Claimant is entitled to any remedies.

REPRESENTATION

The Claimant was represented by Mr. Kisambira Solomon of M/S Ajuu, Baleese Bazirake Advocates, Kampala and the Respondent by Mr. Musinguzi Bruce and Ms. Barbra Musimenta of Kampala Associated Advocates, Kampala.

EVIDENCE

The Claimant adduced his own evidence and the Respondent adduced evidence through Kennedy Mutua, its Human Resource and Administration Officer.

Allan Baleese Kwagala, testified that he entered into an open-ended contract with the Respondent Company on 1/08/2015 and he was dismissed on 3/05/17 on allegations that he made disrespectful comments on a social media platform 20/04/2017 and 27/04/2017. He also stated that the allegations were unfounded and baseless. He stated that he was issued with a warning letter in accordance with the disciplinary procedure. According to him this was the 1st warning letter (marked "D4") and it was for late coming. He expected to receive a subsequent warning including a final warning before termination. He stated that there was no basis for his dismissal.

Kennedy Mutua, the Respondent's Human Resources Manager testified that the Claimant was terminated partly for late coming, although this was not stated in the dismissal letter and for uttering abusive and disrespectful comments on a what's up forum. It was his testimony that he was not a member of the forum on which the alleged disrespectful comments were posted, but he was informed by one of its members, a one Wesley Songok, one of the Respondent's managers. However, Mr. Songok was not called as a witness.

SUBMISSIONS

1. Whether the Respondent was entitled to dismiss the Claimant and whether the summary dismissal was unlawful/wrongful/unfair?

Mr. Kismabira Counsel for the Claimant, submitted that the Respondent did not prove the allegations against the Claimant because it did not state the actual abusive and insulting words which were purportedly said by the Claimant. He also refuted the allegation that 5 members of staff refused to work because of the Claimant's statements, on grounds that there was no evidence to that effect. He further submitted that whereas the Respondent in the letter of termination stated that the Claimant “*was engaged in and made disrespectful” comments in social media*, it was the RW1's testimony that he “*participated in a discussion on a social media platform wherein he made abusive and insulting comments about managers of the respondent*”, therefore it was not sure what the reason actually was. He was of the opinion that the Respondent therefore was not entitled to dismiss the claimant.

As to whether the dismissal was lawful/wrongful/unfair, Counsel submitted that the Claimant was not given an opportunity to defend himself against the allegations that led to his summary dismissal. According to him the Respondent's witness RW1 admitted that the Claimant was not subjected to any disciplinary proceedings, he was not invited for any disciplinary proceedings and there is no record of a disciplinary hearing. Counsel also contended that whereas RW1 testified that he was informed by another member of staff, there is no record of the alleged disrespectful comments or the complaint made by the said staff member. It was his submission that all the tenets of a fair hearing were never complied with and the Respondent's Human Resources Manual which provides for an elaborate disciplinary process was disregarded. He cited **Magara Olive Vs Umeme Ltd C. S 39/2010, Section 66 of the Employment Act, 2006 and Jabi Vs Mbale municipal Council (1975) HCB 191, Eng. Pascal R. Gakyaro Vs Civil Aviation Authority, CACA No.60/2006 and Article 28 of the Constitution of Uganda as Amended**, to the effect that even if an employee's conduct justified summary dismissal, he or she was still entitled to a fair hearing before his or her dismissal.

He reiterated that whereas RW1 testified that he was informed by another staff, a one Songok, there is no record of the complaint which Songok made or evidence that the Claimant was informed about the allegations. And even then the dismissal would still be wrongful even if there was such a record, because the Claimant was not accorded a right to respond to the allegations, before an independent body. It was his submission that the Claimant was not given a right to question Wesley Songok and to examine the evidence against him in respect of the allegations of misconduct. He cited **Batuli Gearge William Vs Nakasongola District Council CS 372 of 2007** in support of this argument.

He prayed that Court should find that the Claimant's summary dismissal was unlawful and wrongful because the Claimant was not given an opportunity to be heard.

In reply Counsel for the Respondent submitted that the comments which the Claimant made on social media were abusive and insulting the managers and bordered on incitement and threatened to negatively impact the working relations at the Respondent Company.

