THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

[Coram: R. Buteera, DCJ, C. Bamugemereire, & C. Gashirabake, JJA.]

CIVIL APPEAL NO. 182 OF 2021

BETWEEN

STANBIC BANK (UGANDA) LIMITED..... APPELLANT

AND

NASSANGA SAPHINAH KASULE..... RESPONDENT

(Appeal from the Award of the Industrial Court of Uganda at Kampala delivered by Ruhinda Asaph Ntengye. J, Linda Tumusiime Mugisha. J, Mr. Ebyau Fidel, Ms. Julian Nyachwo, and Mr. Mavunwa Edson Han on 23rd August 2019 in Labour Dispute Claim No. 227 of 2014; Arising from H.C.C.S No. 196 of 2013)

JUDGMENT BY CHRISTOPHER GASHIRABAKE, JA.

Introduction

1.] This is an appeal against part of an award by the Industrial Court. The facts are that the respondent was employed by the appellant on the 15th of February 2001. Under the employment contract, clause 18, stipulated that either party could terminate the Contract upon issuance of the requisite notice or payment in lieu of notice. On the 13th December 2012, the Appellant pursuant to clause 18 of the Contract terminated the respondent's employment and paid her three month's salary in lieu of notice and all other terminal benefits that she was entitled to.

2.] The respondent's claim before the Industrial Court was that the termination of her employment was unlawful on the basis that neither was a reason given by the appellant for the termination and nor was she accorded a fair hearing before her employment was terminated. She further alleged that her employment was terminated because she instituted **High Court Civil Suit No.**

150 / 2012, against the Appellant alleging a violation of her right to privacy following an email sent out to other banks by the Financial Crime Control Unit of the Appellant during its investigation into a loan fraud at the bank.

3.] In its defence at the Industrial Court, the appellant stated that the employment relationship was ended by termination as opposed to dismissal, and no wrongdoing was alleged against the respondent as such no reason for termination needed to be given in law for the termination to be lawful.

4.] The Industrial Court determined the matter in the interest of the respondent, finding that the respondent was wrongfully terminated and it awarded her general damages of Ug. Shs. 65,000,000/= (Sixty-five million shillings) only. Dissatisfied with the decision of the industrial court the appellant filed this appeal on the grounds that;

a. *The Learned trial Judges and Panelists of the Industrial Court erred in law in holding that the termination of the Respondent's employment by the Appellant was unlawful.*
b. *The Learned trial Judges and Panelists of the Industrial Court erred in law in holding that the Appellant cannot in law terminate the Respondent's employment by "Notice" or "Payment in lieu of Notice" unless it gives justifiable reasons for termination.*
c. *The Learned trial Judges and Panelists of the Industrial Court erred in law in awarding the Respondent general damages on no basis at all.*

5.] It was proposed to ask the Court for orders that;

1. *The Appeal be allowed, the Industrial Court's Award be set aside and in its place an order be made by this Court dismissing the Respondent's claim; and,*
2. *The Appellant be allowed the costs of this Appeal and in the Courts below.*

6.] The respondent filed an amended cross-appeal on the grounds;

1. *The learned trial Judge and Panelists of the Industrial Court erred in law when they failed to properly evaluate the evidence on record and declare that*

clause 18 of the employment contract relied on by the Appellant is illegal and cannot be modified by the Employment Act 2006 as claimed by the Appellant.

2. *The learned trial Judge and Panelists of the Industrial Court erred in law when they acknowledged that the Respondent was not subjected to any disciplinary procedure but failed to declare that her termination from employment was in contravention of Constitutional guarantees prescribed by Articles 28, 42 and 45 of the Constitution, Section 66 of the Employment Act 2006 and Applicants own Human Resources Manual, particularly the discipline management policy and procedures.*

3. *The learned trial Judge and Panelists of the Industrial Court erred in law when they declined to award the Cross Appellant Severance Allowance by holding that it was not pleaded and the policy did not make it a right that could accrue to any staff and yet the Cross Appellant even prayed for it in her witness statement and was uncontroverted.*

4. *The learned trial Judge and Panelists of the Industrial Court erred in law when they failed to evaluate the evidence on record and decided that parties were held by their pleadings and declined to order the Respondent to pay the outstanding salary home loan and refund all deductions made after her unlawful termination.*

5. *The learned trial Judge and Panelists of the Industrial Court erred in law when they declined to award aggravated and exemplary damages.*

6. *The learned trial Judge and Panelists of the Industrial Court erred in law when they declined to award the Respondent a Repatriation allowance.*

7. *The learned trial Judge and Panelists of the Industrial Court erred in law in holding that they find no aggravating circumstances to warrant an award of exemplary damages. They do not think that an inquiry into her account was out of the ordinary, especially given the fact that the fraud occurred in the department in which she served as an account executive.*

8. *The learned trial Judge and Panelists of the Industrial Court erred in law when they failed to evaluate the evidence on record and awarded only 65,000,000/= as General Damages when the Ag Head, Human Resources who*

signed on her termination letter and was the main witness accepted that the Cross Appellant was never found culpable, they never cleared her name damaged by the illegal email search which went viral sent to all Commercial Banks who are would be potential employers and being HR Person he acknowledged that such person is not employable with Banks being very sensitive organization and yet they went ahead and terminated discriminately her without according her fair hearing and without being cleared until during the cross examination yet her counterparts who were found culpable were given fair hearing and exonerated by issuing final warning letters which are only valid for six months.

7.] The Appellant sought for orders that: -

1. *The Cross-Appeal be allowed, the Industrial Court Award be set aside in part, and in this place make the following additional Declarations and Orders: -*

a) *A Declaration that clause 18 of the Employment contract relied on by the Appellant is inconsistent with sections 58 and 65 (1) (a) of the Employment Act 2006 and therefore void and can only be relied on if amended to be in conformity with the said sections of the Employment Act 2006 and therefore void and can only be relied on if amended to be in conformity with the said sections of the Act and signed by the Cross Appellant.*

b) *A Declaration that the provisions of the Constitution and the Employment Act 2006 are paramount and since the Cross Appellant was not given a fair hearing, her termination was not in conformity with the Constitution and the Law hence was unlawful.*

c) *A Declaration that the Appellant's Human Resources Manual particularly the Discipline Management Policy and Procedures which forms part of her employment contract and is binding on both parties provides for a fair hearing before termination, her termination without being accorded a fair hearing was in gross breach of her Employment contract and therefore unlawful.*

d) *An Order that the Cross Appellant be paid Severance allowance since it is payable unconditionally under section 87 of the Employment Act 2006 where*

the Employer unfairly dismisses/terminates an employee and the Court has already ruled that the termination was unlawful.

e) *A further Order that Severance pay of the equivalent of three months' salary for every year worked paid to her as negotiated and signed in the Union Collective Agreement in conformity with Section 89 of the Employment Act 2006.*

f) *An order that the Salary Home Loan which was granted on the understanding that the Cross Appellant would be employed until retirement and the repayment spread up to her retirement entirely from her monthly salary be paid by the Respondent who frustrated the repayment process by unlawfully terminating/dismissing her from employment.*

g) *A further order that Respondent refunds all monies recovered from the Cross Appellant to pay the outstanding Salary Home Loan from the time of her unfair termination/dismissals.*

h) *An Order that the email search message which was sent without a search warrant to all commercial Banks in the names and photographs of the Cross Appellant went viral and therefore infringed not only on her right to Privacy but damaged her reputation which she labored to build not only with the would-be future potential employers after her unlawful termination/dismissals by the entire world and in the circumstances she is entitled to an award of aggravated and exemplary damages.*

i) *An Order that the Cross Appellant be repatriated to Bukomansimbi as provided under Section 39(3 of the Employment Act 2006*

j) *An Order that general damages of UGX 120,000,000/= will properly compensate the Cross Appellant who innocently suffered wrongful and unlawful termination, betrayal, harassment/embarrassment, and willful damage to her reputation and career which ruined her entire life occasioned by the Respondent's highhandedness, cruelty.*

Representation

At the hearing, the parties filed written submissions that were adopted by the court as their arguments. The appellant was represented by Mr. Bwogi Kalibala. The respondent represented herself.

Preliminary Objection

8.] It was submitted for the appellant that Rule 86(1) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10, stipulates that grounds of Appeal set out in the Memorandum of Appeal (including in the Notice of Cross Appeal) must not be argumentative or narrative. It is submitted that Grounds 5, 6, 7, and 8 of the Cross Appeal are argumentative and contain narrations thus offending Rule 86 (1) and thus should be struck out. To support his view counsel stated that in **Attorney General Versus Florence Baliraine, Civil Appeal 79 of 2003**, this court struck out two grounds of the Appeal because they offended Rule 86 (1) of the Judicature (Court of Appeal Rules) Directions.

Respondent's response to the preliminary objection.

