

RWANDA / JUDGMENT

UWAMALIYA v. API BUSINESS DEVELOPMENT COMPANY (ABDC) Ltd

RSOCA 0157/13/HC/KIG

COURT

High Court

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UWAMALIYA v. API BUSINESS DEVELOPMENT COMPANY
(ABDC) Ltd

[Rwanda HIGH COURT – RSOCA 0157/13/HC/KIG (Hitimana, P.J.) May 02, 2014]

Labour law – The transfer of the employment contract – Probation period – The applicable contract when there is a transfer of the employees among the different institution – The employee could not be under the probation period in case there was a transfer of an employment contract since the applicable contract is the one concluded with the former employer – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 23(2).

Labour law – Unfair dismissal – Moral damages – Unfair dismissal is the termination of the employment contract by the employer without justifiable reason or observance of the procedures established by law this lead an employee to be awarded the moral damages which cannot go below his/her three months salary but they cannot exceed the six months salary – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 1(21), 33.

Labour law – Termination of employment contract – Notice – The effects of terminating an open ended contract – Any termination of the contract without notice or without having observed the notice period compels the responsible party to pay the other party compensation corresponding to the salary and the other benefits from which worker would have benefited during the notice period that has not been effectively respected – Law n° 13/2009 of 27/05/2009 regulating labour in

Rwanda, article 32.

Labour law – Moral damages – There is no awarded moral damages when the claimant does not demonstrate its basis and its difference with the damages of unfair dismissal

Fact : Uwamaliya concluded an open ended contract with ARDI but then after there was a transfer of employees between ARDI and ABDC Ltd, it was in that way Uwamaliya was transferred into ABDC Ltd. ABDC Ltd also concluded another fixed term contract with Uwamaliya which includes six months of probation..

After the probation, ABDC Ltd terminated the contract without notice because after being evaluated, it realised that Uwamaliya does not have the competence to fulfil the duties and also the other motif of the termination of the contract is that she does not obey her superiors, little performance in drafting the report of her work and voluntary absence without motif.

Uwamaliya filed a claim at the Intermediate Court of Nyarugenge, claiming to be unfairly dismissed, to be paid the notice compensation, to be remunerated the remaining salary till the end of the contract, moral damages, compensation, counsel fees, RAMA contribution, transport fees and the communication and also she explained to the Court that she was not in probation period because she was been employed by ARDI.

The Intermediate Court declared that she concluded the contract with ABDC Ltd and that the letter which Uwamaliya states that she wrote to ARDI and gave the copy to ABDC Ltd informing them that she will accept the transfer if the new employer accepts to grant her all entitlement she had when she was employed by ARDI; she wrote that letter after concluding the new contract with ABDC Ltd so that letter does not have link with the contract between ABDC

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Ltd and Uwamaliya. That Court held that ABDC Ltd did not have any obligation to ask the explanations from Uwamaliya before terminating the contract especially the labour law does not provide the other procedures of terminating the contract for the person under probation period, and it ordered her to pay the procedure and counsel fees.

Uwamaliya was not satisfied with the ruling, and then she appealed to the High Court arguing that in rendering the judgment, the Intermediate Court did not give value the submitted evidences and what are included into the contract which she submitted at the day of filing a claim and in hearing session. In brief she states that she is not concerning with the provision of the contract which stipulates about six months of probation because she was an employee of ARDI.

Held:1. The employee could not be under the probation period in case there was a transfer of an employment contract and the contract of the former employer is still applicable.

2. Unfair dismissal is the termination of the employment contract by the employer without justifiable reason or observance of the procedures established by law this lead an employee to be awarded the moral damages which cannot go below his/her three months salary but they cannot exceed the six months salary.

3. Any termination of the contract without notice or without having observed the notice period compels the responsible party to pay the other party an allowance corresponding to the salary and the

other benefits from which worker would have benefited during the notice period that has not been effectively respected; Uwamaliya is awarded the damages of the notice of one month salary because she exceeded one year in function.

