

UGANDA / JUDGMENT

Samuel Cedric Maniala v Airtel Uganda Limited (Labour Dispute Claim 209 of 2018) [2022] UGIC 55 (11 March 2022)

[2022] UGIC 55

COURT

Industrial Court of Uganda

BEFORE

Ruhinda-Ntengye, J

CASE / FILE NUMBER

Labour Dispute Claim 209 of 2018

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**THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 209 OF 2018 [ARISING FROM KCCA/RUB LC/142/2018]**

BETWEEN

SAMUEL CEDRIC MANIALA CLAIMANT

VERSUS

AIRTEL UGANDA LTD RESPONDENT

BEFORE

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1. Hon. Head Judge Ruhinda Asaph Ntengye

PANELISTS

- 1. Ms. Adrine Namara
- 2. Mr. Michael Matovu
- 3. Ms. Susan Nabirye

AWARD

Brief facts

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The claimant was an employee of the respondent as Territory Business Manager reporting directly to the Regional Business Manager. It was alleged in the memorandum of claim that despite performing well, the claimant was slapped with ^a letter placing him under ^a Performance Improvement Plan (P. I. P) effective 1/1/2015 without any performance appraisal having been effected. According to the claimant, the January and February 2018 PIP document contained eleven key result deliverables and the March 2018 contained six of them yet in February the Uganda Communication Commission (UCC) issued directives that affected growth

inf business since most retailers could not afford to comply with the directive, ctfusing drop of sales.

liie claimant alleged that he was only called to attend ^a PIP review session for the month of March on 11/4/2018 after which he was informed that he would receive ^a feed back after his performance was discussed by the Resource Manager and the C. E. O which was on 20/4/2018 and at which he was handed ^a termination letter.

In reply to the above claims, the respondent in ^a memorandum in reply asserted that the claimant struggled to achieve the key result areas as per key performance indicators in his job description and when he was placed on P. I. P to enhance his performance under mutually agreed key performance indicators, on assessment at ^a monthly basis he was found to have failed to achieve targets and hence he was terminated.

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Issues

- (1) Whether the termination was illegal.
- (2) What are the available remedies?

Representation*'

The claimant was represented by Mr. Karoro Francis of A. L. Advocates while Mr. Ocaya Thomas of M/s. K&K Advocates was for the respondent.

Evidence adduced

The claimant relied on his own written witness statement together with documentary evidence both on the court record while the respondent relied on two written witness statements of one Favia Ntambi and one Ali Balunywa and documents on the record.

Submissions

Counsel for the claimant submitted that whereas the claimant was terminated for poor performance, such ^a reason was not one of those mentioned under **paragraph 7.2.2, (as per PEX 2, page 64, claimant's trial bundle)** of the Human Resource

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Manual of the respondent and therefore termination was contrary to the H. R. M, making it illegal.

It was further contended by the claimant that the claimant was not afforded any hearing contrary to **Section 66 (2) of the Employment Act**. Counsel argued that the purpose of the P. I. P having been to ascertain whether the claimant's performance had improved, ^a review meeting of the P. I. P of 19/4/2018 was not ^a hearing in the absence of any minutes of the hearing.

Counsel argued that the termination was unfair in the face of **Section 73(2) of the Employment Act** given that some other employees put on the P. I. P who failed to achieve 100% target were not terminated.

It was submitted for the claimant that the respondent did not take into consideration his past performance before the P. I. P which included congratulations upon excellent performance from management as per emails at pages 13, *14, 15,* 15,16, 17 and 18 of the claimants trial bundle.

Counsel argued that the conduct of the P. I. P was in an unfair and illegal manner contrary to principles of natural justice in the sense that nothing in the P. I. P plan required the claimant to achieve ^a target of 100% and this was not mutually agreed as alleged by the respondent.

According to counsel whereas the deliverables for the PIP were ^a maximum of 6, as per page 19 of the respondent trial bundle, the month of Feb. 2018 showed deliverables to be 11. Counsel continued to argue that placing different O deliverables for February and March during the P. I. P made the P. I. P ^a sham and unlawful for being not based on principles of natural justice and for not being consistent in assessment.

Counsel strongly submitted that the termination was not fair or lawful since it was in breach of **Section 58 of the Employment Act** and paragraph 13.02 of the terms and conditions of service as well as paragraph 9.2. of the contract of service of the claimant.

