THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE APPEAL NO. 045 OF 2017

[ARISING FROM KCCA/CEN/LC/164/2017]

BETWEEN

KCB BANK UGANDA LIMITED……..……..……..APPELLANT

VERSUS

SYLVIA MBOHA..……..……..RESPONDENT

BEFORE

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

PANELISTS

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

AWARD

This is an appeal against the decision and orders of the labour officer in complaint No. **KCCA/CEN/LC/164/2017.**

The appellant was represented by Mr. Amar Ali of Kabayiza Kavuma Mugerwa & Ali Advocates while the respondent was represented by Mr. Kawuzi Peter and Ms. Jakora Deborah of Wakabala & Co. Advocates & Musagala Advocates Solicitors respectively.

The brief facts arising from the appeal are:

The respondent was an employee of the appellant. Num Agriculture Limited held an account with the respondent Bank to which one Kareem Abdu was the sole signatory. The auditors of Num Agriculture Ltd asked for information relating to this account and Mr. Kareem Abdu gave permission to the respondent to release information to the Auditors and she released account balance of 106,711,550 as at end of 2014. The auditors however wrote back asking her to cross check since they had information from KCB Kampala branch that the account balance was 787,380,050/=.

According to the respondent, the next morning Mr. Abdu Kareem asked her not to communicate to the auditors any more since one Simon, his relationship manager would handle and she obliged. Kareem then informed her that she gave him a wrong figure to which she apologized and referred the auditors to Simon who also confirmed balance as 106,711,500/= and thereafter she was terminated.

The labour officer found the termination unlawful and ordered the appellant to pay certain amounts and the appellant, feeling aggrieved lodged this appeal.

According to the memorandum of Appeal, there are 3 grounds of appeal to wit:

1) The labour officer erred in law when he found that the respondent was unfairly terminated.
2) The labour officer erred in law when he found that the disciplinary hearings were not conducted within the law.
3) The labour officer erred in law when he found that the respondent is entitled to remedies.

As the 1st appellate court, this Court shall re-evaluate the evidence on the record and thereafter reach its own decision.

The respondent was terminated because the disciplinary committee found that she had concealed or given incorrect information relating to the account balance of the appellant's client.

The evidence available to the labour was that the respondent being an employee of the appellant availed information as to the balance on the account of a client of the appellant which was 106,711,550/=.

The client asked her to cross check since he had information from another branch that the balance on account was 787,380,050/= but before she cross checked she was informed by the client that she need not bother since the client was in touch with his relations manager who would sort out the issue. However, the client sent a message that she, the respondent had given a wrong figure to which she apologized and advised that the relationship manager would provide precise information. The emails from both respondent and client read as follows:

"From: Saeed Yusuf (Mailo: syusu@Pharofoundation.org)

Sent: Wednesday, July 15, 2015 6.05pm.

To: Mboha, slyvia

Cc: James Brown

Subject: **Re: Account information**

Hi Sylvia,

Can you please double check the balance on account 2202263993?

According to the attached statement the balance should be 787,380.050.00/=

Kind regards,

Saeed Yusuf.'

The next day, 16/7/2015 at 14.48, the respondent replied.

"Dear Mr. Brown,

I hope that you are well.

Apologies for inaccurate information sent to you yesterday. That was unfortunate on my part. My colleague Simon handles Num Agriculture Ltd. account. All issues regarding Num Agriculture Ltd. should be directed to Smutabule@ug.kabbankgoup.com who is the relationship manager. He will contact you shortly with precise information.

Thank you and best wishes".

On November 24th, 2016, Human Resources Manager wrote to the respondent for an explanation:

"Dear Sylvia,

Re: Request for explanation

It has been reported that on 16/7/2015 you gave customer Num Agriculture Limited's Auditors wrong information regarding their account No. 2202263993 balances. The information you provided made the client, his shareholders and auditors believe that their account balance was Ugx. 787,380,050 and not 106,711,550, yet the latter was the correct account balance.

Your action if proven constitutes an act of gross negligence.

In light of the above you are hereby asked to explain your involvement in the above stated incident …."