4. The fact that the contract entered between Uwamaliya and ABDC Ltd was null and avoid it lead

her not be given the amount of salary which Uwamaliya requests of the remaining time so that the contract be terminated.

5. The final liquidation shall not be given when the requester does not demonstrating it's composed money in reality.

6. The employee who is unfairly dismissed will be awarded the compensation damages when he/she is not still under probation period.

7. Uwamaliya shall not be awarded the deducted amount which she was deposited in RAMA because she was reimbursed.

8. The fact that the requester of the moral damages does not demonstrating its basis and its difference with the damages of unfair dismissal, it lead him /her to not be awarded.

9. The fact the party did not claim what are concerning the procedure fees and counsel fees before labour inspector does not deprive the rights of requesting the Court that fees because it is contrary to the amount resulting from the labour dispute rather it is the effects of claim is supposed to be filed to the Court, and that amount is paid by the one who lose the judgment.

10. The procedure and the counsel fees is awarded in Court in discretion

The appeal has the merit.

Cross appeal has not merit.

With the court fees to the respondent

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Statutes and statutory
instruments referred to:

Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 1(21), 23, 27(3); 32;
33 .

No Case referred to.

JUDGMENT

I. BACKGROUND OF THE CASE [1] UWAMALIYA Floride concluded an employment contract with a determined period with Api-Business Development Company (ABDC Ltd). In that contract, there the clause of the probation of six months. After six months, ABDC Ltd terminated the contract with a prior notice because after the evaluation, ABDC Ltd found that UWAMALIYA Floride was not competent to perform her duties. ABDC Ltd in the letter terminating the contract explained the contract is terminated because of her insubordination, inability to prepare reports and unjustified absence at the working place. [2] UWAMALIYA Floride seized the Intermediate Court of Nyarugenge claiming that she was unfairly dismissed, the payment of notice compensation, payment of the salary of the remaining period for the contract to come to an end, damages, accompanying allowance, the contributions of RAMA deducted yet she has never been the beneficiary of it, the amount of transport and communication. He explained that she was normally the employee of ARDI and accepted to be transferred in ABDC Ltd on condition that her rights while she was the employee of ARDI are respected; therefore she was not in probation period as UWAMALIYA Floride explains. [3] The Intermediate Court ruled that on 01/06/2011 is the day on which she concluded the contract with ABDC Ltd, therefore the letter addressed to ARDI of 16/11/2011, with a copy to ABDC Ltd notifying that she will accept the transfer of employment contract on condition that the employer recognizes her rights while she was the

employee of ARDI, she wrote after concluding the contract with ABDC Ltd, therefore, that letter is not related to contract between UWAMALIYA Floride and ABDC Ltd. [4] The Intermediate Court basing on article 20 of the law governing labour in Rwanda ruled that that article does not provide for other formalities when it comes to terminating the employment contract during the probation period. It ruled that during six months period as agreed by both parties, ABDC Ltd evaluated the performance and her production and found that they were not satisfactory, in the board meeting held on 29/11/2013 with the aim of supervising employees of ABDC Ltd after the probation the Commission of evaluation of ABDC Ltd personnel decided that UWAMALIYA Floride failed to fulfil her duties because of her insubordination towards her superiors and her limited skills in preparing reports and unjustified absence, ABDC Ltd was not bound to a prior request of explanations from UWAMALIYA Floride about her conduct before the termination of the contract.