In his view there was no requirement for a hearing because according to **Hilda musinguzi Vs Stanbic Bank(U) Limited CA No.005/2016**, an employer could dismiss an employee when the employee has committed verifiable misconduct and the employer cannot be forced to keep an employee against his will. He also cited **section 69 of the Employment Act 2006, Uganda Development Bank vs Florence Mufumbo CA No.241 of 2015** and **Odeke Francis &5 others vs Ibero (U) Ltd CA No. 100 of 2011**, for the legal proposition that an employer cannot be forced to keep an employee he or she did not want and he or she could dismiss an employee where the employee by his/her conduct indicated that he or she has fundamentally broken his/her obligations arising under the contract of service.

According to him, clause 13.1.6 of the Respondent's Human Resource Manual clearly prohibits the access, transmission and receipt of data containing content that could be considered discriminatory, offensive, obscene, threatening breach of peace, inciting, harassing, intimidating or disruptive to any employee or other person. In addition, the contract of employment prohibited the employee from using abusive or insulting language and if used it amounted to gross misconduct which justified summary dismissal. It was his submission that RW1 testified that on 27/04/2017, the Claimant in disregard of the Manual and his contract of employment, made abusive, disruptive and insulting comments against the Managers of the Respondent. According to him these statements bordered on incitement and threatened to negatively impact on the working relations at the Respondent company, because other employees refused to carry out their work, hence disrupting the Company's operations. Citing **Barclays Bank of Uganda vs Godfrey Mubiru CA No.1 of 1998** and **Hilda Musinguzi vs Stanbic Bank (U) Limited (supra)** to the effect that employees were accountable to their employers for acts which during the course of their duties, may compromise the interests of their employer. He contended that the single act of misconduct by the Claimant and its resultant effects justified his summary dismissal by the Respondent.

He further submitted that at the time the Claimant misconducted himself, the Company was executing a contract with the National Information Technology Authority (NITA), yet he was required to restore a network interruption that occurred. He contended that the Claimant's conduct affected the Claimant's performance of his fundamental roles and this had a ripple effect on other employees' duties.

He argued that there was no contradiction between the reasons stated in the dismissal letter and what RW1 stated in his witness statement as submitted by the Claimant. It was clear that the reason for his dismissal was his abusive and disrespectful comments and not late coming as was assumed.

According to Counsel the Claimant was summarily dismissed on account of his fundamental breach of contract, and the Human Resources Manual, which amounted to verifiable misconduct and therefore, his dismissal was justified.

Counsel submitted that although the Human Resource Manual provided for the suspension from work under normal circumstances, in the instant case the Claimant's actions led to other staff laying down their tools in the course of carrying out their work with NITA, which disrupted the network which needed to be rectified urgently, therefore the respondent had to act urgently to safe guard its interests and those of its clients hence the summary dismissal. Counsel stated that upon his dismissal the claimant was paid all statutory payments as required under the law, therefore the termination was lawful.

DECISION OF COURT

1. Whether the Respondent was entitled to dismiss the Claimant and whether the dismissal was unlawful/wrongful or unfair?

It is trite that an employer is entitled to dismiss an employee and the courts cannot fetter this right, as long as the employer follows the correct procedure of the law.(see **Hilda Musinguzi vs Stanbic Bank (U) Ltd SCCA No.5/2016**, **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010**, **Kasingye Tumuhirwe Genevieve Vs Housing Finance Bank LDR No. 115/2016**).

Section 2 of the Employment Act defines dismissal from employment as the “discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct”*

It was the Respondent's case that the Claimant was summarily dismissed in accordance with section 69 of the Employment Act, for fundamental breach of his contract and the Human resources Manual, when he made abusive and insulting comments against the company's managers. RW1, the Respondent's Human Resources manager testified that the Claimant was terminated for making abusive and insulting comments about the Respondent's Mangers and this amounted to gross misconduct and a fundamental breach of his contract and the Respondent's human Resources Policies and Procedures Manual. He however stated that the Claimant was not subjected to any disciplinary proceedings even though the Respondent's Human Resource Policies and Procedures Manual, provides for a disciplinary procedure.

