

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.43 OF 2010

BETWEEN

UGANDA REVENUE AUTHORITY :::::::::::::::APPELLANT

AND

WANUME DAVID KITAMIRIKE :::::::::::::::RESPONDENT

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ

HON. JUSTICE C.K. BYAMUGISHA, JA

HON. JUSTICE REMMY KASULE, JA

JUDGEMENT OF REMMY. K. KASULE, JA.

This appeal is from the judgement of the High Court at Kampala delivered by Hon. Justice J.P.M. Tabaro on 28.09.09 in a Judicial Review application number H.C.T-00-CV-MA-556 of 2008.

In the stated application by way of originating summons, the respondent applied to court, to determine three questions or issues namely:-

“(a) Whether or not the decision to terminate the applicant’s services with the Uganda Revenue Authority for unsatisfactory performance should be quashed.

(b) Whether or not the applicant is entitled to general damages against the Uganda Revenue Authority, and if so, how much should be awarded.

(c) Whether the applicant is entitled to the costs of this application.”

The respondent supported his application in the High Court with two affidavits, the first dated 24.11.08 and the second, in rejoinder, dated 22.12.08.

The appellant, through one Jacqueline Kobusingye Opondo, Commissioner, Internal Audit and Compliance, swore and filed an affidavit in reply asserting that the application for judicial review was incompetent as it had been prematurely filed.

Proceedings in the High Court proceeded on the basis of affidavit evidence only. The facts of the case in the court below, as could be ascertained, were that the respondent in this appeal started working for the appellant in August 1999 as a Senior Revenue Officer. By 2005 he had risen to be regional Manager, Domestic Tax Department. On 31.10.08 the appellant terminated in writing the respondent's services with immediate effect because his performance was unsatisfactory. Contending that the termination was based on wrong appraisal of the records and documents of his performance, the respondent moved court, by way of Judicial Review, to determine the stated questions.

Counsel for the respective parties filed written submissions and thereafter the trial judge delivered judgement. He held that the respondent had been wrongly dismissed from employment because instead of forwarding the correct score points of his job

performance to the appellant's Board of Directors, the appellant's Departmental Appraisal Committee had fraudulently sent lower score points that placed the respondent under the group of incompetent job performance necessitating the termination of his services. The trial judge awarded him general damages of Shs.208,485,216/= as well as punitive damages of Shs.100,000,000/=.

Dissatisfied with a part of the decision of the judgement, the appellant lodged an appeal to this court on the grounds that:-

- 1. The learned trial judge erred in law in awarding the respondent compensatory damages when he had been paid two months' salary in lieu of notice before termination.*
- 2. The learned trial judge erred in law in assessing the quantum of compensatory damages payable to the respondent.*
- 3. The learned trial judge erred in fact in holding that the respondent was employed on three year (36 months) contract by the Appellant and thereby basing the award of compensatory damages to the respondent on a multiplier of 36 months.*

- 4. The learned trial judge erred in law in awarding the respondent compensatory damages of UGX 208,485,216/= which was so high in the circumstances.*
- 5. The learned trial judge erred in law in awarding the respondent punitive damages of UGX 100,000,000.*

Appellant prayed this court to allow the appeal by setting aside the awards of the trial judge of compensatory and punitive damages and order the respondent to pay to appellant ½ the costs of the appeal and those of the trial court.

The respondent, in turn, also cross-appealed on two grounds:

- 1. The learned trial judge erred in law when he based the calculation of compensatory damages on a presumed 3 year contract instead of basing it on the remaining 57 months which respondent was required to serve before reaching the retirement age of 55 years in accordance with Regulation 2.4.2(a) and 13.6.1(a)(1) of the Appellant's Human Resource Management Manual.*
- 2. Well aware that any delay to pay the said money would render the award less valuable, the learned trial Judge erred in law when he did*

not award interest on the sums awarded to the Respondent without assigning any reasons when the respondent had prayed for it.

The respondent prayed this court to allow the cross-appeal by varying the award of Shs.208,485,216/= made on the basis of a presumed 3 year contract, by enhancing it, being based on the remainder period of 57 months which the respondent was required to serve until his retirement at 55 years, together with interest thereon at the rate of interest prayed for in the lower court.

At the hearing of the appeal, the appellant was represented by learned counsel George Okello assisted by Yahaya Alike, while Counsel Ngaruye Ruhindi represented the respondent.

Conferencing proceedings before the Registrar of this court were held on 14.02.2011.