In her explanation, the respondent wrote:

"…I responded to the auditors on 15/7/2015. I particularly advised the balance as at 31/12/2014 on account No. 2202263993 as Ugx. 106,711,550. On the same day I received an email from the auditors claiming that balances I had issued differed from the balances they held. They also had a statement reflecting Ugx. 787,380,050 which they said they had received from the Bank, through their relationship manager. I counter checked account balances I had provided with balances in the system and they were similar. I also went over all the other information I had responded to, and it appeared correct. I called the client and verbally communicated the same.

However the client (Mr. Abdu) maintained that I cease communicating with his auditors. He informed me that he no longer wanted to be handled by myself and informed me that his relationship manager has been Mr. Simon Mutabule and that Simon who mentioned that he was aware and will conclude with the auditors the same day. I responded to the email from the client s auditors, apologized and referred them to Simon who was to verify the balances and advise them. I later followed up with the client and he assured me that the issue had been resolved; the auditors had received the balance confirmation".

On 15/7/2015 at 15.11 Mutabule P. sent an email to James Brown on the account balances:

"Following your request, I hereby confirm that:

(a) Num Agriculture Limited maintained 3 current accounts up to the 31/12/2014:
USD Account 2202264043 with a balance of 0.81
Ugx. Account 2202429026 with balance of – 11,000/=
Ugx. Account 2202263993 with a balance of 787,380,050/=

I hope this information is sufficient but please do not hesitate to contact us in case of any further clarifications.

An undated email from Saeed Yusuf addressed to the respondent suggest that the above bank statement was from Kampala Road branch to which the respondent replied on 15/7/2015 17.14.

"I will double check and confirm tomorrow morning, as I am out of office. Please advise on the source of the statement**?"**

During the disciplinary hearing the respondent is reported to have tried to confirm with Kampala Road branch but no one seemed to recognize the signature on the statement and that she noted that the last 3 entries on the statement were missing. She is reported to have failed to share her observations on the statement with anyone including her supervisors or the customer auditors having assumed that it would have been a system error. She is reported to have said that she recalled her email because she had to manage the client relationship first since she thought the auditors were collecting additional information.

The disciplinary committee observed:

(a) The respondent had made every effort to verify information when she received the falsified statement.
(b) The email sent on 16/7/2015 implied she admitted having sent wrong information, it discredited her earlier communication and gave her customer confidence to deal with Simon Mutabule.

(c) The email was sent after Simon's wrong balance and she had opportunity to confirm the correct balance.
(d) She failed to escalate or follow through after realizing there was something wrong with the balances and statement held by the customer.

With the above observations the committee concluded that there was a likelihood of collusion by Sylvia Mboha, Simon Mutabule and Abdi Kareem and that the respondent exhibited gross negligence and exposed the bank to a financial loss, the reason of the recommendation to terminate her.

Counsel for the appellant chose to argue grounds 1 and 2 together and he strongly submitted that the labour officer misconstrued facts when he stated that the complainant did not provide (wrong) information. His submission was that the hearing was conducted within the law since the decision of the committee stemmed from the respondent's confirmation of her conduct that misled the customer and the auditor, and from her own email that apologized for inaccurate information sent by her to the client.

Counsel for the respondent on the other hand argued strongly that the respondent never provided any wrong information as the account balances she provided the client were the correct balances and that she never confirmed the figure of 787,380,050 as account balance. Counsel argued that the committee should have pointed out any procedures in the human Resource policy that the respondent flouted before reaching her decision. He submitted that the appellant's claim that the respondent should have reported the inconsistency to the auditors was farfetched since this was not the norm and even then it was the account holder himself who was claiming that the balance provided by the respondent was false, making it difficult for her to believe that the account holder was fraudulent. According to counsel the bank dismissed the respondent on a wrong assumption that she gave a balance of 787,380,050 instead of 106,711,050.

While the labour officer was discussing the contents of the termination letter at page 10 of the Award, he stated:

> "**While the termination letter states that the information the complainant provided made the client, his shareholders and auditors believe that their account balance was Ugx. 787,380,050 instead of 106,711,550, on closer**

scrutiny of all the evidence adduced at no point in time did the complainant actually provide information as stated

In her witness statement, the complainant states that she believed that she was unfairly terminated since she gave the correct balance. That her apology was based only on instructions she received from a one Abdu Kareem telling her to cease communication.