9.] In response to the preliminary objections counsel for the respondent submitted that the Judicature (Court of Appeal Rules) Directions distinctively provide for Memorandum of Appeal and Notice of Cross Appeal under Rules 86 & 91 respectively and it would not be in the interest of justice to use Rule 86 to strike out rule 91.

10.] The respondent submitted that there is no mention of "*Notice of Cross-Appeal*" under Rule 86 of the Judicature (Court of Appeal rules) Directions. Therefore, grounds 5, 6, 7, and 8 of the Cross Appeal cannot be said to be defective under the said rule and cannot offend it. Furthermore, no such provisions are made under Rule 91 of the Judicature (Court of Appeal Rules) Directions, **and** neither is there reference made to Rule 86 under Rule 91.

11.] In the respondent's view is that the case of the **Attorney General versus Florence Baliraine** (*supra*) relied on by the Appellant is distinguishable from the facts in the instant case. Whereas **Attorney General versus Florence Baliraine** *(supra)* is about a Memorandum of Appeal under Rule 86 of the Judicature (Court of Appeal) Directions the instant case is about Notice of Cross-Appeal under Rule 91 of the Judicature (Court of Appeal Rules) Directions.

12.] The respondent submitted that in case this court upheld the preliminary objection, it should consider the fact that she is a layperson who is unrepresented. She cited **Mulindwa George William Vs Kisubika Joseph, Civil Appeal No. 12 of 2014** where the Supreme Court was of the view that the appeal ought to have been struck off for offending Rule 8(1) of the Supreme Court Rules but was considerate because the appellant was a layman.

Rejoinder

13.] In rejoinder to the respondent's reply, Counsel for the appellant submitted that the arguments advanced by the respondent were a misstatement of the law. He went on to state that Rule 91 of the Rules provides for filing a Notice of Cross Appeal which must set out the grounds for the Cross Appeal. A cross-appeal is an independent appeal that survives the main appeal for example in instances when it is withdrawn and as such the grounds in a notice of appeal are governed by the requirement set out in Rule 86 (1) of the Rules.

14.] The case of **Mulindwa George William vs Kisubika Joseph** *(Supra)* relied on by the respondent is distinguishable from the present case. On the premise of the submissions above and in the Appellant's conferencing notes, counsel prayed that the Court upholds the preliminary objection raised and strikes out grounds 5, 6, 7, and 8 of the cross appeal for being argumentative and narrative.

Court's finding

15.] **Rule 86 of the Judicature (Court of Appeal Rules) Directions provides that:**

> *"(1) A Memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."*

16.] **Rule 91 of the Judicature (Court of Appeal Rules) Directions provides that;**

> *"(1) A respondent who desires to contend at the hearing of the appeal in the court that the decision of the High Court or any part of it should be varied or reversed, either in any event or on the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his or her contention and the nature of the order which he or she proposes to ask the court to make, or to make in that event, as the case may be.*
>
> *(2) A notice given by a respondent under this rule shall state the names and the addresses of any persons intended to be served with copies of the notice and shall be lodged in four copies in the registry not more than thirty days after the service on the respondent of the memorandum of the appeal and the record of the appeal.*
>
> *(3) A notice of cross-appeal shall be substantially in form G in the First Schedule to these Rules and shall be signed by or on behalf of the respondent."*

17.] I have perused the submissions of both parties. I do not agree with the submissions of counsel for the appellant that a Notice of Cross Appeal under Rule 91 can be struck out under Rule 86 of the Rules. Rule 86 requires the appellant to set the grounds of objection concisely under distinct heads, without argument or narrative. Under Rule 91, the respondent is required to specify the grounds of contention and the nature of orders they propose court

to make. The respondent rightly did so. If the framers of the Rules intended that the requirement under Rule 86 of the Rules apply to the Notice of Cross appeal under Rule 91, they would have expressly stated as they did with other provisions.

In view of the provisions of the law, this preliminary objection is overruled.

Appeal

Grounds 1 and 2 of the Appeal and Grounds 1 and 2 of the Cross of Appeal, shall be handled jointly because they are interrelated. I will follow the same flow.

1. *The Learned Trial Judges and Panelists of the Industrial Court erred in law in holding that the termination of the Respondent's employment by the Appellant was unlawful.*
2. *The Learned Trial Judges and Panelists of the Industrial Court erred in law in holding that the Appellant cannot in law terminate the Respondent's employment by "Notice" or "Payment in lieu of Notice" unless it gives justifiable reasons for termination.*

And cross-appeal

1. *The learned Trial Judge and Panelists of the Industrial Court erred in law when they failed to properly evaluate the evidence on record and declare that clause 18 of the employment contract relied on by the Appellant is illegal and cannot be modified by the Employment Act 2006 as claimed by the Appellant.*
2. *The learned Trial Judge and Panelists of the Industrial Court erred in law when they acknowledged that the Respondent was not subjected to any disciplinary procedure but failed to declare that her termination from employment was in contravention of Constitutional guarantees prescribed by Articles 28, 42 and 45 of the Constitution, Section 66 of the Employment Act 2006 and Applicants own Human Resources Manual, particularly the discipline management policy and procedures.*

Submissions by counsel for the appellant

18.] Counsel for the appellant submitted that grounds 1 and 2 of the Appeal and grounds 1 and 2 of the Cross Appeal are with regard to the lawfulness of the termination of the respondent. Counsel submitted that in order to resolve these grounds they would resolve two issues, which are:

1. *Whether "termination" as distinct from "dismissal" requires a reason to be lawful, and*

2. *Whether "termination" as distinct from 'dismissal requires a hearing to be lawful.*

Whether "termination" as distinct from "dismissal" require a reason to be lawful?

19.] Counsel defined the terms under contention as provided for by section 2 of the Employment Act., which defines *"dismissal from employment"* as the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct; and *'termination of employment"* as the discharge of an employee from employment at the initiative of the employer for justifiable reasons *other than misconduct,* such as expiry of the contract, attainment of retirement age, etc.

20.] It was submitted by counsel for the appellant that the words *"justifiable reasons"* (other than misconduct) in the above definition of *"termination of employment*" by example is instructive and creates a genus of what in essence this term includes. The examples are all instances of a contract of service coming to an end by operation of the law. Counsel for the appellant submitted that the word *"etc"* that follows also serves to indicate that the term only includes other instances of a like kind. The two examples given as instances of *"justifiable reasons"* are the coming to an end of a fixed-term contract, which in law occurs automatically at the end of its fixed duration by effluxion

of time and the coming to an end of an age-based contract which also in law occurs automatically upon the defined retirement age being reached.

21.] Counsel for the appellant referred to the definition of the word termination under Section 2 of the Act which refers to the substantive provisions of Section 65 of the Act and it states as follows;

"Termination" has the meaning given by Section 65;

Section 65 (1) (a)

Termination

(1) Termination shall be deemed to take place in the following instances: -

(a) Where the contract of service is ended by the employer with notice;"

22.] It was further argued that the above definition of termination does not contain any requirement for a reason and indicates that termination of the contract of service is simply the ending of the contract of service by the employer with notice. The requisite period of notice for such termination is either contractual or that provided by Section 58 (3) of the Act, whichever is longer. Counsel continued and submitted that it is an independent stand-alone definition and refers to a substantive provision in the Act and accordingly must be read for what it says as indeed must the previous definition which has the limitations and context pointed out.

23.] It is further submitted for the Appellant that the above position as to termination does not require a reason and its juxtaposition with dismissal which does (require a reason) is brought out clearly in Section 69 of the Act. Section 69(1) and (3) deals with "dismissal" whilst Section 69 (2) deals with "termination". They provide as follows;

"Section 69"

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

and

3. An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has his or her conduct indicated that he or she has fundamentally broken his or her obligation arising under the contract of service."

24.] It was submitted that the above is "dismissal provisions" and not only is a "reason' required for a dismissal to be lawful but the reason must be established and justified in Section 69 through a hearing.