The issues arising out of the appeal and cross appeal were framed as follows:-

- 1. Whether or not the learned trial judge was justified in awarding the respondent compensatory damages when the respondent had been paid two months' salary in lieu of notice by the appellant.*

2. *Whether or not the learned trial judge was justified in holding that the respondent was employed on a three year (36 months) contract.*
 3. *Whether the trial judge was justified to base the computation on a multiplier of 36 months, and if not, what should have been the appropriate award.*
 4. *Whether the learned trial judge was justified in awarding punitive damages to the respondent.*
 5. *Whether the learned trial judge was justified in not awarding interest on the sums awarded.*
9. *Remedies available to the parties.*

For the appellant it was submitted that the respondent's employment with the defendant was governed by a term that his employment was liable to termination on being given two (2) months termination notice, or payment in lieu thereof. This term was contained in the appointment letter dated 19.09.05, which had to be read together with the terms and conditions contained in the appellant's Human Resource Management Manual and the staff code of conduct that too governed the employment of the respondent. The respondent had been paid in lieu of a two months notice on 31.10.08. He was thus not entitled to any other damages for his dismissal.

Further, the trial judge erred and acted on a wrong principle of awarding and assessing compensatory damages for the respondent basing on a multiplier of 36 months. The judge ought to have applied the correct principle by finding that the respondent's contract was a fixed term contract and as such, the respondent was only entitled to recover damages being the equivalent of remuneration for two (2) months, the notice period stipulated in the contract.

Learned appellant's counsel relied on the cases of: *Supreme Court Civil appeal No.6 of 1999: GULLABHAI USHILLINGI VS KAMPALA PHARMACEUTICALS LTD*, *Uganda Supreme Court Civil Appeal No.7 of 2001: AHMED IBRAHIM BHOLM VS CAR AND GENERAL LTD*

and

Uganda Supreme Court Civil appeal No.12 of 2007: BANK OF UGANDA VS BETTY TINKAMANYIRE, and invited court to answer issues 1 and 2 of the appeal in the negative.

With respect to issue No.3, counsel criticized the trial judge for using a multiplier of 36 months on the false basis that the respondent was employed by the appellant on a three (3) year contract. The correct state of affairs was that the respondent was employed on permanent terms, according to the Human Resource Management Manual, since the respondent was staff below the level of Assistant Commissioner, and not at the level of management staff. At any rate the heads under which the trial judge calculated the compensatory damages such as monthly salary, service award, retirement benefits scheme, medical allowance and leave entitlement, apart from being special damages in nature, and which the respondent did not specifically plead, had also not become due within the two (2) months period of notice before termination.

Appellant's counsel contended that at any rate, the sum of Shs.208,485,216/= awarded as compensatory damages, was so high to make it entirely erroneous, and as such this appellate court should interfere in the said award by holding that the measure of the damages awardable is limited to payment in lieu of notice at the termination of the respondent's employment contract.

In respect of ground four (4), the learned trial judge is criticized for having awarded punitive damages of Shs.100,000,000/=, when in law, such damages are not awardable in cases of breach of contract, except where there is some tort committed, and the award is not in respect of the contract breach per se, but in respect of the tort. Counsel invited court to consider on this point, the case of *Uganda Supreme Court Civil Appeal No.3 of 1993 ESSO STANDARD (U) LTD VS SEMU AMANU OPIO*.

Appellant's counsel finally invited court to allow the appeal by setting aside the compensatory and punitive damages awarded at the trial, and substitute the same with damages equivalent to two (2) months pay in lieu of notice which had already been paid. In the alternative this court was invited to make a fair and reasonable award of aggravated damages for the grounds given in favour of the appeal. The cross appeal ought to be dismissed and each party should bear its own costs given the fact that the appeal is due to errors by the trial court.

Learned counsel Ngaruye Ruhindi for the respondent submitted in opposition to the appeal but in favour of the cross appeal that the respondent was never paid two months salary in lieu of notice before termination. The appellant deposited the money on respondent's account after he had been dismissed. Therefore the respondent's employment had been terminated unlawfully by the appellant's responsible officers

fraudulently falsifying his job performance appraisal results with the sole purpose of getting rid of him. Respondent had as at the time of trial, not succeeded in obtaining other employment. The appellant had accepted liability to compensate the respondent. Counsel further submitted that the case law authorities relied upon by appellant were inapplicable to the respondent's unique and peculiar facts of a deliberate falsification of job performance appraisal results so as to get rid of him by the appellant. The learned trial judge considered all these factors and therefore cannot be said to have erred in his award to the respondent of the compensatory damages that he made.

Respondent's counsel also agreed that the trial judge was wrong to base the assessment on a presumed three (3) year contract. The judge ought to have found, on the evidence before him, that the respondent's contract was a permanent one up to the retirement age of 55 years, and as such, the respondent had a further working period of 57 months, assessed the damages on the basis of 57 months, the respondent's remaining working period before reaching the retirement age of 55 years. Therefore the award of compensatory damages to the respondent ought to be enhanced to reflect this fact.