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In reply to the above submissions, counsel for the respondent contended strongly that the claimant was not summarily dismissed but was terminated. According to counsel **Section 2 of the Employment Act** read together with Section 65 of the same Act and given the interpretation of the court of Appeal in **UDB Vs Florence Mufumba Civil Appeal 241/2015**, employment can be ended by Notice and since the claimant was paid 1 month in lieu of notice, the termination was lawful and in accordance with the law. He relied on the authority of **B. O. U Vs Joseph Kibuuka and others, Civil Appeal 281/2016** which according to counsel re stated the position that at termination the employer need not give any reason.

Counsel argued that clause 7.1(a) of the terms and conditions provided for an option of terminating an employee in accordance with the terms in the contract, and that there was an alternative to terminating employment on recommendation of ^a disciplinary committee. According to counsel since the contract provided that the employer could terminate it with notice or without notice upon payment in lieu thereof, the argument that the respondent did not follow its own terms and conditions had no merit.

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Relying on **DFCU VS Donna Kamuli, Civil Appeal 121/2016**, counsel argued that the respondent was not required to hold ^a mini court in the process of ^a hearing and therefore it was sufficient when the claimant's P. I. P was assessed and found below standard through constant appraisals at the end of every month in which the claimant participated.

According to counsel in an appraisal on 15/2/2018 the claimant achieved one key performance indicator out of the 11 set for him and in March 2018 appraisal, his supervisor's remarks showed he had struggled throughout the P. I. P period despite the support.

Counsel argued that in satisfaction of the requirement of ^a disciplinary hearing, the final review of the P. I. P was done by the line manager of the claimant, Regional Manager, the sales and distribution director as well as the Human Resource Director and according to counsel this was sufficient hearing as per the decision of **DFCU Vs Donna Kamuli (supra)** since the claimant was able to make representations at each review.

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Counsel contended that employees alleged not to have been terminated after failing to get target of 100% like the claimant were operating in ^a different region ⁿ and no evidence was adduced that they were put on a P. I. P.

The emails referred to by the claimant as congratulatory messages were, according to the respondent, mails sent to employees in the entire Northern Uganda Reg' on constituting of Adjumani, Apac, Arua Gulu, Kitgum and Lira where the claimant ' /as stationed. They were not for the claimant as ^a person. Counsel insisted that the specific emails were addressed to specific areas like Adjumani and Kitgum and that the claimant as an individual failed to attain his goals.

Counsel argued that the claimant's overall performance having been below target, in terminating him the respondent did not violate its guidelines, especially so when the claimant was duly informed of the targets he was supposed to meet which were agreed upon. According to counsel the claimant was rightly put on a performance plan and deliverables were never more than 6; only that there was a distinction between key result areas and key performance indicators. In counsel's view the respondent had a right to set different targets for each month for as long as they were in accordance with his job description. The P. I. P was therefore not a sham according to counsel, but it sought to assess and help the claimant improve on all aspects of his job.

According to counsel, the P. I. P reflected the communication of Uganda communications Commission in that the target for gross adds was taken out from the March P. I. P since there was a ban on selling sim cards.

In his submission, the P. I. P process was transparent and the claimant was consulted, and assessed monthly to help him in his performance but he failed and having been paid in lieu of notice, he could not turn round to claim that termination was in breach of **Section 58 of the Employment Act** since the contract itself provided a method of termination which was complied with.

Decision of court:

The law relating to termination of employment was settled by the Highest Court of this land in the case of **Hilda Musunguzi Vs Stanbic Bank (U) Ltd SCCA 005/2016** where the lead judgement of Hon. Justice Eldad Mwangusya at page 14 states:

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"My reading of section 68 (2) of the Employment Act 2006 is that it does not impose such a high standard of proof of the reasons for termination as would be required in a court trial. If the respondent believed that the appellant committed acts of and/ or omissions which compromised the security of the bank leading to a loss of some money in a robbery the respondent was justified in terminating her contract because a lot is expected of an employee charged with the responsibility of running a bank facility as was stated in the case of **Barclays Bank vs Edward Mubiru(supra)**. **The respondent was in my view rightly held accountable for the loss in the branch and as already stated the right of an employer to terminate a contract cannot be fettered by the courts so long as the procedure for termination is followed to ensure that no employee's contract is terminated at the whims of an employer and if it were to happen the employee would be entitled to compensation**".

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our understanding the decision in the above case does not state that without any reason an employer can terminate the contract of an employee by giving notice or payment in lieu of notice to the employee. In our understanding, the decision states that where an employer terminates employee not at his "our whims" (without any reason) or without a hearing as prescribed by Section 66 of the Employment Act, such termination would be unfair and illegal calling for compensation.