"Section 69

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

25.] Additionally, counsel for the appellant submitted that the above provision indicates that the only requirement for a lawful termination is adequate notice or payment in lieu thereof. There is no separate requirement for "*a reason*" and for "*Justification*" or "*a hearing*." Counsel cited **Barclays Bank of Uganda Vs Godfrey Mubiru, S.C.C.A No. 1 of 1998,** and **Stanbic Bank Ltd. Vs Kiyemba Mutale, S.C.C.A No. 02 of 2010.**

26.] Furthermore, counsel submitted that the question that arises is whether this position of the law was changed upon the promulgation in 2006 of the Employment Act. The answer is that the law on termination remained the same after the coming into force of the new Act and this is supported by the Supreme Court case of **Hilda Musinguzi vs Stanbic Bank Uganda Ltd, S.C.C.A No. 28 of 2012.**

27.] Counsel cited the case of **Stanbic Bank Uganda Ltd. Vs Kiyemba Mutale, S.C.C.A No. 02 of 2010,** where the court held that the employer can terminate the employee's contract with or without a reason. This was the same holding in the **Bank of Uganda Vs. Joseph Kibuuka & 4 Others, Civil Appeal No. 281 of 2016.**

28.] The applicability of Article 4 of the International Labour Organization Convention No. 185, which stipulates a requirement for a reason for termination was addressed by Irene Mulyagonja, J.A in **Bank of Uganda Vs. Joseph Kibuuka** *(supra)*.Counsel for the appellant submitted that Uganda is a dualist state and as such international law treaties and principles however fanciful and appealing they might be, cannot be enforced by domestic Court unless such treaties and principles have been domesticated through an Act of Parliament. In the premises, **Article 4 of the International Labour Organization Convention No. 158,** upon which the Industrial Court premised its finding that the respondent was entitled to a reason for her termination absence which rendered her termination unlawful is not applicable. The article was not enacted as a section in the Employment Act, of 2006 and as such was never domesticated thus it has no force of law in Uganda.

Whether "termination" as distinct from "dismissal" requires a hearing to be lawful.

29.] It follows from the authorities cited above that if termination can be for a reason or none then termination does not require a hearing as there is no reason to be given such as would necessitate a hearing. This is borne out by the provisions of Section 66 (1) and (2) of the Employment Act which provides for a hearing only in the case of a "*dismissal*" as opposed to "*termination*".

Section 66

(1) Notwithstanding any other provision of this Part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal 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."

30.] Counsel reiterated that the question as to whether "*termination*" as opposed to "*dismissal*" requires a hearing should be answered in the negative. The Industrial Court should accordingly have held that the termination of the Respondent's employment by the Appellant was lawful and accordingly prayed that Grounds 1 and 2 of the Appeal be allowed and Grounds 1 and 2 of the Cross-Appeal be dismissed.

Submissions by the respondent

a. Ground 1 of the appeal

31.] The respondent submitted that in order to present the arguments effectively she would first argue ground one but most importantly, whether termination is distinct from dismissal. The respondent distinguished *termination* from *dismissal* as defined in section 2 and 65 of the Employment Act 2006.

32.] Counsel for the respondent argued that the two words "*Dismiss*" and "*Terminate*" are interchangeably used for example the word *"Terminate"* is strictly used for sections like 65, 66, 68, 69, 71, 73, 75, 77, 80, 81 and the word *"Dismissal"* or both of the words are used in subsections of the above provisions. However, under sections 66, 68, and 71 both words in her view only emphasize the point that either way, reasons must be given by the employer and the reasons must be in existence at the time the decision is made.

33.] The respondent noted that the above view was addressed in the case of **Twinomujuni Moses Vs. Rift Valley Railways, Civil Suit No. 212 of 2009** that;

> *"It is to be noted that "termination" and "dismissal" are used interchangeably. .... Therefore, this Court would always enquire into whether the Plaintiff was accorded a right to be heard"*

34.] Furthermore, counsel for the respondent submitted that the learned trial Judges and Panelists of the Industrial Court were justified in holding that the termination of her employment by the Appellant was unlawful.

35.] She cited Article 4 of the Termination of Employment Convention No. 158 of 1982, which provides for valid reason for termination;

> *"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."*

36.] The respondent further submitted that the above Article 4 was ratified by Uganda on the 18th of July 1990 and is therefore in force and applicable as the employment laws of Uganda by virtue of Article 287 of the Constitution of Uganda. Besides the above, it was her strong conviction that the drafters of Section 68 of the Employment Act 2006 were cognizant of the fact that Article 4*(Supra)* requires reasons for termination, the absence of which renders the

termination unlawful. The respondent submitted that this could be implied from Section 68 (1) of the Employment Act 2006 by the use of the words *"any"* and *"shall"* which provides proof of reasons for termination as shown below;

> *"In any claim arising out of termination, the employer shall prove the reasons for the dismissal, and where the employer fails to do so, the dismissal shall be deemed to be unfair within the meaning of section 71, (2) the reason for dismissals shall be matters which the employer, at the time of dismissal genuinely believed to exist and which caused him or her to dismiss the employee".*

37.] The respondent submitted that the use of *"any"* under section 68 above makes reason a requirement for all/every termination as defined on page 94 of **Black's Law Dictionary (6th Edition), page 94** where the word *"any"* has a diversity of meaning and may be employed to indicate *"all"* or *"every"* as well as *"some"* or *"one"* and its meaning in a given statute depends upon the context and the subject matter of the statute. Furthermore, the respondent submitted that the use of *"shall"* under section 68 of the Employment Act 2006 above makes the reason for termination a must/mandatory for lawful termination. The respondent cited the case of **Obore George Alfred Vs. The Inspectorate of Government & A.G. HCT-04-CV-005-2013,** where the definition of the word *'shall'* was given while relying on the Black's Law Dictionary as:

> *"Generally imperative or mandatory, that is the word 'shall' is a word of command and one that must be given compulsory meaning as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."*

38.] Counsel submitted that enacting domestic laws is only one of the methods of domestication recognized under Article 1 of the Convention but

the same Article also enjoins state parties to give effect to the convention through among others; Court decisions, Arbitration awards, Collective agreements or such other manner as may be consistent with national practice thus the award/decision of the trial Court was another way of domestication of Article 4 of the international convention. This view was elucidated by Mpagi-Bahigeine, JCC in the case of **Uganda Association of Women Lawyers V Attorney General, Constitutional Petition No. 2 of 2003,** while commenting on the applicability of the Convention that:

> "There is an urgent need for parliament to enact the operational laws and scrap all inconsistent laws so that the rights to equality ceases to be an illusion but translates into real substantive equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void where called upon to do so or whenever the occasion arises"

39.] The respondent further submitted that cognizance of the international instruments by Courts was made in the case of **Katamba Hussein v Uganda National Roads Authority, Civil Suit No.18 of 2021**, where the court was happy to consider several UNESCO Conventions on culture heritage rights without considering whether they had been passed into Uganda *legislation.*

> *"In addition to that, this Honourable Court takes cognizance of the International instruments that recognize the protection of cultural heritages and I will briefly highlight them below;"*

40.] It was submitted by the respondent that compliance with International Labour Organization Conventions has been adopted by the Industrial Court of Uganda. One of the main goals of the Industrial Labour Court is to comply with International Labour Organization Conventions. The respondent submitted that this aims to improve the Labour standards of people in Uganda.

To buttress her argument, she cited the Nigerian case of **Ebere Onyekachi Aloysius V Diamond Bank Plc, (2012 58 NLLR 92.**

b. <u>Ground 2 of Appeal and 1 of Cross Appeal.</u>

41.] The respondent submitted that the Trial court completely ignored clauses e, f, and g of her memorandum of claim, clause 5 of the joint scheduling Memorandum, Appeal letter to the Head of Human Resources, clause 18 of the employment contract, Appellant's pleading in the trial court under clauses 4 (i) and (ii) of their Response to the memorandum of claim pages 6, 7, 43,44,28, 39, 35 and 36 of record of Appeal respectively and they also failed to correctly record my cross-examination testimony as reflected in her general affidavit of Court proceedings on Court record that

42.] It was the submission of the respondent that she was employed by the Appellant effective 19th February 2001. Her services with the Appellant were terminated on 14th December 2012 after serving for about 12 years. The respondent submitted that section 58 (1) of the Employment Act provides that;

> *"Contract of Service shall not be terminated by an employer unless he or she gives notice to the employee, except: -*
>
> *a. Where the Contract is terminated summarily under section 69 or*
>
> *b. Where the reason for termination is the attainment of retirement age"*

43.] Furthermore, The Employment Act 2006 provides only for the notice period and not payment in lieu of notice. It only provided for the payment in lieu of notice if it is provided for in the agreement or contract between parties and is in conformity with the provision of sections 58 (3) (a) to (d) of the Employment Act 2006. The respondent argued that she had served the appellant for about 12 years. Section 58 (3) (d) of the Employment Act 2006 provides that; the notice required to be given by an employer or employee

under this section shall be – not less than three months where the service is ten years or more. Contrary, to the above provision of the law, Clause 18 of her employment contract relied on by the appellant to terminate the employment provides for one month's notice in writing or paying a month's salary in lieu of notice irrespective of the number of years served.