With regard to punitive damages, respondent's counsel submitted that there was no basis for this appellate court to interfere with the trial judge's award to respondent of Shs.100,000,000/= punitive damages as the award had been based upon proper principle and the amount awarded was just adequate, not too high or too low.

The appellant's conduct in terminating the respondent's employment had been vindictive, highhanded, oppressive and malicious and thus justified the award.

Respondent's counsel finally submitted that the learned trial judge erred in not awarding interest on the sums awarded to respondent without assigning any reasons yet the respondent had prayed for interest in his submissions. He prayed this court to order that interest at 24% p.a. Counsel prayed court to allow the cross-appeal.

By way of reply, appellant's counsel submitted that the trial judge ought not have awarded any compensatory damages at all since the respondent/cross-appellant had already been paid two months' salary in lieu of notice in respect of termination of his employment contract. This had been done in strict compliance with the terms of the employment contract.

As to non award of interest, appellant's counsel maintained that the trial judge was right in not awarding any interest because first, in the trial court there was never a prayer for interest by the respondent in his pleadings filed in court by way of Judicial Review. Respondent only prayed for interest in his written submissions to court and he did not give reasons for such a prayer. Secondly by the very nature that the respondent's cause was by way of Judicial Review, disentitled the respondent from claiming interest as Order X LVI A of Civil Procedure Rules, that was the applicable law at the material time of the respondent's cause, did not make provision for the award of interest. So the trial judge was justified in not awarding interest to the respondent. The cross appeal therefore ought to be dismissed.

Having carefully considered the record of proceedings, the submissions of respective counsel and the legal authorities relied upon, I will proceed to resolve the issues that have been submitted upon.

Issues 1 and 2 of the appeal were argued together by the appellant. I will also deal with them together.

The first issue is whether or not the learned trial judge was justified in awarding the respondent compensatory damages when the respondent had been paid two months' salary in lieu of notice by the appellant.

The second issue is whether or not the learned trial judge was justified in holding that the respondent was employed on a three year (36 months) contract.

The learned trial judge held at pages 8 and 9 of his judgement that:-

“Mr. Ruhindi prayed for the sum of money earnable as a salary till the age of retirement at 55 years. I think this is not available because if he had not been fraudulently terminated URA would be within the ambit of the law to give two months notice or payment in lieu of. I have already explained why the purported notice presently is not liable and only wish to reiterate that fraudulent termination is as good as wrongful dismissal. I will therefore base the award of damages based on the multiplier of 36 months, as follows:”. The learned trial judge then proceeded to make awards for monthly payment, service award, 5% Retirement benefits Scheme, Medical allowance and leave entitlement.

It is this award and method of assessing the sums awarded that are the subject of the first and second issues.

An examination of some principles of the law of employment is necessary for resolution of both issues.

Two types of contracts of employment are relevant to this case. First, is the fixed term contract of employment with a provision for termination by way of notice, or payment in lieu of notice before the expiry of the contract. Second, is a contract of employment which makes no provision for termination prior to the expiry of the fixed period.

The distinction between the two types is important because breach by way of unlawful termination of each type of contract of employment results in a different measure of damages.

The general principle is that an employee wrongfully dismissed is entitled to be compensated fully for the financial loss that may be suffered as a result of the

dismissal, subject to the duty of the dismissed employee to mitigate loss. :

SOUTHERN HIGHLANDS TOBACCO UNION LIMITED V. DAVID

MCQUEEN: [1960] EA 490:

and

: Barclays Bank of Uganda Vs Godfrey Mubiru: Civil Appeal No.1 of 1998

(sc).

When it comes to the issue of assessing the damages awardable in the event of an employment contract breach, Mulenga JSC, as he then was, stated the law distinctly in the ***GULLABHAI USHILLINGI VS KAMPALA PHARMACEUTICAL LTD: CIVIL APPEAL NO. 6 OF 1999 (SC)*** case thus:

“In deciding that issue of damages, the Court of Appeal appreciated that the employment in the instant case, was for a fixed period. The court made a distinction between a contract which makes no provision for termination prior to expiry of the fixed period, and one in which there is a provision enabling either party to terminate the employment. The learned justices stated the law to be that in the event of wrongful termination by the employer, the employee in the former contract would be entitled to recover as damages, the equivalent of remuneration for the balance of the contract period, whereas in the latter case the wronged

employee would be entitled to recover as damages, the equivalent of remuneration for the period stipulated in the contract for notice. I respectfully agree that this is the correct statement of the law. I would add that it is premised on the principle of restitution in integrum. Damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. Thus in the case of employment contract for a fixed period which is not terminable, if there is no wrongful termination, the employee would serve the full period and receive the full remuneration for it. And in the case of the contract terminable on notice, if the termination provision is complied with, the employee would serve the stipulated notice period and receive remuneration for that period, or would be paid in lieu of the notice.”

