

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CV-CS-034 OF 2012

MUGISHA TUMWINE DB ::: PLAINTIFF
VERSUS

ATTORNEY GENERAL :::DEFENDANT

BEFORE: HON. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

The Plaintiff brought this suit against the defendant for recovery of general damages and compensation for wrongful termination of his Prisons Service, special damages equal to UGX 273,298/= from the date of termination until payment in full, general damages for inconvenience and mental suffering and costs of the suit.

The plaintiff was from 2001 employed as a prison warder by Uganda Prisons under No. 7086. In the year 2009, he was at Fort Portal Government prison at Katojo. On 8/7/2009, the plaintiff was granted a 60-day leave to take care of his domestic issues, allegedly with a sick child in Bushenyi. The leave was to expire on 7/9/2019. The plaintiff reported back for work after the expiration of leave but the Officer in Charge allegedly threw him out of the staff quarters and the plaintiff allegedly returned to his home in Bushenyi to look after his sick child. On 25th September 2009, the plaintiff was dismissed from the service for desertion.

The plaintiff claims that the actions of the defendant's agents were illegal, uncalled for and violated his right to a fair hearing and natural justice. He lost expected earnings from his service and it caused his suffering and his entire family.

The case for the defendant is that the plaintiff absconded from duty after being granted leave. That the plaintiff reported back for work on 5/9/2009, rejected the alternative accommodation that was availed to him and disappeared from the station for a period of more than 21 days and therefore declared a deserter and lawfully dismissed from the Prisons Service.

Representation and hearing

The plaintiff is represented by Mr. Muhumuza Samuel of The Legal Aid Project of the ULS. The defendant is represented by Ms. Anne Tusiime of Attorney General's chambers, Fort Portal.

The hearing proceeded by way of witness statements and cross examination. The plaintiff led evidence of only himself as PW1. The defendant led evidence of two witnesses. Gervase Tumuhimbise DW1 and Tumusabe Israel as DW2. Both counsel have also filed written submissions that have been considered herein.

At Scheduling, the parties raised the following issues for determination by court:-

- 1. Whether the termination of the Plaintiff's service from Uganda Prisons was lawful***
- 2. Whether the plaintiff is entitled to the remedies sought***

I resolve the issues in the order framed.

Burden and Standard of proof

The burden of proof is upon the Plaintiff to prove his case on a balance of probabilities. **Section 101, 102 and 103 of the Evidence Act** provide that he who asserts a fact must prove it. Whoever desires any court to give the

judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see **Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345** and **Sebuliba Vs Cooperative Bank Ltd (1982) HCB130**)

Court's determination

Issues 1

The suit now seeks to determine whether the plaintiff's dismissal from the Prisons Service was lawful.

The plaintiff, **PW1** testified that as a result of the change in environment when he was transferred from Luzira to Fort Portal, his first born developed a strange illness. He asked for a 60-day leave to go and take care of his child which was granted on 8/7/2009 to expire on 7/9/2009. He relied on **Pexh2**. He returned to his post on 4/9/2009 and found that his personal belongings taken and his accommodation occupied by another officer. He requested for leave extension but it was not granted. He returned to his home to look after his sick child. On 15/9/2009, he wrote to the Regional Commander (**Pexh3**) to explain his problem but received no response. On 25/9/2009, he was dismissed from the service (**Pexh4**) on grounds of desertion. He was paid his October Salary.

During cross examination, **PW1** confirmed that after his leave, he left the station without permission.

DW1 was the Officer in Charge of Katojo prison in 2009. He testified that while the plaintiff was away on leave, the station experienced scarcity in accommodation and out of the plaintiff's two rooms, one was allocated to another officer. That on 6/9/2009, the plaintiff was required to report for duty, which he did but later disappeared and DW1 informed the Prisons headquarters of the disappearance on 16/9/2009 (**Dexh1**). On 20/9/2009, DW1 wrote to the Commissioner General of Prisons, the Chief Administrative Officer and Resident District Commissioner Bushenyi district requesting them to trace for the plaintiff and provided full address of his home (**Dexh2**) but in vain. DW1 had information that the plaintiff had been employed by Kyenjojo District Local Government which he confirmed by the plaintiff's appointment letter dated 1/6/2009 (also labeled as **Dexh1**). The plaintiff was accordingly declared a deserter and dismissed from the service.