44.] The respondent argued that having served for about 12 years, there is no provision at all for three (3) month's salary in lieu of notice in her Contract as expected to conform with section 58(3) (d) of the Employment Act 2006, which provides for notice not less than three (3) months where the service is ten years or more". The respondent submitted that the minimum period of notice to be given by the employee or the Bank is as follows:

Period of Service		**Notice period**
1. Probationary period	-	*7 days*
2. Less than 12 months	-	*7 days*
3. Between 1 and three years	-	*15 days*
4. Between 3 and 5 years	-	*1 months*
5. Between 3 and 10 years	-	*2 months*
6. 10 years or more	-	*3 months*

45.] The respondent further submitted that Clause 18 of the employment contract relied on while terminating her is illegal in terms of Section 58 (3) (d) and Section 69 (2) of the Employment Act 2006 as explained above and therefore a nullity as decided in the case of **Omega Enterprises (Kenya) Limited Vs Kenya Tourist Development Corporation & 2 Others, Kenya Court of Appeal,** where they relied on the decision by Lord Denning MR, in the case of **Macfoy Vs United Africa Co. Ltd. {1961} 3 ALL ER 1169** for the position that;

> *".... If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order to set it aside. It is*

automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something and expect it to stay there, it will collapse".

46.] In addition, the respondent further relied on the case of **Andrew Kananura Vs. Mary Mugenyi, Civil Suit No. 57 of 2008** where the court decided that;

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality".

47.] The respondent invited the court to find that she was summarily terminated because Clause 18 of the Employment contract referred to while terminating her provides for one-month notice instead of three months' notice having served for over ten years as stipulated under **Section 69 (1).** The respondent cited the case of **AM Jabi Vs Mbale Municipal Council (1975) HCB 191 and C Ushillani Vs Kampala Pharmaceuticals Ltd, SCCA No. 6/1998** which was cited and relied upon in the case of **Mugisha Richard Bob Kagoro Vs Uganda Wildlife Authority, Civil Suit No. 263 of 2007** for the view that;

".... Summary dismissal, which is termination without notice or with less notice that the employee is entitled to by a statutory or contractual provision, should only be done where the employee's conduct was so gross that it affects his line of employment."

48.] In **Uganda Development Bank Versus Florence Mufumba, Civil Appeal No 241 of 2015**, the Employer terminated the Respondent's permanent and pensionable contract of service without giving any reason, this

court after interpreting Sections 58 and 69 of the Employment Act held that the services of the Respondent in that case could not be terminated summarily without notice if she had not committed a fundamental breach of her terms of service.

49.] Given the above inconsistencies between her contract and the law, the respondent submitted that Section 58 (5) of the Employment Act 2006 provides that no agreement will exclude the operation of the law. It also goes further to state that an employee shall not be prevented from receiving payment in lieu of notice. The respondent cited **Mary Pamela Sozi Vs. The Public Procurement and Disposal of Public Assets Authority, H.C.C.S No. 63 of 2012** where the court held that;

> *"An employer cannot unreasonably and without justification terminate the contract of the employee simply because there is a clause in the employment contract that allows for payment in lieu of notice".*

50.] The respondent submitted that termination of her employment by *"notice"* or *"payment in lieu of notice"* which is the basis of ground 2 of the appeal was not mentioned or addressed either in the appellant's pleadings, cross-examination, and or submissions in the trial Court and therefore could not be raised as a ground of appeal.

51.] It is settled law and practice that a party is bound by his/her pleadings which is very clear under Order 6 rules 6 and 7 Civil Procedure Rules (CPR) and since this was not done under the provisions of Order 6 rule 6 of the CPR, the Appellant is accordingly prevented from departing from their pleadings under Order 6 rule 7 of the CPR. The respondent cited the case of **Interfrieght Forwarders (U) Limited vs. East African Development Bank Civil Appeal No. 33 OF 1992** held that,

"He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings. For the above reasons, if the Plaintiff did not plead that the Defendant was a common carrier, I think that he cannot be permitted to depart from what appears to have been his case as stated in the plaint and claim that there was evidence proving that the Defendant was a common carrier. As already found above no evidence supported that contention".

52.] Given the above, the respondent invited the Court to find that ground 2 of the Appeal amounts to a departure from the original pleading and offends the principles that govern the amendment of pleading and the appellant should be estopped from attempting to use what was not pleaded to form Ground 2 of Appeal and therefore be dismissed and Ground 1 of cross Appeal be allowed.

Ground 2 of Cross-Appeal

53.] It was the submission of the respondent that the Appellant failed to mention the reason in the termination letter but later mentioned it during cross-examination. This constituted dishonesty on the part of the Appellant which was deliberately orchestrated to deny her the right to a fair trial. The respondent cited the case of **Mary Pamela Sozi Vs. The Public Procurement and Disposal of Public Assets Authority, H.C.C.S No. 63 of 2012,** and **Akeny Robert Vs. Uganda Communications Commission, LDC No. 023/2015.**

54.] The respondent further submitted that the termination was unfair as provided under **sections 71 (1) (a) & Section 75 (h) of the Employment Act 2006** which provide that,

"A termination shall be unfair for this part where ...the termination is for any of the reasons specified in section 75" and ***section 75 (h)*** *provides that "The following* ***shall not*** *constitute fair reasons for dismissals or the imposition of disciplinary penalty ... an employee's initiation or proposed initiation of a complaint or other legal proceedings against his or her employer".*

55.] Given the above, the respondent's counsel invited this Honourable Court to find that the respondent was faulted and unfairly terminated for suing the appellant and hold that the learned trial Judge and panelists of the Industrial Court were justified in holding that her termination from employment was unlawful and pray that ground 1 of appeal be dismissed.

56.] *"Becoming uncooperative and stopping to come to work"* was the second reason given during the cross-examination by the Appellant's witness is referred to as *"absence from work without permission*" which is a minor and straightforward offense which does not lead to termination or dismissal under clause 1.5.1 of Discipline Management Policy on pages 30 & 122 record of appeal hence making the said termination heavy-handed and unlawful.

57.] The respondent submitted that the termination for the above reasons by the Appellant without being accorded the right to a fair hearing was in total violation of Article 28 (1) of the Constitution which provides for the Right to a fair hearing. To buttress her submission, the respondent cited the case of **Caroline Turyatemba and others Vs. Attorney General, Constitutional Petition No. 15 of 2006**, where it was held that:

"The right to be heard is a fundamental basic right. It is one of the cornerstones of the whole concept of a fair hearing. The principle of ***"hear the other side" or in Latin: "Audi Alteram partem"*** *is fundamental and far-reaching. It encompasses every aspect of fair procedure and the whole area of due process of the law, it is as old as the creation itself, for even in the Garden of Eden "the Lord first afforded a hearing to Adam and Eve, as to why they had eaten the forbidden fruit before he pronounced them guilty..."*

58.] The respondent submitted that under section 66 of the Employment Act 2006, a hearing is a minimum requirement before the dismissal of any employee. It is mandatory for all organizations as provided under **Schedule 1 Disciplinary Code (1) Disciplinary Rules (1) of Employment Act 2006** to have disciplinary rules.

59.] The respondent submitted that in conformity with the above provision of the law, the appellant had Discipline Managing Policy and procedures which formed part of the employment contract and the legitimate expectation on the part of the employees as regards what conduct is forbidden, the consequences of violating the policies.

60.] The respondent further submitted that whereas the Discipline Management Policy and procedures apply to all the appellant's employees and also form part of the contract of employment provided under clause 5 of the employment contract, the appellant recklessly disregarded the due process. The respondent cited, the case of **Twinomugisha Moses Vs Rift Valley Railways, Civil Suit No. 212 of 2009** where the court held that;

> *"I find that whatever the Employment Contract or Human Resource Manual provides on termination, the provisions of the Constitution and the Employment Act 2006 are paramount. Since the Applicant was not given a fair hearing, I can state that the termination was not in conformity with the law and hence was unlawful."*

61.] It was submitted by the respondent that from the foregoing explanation the appellant acted in total disregard of the due process or correct procedure of termination provided by the Constitution, the Employment Act 2006 and the appellant's own Disciplinary Management Policy, and procedure which form part of the contract of employment.

62.] The respondent invited the Court to uphold the decision of the trial Court, dismiss the appeal in totality and ground of cross Appeal should be allowed.

Rejoinder

63.] Counsel for the appellant reiterated that there is no requirement under the Employment Act, 2006 for an employer to give a reason before terminating an Employee's employment contract. In addition, the Appellant submits that Article 4 of the International Labour Organization Convention No. 158 ("Article 4") which the Industrial Court premised its finding that Respondent was entitled to a reason is not applicable. The article was not enacted as a section in the Employment Act, of 2006 and as such was never domesticated thus it has no force of law in Uganda.

64.] It was argued that the appellant did not give reasons for termination as alleged by the respondent in her submissions. In his view, the respondent seeks to support this assertion by cherry-picking a part of David Mutaka's evidence. However, the appellant terminated the respondent by the termination clause of her employment contract which allowed for termination without any reason if she was given the requisite notice or payment in lieu of that notice.

Resolution of court.

Grounds 1& 2 of the Appeal and 1&2 of the Cross Appeal.