Section 69 provides:

69. summary termination

(1) summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

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

(3) An employer is entitled to dismiss summarily and the dismissal shall be termed justified , where the employee has, by his or her conduct indicated that he/she has fundamentally broken his or her obligations arising under the contract of service”

Did the Claimant fundamentally breach his contract to warrant a summary dismissal?

It is now settled that, before an employer dismisses or terminates an employee, he or she must give the employee in issue a reason or reasons why he or she is being considered for termination and an opportunity to respond to the reason/s within a reasonable time and an opportunity to appear before an impartial tribunal or disciplinary committee, to make representations regarding the reasons leveled against him or her. Section 66 of the Employment Act provides for the procedure to be followed before the termination or dismissal of an employee as follows:

“66. Notification and hearing before termination

(1) Notwithstanding any other provision of this part, an employer shall before (*our emphasis) *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 (emphasis ours) and the employee is entitled to have another person of his or her choice present during this explanation,

(2) Notwithstanding any other provision of this part, an employer shall before reaching a 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 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...

The Respondent argued that the abusive comments made by the Claimant incited other workers not to do their duties leading to a network shut down of one of its clients NITA (Uganda) and because of the urgency to restore the network, there was no requirement to conduct accord the Claimant hearing.

The Employment Act, 2006 makes it mandatory for the Employer to justify the reasons for dismissal or termination of an employee. Section 68 provides that:

68. Proof of reason for termination

(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71

(2) The reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee....”

In our considered view the employer can only prove the reasons if he or she notifies the employee in issue about the reason/s and gives the said employee an opportunity to show cause why he or she should not be dismissed for the stated reasons.

In the instant case RW1's testified that he was informed by one of the managers a one Songok Wesley that the Claimant participated in discussions on social media, which were abusive and insulting to the Respondents Managers. He was not a member of the media platform. However, Mr. Songok, who informed him, was not called as witness nor was there any documentary evidence of the report he made to RW1 placed on the record. The abusive and insulting comments were also not particularized to enable us discern the magnitude they had on the Management or how they incited the other workers and breached the peace at the Respondent Company. There was no evidence led to prove that staff were actually incited. There was no record of a disciplinary hearing and there was nothing to show that the allegations against the Claimant were put to him or that he was asked to make any representations about them. In our considered view given that RW1 was not a member of the media platform, he should have gone further to verify the information given to him by Mr. Songok. What was reasonably expected of RW 1 was for him to further investigate this alleagtion through the ICT/ Systems Administrator. Courts have taken cognizance that in this digital error every contact on a such a system leaves a trace that can be established. This was not the case.

Clause 15.1 of the Respondent's Human Resources Policies and procedures Manual provides that:

“An employee who is accuse or is suspected of gross misconduct will normally be suspended from work on full pay while the company investigates the alleged offence. The employee will be required to attend a disciplinary interview within five days (or longer if the period of suspension has been extended or renewed).”

This clause, clearly shows that it is mandatory for an employee who is accused of misconduct as the Claimant was, to be subjected to a disciplinary process. We therefore do not accept the assertion by RW1, that the dismissal of the Claimant was so urgent to warrant a total disregard for this procedure. In our view it was a lame excuse to try and exonerate the Respondent for failing and or refusing to follow the correct procedure before dismissing the Claimant. In any case, the only evidence of any disciplinary action that was ever taken against the Claimant is “D4” which is a warning against late coming. RW1 categorically stated that the Claimant was terminated for the reasons stated under paragraph 10 of his evidence in chief, that is; ***“Between 20th April 2017 and 27th April 2017, the Claimant participated in a discussion on social media platform wherein he made abusive and insulting comments about the managers of the Respondent.***

Having found nothing on the record to prove that the Claimant made the abusive and insulting comments, we have no doubt in our minds that the Respondent failed to prove fundamental breach of his contract of service and its Human Resources Policies and Procedures Manual. In the circumstances, the Claimant's summary dismissal was wrongful and unlawful.