I find that the reason adduced for the termination of the complainant was not justifiable but a fabrication to get rid of her…"

We have no doubt in our minds and it is not disputed by the appellants that the account balances provided by the respondent were the correct ones. The termination of the claimant was as a result of her apology which according to the respondent recanted the earlier correct balances and confirmed the wrong balances. The case for the appellant therefore is that apologizing and therefore confirming the wrong balances constituted negligence on the part of the respondent to which she was culpable.

Whether or not someone is negligent will always depend on the circumstances of a given case. In the celebrated case of **Donougue Vs Stephenson (1932) AC** it was held that negligence will be proved when it is established that the defendant:

(a) Owed a duty of care to the plaintiff
(b) Breached that duty of care
(c) Plaintiff suffered loss or injury as a result of such breach

In the case of **Barclays Bank of Uganda Vs Godfrey Mubiru Civil Appeal, 1 of 1998.**

The Supreme Court emphasized the role of bank managers in the banking industry when it stated thus:

'**Managers in the banking business have to be particularly careful and exercise a duty of care more diligently than managers of most businesses. This is because banks manage and control money belonging to other people and institutions, perhaps in their thousands and therefore are in a fiduciary relationship with their customers whether actual or potential…"**

In the recent case of **Ekemu Jimmy Vs Stanbic Bank Uganda LDC 308/2014** the same principal was borrowed and emphasized by this court.

Although in the instant case the respondent was not a manager, it has to be emphasized that anyone dealing with money in the bank system has to be particularly careful since as stated in the above case, the money belongs to third parties for whom the bank holds the same in trust.

Accordingly the respondent's duty of care to the customers of the bank was equivalent to the duty of care of managers in the above cases. We have no doubt that the respondent owed a duty of care to provide correct balances on accounts of the customers of the appellant and in the event that she failed in this duty resulting in loss she would be liable.

As already pointed out the balances that were given to the customer of the Bank by the respondent were the correct balances. After being informed by the customer that the balances were incorrect and that he had a different figure from another branch of the Bank, the respondent asked him the source of the balances and the customer only told the respondent to stop communicating about the account since he was now in touch with his own relationship officer particularly in charge of the account. It is noted that the email conversation to the respondent about concerns of wrong account balances was on 15/7/2015 at 6.05p.m when the respondent was asked to double check but at the same time asked not to deal with the account anymore but instead let one Simon handle.

The next day the respondent wrote:

> "**Apologies for inaccurate information sent to you yesterday. That was unfortunate on my part. My colleague Simon handles Mun ……Account. All issues should be directed to Simon ….who is the relationship manager……"**

Was this apology amounting to confirming that the account balance was not 106,711,550 but 787,380,050 as the disciplinary committee found? Did the apology constitute negligence as held in the case of **Donogue Vs Stephenson?** Did it amount to an admission that the account balance of 106,711,550 given to the customer was a wrong balance on account?

It seems to us that the apology was a courteous way of telling the customer that if the customer believed that the account balances of 106,711,550/= given to him was wrong, then the respondent was sorry about it, but the customer could confirm with Simon, his preferred officer to work with about the same issue.

We think that being courteous to a customer by saying sorry to what the customer believes is offensive or not right should not necessarily be taken to have been an admission of doing wrong.

The circumstances under which the apology was made and the nature of the apology itself suggests to us that the respondent was only being polite to the customer and not admitting to have given the customer the wrong balance in preference to the falsified balances as the true balances.

According to the disciplinary committee, the email (or the apology) exposed the Bank to financial loss and by sending the email the respondent exhibited gross negligence.

We do not find any evidence of any financial loss as a result of the apology. Although the apology may have caused the customer to believe that he had the wrong balances or account, nothing on the evidence showed that this led the customer to do certain things which he would not have done had he not been made to believe that he had what was not on account. The apology could have been a mistake but in terms of the case of **Donogue Vs Stephenson** unless the mistake is acted upon to the prejudice of the plaintiff, such a mistake can only be called a mistake and not an act of negligence. The mistake must result in injury or loss suffered by the offended party in order to amount to an act of negligence. In the instant case neither the customer of the Bank not the Bank itself suffered any injury.