In *SOUTHERN HIGHLANDS, TOBACCO UNION LIMITED* (supra) the contract was for a fixed period with no provision for termination before the expiry of the fixed period. The plaintiff (respondent) on appeal was awarded damages for unlawful termination of the employment contract equivalent to remuneration for the balance of the contract period.

On the other hand, in *Barclays Bank of Uganda v. Godfrey Mubiru* (supra), the employment contract had a provision enabling each party to terminate the contract.

The Supreme Court thus held that if the dismissal had not been summary dismissal, which the circumstances of the case justified, the employee (Godfrey Mubiru) would have been entitled to one month's notice or one month's payment in lieu of notice.

In this appeal, the re-evaluation by this court of the evidence adduced at trial shows that the employment contract between the appellant and respondent was such a one of a fixed period of employment with a provision enabling each party to terminate the same.

The appointment letter dated 19.04.05 issued by the appellant to the respondent who accepted its terms provided in its paragraph 6.2 thus:-

“ **6.2 Termination:**

You will be given two months' notice or two months' salary in lieu of notice in the event of termination and likewise you will be obliged to do the same to the Authority should you choose to resign.”

It follows therefore that the learned trial judge was in error when he failed to make a specific finding that the respondent's contract of employment was terminable by either party giving to the other two months termination notice or paying two months'

salary in lieu. The judge further erred when he failed to hold that the respondent, given the nature of the contract, was entitled to recover damages equivalent to remuneration for the period of two months stipulated in the contract for notice.

The learned trial judge also held that as a manager, the respondent was employed on a three year (36 months) contract in accordance with the appellant's Human Resource Management Manual.

With respect, I find that the learned trial judge was also in error on this point. The Human Resource Management Manual that was part and parcel of the employment contract between the appellant and the respondent provided in its paragraph 2.4.2 that staff below the level of Assistant Commissioner were to be employed on permanent terms until reaching the retirement age of 55 years. It is in paragraph 2.4.1 that it was being provided that management staff were to be employed on a three year (36 months) contract.

The respondent did not claim in his evidence to be at or above the level of Assistant Commissioner. The appointment letter of 19.04.05 did not specifically provide that

he had been appointed for a term of three years (36 months). It follows therefore that the respondent fell under the category of staff that served under permanent terms, serving until the retirement age of 55 years, subject to termination in the terms already considered. Therefore the learned trial judge was not justified to use the multiplier of 36 months while calculating the awards he awarded to the respondent. Issues 1 and 2 are accordingly resolved as above.

As to issue 3, the answer to the same is what has already been held in respect of issue 2, namely that the respondent was employed on permanent terms, and not on a three year (36 months) contract. The damages that the respondent/cross appellant was entitled to are those equivalent to payment of two months' salary in lieu of notice. Whether or not the respondent was entitled to be awarded any further type of damages is dealt with while considering issue 4.

Issue 4 is whether the learned trial judge was justified in awarding punitive damages to the respondent.

The trial judge justified this award of punitive damages because the appellant's servants committed fraud and caused embarrassment and humiliation upon the plaintiff. Further, since the respondent could not be reinstated in his employment, he had to be compensated for that.

An appellate court, like this one, will not reverse a judgement on a question of damages unless the appellate court is satisfied that the trial judge acted on a wrong principle or that the amount awarded was so extremely large or so very small as to make it, an entirely erroneous estimate of the damage.

See: ***OBONGO VS KISUMU MUNICIPAL COUNCIL [1971] EA 91***

and

AHMED IBRAHIM BHOLM VS CAR AND GENERAL LTS, CIVIL APPEAL NO.12 OF 2002 (SC)

Damages is compensation in money terms through a process of law for a loss or injury sustained by the plaintiff at the instance of the defendant.

General damages are awardable by court at large and after due court assessment. They are compensatory in nature in that they should offer some satisfaction to the injured plaintiff.

Aggravated damages are, like general damages, compensatory in nature, but they are enhanced as damages because of the aggravating conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant's actions/omissions.

Both general and aggravated damages focus on the conduct of the defendant in causing the injury to the plaintiff that is being compensated for.

Punitive or exemplary damages are an exception to the rule, that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society's and also the court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract.

The common law principles that damages are not awardable for injury to feelings or reputation by reason of unlawful dismissal or termination of contract of employment [*ADDIS V GRAMOPHONE CO*[1909] A.C.488] or for causing plaintiff have more difficulty in obtaining new employment [*MAW Vs JONES (1890) 25 QBD 107*] have over time been interpreted so as to make employment law keep pace with economic and other social developments of modern society.