This is in line with the Termination of Employment Convention (ILO) No. 158 of 1982 which under Article 4 provides

"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

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Consequently, the submission of counsel for the legal proposition that the employer is not obliged to give a reason in reliance of a court of Appeal decision, does not have merit.

We entirely agree with the submission of counsel for the respondent that an employer has all the rights to subject an employee to a Performance Improvement Plan aimed at enabling the employee improve performance where such employee is lacking. In such a scenario it is expected that the employer in an ordinary assessment and appraisal of the employee finds an insufficiency before subjecting him/her to a P. I. P. The employee undertakes a P. I. P well knowing his weakness and what the employer expects him or her to improve on. The P. I. P must have certain aspects aimed at improving performance of the employee and after the P. I. P agreed period the employee is assessed or appraised on his/her performance on the P. I. P and consequent to the appraisal results, the employer takes a decision.

A Performance Improvement Plan, unless provided for in the contract of service or in the Human Resource Policy, is but at the discretion of the employer, otherwise in our view, once an employee fails to perform duties as agreed upon, and after giving such employee a fair hearing and after proof of such failure to perform, may terminate the employee without subjecting him or her to a P. I. P.

According to RW1 and RW2, the claimant had duties with corresponding key performance indicators including "growing the company SOGA, RMS and CMS, drive infrastructure growth and achievement by site in the territory, management and coordinating the territory activities of network management.

From the evidence of RW2, Balunywa Ali, "during the period April 2017, the claimant's performance on their KRA's were found wanting both from a number's perspective and also from an overall market perspective" and as a result he was put on a P. I. P in December 2017 effective 2008.

Although the letter dated 19/12/2017 placing the claimant under ^a P. I. P informs the claimant that on assessment his performance was found below expectation, no such assessment or appraisal was adduced in evidence.

It seems to us that no formal appraisal or assessment was done for the period April ²⁰¹⁷ - November ²⁰¹⁷ which RW2 claimed led to placement of the claimant under ^a P. I. P and in our view this was ^a material irregularity, since as already noted placement under ^a P. I. P would only follow evidence of dismal performance by an

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employee. The PIP plan was effective 1/1/2017 for 3 months meaning it would be upto 1/4/2017.

On perusal of the P. I. P indicating performance by 15/2/2018, at page 19 of respondent trial bundle the regional manager's comments shows that the claimant had achieved on ^I KPI out of ¹¹ and that this was the same - January. The second column indicates the 11 to be deliverables and the 1st column indicates 4 parameters. The P. I. P clearly indicates 6 key expectations which both claimant and supervisor signed.

In our opinion it was these expectations that ought to have been assessed and appraised so as to determine whether the claimant had improved or not.

The supervisor's assessment that the claimant had achieved 1 KPI out of 11 was in direct conflict with the submission of counsel that the column for deliverables was divided into four which were at the same time key result areas. There was no sufficient explanation as to why the deliverables were referred to as KPI's by the supervisor. The guidelines as ^a key to the P. I. P clearly showed that there should be ^a maximum of 6 deliverables. In our view, introducing 11 KPIs outside the guidelines and calling them deliverables was an indication that the P. I. P was not properly introduced, most probably because there had been no assessment prior to its introduction. There was no prior appraisal of the exact weakness of the claimant so as for the P. I. P to reflect the exact need of improvement.

Although the respondent witness testified that the targets were agreed at 100%, there is nothing on the record to suggest that there was ^a mutual agreement to the target of 100% for each of the deliverables or KPI's as the supervisor referred to them.

Although the formal progressive review was expected every end of month, the record does not show the review of the end of January and the end of April. The P. I. P period was expected to end by 1/4/2017 which was expected to be the date of the last review. Only two formal progressive reviews seem to have been done: the one of 15/2/2018 which was signed off on 16/03/2018 and the one of 1/3/2018 which was signed off on 16/4/2018. The P. I. P was for 3 months and reviews should

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have been made 1/2/2017, 1/3/2017 and 1/4/2017 to be able to align the appraisals with the period under which the claimant was expected to be assessed and appraised. In the absence of ^a constant appraisal for the period agreed, we cannot be positive that the claimant did not pass the P. I. P.

It is out finding that the P. I. P having initially been instituted without ^a clear and formal establishment of the weakness of the claimant its assessment and appraisals having controversies surrounding what constituted key result areas, deliverables, parameters or key performance indicators, and there having been 2 instead of ³ appraisals it was not conclusive of the failure of the claimant to perform his duties as per his job description.