The apology was written on 16/07/2015 but the respondent was asked to file an explanation 24/11/2016 and all along she was working as if nothing had happened. Whereas annexure D at page 96 of the record of appeal is a Civil suit agent the respondent together with the appellant and Simon Mutabule filed by Num Agriculture (U) Limited for recovery of USD 832,451, there is nothing in the plaint that shows how the apology of the respondent caused the loss of USD 832,451and this fortifies our earlier finding that the third ingredient of the tort of negligence was not proved. The Civil suit was filed on 26/4/2017 in the commercial division of the

High Court, 5 months after the respondent was asked to file an explanation which was more than 1 year after the apology. On perusal of the appeal hearing, it occurs to us that the dismissal of the respondent was occasioned by the intention of the appellant to sue the appellant in the above case. This is because the appellate committee agreed to uphold the decision of the disciplinary Committee because

> **"Retraction of her balance information misled the customer and is an act of gross negligence on her part which has resulted into reputational risk when the bank was reported in national newspapers as well as a pending intention to sue worth USD 1 million. She committed the bank and has exposed the bank to supposed loss".**

It is our finding that the dismissal of the respondent was precipitated by panic over the potential filing of a suit against the appellant without analyzing the demerits and merits of the suit, instead of being precipitated by the negligence constituted in the omission or action of the respondent. We believe this is the reason it took more than 1 year before she was asked to explain and most probably after the threat of being sued.

It was strongly argued on the 2nd ground of appeal that the restriction of the employee to only his fellow employee to attend the hearing flouted the rights of the respondent to a fair hearing. It was also argued that in accordance with **section 65(5) of the Employment Act,** the appellant could not proceed with a disciplinary hearing since 22 days after the occurrence of the alleged misconduct the appellant had waived the right to press disciplinary proceedings against the respondent.

Section 66 of the Employment Act provides

> "**66 Notification and hearing before termination**
>
> **(1) Notwithstanding any other provision of this part, an employer shall, before reaching a decision to dismiss an employee, on the ground of misconduct or poor performance, explain to the employee, in a language the employees 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*.**

> ***(2)*** **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 Section (1) may make.***

Section 62(5) of the Employment Act provides

> **"Except in exceptional circumstances an employer who fails to impose a disciplinary penalty within *fifteen days from the time he or she becomes aware of the occurrence giving rise to disciplinary action, shall be deemed to have waived the right to do so."***

Section 66(1) of the Employment Act above mentioned provides for a third party chosen by the employee to listen in and give support to the employee. While inviting the respondent for a disciplinary hearing, the appellant informed her of the following rights

"(1) put your version of the story to the hearing.

(2) Invite witnesses in support of your version.

(3) *Be represented by a fellow employee of your choice*.

(4) An interpreter if you so elect.

(5) Challenge evidence brought against you

(6) challenge the outcome of the hearing within 3 days of the decision thought an appeal procedure if you are dissatisfied with such outcome."

Unfortunately for the respondent **Section 62(5)** above mentioned applies only and only once the disciplinary action is not a dismissal.

It is provided under **Section 62(5)** that

> **"(1) Section 62(5) to 64 shall apply where an employer imposes a disciplinary penalty, *other than dismissal*, on an employee because of**

neglect, failure or alleged failure on the part of an employee to carry out his or her duties under his or her contract of service."

Accordingly the submission of counsel for the respondent that the bank having instituted disciplinary proceeding 7 days after the time prescribed under **Section 62(5)** above mentioned made hearing null and void has no merits at all since the disciplinary penalty was a dismissal.

We appreciate the submission of counsel for the respondent that the respondent was limited to a choice of a fellow employee contrary to the spirit of **Section 66(1)** and **66(2)** which in our opinion extends to any other person including legal counsel.