Thus, in *DUNK VS GEORGE WALLER & SON* [1970] 2QB 163(CA), damages additional to those of loss of earnings were awarded to a plaintiff for his loss of training and for the diminution of his future prospects by reason of his loss of status of a person who had completed an apprenticeship, which was taken to be important in

his acquiring a new job. The plaintiff's contract of apprenticeship had been wrongfully terminated during its course.

The plaintiff in *COX VS PHILIPS INDUSTRIES [1976] 1 WLR 638*, while he could recover no damages for wrongful dismissal as the defendants had paid him appropriate compensation for the unlawful dismissal, was awarded damages for depression, anxiety, frustration and illness. The plaintiff had been offered and he had accepted a better position with greater responsibility and an increased salary by the defendants, in order not to lose him to a rival company. The defendants, later, in breach of their contractual obligations to the plaintiff, relegated him to a position of less responsibility and vague duties. The plaintiff became depressed, anxious, frustrated and ill. He left employment under conditions of wrongful dismissal by the defendant.

The employee in *Rigby Vs Ferodo [1987] I.R. L.R 61(CA)* was made to work being paid a lower figure of wages, the reduction being wrongfully made by the employer. He sued for damages for breach of contract of employment. His entitlement to damages was held by the Court of Appeal to be more than, and not only restricted to

the 12 week period of notice by which the contract could have, but had not, been lawfully terminated by the employers.

The above cases are proof that in England (and possibly elsewhere) courts are now, awarding damages, for other consequences of employment, in addition to the traditional damages that the plaintiff is entitled to recover by way of payment of salary in lieu of termination notice, where the employment contract is terminable by notice, or by way of remuneration for the remainder of the contract period, where the employment contract is not terminable by notice.

As to punitive/exemplary damages the courts in England have tended to be guided by the House of Lords decision in *ROOKES VS BARNARD (1964) A.C. 1129, 1 ALLER 367* later confirmed in *CASELL CO LTD VS BROOME (1972) 1 ALLER 801*. In both of these decisions the award of punitive /exemplary damages is limited to three cases of first, oppressive, arbitrary or unconstitutional action by public servants, excepting oppressive action by private corporations or individuals. Second, where the motive of making a profit is a factor, such as where the defendant in disregard of the plaintiff's rights, calculates that the money to be got out of the wrong to be inflicted upon the plaintiff will exceed the damages at risk. It is then necessary

for the law and courts to show that rights of an individual cannot be trampled upon and the law infringed with impunity. Third, where a statute imposes punitive/exemplary damages to be paid.

In cases of breach of contract, breach of contract of employment inclusive, the position of the law has tended to be that punitive/exemplary damages are awardable in respect of a breach of contract, where the breach involves a tort in the course of or in relation to the breach. Thus in reality punitive/exemplary damages are awardable in respect of the tort and not the breach of contract per se.

This restrictive approach led the courts in Australia not to apply the decision of ***ROOKES VS BARNARD*** in Australia. The Privy Council, ruling in favour of Australia, held that Australian decisions extending exemplary damages to be awardable covering a wider scope was embedded in Australian common law and could not be restricted by ***ROOKES VS BARNARD***: See ***AUSTRALIAN CONSOLIDATED PRESS LTD VS. UREN [1967] 3 ALLER 523***. It has been observed in this regard that Canada, New Zealand and USA have preferred a wider approach to the operation of punitive/exemplary damages: See: ***Judgement of Platt***,

JSC, in Uganda Supreme court Civil Appeal No.3/93: Esso Standard (U) Ltd Vs Semu Amanu Opio.

Specifically with regard to East Africa, in **OBONGO & ANOTHER VS MUNICIPAL COUNCIL OF KISUMU [1971] EA 91**, the then Court of Appeal for Eastern Africa, unlike the Privy Council in the case of Australia, held that, on consideration of the local decisions, there was no decision inconsistent with **ROOKES VS BARNARD** and therefore that the law concerning positive exemplary damages in tort is authoritatively set out in **ROOKES VS BARNARD**.

The decision in **OBONGO'S** case in effect meant that in East Africa, as far as, breach of contract was concerned, punitive/exemplary damages could only be awarded, in respect of some tort being committed, in the course of or in relation to a breach of contract. Thus in **OBONGO'S** case, a case that was in the nature of a breach of contract of a monthly tenancy, exemplary damages were awarded because:-

“the judge had power to award exemplary damages if, as in the present case, a breach of the implied agreement for quiet enjoyment amounted to the tort of trespass. See: Judgement of Spry, V.P, [1971] EA 91 at page 93 paragraph (i).