During cross examination, DW1 confirmed that the plaintiff was dismissed after 19 days of absence and not 21 days as required by the Uganda Prisons Service Standing Orders.

DW2 is the Senior Human Resource Officer of Kyenjojo district. He testified that the plaintiff was employed in Kyenjojo District Local government as a Lab Assistant on 1/6/2009. He referred to the plaintiff's appointment letter dated 1/6/2009. On 13/7/2009, the plaintiff was posted as a Lab Assistant to Mpara HCIII (**Dexh2**) and also exhibited the plaintiff's payment slip.

In his submissions, counsel for the plaintiff argued that **Section 47 of the Prisons Act 2006** requires that for a person to be considered a deserter, he or she needs to have been absent without authority for at least 21 days. He argued that the plaintiff was dismissed for desertion after only 19 days

which was wrong and illegal. Counsel further argued that the plaintiff was not heard which is against to his mandatory right to a fair hearing.

Counsel for the plaintiff also argued that the defendant departed for his pleadings when he led evidence of the plaintiff's employment with Kyenjojo district when the same was never pleaded in the written statement of defence.

In response, Counsel for the defendant argues that before court can delve into the aspects of desertion, it needs to note that the plaintiff is a public officer in line with **Article 175(a), (b) and Article 257(1) of the Constitution** of the Republic of Uganda, 1995. As such, he is bound by the Public Service Standing Orders 2021 which provide under **Section (A-o)** that a public officer can be removed from office for among others abandonment of duty for 14 days or more. The same position is highlighted in the case of ***Akello Beatrice Ociti Vs Attorney General HCCS No. 19 of 2011***. Counsel argues that the plaintiff was absent from his job for more than 19 days. Counsel also argues that the same Standing Orders under **Section (F-r)** prohibit the holding of more than one full time public office concurrently by the same officer which the plaintiff did when he was appointed by Kyenjojo District Local Government while still in the employment of Uganda Prisons Service.

As regards the concern for not affording the plaintiff a fair hearing, counsel argued that the plaintiff was nowhere to be seen despite efforts to locate him and he was therefore not available to be afforded the right to be heard.

Counsel for the defendant also argued that while the plaintiff's counsel contends that the defendant had departed from pleadings, this was not the case. Counsel argued that it came from the plaintiff's own evidence that he

was employed by Kyenjojo District Local Government from 1st June 2009 when he was still employed by Uganda Prisons. In light of the above, counsel relied on the case of ***Makula International Ltd Vs His Eminence Cardinal Nsubuga & Another (1982) HCB 11*** to argue that a court of law cannot sanction what is illegal. An illegality once brought to the attention of court overrides all questions of pleadings, including any admission thereof and court cannot sanction an illegality. Further that the plaintiff contravened several provisions of the Public Service Standing Orders as highlighted above and court should not allow that breach to subsist.

I have carefully studied the parties' pleadings, evidence and submissions. It is not in dispute that by the time the plaintiff applied for the 60-day leave from Uganda Prisons which was granted on 8th July 2009, he was already employed by Kyenjojo District Local Government starting from 1st June 2009. I suppose he had already earned the June 2009 salary from the later employer. He continued to earn two salaries for two full time public office jobs from June 2009 to October 2009. It is not clear whether the 60-day leave was intended to actually serve the purpose of making time for the plaintiff to look after his sick child or to make time for him to formalize and commence work at his new job with Kyenjojo District. No medical evidence of the sick child was actually presented by the plaintiff.

Consequent to the above, the complaint that the court now ought to look into is whether the plaintiff was fairly heard before he was dismissed. A decision maker commits a legal error and a breach of a person's non-derogable right when they breach natural justice or fail to follow a statutory procedure that is designed to provide a fair hearing before an administrative decision is taken in line with **Articles 28, 42 and 44 of the Constitution**. Natural justice means more than affording someone the opportunity to "say

their piece." Individuals have a right to a hearing and are entitled to respond to any adverse material, from whatever source that could influence the decision. They are entitled to have their evidence and submissions properly considered. Failure to give genuine, realistic and proper consideration to both sides of a case can give rise to an apprehension of bias on the basis of prejudice.