65.] The duty of this court as a first Appellate Court was stated in Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI 13/10 and in the case of **Kifamunte Henry V Uganda, S.C Criminal Appeal No. 10 of 1997, the** court held that;

"The first appellate court must review the evidence of the case, to reconsider the materials before the trial judge and make up its mind not disregarding the judgment appealed from but carefully weighing and considering it.".

66.] A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. However, this is not the case for appeals arising from decisions from the Industrial Court. The duty of this court as the first appellate court in decisions from the Industrial court, is limited to points of law and its jurisdiction. This is the position of the law under section 22 of the Labour Disputes (Arbitration and Settlement) Act, No. 8 of 2006. See also **Bank of Uganda vs. Joseph Kibuuka and 4 others, Civil Appeal No. 281 of 2016**, where this court held that appeals against the decisions of the Industrial Court lie to this court only on points of law and its jurisdiction.

67.] I have considered the evidence before the trial court, the submissions of counsel for both parties, the authorities cited and those not cited. It is my view that to determine these grounds, I should determine whether the respondent's employment was wrongfully terminated.

Whether the respondent's employment was wrongfully terminated?

68.] Clause 18 of the offer letter provides that:

"after confirmation of your appointment, your employment may be terminated by either party giving to the other one month's notice in writing or paying one month's salary in lieu of notice."

69.] To resolve this issue, it is important to analyze the wording of the appellant's termination letter, and offer letter in line with the law.

RE: TERMINATION

Reference is made to your employment contract with the bank effective 11th February 2001 and the terms on termination of the contract of employment.

This is to inform you that your services with the Bank have been terminated with effect from 14th December 2012. Your last working day will be 13th December 2012.

You will be paid your salary up to the last day of work and Ugx. 17,887,500 as 3 months' salary in lieu of notice as per contract plus leave encashment of 0.85 current outstanding leave days by the 24th December 2012.

You have an outstanding Miscellaneous loan balance of Ugx 20,094, 188/= with a value of Ugx. 21,378/= Staff Home loan balance of Ugx. 149,852,583/= with an overdue of Ugx. 51,294/= which becomes payable on demand or you may contact the credit department on repayment options available to you before any of your dues can be processed. Please note that rates on your staff loan will be varied at prevailing customer rates.

Please do a formal handover of your role and hand over all company property in your possession, including the Bank Identity Card to your Line manager.

Signed

David Mutaka

Ag. Head Human Resource.

70.] It was submitted by the respondent that whereas the letter was crafted as a termination letter, it was a dismissal letter. The respondent stated that she

was not given notice. That this action fits well within the definition of a dismissal in the respondent's discipline management policy.

71.] Under section 2 of the Employment Act *"dismissal from employment"* means the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct. *"Termination of employment"* means the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of the contract, attainment of retirement age, etc.

72.] The respondent argued that she was not given notice as required under section 65(1)(a). It has been held by the Supreme Court that payment of compensation in Lieu of Notice suffices as notice required under section 65 of the Employment Act. Kanyeihamba, J.S.C in the case of **Barclays Bank of Uganda vs. Godfrey Mubiru**, *(supra)* explained this concept and held that;

> *"In my opinion, where any contract of employment, like the present, stipulates that a party may terminate it by giving notice of a specified period, such contract can be terminated by giving the stipulated notice for the period. In default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no period for notice is stipulated, compensation will be awarded for reasonable notice which should have been given, depending on the nature and duration of employment. Thus, in the case of* ***Lees v. Arthur (Greaves Ltd, (1974) I. C. R. 501****, it was held that payment in lieu of notice can be viewed as ordinary giving of notice accompanied by a waiver of service by the employer to terminate by notice. Indeed, in the English case of* ***Rex Stewart Jeffries Parker Ginsberg Ltd v. Parker (1988) I. R. L. R. 483, at p. 486****, it was held that notwithstanding statutory or employment contract provisions, if the parties agreed upon a payment in lieu of notice*

for a period shorter than stipulated, the employer is entitled to terminate the contract of employment by offering the payment in lieu of notice. The right of the employer to terminate the contract of service whether by giving notice or incurring the penalty of paying compensation in lieu of notice for the duration stipulated or implied by the contract cannot be fettered by the courts. The employee is entitled to compensation only in those cases where the period of service is fixed without provision for giving notice."

73.] It is undeniable that the Employment contract under clause 18 provided for an avenue for either party to terminate the contract either with notice or without notice as long as there was payment in lieu of the Notice. I acknowledge the fact that clause 18 falls short of the requirements under section 58 (3)(d) which requires that an employee who has worked for more than 10 years should be given 3 months' notice. Nevertheless, on page 27 of the proceedings, annexure "C" which is the termination letter, indicates that the respondent was paid Ugx 17,887,500/= as 3 months' salary in lieu of notice. This was corroborated by the respondent in her evidence on page 221 of the record of proceedings where she acknowledged receipt of the same. The appellant having complied with the requirements of the law cannot be faulted. Mwangusya, J.S.C in the case of **Hilda Musinguzi vs. Stanbic Bank (u) Ltd, Civil Appeal No.005 of 2016,** handled a similar matter and held that;

"the respondent exercised a recognized Employer's right to terminate the appellant's contract. It was admitted at the trial that the appellant was paid a sum of Shs 3,440,569/= in Lieu of Notice, 12 days outstanding leave, half pay for December 2007 to February 2008, and the March 2008 salary. The payment in Lieu of notice was made after the appellant had raised a complaint that her termination had not complied with the Employment Act and in compliance with the Act a

payment was made and to me, it is immaterial that the payment was made after the termination of the contract because once the payment was made as a corrective measure the respondent cannot be faulted for not meeting the requirement of the Employment Act, 2006"

74.] Similarly, the appellant exercised its right to terminate the respondent's employment contract which cannot be fettered by this Court. This right was provided for in the contract, it is immaterial that the contract provided for a one-month payment in lieu of notice. It is satisfactory that the appellant complied with the requirement of the law by paying a three-month salary in lieu of notice. It has to be observed that the letter was signed before coming into force of the Employment Act 2006.

75.] Turning to whether termination under section 65(1)(a) needs reasons and/or a hearing, is a matter that has been handled by both the Supreme Court and this court. Where it has been held that an employer can terminate the employee's employment contract for a reason or no reason at all. In the case of **Stanbic Bank Uganda Limited vs. Deogratius Asiimwe, Civil Appeal No. 18 of 2018,** Tuhaise, J.S.C held that;

"the authorities cited above are clearly to the effect that an employer can terminate the employee's employment for a reason or no reason at all. To that extent, one would not fault the appellant for terminating the respondent employment immediately and pay him his three months' wages in lieu of notice as indeed it did in this appeal" (emphasis mine)

76.] On this same issue Mulyagonja, J.A in the case of **Bank of Uganda vs. Kibuuka and 4 others,** *(supra)* held that;

I therefore find that in the absence of a specific provision in the law and in the face of the decision of this court and the decisions of the Supreme

Court on that point of law which are binding on this court, there is no support for the finding of the trial court that in every situation where an employer terminates employment under section 65(1)(a) and section 2 of the Employment Act, and/or the terms of the contract of employment reasons have to be provided to the employee for their actions. However, reasons are required for termination of a contract under section 65(1) (c) of the Act." (Emphasis mine)

77.] It is therefore very clear from the above authorities that the employer is not required to give reasons for termination of employment contract under section 65(1)(a). Unless the employment contract states otherwise the employer does not need to have a good reason or any reason to terminate the employment contract. It suffices that the employer has given sufficient Notice as provided for under section 58 of the Employment Act, the employment contract, and any other documents governing the said contract. Where notice is not given, payment in lieu is required as provided by the law and contract. The famous article 4 of the Termination of Employment Convention No. 158 of 1982, relied on by the respondent can only bear its fruit if it were incorporated into the Employment Act, but it was not.

78.] In submission for the cross-appeal the respondent argued that given article 4 of the Termination of Employment Convention No. 158 of 1982, the appellant ought to have given reasons for the termination. This very Court in the case of **Bank of Uganda vs Joseph Kibuuka***(supra)*, Mulyagonja, J. A held that:

"the judges and panelists of the industrial court may have relied upon the principles set out in this convention though they did not say so it is also observed that though parliament drew important principles from the convention on the re-enactment of the Employment Act of 2006, it omitted to include the overriding principle contained in Article 4

thereof to bring the important principle in it into force in the laws of Uganda. The omission of the principle should be brought to the attention of the Attorney General who should ensure that it is incorporated into the Employment Act."

79.] Turning to whether a hearing is necessary for a termination under section 65 (1)(a). Section 66 of the Employment Act provides that an employee is entitled to a hearing before he is dismissed on grounds of misconduct or poor performance. The employer must explain to the employee in the language they understand the reasons for dismissal. This may be done in the presence of any other person at the choice of the employee.