2. Whether the Claimant is entitled to any remedies?

According to his memorandum of claim he claimed for a declaration that he was unfairly, wrongfully and unlawfully dismissed, payment in lieu of notice, General Damages, Aggravated Damages, punitive damages, interest on all pecuniary awards from date of judgement until payment in full.

1. Declaration

The Claimant was unlawfully and wrongfully dismissed.

1. Payment in Lieu of notice

He claimed for Ugx. 1,200,000/-as 1 month's salary in lieu of notice in accordance with section 58 of the Act. Section 58 provides for notice periods as follows:

"58. Notice periods

- 1. A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-**
 - (a) where the contract of employment is terminated summarily in accordance with section 69; or (b) where the reason for termination, is attainment of retirement age.**
 - (2) The notice referred to in this section shall be in writing, and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.**
 - (3) The notice required to be given by an employer or employee under this section shall be-**
 - (a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;**
 - (b) not less than one month, where the employee has been employed for a period of more than twelve months, but less than five years;**
 - (c) not less than two months, where the employee has been employed for period of five, but less than ten years; and**
 - (d) not less than three months where the service is ten years or more.**

Having established that his summary dismissal was unlawful, the Claimant is entitled to notice or payment in lieu of notice. He worked for 1 year and 6 months, therefore he is entitled to 1 months' notice or 1 months' salary in lieu of notice as provided under section 58(3)(b) supra, amounting to Ugx. 1,200,000/=.

3. Severance pay

He also prayed for severance allowance as provided under Section 87 of the Employment Act. Section 87(a) provides for the payment of severance allowance to an employee who has been in the employ of an employer for a period of 6 months or more and is unlawfully terminated. Section 89 provides however that the formula for calculating severance pay shall be negotiated between the employer and employee, but it is silent in circumstances where there is no formula. This Court in **Donna Kamuli Vs DFCU Bank LDC No. 02/2015**, held that where there was no formula for calculating severance pay, the employee in issue would be entitled to the payment of 1 months' salary for every year served as severance pay. The Claimant however did not plead severance and he is bound by his pleadings. The Holding by the Court Appeal in **DFCU Vs Donna Kamuli CA No. 121/2016**, was to the effect that a court can not make an award for a claim that was not pleaded and submissions of counsel do not amount to a pleading. In the Circumstances this claim is denied.

4. General Damages

It was submitted for the Claimant; he was entitled to an award of general damages because he was dismissed for no reason at all and without following due process. He lost time and an opportunity to provide a decent living to his family because he was not able to get another job. He cited **Batuli George Vs Nakasongola District Local Council and Issa Baluku Vs SBI INT Holdings**, for the principle adopted by Courts to exercise their discretion, to award damages which reflect disapproval, of the wrongful and unlawful dismissal of employees, where appropriate and prayed that given that Court Awarded Ugx. 50,000,000/- in that **Batuli**(supra), this Court should award the Claimant Ugx. 100,000,000/=.

It is trite that general damages are awarded at the discretion of Court and based on the merits of each case. General damages are intended to return an aggrieved party to the position he/she was in before the injury caused by the Respondent occurred.

It is settled that an employee who was unlawfully dismissed is entitled to an award of General damages in addition to the remedies prayed for under the Employment Act. We have already established that the Claimant in the instant case was unlawfully terminated. He is therefore entitled to an award of general damages. He worked for the Respondent for a period of 2 years and had reasonable expectation to continue in the employment but for the unlawful termination. We think an award of Ugx. 24,000,000/= is sufficient as General Damages.

1. Aggravated and Punitive Damages

We found no justification to award, aggravated and Punitive damages. They are denied.

1. Interest of 15% on all pecuniary awards is granted from the date of Judgment until payment in full.
2. No order as to costs

In conclusion this claim succeeds in the following terms:

1. The Claimant was unlawfully and wrongfully terminated.
2. An award of Ugx. 1,200,000/- in lieu of notice.
3. An award of Ugx. 24,000,000/ as General Damages
4. Interest of 15% is awarded on 2 and 3 above from date of Judgement until payment in full.
5. No order as to costs.

Delivered and signed by:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

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

DATE: 30TH OCTOBER 2020

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