In this case, it is quite clear that the plaintiff was not afforded the right to be heard before he was dismissed from the Service. Counsel for the defendant argues that the plaintiff was not available to be afforded his right to be heard. I may agree with this assertion but note that the right to be heard needs to arise after the occurrence of the event that warrants the right to be afforded. In this case, the right should have accrued after the expiration of 21 days when an officer is considered to have deserted the Service in line with **Section 47 of the Prisons Act 2006**. Prior to the 21 days, the defendant needs to show that the administrative procedure leading to the dismissal is required for another reason other than desertion.

The defendant did not wait for the lapse of the 21 days and for this, the defendant would be at fault.

I have earlier noted that the plaintiff's dismissal on the ground of desertion was short of time. The plaintiff was dismissed after 19 days of absence from the station contrary to the required 21 days. However, I also need to mention that the plaintiff's conduct amounted to breach of various statutory provisions that govern the public service for which he could have still been dismissed. **Section 46 of the Prisons Act 2006** makes it an offence for a prison officer to absent himself without permission. Such offence is

punishable by a fine or imprisonment for a term of not more than twelve months. The plaintiff was guilty of this.

The plaintiff was also guilty of abandonment of duty in breach of **Section (A-o) of the Public Service Standing Orders 2021**. This is in *pari materia* with **Regulation 37 of the Public Service Commission Regulations 2009** that commenced on 23rd January 2009. He was absent from his duty for more than 19 days without permission and without justifiable cause. He also concurrently held more than one full time public office when he was employed by Kyenjojo district in June 2009 when he was still in the service of Uganda Prisons in breach of **Section (F-r) Public Service Standing Orders 2010**, as well as **Section (F-a) of the 2021 Standing Orders**. Court will not overlook this misconduct on the part of the plaintiff.

The plaintiff now contends that his dismissal was unlawful yet he was fraudulently earning two salaries from monies drawn from the consolidated fund. He was denying his employer of services and made a total foolery of the system when he had his leave approved on false allegations of a sick child when he was going to formalize his new employment.

Adjudication in courts of law should be undertaken not merely for sake of it but for purposes of determining real substantive rights of persons and enforcing the same. Not to create a foolery of the system which would amount to an abuse of the court process.

This issue is partly answered in the affirmative.

Issue 2: Remedies

I agree with the plaintiff that he was not accorded a fair hearing before his dismissal. However, he was guilty of several acts of misconduct and made

a foolery of authority. While the defendant cited desertion as the ground for dismissal, there are various other grounds that could have led to his dismissal and probably criminal prosecution leading to imprisonment upon conviction. The plaintiff did not come to court with clean hands. Am alive to fact that the reliefs prayed are not equitable in nature. But legal redress should not be granted to a party who has demonstrated openly by his or her conduct that he or she is undeserving of the redress such to grant him the redress would be a mockery of justice.

The plaintiff's success in this suit in as far as he was not afforded the right to be heard compared with his conduct can only be rewarded by an award of nominal damages.

The guiding principles on awarding nominal damages may be found in ***The Medina [1900] AC 113*** where it was stated that a plaintiff is entitled to nominal damages where his rights have been infringed but he has not in fact sustained any actual damage from the infringement. I need to add that nominal damages should also be awarded where the plaintiff's circumstances and conduct are such that to award him substantive remedies would be to make a mockery of justice. In ***Halsbury's Laws of England Vol. 12 (1) paragraph 183***, the principle in the Medina case was further emphasized. Also, in the case of ***Constantine Vs. Imperial London Hotels Ltd (1944) ALL ER 171***, it was held that nominal damages may be awarded where there is a prima facie case but no actual harm has been suffered by the plaintiff.

The plaintiff was already illegally earning two salaries drawn from the consolidated fund. He made a foolery of authority and committed various breaches of law. He cannot be said to have been aggrieved by the actions of

the defendant. This suit was a complete waste of court's time. In the premises, I award the plaintiff nominal damages of UGX 10,000/= (Ten Thousand Shillings).

All other remedies are declined

In the final result, the suit partly succeeds and I make the following orders.

- a. The plaintiff is awarded UGX 10,000/= as nominal damages
- b. Each party shall bear its own costs of the suit.

It is so ordered

Dated at Fort Portal this 28th day of April 2023. .



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties



Vincent Emmy Mugabo

Judge

28th April 2023.