80.] It is my view, that this was not a dismissal but a termination. For one to invoke the application of section 66 of the Employment Act, it must be a dismissal on grounds of misconduct or poor performance. Since it is not the case in this matter it is my view, that there was no need for a hearing. The purpose of the hearing is to establish whether the allegations advanced against the employee are true. However, in the circumstances, where no allegations were made against the respondents, then there was no need for a hearing. As is in the case before this court. In the case of **Stanbic Bank Uganda Limited Vs. Deogratuis Asiimwe** (*Supra)*, Tuhaise, J.S.C held that,

"the authorities cited above are clearly to the effect that an employer can terminate the employee's employment for a reason or no reason at all. To that extent, one would not fault the appellant for terminating the respondent's employment immediately and paying him his three months' wages in lieu of notice, as indeed it is in this appeal, ***but that is if and if only it had gone no further than simply stating that it was terminating the services of the respondent.*** *To the contrary, however, the termination letter exhibit P3* ***stated that the reason for termination letter exhibit P3 stated that the reason for terminating the contract of***

employment was the respondent's unsatisfactory performance which put the respondent's performance in issue. *Under such circumstances it would only have been fair, in line with the principles of natural justice, to avail the respondent a hearing, to allow him to defend himself before his dismissal since the termination was expressly stated to be faulted based against the respondent."*

81.] Considering the principle of judicial precedent, I am bound to follow the Supreme Court decision in the above matter, the circumstances are different in as far as there were no reasons granted for the termination of the contract. The appellant is therefore protected from the need for a hearing.

82.] Having considered the law and the evidence on record it is my finding that the learned panel erred when they found that the appellant failed to follow the procedure set out in sections 66 and 68 of the Employment Act. Considering the cases decided by the Supreme Court and this court, it is my finding that termination of an employment contract under section 65(1)(a) of the Employment Act does not always need reasons for termination. Where no reason for termination is given, then there is no need for a hearing since no allegations are made against the employee.

83.] I find therefore that grounds 1 and 2 of the appeal succeed, and grounds 1 and 2 of the cross appeal fail.

Grounds 3 of the Appeal and 8 of the Cross-Appeal

The Learned Trial Judges and Panelists of the Industrial Court erred in law in awarding the Respondent general damage on no basis at all.

And

The learned Trial Judge and Panelists of the Industrial Court erred in law when they failed to evaluate the evidence on record and awarded only 65,000,000/= as General Damages when the Ag Head, Human Resources

who signed her termination letter and was the main witness accepted that the Cross Appellant was never found culpable, they never cleared her name damaged by the illegal email search which went viral sent to all Commercial Banks who would be potential employers and being HR Person he acknowledged that such person is not employable with Banks being very sensitive organization and yet they went ahead and terminated discriminately her without according to her fair hearing and without being cleared until during the cross-examination yet her counterparts who were found culpable were given a fair hearing and exonerated by issuing final warning letters which are only valid for six months.

Appellant's submissions.

84.] It was submitted for the appellant that the court erred in awarding the respondent Ugx. 65,000,000/= as general damages to the respondent on grounds of longevity in the service without justification. As earlier submitted in Grounds 1 and 2 of the Appeal, the appellant could terminate the Respondent's employment without any reason provided it gave her the requisite notice or payment in lieu of that notice as was in this case. Therefore, the award of general damages is unjustified.

85.] In the alternative, counsel for the appellant submitted that the award of UGX 65,000,000/= as general damages was excessive and without a basis or premise in the law. It was further submitted for the appellant that the award of general damages rests on the common law principle of *restitution in integrum* which requires the court to put the claimant in a position he or she would have been in had the breach not occurred. In the case of **Addis Versus Gramophone Co. Limited, [1909]AC 488**, the House of Lords held that damages awarded in an employment action are confined to loss suffered because the employer failed to give proper notice and that no damages are

available to the employee for actual loss of his or her job and/or pain and distress that may have been suffered because of being terminated or dismissed.

86.] Additionally, it was submitted that the House of Lords in the **Addis Case** *(supra)* further held that an employee cannot recover damages for injured feelings, mental distress, or damage to his reputation, arising out of the manner of his dismissal. The rationale was that such a head of loss together with any claim for distress or injury to feelings, was properly the subject of a claim in tort rather than in Contract.

87.] In the premises, it was submitted that the award of general damages allegedly to atone for the pain and suffering, loss of self-esteem, dignity, and reputation the Respondent suffered as a result of the allegedly unlawful termination was an error and, therefore, should be set aside.

Submissions by counsel for the respondent.

88.] The respondent submitted that the awarded UGX 65,000,000/= was not commensurate with the pain and suffering undergone and therefore incapable of restoring her to the monetary state she was in before.

89.] The respondent submitted that she was able to pay the appellant her monthly installments on both home and miscellaneous salary loans whose balances were outstanding at Ugx. 149,852,583/= and Ugx. 20,094,188/= respectively at the time of termination.

90.] It was further submitted that after termination in December 2012, the interest on both loans was converted to Commercial rates which was very high especially that on mortgage home loans which was raised from 50% of prime rate to over 100% making it unaffordable hence endless phone call from the appellant and her agents. She submitted that she used to get threatening calls from the appellant's agent which caused her emotional breakdown.

91.] It was further submitted that it becomes almost impossible with total the amount paid from the time of her termination standing at UGX 425,976,525/= which is almost 3 times what was outstanding at the time of termination and the balance outstanding currently stands at UGX 67,141,879/= which is almost half of what was outstanding at the time of termination.

92.] The respondent further submitted that she should be awarded special damages only in the form of loss of salary earnings for the remaining eighteen (18) years of her permanent and pensionable job whose retirement age was 58 years. The respondent cited, the case of **National Forest Authority versus Sam Kiwanuka, Civil Appeal No. 005 of 2009**, where the Court of Appeal held that

> *"special or general damages may be awarded where a party contracts a loan obligation but as a result of the unlawful or wrongful act of another making the loan contractor fail to pay the loan, the latter is entitled to special damages of an amount equivalent to the outstanding bank loan at the time of the unlawful act. The victim is also entitled to general damages for the inconvenience and embarrassment caused to him as a result of the unlawful acts of the defendant."*

93.] It was submitted by the respondent that the loans should be paid off by the Respondent's bank because her source of repayment ceased at the time of illegal and wrongful termination. She submitted that the termination reduced her to a full-time housewife with no income, a situation which had made her suffer depression, anxiety, humiliation, embarrassment, loss of self-esteem, mental distress/agony, loss of dignity and reputation as well as inconvenience. The respondent cited the case of **Charles Abigaba Lwanga VS Bank of Uganda LDC No. 142 of 2014.**

94.] The respondent prayed that given the foregoing explanation and authorities, ground 8 of the cross-appeal should succeed. She invited court to award special damages of Ugx 493,118,404/= being the total amount paid from the time of her termination which is now standing at UGX 425,976,525/= plus the current balance outstanding of Ugx 67,141,879/=, vary the award of the trial court and award additional general damages of UGX 55,000,000/= to make 120,000,000/= and dismiss ground 3 of the Appeal.

95.] She prayed that ground 3 of the appeal be dismissed and ground 8 of the cross-appeal be allowed.

Resolution of court.

96.] The damages have been defined by the learned author **Harvey McGregor, in his book "McGregor on Damages, 19th Edition, Sweet & Maxwell, 2014" page 1** as,

"an award in money for a civil wrong"

97.] On the other hand, Lord Macnaghten in the case of **Stroms Bruks Aktie Bolag and others Vs. J&P Hutchison [1905] A.C at page 515,** defined general damages as;

"as I understand the terms are such as the law will presume to be the direct natural or probable consequence of the act complained of."

98.] From the foregoing definitions damages are awarded where there is a civil wrong against the complainant. The award intends to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. The claimant must plead and prove that there were damages, losses, or injuries suffered as a result of the defendant's actions.

99.] In exercising my discretion whether to award general damages or not, I am guided by the position of the ruling in the case of **Addis Versus Gramophone Co. Limited, [1909]AC 488**, cited by counsel for the appellant where The House of Lords held that damages awarded in an employment action are confined to loss suffered because the employer failed to give proper notice and that no damages are available to the employee for actual loss of his or her job and/or pain and distress that may have been suffered because of being terminated or dismissed.

100.] Considering the fact that the damages are awarded as a consequence of the wrong done by the appellant, the Industrial Court erred when it awarded damages in the circumstances of this case. The employer made payment in lieu of notice, in accordance with section 58(5) of the Employment Act 2006 that allows the employee to accept payment in lieu of notice. It therefore follows that there was no need for an award of damages.

101.] Having found that the respondent was lawfully terminated I decline to award any damages. Ground 3 of the appeal succeeds and ground 8 of the cross appeal fails.