In Uganda, the correct legal position as to the award of exemplary damages in instances of a breach of contract requires some critical examination.

In *ESSO STANDARD (U) LTD VS SEMU AMANU OPIO Supreme Court Civil Appeal No.3/93*, the respondent managed a petrol station for the appellant under terms, amongst which was one, that the respondent's services could only be terminated by the appellant on giving him six months' notice. The appellant, in breach of this term, gave the respondent only two weeks' notice to vacate and on failure to do so, the appellant, in the language of the trial judge:

“bundled out (the respondent) in the most cavalier fashion.”

The trial court awarded respondent Shs.15,000,000/= general damages for breach of contract and the damages included an element of punitive damages.

On considering the appeal against the award of damages, including aggravated and punitive damages, PLATT, JSC, who wrote the lead judgement, with which the rest of the other of their Lordships concurred, held at page 8 of his judgement:

“.....there cannot be any justification for extending the exemplary principles to breach of contract. There has been no previous precedent for that extension. There is no warrant for it in principle.” Later at page 13 of his judgement, His Lordship concluded:-

“For these reasons, though understanding the aim of the learned judge with respect, I find myself unable to agree with him that exemplary or aggravated damages may be awarded for breach of contract.”

Their lordships then proceeded to reduce the damages from Shs.15,000,000/= (old currency) to Shs.50,000/= (new currency), the same being awarded as general damages for breach of contract.

However, in *Uganda Supreme Court Civil Appeal No.12 of 2002: AHMED IBRAHIM BHOLM V. CAR GENERAL LTD*, (supra) a case of breach of contract of employment *the decision in ESSO STANDARD (U) LTD* case, notwithstanding, TSEEKOKO, JSC, in his lead judgement stated:

“As I said earlier, in the plaint the appellant prayed for exemplary damages but the learned trial judge described them as general damages. It is now recognized that courts in East Africa can award punitive and/or exemplary damages in torts

and contracts. This is clear from the decision of OBONGO VS KISUMU MUNICIPAL COUNCIL [1971] EA 91, a decision of the EA Court of Appeal.”

The Supreme Court then proceeded to uphold the award of punitive damages to the appellant, though at a reduced amount of Shs.5m/= instead of Shs.30m/= that had been awarded by the trial judge. The justification for the award of punitive damages was because of the harassment, humiliation and embarrassment that the respondent had meted out to the appellant. The respondent, contrary to the terms of the contract, had terminated the appellant’s employment due to irreconcilable differences between the appellant and respondent’s General Manager. Appellant was to be paid one month’s salary in lieu of notice. The contract was for two years and had no provision for termination. The trial judge found that the real reason for appellant’s dismissal was because the respondent wanted to replace him with another person. Appellant was denied by the respondent many of the privileges he was entitled to.

Their Lordships did not indicate whether in awarding punitive damages in the **AHMED IBRAHIM BHOLM** case, they did so, because some tort had been committed by the respondent in the course of the termination of the appellant’s employment contract. Whatever may be the case, there is need, and it is hoped an occasion will avail itself to their Lordships of the Supreme Court to reconcile the two

decisions of *CIVIL APPEAL NO.3/93 ESSO STANDARD (U) LTD VS SEMU AMANU OPIO* and that of *CIVIL APPEAL NO.12 OF 2002 AHMED IBRAHIM BHOLM VS CAR AND GENERAL LTD.*

I, on my part, prefer to follow the decision, in the *AHMED IBRAHIM BHOLM* case (supra) as it reflects the broader perspective of the award of damages in breach of contract cases, particularly breach of employment contracts. I am further strengthened in this because

their Lordships of the Supreme Court also seem again to have taken this approach in the case of *BANK OF UGANDA VS BETTY TINKAMANYIRE; Supreme Court of Uganda Civil Appeal No.12 of 2007*, also a case of wrongful dismissal.

The respondent had been employed by the appellant as a senior member of staff and had worked diligently until when she was wrongly dismissed from her employment. The dismissal followed a circular prepared and published to all employees of the appellant and prominently displayed on appellant's notice boards to the effect that

staff who were incompetent, poor time managers, alcoholic, thieves, fraudsters and insubordinate ones were to be dismissed. The circular was read by all and sundry.

On the day of pinning up the circular on the notice boards, the appellant's Deputy Governor communicated in writing to the respondent that the appellant's Board had decided to retire her with immediate effect. No reasons were given for the retirement. Appellant offered to pay respondent three months' salary in lieu of notice, commutation of annual leave and pension cash. These however were virtually wiped out by the respondent's financial obligations to the appellant. At the time of dismissal, the appellant had just successfully completed training on the job assignment in Germany which had been fully supported by the appellant. The respondent sued for reinstatement or in the alternative damages for forced retirement that had resulted in loss to her reputation, employment, all leading her to suffer mental anguish.