The respondent contended that the claimant had been given ^a fair hearing during the process of assessment of the P. I. P. Apart from the signatures of the claimant on the two P. I. P appraisals, there is no other evidence that the claimant attended a fair hearing.

Relying on the Donna Kamuli case (supra) counsel for the respondent intimated that the final performance review handled by the line manager, regional manager sales Distribution director and Human Resource Director constituted ^a hearing.

The claimant was invited for ^a final review or feedback review on ^a WhatsApp message on 19/4/2018 only to receive ^a termination letter dated the same date. Nothing in this process was the equal of the process in the Donna Kamuli case

In the final analysis on the first issue it is our finding that the termination of the claimant was illegal.

The next issue is about remedies

- (a) It is hereby declared that the termination of the claimant from employment was illegal without due process.
- (b) Payment of salary arrears from date of termination till date of Award This prayer is denied for being futurist and for offending **Section 41(b) of the employment Act** that provides for payment of salary only for work done. (See also **Francis Ouma Vs Oakwood investments Limited LDR 46/2015**).

(c) Payment in lieu of leave

This fails because there was no evidence to show that the claimant applied for leave and it was rejected, (see: **Kangaho Silver Vs Attorney General, LDC 276/2014; Malinzi Vs Uganda Printing & Publishing Corporation LDC 50/2017**).

(d) Compensation for unlawful termination

This prayer fails because the power to grant the same is under **Section 78** providing for the labour officer to grant the same because unlike this court the labour office is limited in the total amount he can award in respect to compensation. This court can Award damages to ^a limit only the court deems fit, yet compensation serves the same purpose as damages, (see also **Irene Rebeca Nasuuna Vs Equity Bank Uganda, LDC 06/2014**).

(e) Special damages of 29,517,549/=

The respondent does not deny that the loan was incurred on the premises that the claimant would pay the same solely by installment deductions from his salary. We have looked at the letter of undertaking by the respondent and in our view it confirms that the loan payments would be recoverable by instalment deductions from salary. Therefore, in accordance with the decision of this court in **Florence Mufumba Vs Uganda Dev. Bank LDC 138/2014**, this prayer is allowed.

(f) Severance allowance

Relying on **Uganda Development Bank Vs Florence Mufumba LDC 138/2014** counsel for the respondent argued that the claimant was not entitled to severance pay because **Section 87 of the employment act** was not applicable to ^a cause of action of unlawful termination. True to the submission of counsel, the above case at page 49 of the judgement states:

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"In the circumstances, section 87 of the Employment Act which gives the instances where severance package is due is inapplicable to a cause of action of unlawful or wrongful termination as in this case "

In another judgement of the coy^t of Appeal, **Joseph Kibuuka & 4 others Vs Bank of Uganda, court of Appeal No. 281**, the decision of this court to award

severance allowance in the same circumstances was upheld at page 39 of the judgement.

Considering that that the Florence Mufumba court of Appeal decision was on 3/7/2020 and the latter case of Joseph Kibuuka was on 11/05/2021, we follow the latter decision and find that the claimant was entitled to severance allowance. In accordance with the calculation used in **Donna Kamuli Vs DFCU LDC 2/2015** which was upheld in **Bank of Uganda Vs Joseph Kibuuka & 4 others (supra)** the claimant having worked from November 2015 to April 2018 at 3,000,000/= per month will be entitled to 6,750,000/=

(g) General damages

Given that the claimant earned 3,000,000/= per month and given that he had worked for slightly more than 2 years, and given severance and loan repayments awarded to him, he is hereby awarded 35,000,000 as general damages.

(h) Repatriation

In *Okello Jane Vs Entebbe Handling Services Limited* LDC 200/2014 this court in interpreting section 39 of the Employment Act was of the view that ^a contract terminated before expiry and not within the circumstances enumerated therein did not call for liability to pay repatriation allowance. For the same reasons in the above case, this prayer is denied. In any case matter of transfer from station to station has nothing to do with section 39 of the employment Act.

(i) Payment in lieu of Public holidays worked

This prayer is denied for having not been supported by evidence.

(j) Costs

No order as to costs is made.

In conclusion the claim succeeds in the above terms.

Delivered & signed by:

1. Hon. Head Judge Ruhinda Asaph Ntengye

PANELISTS

1. Ms. Adrine Namara
2. Mr. Michael Matovu
3. Ms. Susan Nabirye

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Dated:11/03/2022

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