GROUNDS 3, 4 AND 6 OF THE CROSS-APPEAL

The learned trial Judge and Panelists of the Industrial Court erred in law when they declined to award the cross-appellant severance allowance by holding that it was not pleaded and the policy did not make it a right that could accrue to any staff and yet the cross-appellant even prayed for it in her witness statement and was uncontroverted,

The learned trial Judge and Panelists of the Industrial Court erred in law when they failed to evaluate the evidence on record and decided that parties were held by their pleadings and declined to order the Respondent

to pay the outstanding salary home loan and refund all deductions made after her unlawful termination.

And

The learned trial Judge and Panelists of the Industrial Court erred in law when they declined to award the respondent a Repatriation allowance.

Submissions by counsel for the Appellant

102.] Under these grounds, it was submitted for the appellant that it is trite law that parties are bound by their pleadings and that the court can only award a party a remedy that it has sought. Counsel cited the case of **Interfreight Forwarders (U) Limited versus East African Development Bank,** *(supra)* where the Supreme Court held that parties are bound by their pleadings. The Industrial Court therefore rightfully held that the respondent having not pleaded the above remedies, was not entitled to them. Counsel further cited the case of ***Ms. Fang Min versus Belex Tours and Travel Limited, SCCA No. 6 of 2013 consolidated with Civil Appeal No. 1 of 2014; Crane Bank Limited versus Belex Tours and Travel Limited*** in which the Court held that a party cannot be granted relief which it has not claimed in its plaint or claim.

103.] The Respondent did not pray for severance allowance, payment of outstanding salary home loan, or repatriation allowances in her Memorandum of Claim. In the premises, the Court could not grant her those reliefs as it would be a departure from the Respondent's pleading.

104.] It was therefore prayed for the appellant that the Court dismisses grounds 3. 4 and 6 of the Cross Appeal and upholds the finding of the Industrial Court.

Submissions for the respondent.

105.] The respondent submitted that whereas the trial Court declined to award, severance allowance and repatriation allowance merely because they

were not pleaded in the memorandum of claim, the respondent argued that she pleaded the same under clauses 52 (b), (c), (d), (e) & (f) of the Witness Statement.

106.] Furthermore, the respondent submitted that the appellant did not challenge the witness statement during cross examination hence it stands. She relied on the case of **Nigel Sutton Vs. Slowey Shauna Sutton, Divorce Cause No. 63/2013,** where Hon. Lady Justice Percy Night Tuhaise relied on the decision of the Supreme Court in the case of **Habre International Co. Ltd. Vs Ebrahim Azakaria Kassam & Others, S.C.C.A 4/1999** held that whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

107.] To support her assertion further, the cross appellant/ respondent cited the case of **James Sowabiri & and Another Vs. Uganda, S.C. Criminal Appeal No. 5/1990, Uganda Revenue Authority Vs Stephen Mabosi, Supreme Court Civil Appeal No. 26/1995.**

Severance allowance

108.] The respondent submitted that whereas her Counsel at the trial Court did not plead Severance Allowance in the Memorandum of Claim, the trial Court quoted a wrong amount of Ugx. 165,258,250/= instead of Ugx. 196,762,500/= which she prayed for under clause 52 (b) of her Witness statement which was left unchallenged during the cross-examination.

Section **87 of the Employment Act 2006,** provides that;

> *"Subject to this Act, an employer shall pay severance allowance where an employee has been in his or her continuous service for a period of six months or more and where any of the following*

situations apply - (a) the employee is unfairly dismissed by the employer."

109.] The trial Court ignored the above provision of the law applied the wrong principles and arrived at the wrong decision that severance allowance was not pleaded and the policy.

110.] The respondent invited the Court to find that having decided that she was unlawfully terminated by the employer, severance allowance becomes an entitlement. The respondent cited the case of **Tumusiime & 5 others Vs Mukwano Personal Care Products (Labour dispute reference No. 022 of 2014 [2019] UGIC 30 (10 May 2019)** where it held that;

"Having found that the claimants were unlawfully terminated, the first prayer of declaring that the dismissal was illegal is granted. ……. Since the claimants were unlawfully terminated, under section 87 of the Employment Act they are entitled to severance pay. Since the evidence does not reveal that there was any arrangement between the Respondent and the Claimants as to the calculation of Severance, this court hereby invokes its authority of ***DONNA KAMULI VS DFCU, LABOUR CLAIM NO. 02/2014*** *……."*

111.] In the case of **Mugisha M. Rogers Vs Equity Bank (U) Ltd, (Misc. Application No. 70 of 2019),** the court held that;

"……. We agree with counsel for the applicant that this interpretation was done without looking at Section 87 of the Employment Act which entitles a person who has worked continuously for at least 6 months. The above interpretation deprives the person described in Section 87 of his/her severance"

Repatriation Allowance

112.] **Section 39 (1) & (3) of the Employment Act 2006 provides for repatriation viz;**

(1) An employee recruited for employment to a place that is more than one hundred kilometers from his/her home shall have the right to be repatriated at the expense of the employer to the place of engagement in the following cases: -

(2) Where an employee has been in employment for at least ten years he or she shall be repatriated at the expense of the employer irrespective of his or her place of recruitment.

113.] In her witness statement, the respondent prayed for Repatriation from Kampala to Bukomansimbi which was Ugx 4,500,000/=.

Outstanding salary loan and refund of all deductions

114.] The respondent submitted that because she was a permanent staff with a promising career, she applied for a mortgage loan of ninety-six million (96,000,000/=) in 2006 and topped up with seventy million (70,000,000/=) in June 2010 to run for 240 months (20 years) whose expiry would go until her retirement.

115.] Additionally, the respondent submitted that the facility for staff to access mortgage loans was at an interest of 50% of the Bank's Prime Lending Rate, which made it very affordable. However, at the time of her termination in December 2012, the outstanding amount was Uganda shillings 149,852,583/= and 20,094,188/= for the salary loan, and the interest, on these loans was converted to Commercial rates which is very high.

116.] Due to this mistreatment and termination, she stated that she suffered financially with no income to service the loan because the source of repayment was salary.

117.] She prayed that these loans be paid off by the respondent bank because her source of repayment ceased at the time of illegal and wrongful termination, she was now a housewife with no sources of income.

118.] The respondent invited the Court to order the appellant to pay the outstanding loan balances and reimburse all deductions made after her unlawful termination to clear the outstanding obligations namely housing and salary loans which currently stand at **UGX 425,976,525/=** and that Ground 4 of cross-appeal succeeds because her failure to service the loan which were serviced through salary deductions is a direct consequence of the unlawful termination.

Resolution of Court.

119.] After examining the record of the trial proceedings available on record and arguments of the parties, it is important to note that pleadings are different from Witness Statement. A pleading is defined under section 2 (p) of the Civil Procedure Act to include *"any petition or summons and also includes the statements in writing of the claim or demand of any plaintiff and the defence of any defendant to them, and the reply of the plaintiff to any defence or counterclaim of a defendant."* Whereas a witness statement is a statement of evidence of a party to the suit, it is evidence in chief. A party cannot bring a new claim in the witness statement and expect the Court to be bound by it. In the case of **Adetoun Oladeji (NIG) Ltd Vs. Nigerian Breweries PLC, S.C. 91/2002, Pius Aderemi J.S.C. held that;**

> *".... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which do not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."*

120.] Not only are the parties bound by the pleadings but the Court as well. This was the position of the court in the case of **Jani Properties Ltd versus Dar-es-Salaam City Council (1966) EA 281;** and **Struggle Ltd versus Pan African Insurance Co. Ltd (1990) ALR 46 -47,** wherein the Court rightly observed that;

> *"the parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings"*

121.] In the case of **Interfreight Forwarders (U) Ltd. vs. East African Development Bank, SCCA No. 33 of 1992,** the Court held that;

> *"The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what the case of the opposite party which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial. See Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition page 3. Thus, issues are framed on the case of the parties so disclosed in the pleadings, and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be not allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings."*

122.] It is trite law that evidence that does not support the averments made by parties should be disregarded by the court. Through the pleadings, parties are to formulate their case subject to the rule of drafting pleadings laid down in the Civil Procedure Rules. The reason for this is for certainty and also finality. The parties are then bound by their pleadings in case of any need for change the parties have an opportunity to amend their pleadings at any stage before judgment. It would be contrary to the principles of justice if the court made a finding on unpleaded matters by the parties. A decision made on a claim or defence not pleaded is equivalent to no hearing which is an infringement of the right to a fair hearing. The parties are given the privilege of setting the court in motion through the pleadings neither party should complain if the court strictly adheres to the motion they have set for themselves.