The High Court (Okum Wengi J.) awarded her compensatory damages, and on an appeal by Bank of Uganda, the Court of Appeal dismissed the appeal, prompting the bank to appeal to the Supreme Court.

Kanyeihamba JSC (as he then was), who wrote the lead judgement, with which the rest of their other Lordships concurred, held on the issue of compensation for unlawful dismissal that:-

“I would confine the compensation for the unlawful dismissal of the appellant to the monetary value of the period that was necessary to give proper notice of termination which is commonly known in law as compensation in lieu of notice.”

With regard to the award of the combined sums of Shs.30,000,000/= general damages and Shs.20,000,000/= punitive damages, making a total of Shs.50,000,000/=, His Lordship, enhanced the award to Shs.100,000,000/= but awarded the same not as general and punitive, but as aggravated damages, because:-

“In my opinion the acts of the appellant were not only unlawful, but were degrading and callous. In my view, a good case has been shown for the respondent to be eligible for the award of aggravated damages.”

Tsekooko, JSC, concurring with the above decision of Kanyeihamba, JSC, found the reasoning of the Court of Appeal of Ghana in the case of **AGBETTOH VS GHANA COCOA MAKETING BOARD (1984-86) GLRD 16** to be sound. It was held in that case in which the plaintiffs had been wrongly retired, that:-

“.....it would be just and proper for the court to mark its disapproval of the plaintiffs’ unconstitutional retirement by ordering that the defendant board pay to each plaintiff an amount equal to two years’ salary in addition to receiving their entitlements under their contract of employment.” Their Lordships of the Ghana Court of Appeal had based their stated decision on the overriding consideration that:-

“A Ghanaian who has suffered a wrong expects redress and our law of wrongful dismissal should reflect it.”

Okello, JSC (as he then was), also concurring in the lead judgement of Kanyeihamba, JSC, stated:-

“In the instant case, I accept Mr. Maseembe-Kanyerezi’s contention that for a case of this nature, a court is only limited to award of aggravated and not punitive damages. This view is supported by ESSO STANDARD (U) LTD VS SEMU AMANU OPIO, CIVIL APPEAL NO.3 OF 1993, where this court (PLATT, JSC, as he then was) stated that the principles of exemplary or punitive damages cannot be extended to breach of contract and that there is no precedent for that extension.”

I find the decision reached by their Lordships as to damages awarded in the nature of aggravated damages, as well as the facts of the case in the **BANK OF UGANDA VS**

BETTY TINKAMANYIRE (supra) to be appropriate and having similarity to the case under consideration in this appeal. I am therefore following the said case and applying its principles as to damages awardable to this appeal.

As already held, the evidence is overwhelming in this appeal that the employment contract of Mr. Wanume David Kitamirike, the respondent, was one that was terminable on giving notice. Therefore the compensation for his unlawful dismissal must be confined to compensation in lieu of notice. This compensation has already been paid to the respondent by the appellant. It follows therefore that the award of Shs.208,785,216/= general damages was made on a wrong principle of law and the same is hereby set aside.

Having evaluated the evidence adduced and considered the law, I have reached a conclusion that this is a case where punitive damages should not have been awarded as a matter of principle. I therefore set aside the award of Shs.100,000,000/= punitive damages.

However, like in the *Bank of Uganda Vs Betty Tinkamanyire* case, I find that the respondent is entitled to be awarded aggravated damages. He was a regional manager of the appellant, a position of considerable responsibility. His services were

terminated wrongly by manipulation of his performance result points, showing that he had scored poorly, when in actual fact he had scored highly, certainly high enough to remain in the service of the appellant. He was thus greatly embarrassed and greatly inconvenienced by loss of a well paid job. He missed the opportunity to work up to a retirement age of 55 years. No evidence was adduced that he was performing poorly prior to wrongful manipulation of his performance results. On discovering the mistake that had been done to the respondent, the appellant had not thought it fit to recall the respondent and reinstate him in his former position or some other alternative position. The evidence before court does not show that any meaningful apology was extended to the respondent by the appellant. By the time of the hearing of the case, the respondent had as yet, inspite of his trying, not succeeded to obtain alternative employment. Bearing all these aggravating factors as well as the inflation that has currently eaten into the value of the Uganda Shilling, I award the respondent aggravated damages of Shs.100,000,000/=.

The respondent cross-appealed on the issue of interest. He contended that the learned trial judge erred in not awarding interest on the awards of damages he made.