We, however do not accept the contention that the respondent did not exercise her right of appearing with another person because she was limited to a fellow employee who according to counsel could not appear before his or her boss. There was no evidence to suggest that none of the employee s or whoever employee the respondent expected to be her choice would find challenges appearing before her/his bosses as intimated by Counsel. Nothing during the disciplinary hearing suggested that the respondent was prejudiced by the restriction to calling a fellow employee.

In conclusion on the first ground of appeal, it is our finding that the appellant having not proved any procedures that were flouted by the respondent and having not proved the 3 main ingredients of negligence against the respondent, the finding of the disciplinary committee that "**there was a likelihood of collusion by Sylvia Mboha, Simon Mutabule and Abdu Kareem'** could not stand and neither could the finding by the same committee that **'Sylvia exhibited gross negligence and has exposed the bank to a financial loss".**

Since the infraction of gross negligence was not proved on the required standard, yet it was the cornerstone of the complaint that led to the dismissal of the respondent, it is our finding that the labour officer was correct in finding that the termination was not in accordance with the law. Accordingly grounds 1 and 2 of the appeal do not succeed.

The complaint of the appellant on ground No. 3 is about the remedies granted by the labour officer. It was submitted that the labour officer having wrongly found that

the dismissal of the respondent was unlawful, there was no basis in allowing any of the remedies.

This court having upheld the decision of the labour officer, we shall proceed to examine whether the remedies granted by the labour officer were in accordance with the law. The labour officer is empowered under **Section 78 of Employment Act** to grant remedies once he/she finds that an employee has been unfairly terminated.

In the instant case the respondent was awarded 2,090,000/= being 4 weeks net pay for failure to give her a hearing. We have failed to trace the origin of this remedy. Although the appellant did not prove the case brought against the respondent, this remedy has no legal basis. In any case the respondent was given an opportunity to defend the allegations. Consequently the award of 2,090,000/= is hereby set aside.

The respondent having been unlawfully terminated she was entitled to severance allowance. In awarding severance the labour officer correctly applied the principle in **Donna Kamuli Vs DFCU Bank** and therefore we have no reason to disturb the award of 22,920,000/= which is hereby upheld. However the labour officer went ahead to lay a fine of 45,840,000/= under Section **92(2) of the employment act.** This section provides for a fine calculated at two times the amount of severance after being convicted of the offence of failure to pay severance. It is our considered opinion that the fine can only be levied after the process of prosecution and conviction of the offender which was not the case in the instant case. Consequently the award of 45,840,000/= is hereby set aside.

The labour officee also awarded the respondent 3,920,000/= as basic compensation. This award was in line with **Section 78(1)** which provides for a basic compensatory order for four weeks wages. The order of the labour officer is therefore hereby sustained.

The labour officer awarded 11,781,000/= as additional compensation of 3 months. On perusal of **Section 78(2) and (3)** it is provided that the labour officer may award as additional compensation an amount not exceeding 3 months wages. This being the case we do not find any reason to disturb the remedy given by the labour officer in exercise of his powers under **Section 78 of the of the Employment Act.** The order of 11,781,000/= as additional compensation is hereby sustained.

Although the labour officer was right to refer the issues of general damages, and costs to this court, it was incumbent upon the respondent to impress it upon this court that the compensation awarded to the respondent was not sufficient and that given the circumstances she was entitled to more than what was awarded by the labour officer. It is only then that this court may exercise its jurisdiction and power under **Section 94(3) of the employment Act** which provides.

> **"The Industrial court shall have power to confirm, modify or overturn any decision from which an appeal is taken and the decision of the Industrial court shall be final..".**

Accordingly, we decline to entertain pleas of award of any other compensation exceeding the awarded by the labour officer in the exercise of his powers under **Section 78 of the Employment Act.**

The labour officer was correct in ordering the appellant to issue a certificate of service and this order is hereby sustained.

In conclusion the Award and orders of the labour officer are sustained except the orders of payment for a fair hearing and the orders of a fine of failure to pay severance allowances.

The sums awarded by the labour officer and sustained by this court shall carry interest of 12% from the date of the Award by the labour officer until payment in full. Orders accordingly.

BEFORE

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

PANELISTS

1. Ms. Adrine Namara ……
2. Mr. Micheal Matovu ……
3. Ms. Susan Nabirye ……

DATED 24/02/2020