123.] The respondent/appellant in this case laid down her claims as:

1. *A declaration that the respondent bank wrongfully and illegally terminated the claimant's employment in contravention of the Employment Act and the constitutional guarantee prescribed by Articles 28,42 and 45 of the constitution of the Republic of Uganda.*
2. *A declaration that the respondent bank contravened its own Human Resource Manual and industry best practices when terminating the claimant's employment.*
3. *A declaration that the respondent bank acted irresponsibly in bad faith and breach of trust and confidence when it terminated the Claimant's employment without any apparent reason.*
4. *An order directing the Respondent to pay to the Claimant special general aggravated and exemplary damages for the loss, damages, and inconvenience caused to the claimant on account of (i) the*

wrongful termination and (ii) statutory and constitutionally prohibited victimization of an employee;

5. *An interest on reliefs in (iv) above at the rate of 30% P.A from the date of judgment until payment in full.*
6. *Costs of the claim and*
7. *Any further or better relief as the court may think fit."*

124.] Accordingly, the respondent did not make any claim about severance allowance, repatriation, and payment of the outstanding loan considering the evidence on record. The Industrial Court therefore was correct in not awarding the unpleaded claim. I also decline to grant these orders because they were neither pleaded nor proved in evidence during the hearing. The respondent who was well represented at trial had an opportunity to amend the pleadings but preferred to make a claim in the Witness Statement that is not a pleading.

125.] I would therefore find that grounds 3, 4, and 6 fail.

Grounds 5 and 7 of the cross-appeal

The learned Trial Judge and Panelists of the Industrial Court erred in law when they declined to award aggravated and exemplary damages.

And

The learned Trial Judge and Panelists of the Industrial Court erred in law in holding that they found no aggravating circumstances to warrant an award of exemplary damages. They do not think that an inquiry into her account was out of the ordinary, especially given the fact that the fraud occurred in the department in which she served as an account executive.

<u>Submissions by counsel for the appellant</u>

126.] It was submitted for the appellant that the Industrial Court awarded the respondent general damages of UGX65,000,000/=. The general principle is

that general damages and aggravated damages cannot be awarded for the same cause of action because general damages and aggravated damages are the same species of damages. In this case, the Industrial Court having awarded general damages to the Respondent, was right in not awarding the Respondent aggravated damages.

127.] Counsel cited the case of **Uganda Development Bank versus Florence Mufumba** *(supra)* where this court dealt with a similar issue regarding the award of general damages and aggravated damages for the same cause of action. The Court held that general damages or aggravated damages may be awarded for a claim of wrongful dismissal, however, the two kinds of damages cannot be granted for the same cause of action because they are the same species, and therefore only one should be granted.

128.] It was submitted that this Court should uphold the finding of the Industrial Court on the award of aggravated damages to the Respondent and dismiss Ground 5 of the Cross Appeal.

129.] The Respondent also faults the Industrial Court for not awarding exemplary damages notwithstanding that there was no circumstance pleaded or even proven which would warrant the award of exemplary damages.

130.] The instances in which a Court may award exemplary damages are laid out in the case of **Rookes versus Barnard (1964) AC 1129** which was cited with approval by the Supreme Court in its decision in the case of **Esso Standard (U) Limited versus Semu Amanu Opio, SCCA No. 03 of 1993.** In the case of **Rookes versus Barnard***(Supra),* the Court held that exemplary damages could be awarded only:

> *"(a) Where the has been oppressive, arbitrary or unconstitutional action by the savants of government.*

(b) Where the defendant's conduct has been calculated by him to make a profit which may exceed the compensation payable to the Plaintiff.

(c) Where some law for the time being in force authorizes the award of exemplary damages.

131.] None of the above circumstances justifying the award of exemplary damages was present in this particular appeal and thus the Industrial Court rightfully found so. In any case, as submitted under grounds 1 and 2 of the Appeal, the Respondent's termination was lawful. However, even if it were to be unlawful, I am unable to agree with the respondent that the appellant acted arbitrarily in terminating the Respondent's employment contract nor did it profit from the termination.

132.] In the premises, the Industrial Court rightfully found that there were no circumstances pleaded or proven warranting the award of exemplary damages and counsel invited the Court to dismiss grounds 5 and 7 of the Cross Appeal.

133.] On the premise of the submissions above, counsel prayed that this Court allow the Appeal and dismiss the cross-appeal with costs to the Appellant in this Court and the Industrial Court.

<u>Respondent's Submission</u>.

134.] The respondent submitted that while she was about to achieve her dream position of becoming Management Director of the Appellant Bank, her career, name, and reputation she labored to build was soiled in the most callous, inhumane manner by the appellant who stages managed a loan fraud investigation for which an email message bearing her name and photograph was sent without her consent to twenty-four (24) commercial Banks and financial institutions including Bank of Uganda who would be her potential

employers. This email went viral as it was shared with all staff in banks and since she was not found culpable, she complained and asked for her name to be cleared and the negative impression created by the email about me to be corrected, the appellant refused and instead terminated her for no apparent reason.

135.] Furthermore, she submitted that the respondent suing the appellant as a reason for terminating the respondent made her termination unfair under **sections 71 (1) (a) & section 75 (h) of the Employment Act 2006.**

136.] The respondent cited the Supreme Court in the case of **Ahmed Ibrahim Bholm Vs Car and General Ltd, Civil Appeal No. 12 of 2002**;

> *"It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit of them goes to the person who was wronged, their object is entirely punitive. In the present case, it is not clear how far damages at large were contemplated either in the consent judgment or in the proceedings that followed. Certainly the judge made no general award, possibly because he considered that the consent judgment precluded it. Aggravated damages were, therefore, inappropriate. On the other hand, I am satisfied that the intention was that the damages should be punitive and that the judge was entitled in law to award exemplary damages."*

137.] And in the case of **Ahmed Ibrahim Bholm Vs Car and General Ltd, Civil Appeal No. 12 of** 2002, this court held that it is well established that when damages are at large and a court is awarding general damages, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, by causing him humiliation or distress.

Resolution of court

138.] Exemplary and aggravated damages like any other damages are awarded because of the wrong one has committed. These damages have been defined by Per McCarthy J. in the case of **Huljiah Vs. Hall [1973]2, NZLR 279 at 287** as;

> *"aggravated damages are extra compensation to a plaintiff for injury to his feelings and dignity caused by how the defendant acted. Exemplary damages, on the other hand, are damages, which in certain circumstances only, are allowed to punish a defendant for his conduct in inflicting the harm complained of."*

139.] Aggravated and exemplary damages are often confused but they are different. This was explained in **Fredrick Zaabwe vs. Orient Bank, SCCA No.4 of 2006,** the court held that;

> *"About exemplary damages, the appellant seems to equate them with aggravated damages. SPRY, V.P. explained the difference succinctly in* ***OBONGO -Vs- KISUMU COUNCIL [1971] EA 91, on page 96; "The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other***

hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive."

140.] In the circumstances of this case, I find that the termination was lawful. Therefore, there was no need to grant the said damages.

141.] The appellant is not liable to the respondent for any of the claims. I find that the Industrial Court did not evaluate the evidence on the record as a whole and thus came to the wrong conclusion.

142.] I decline to grant exemplary and aggravated damages.

Grounds 5 and 7 fail.

Decision

1. This appeal succeeds
2. The cross-appeal fails
3. The judgment and orders of the lower court are set aside.
4. The respondent's claim is hereby dismissed.
5. Costs are awarded to the appellant herein and in the trial Court.

I so order.

Dated at Kampala this.....15th..... Day of .....Nov.....2023

.....

C. GASHIRABAKE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 182 OF 2021

(Coram: R. Buteera DCJ, C. Bamugemereire & C. Gashirabake, JJA)

STANBIC BANK (UGANDA) LIMITED :::::::::::::::::::::: APPELLANT

VERSUS

NASSANGA SAPHINAH KASULE :::::::::::::::::::: RESPONDENT

(Appeal from the award of the Industrial Court of Uganda at Kampala delivered by Ruhinda Asaph Ntengye. J, Linda Tumusiime Mugisha. J, Mr. Ebyau Fidel, Ms. Julian Nyachwo and Mr. Mavunwa Edson Han on 23rd august 2019 in Labour Dispute Claim No. 227 of 2014; Arising from H.C.C.S No. 196 of 2013)

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment of C. Gashirabake, JA in respect of this appeal. I do agree with his reasoning, decision and orders he proposed.

I have nothing useful to add.

Since C. Bamugemereire, JA agrees, this appeal is allowed in the terms as proposed by C. Gashirabake, JA in his lead judgment.

Dated at Kampala this ....15th..... day of ....November..... 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA

I have had the benefit of reading in draft the Judgment of C. Gashirabake, JA in respect of this appeal. I do agree with his reasoning, decision and orders he proposed.

I have nothing useful to add.

Dated at Kampala this ..15th.. day of ..November.. 2023

Catherine Bamugemereire
JUSTICE OF THE COURT OF APPEAL