I note that in the applications both for leave to apply and in the application for judicial review the respondent/cross-appellant did not plead interest on the damages or costs to be awarded, in his pleadings to court. He was duty bound to do so under the then applicable Order XLVI A of the Civil Procedure (Judicial Review) Rules, 2009 and Order VI Rules 1 to 5 of the Civil Procedure Rules. The respondent's counsel only referred to interest in his submissions to court. Yet submissions are not pleadings upon which a party founds a cause of action for a claim. There was no explanation from the respondent as to why he never pleaded in his pleadings a specific prayer for interest.

The failure to plead interest in the pleadings enforces, in my view, the unconventional way, which must be discouraged, of parties like the respondent/cross-appellant bringing causes to court through Judicial view, which causes, by their very nature, are most suitable to be commenced and prosecuted in court as ordinary suits commencing with lodgment of the plaint with detailed particulars of claim as prescribed by Order VII of the Civil Procedure Rules. The respondent/cross-appellant's claim, in my judgement, fell under this category. He should have originated his claim by an ordinary plaint setting out in detail the particulars of the claim, the damages being claimed in their various categories as well as interest and when such interest was supposed to have accrued.

He was also under a duty to support his claim for interest with some evidence. He did not.

Instead he chose to come to court through Judicial review, which is a process, and should as much as possible be restricted to that process, whereby the High Court exercises its supervisory jurisdiction over proceedings and decisions of the inferior courts, tribunals and other bodies or persons carrying out judicial, quasi-judicial functions or who are charged with the performance of public acts and duties. Judicial review has its core purpose of issuing orders within the area of administrative law and not otherwise. See: *Court of Appeal Civil Application No.18 of 2006: PIUS NIWAGABA VS. LAW DEVELOPMENT CENTRE*. It follows therefore, in my judgement, that litigants ought not substitute Judicial Review for ordinary lodgement and prosecution of civil suits.

While section 26(2) of the Civil Procedure Act, gives court discretion to award interest adjudged on the principal sum from any period prior to the institution of the suit, or from the date of filing suit to date of the decree, or on the aggregate sum adjudged from date of decree to date of payment in full, the burden is on the party

claiming interest to plead and adduce some evidence entitling that party to interest. In *Court of Appeal of Uganda Civil Appeal No.30 of Charles Lwanga Vs Centenary Rural Development Bank, 1999*, this court dealt with the issue whether interest was payable on the principal sum admitted for the period prior to the institution of the suit and if so at what rate. After satisfying itself that the appellant had specifically pleaded for interest at the commercial rate of 40% and after considering the evidence adduced, court awarded the appellant interest at the reduced rate of 20% being the current bank interest rate.

By way of contrast, in this appeal, the respondent/cross-appellant did not plead any claim for interest and did not adduce any evidence in that regard. He therefore provided no basis for the trial court to exercise its discretion one way or the other on the issue of interest.

I accordingly find that the respondent by pursuing his claim through Judicial review whereby he did not make any pleading as to his claim for interest and by failure to adduce evidence as to his entitlement to interest, has no justification to fault the trial judge for having not awarded him interest. I so resolve the issue of interest on the cross-appeal.

In conclusion the appeal only partly succeeds in that this court has found that the learned trial judge erred in awarding to respondent compensatory damages and assessing the same using a multiplier of 36 months, all totaling to Shs.208,485,216/= and also punitive damages of Shs.100,000,000/=. The sums so awarded are accordingly set aside. Instead the court awards a sum of Shs.100,000,000/= aggravated damages given the circumstances of termination of the contract of employment of the respondent by the appellant.

The cross-appeal fails and no interest is awarded on the aggravated damages, the respondent/cross appellant having not pleaded for the same, let alone adduced evidence on the issue.

Since the respondent/cross appellant has been awarded, on appeal, aggravated damages of Shs.100,000,000/=: thus being in a way successful in that regard, he is awarded $\frac{1}{3}$ of the costs of the appeal and those in the court below.

Dated this**20th**day of ...**March**.....2012.

Remmy.K. Kasule
JUSTICE OF APPEAL

JUDGMENT OF A.E.N.MPAGI-BAHIGEINE, DCJ

I have read in draft the judgment of my brother Kasule JA.

I concur and have nothing useful to add. Since Byamugisha, JA also agrees, the appeal partly succeeds with the orders as stipulated in the lead judgment.

Dated at Kampala this**20th**day of ...**March**.....2012.

A.E.N.Mpagi-Bahigeine,
Deputy Chief Justice

JUDGMENT OF BYAMUGISHA, JA

I had the benefit of reading the lead judgment prepared by Kasule JA which has just been delivered.

I agree with the orders he has proposed in partly allowing the appeal. I have nothing useful to add.

Dated at Kampala this**20th**day of ...**March**.....2012.

C.K.Byamugisha
Justice of Appeal