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[5] The intermediate court held that ABDC was not obliged to give Uwamaliya Florde notice while she was still in the probation period as provided by article 27 of the law regulating labour , in its paragraph three, which stipulates that no notice during the probation period [6] The Court ruled that even other claims of UWAMALIYA Floride has no merit, it ordered her to pay ABDC Ltd 300.000 Rwf of the counsel's honorary. [7] UWAMALIYA Floride was not contended with this judgment and appealed before this court arguing that in ruling on this case the Intermediate Court did not consider the evidence she has presented and the clauses of the contract submitted at the time of instituting proceedings and during the hearing, in summary she argues that the clause of probation period of six month does not govern UWAMALIYA Floride, since was formerly the employee of ARDI. [8] The legal issue to be analyzed in this case in to know whether the article that stipulates the probation of 6 months period in the employment contract between UWAMALIYA Floride and ABDC Ltd has to be considered as if it does not exist, analyzing the basis of damages UWAMALIYA Floride claims due to her unfair dismissal. ANALYSIS OF LEGAL ISSUES Whether the transfer of Uwamaliya Floride to ABDC Ltd the employment contract she concluded with it should have provided for the probation period [9] The counsel of UWAMALIYA Floride argues that ground to appeal before this Court was because the Intermediate Court did consider the evidence she produced and the stipulations of the contract. He argues that UWAMALIYA Florida concluded an employment contract with ABDC Ltd, but there has been of the contract because UWAMALIYA Floride came from ARDI on the agreement with ABDC Ltd. He argues that UWAMALIYA Floride wrote a letter to ARDI, with a copy to ABDC Ltd, notifying that she will accept that transfer on condition that the new employer pledges to respect her rights as she had them to former employer, and both the first and the second employers did not reply that letter, which means that they consented to that. He also argues that article 5 of the employment contract will by no means affect the stipulations of the existing contract. [10] The counsel of ABDC Ltd argues that the arguments of the counsel of UWAMALIYA Floride is to ignore that the contract was terminated basing on article 4 of the

contract she concluded with ABDC Ltd on 01/06/2011 which is about the duration of the contract and the probation period and article 19 of the law n° 13/2009 of 27/05/2009 governing labour in Rwanda which provides for the probation period. He argues that the contract was terminated after the employer had evaluated the performance of the plaintiff with regard to her productivity as it was agreed in the contract and it was found that she did not have the competence to fulfil her attributions. He argues that the letter UWAMALIYA wrote to ARDI and copied ABDC Ltd that she will acknowledge that transfer on condition that the new employer recognized her rights that the former employer respected. This letter should not be given any value since it cannot remove the contract she concluded with ABDC Ltd on 01/06/2011, especially that that was addressed to ARDI on 15/06/2011 after concluding the contract with ABDC Ltd. The judge of the first instance explained these well under the seventh paragraph of the judgment appealed against.

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- [11] The Court finds that as the litigants agree, UWAMALIYA Floride was the employee of ARDI, due to the agreement between ARDI and ABDC Ltd, she was transferred in ABDC Ltd. This can be found in the contract (Protocol of agreement) ARDI concluded with ABDC Ltd in its article 5, that article stipulates that in order to ensure the smooth running of a new company, ARDI and ABDC Ltd agreed that the employees who used to work in CESAPI are transferred in ABDC Ltd from 1/06/2011. That article explains that those employees are UWAMALIYA Floride, UMUTESI Liliane, and NDAGIJIMANA Vital. After that Memorandum of Understanding, in terms of its enforcement ARDI addressed a letter to UWAMALIYA Floride transferring her in ABDC Ltd (Re: Transfer of the employment contract), this letter of 1/06/2011 explains that it is based on article 21 and 22 of the law governing labour in Rwanda (2009). [12] Article 23, paragraph 2, of the law governing labour in Rwanda (2009) about the transfer of the employment contract provides the transfer must not stop the employee from continuing his/ her employment. That employment has to be pursued to the new employer as if he is their former employer. [13] The Court finds that when UWAMALIYA Floride was working ARDI was not in probation, but rather he was governed by the employment contract of undetermined period. Basing on this article stated in the previous paragraph, it means that the contract of UWAMALIYA Floride is transferred in ABDC Ltd, she should have not been dismissed but rather she should have continued as she was still working in ARDI. As provided by this article the fact that UWAMALIYA concluded the contract with ABDC Ltd that contract stipulating in its article 4 the probation period of 6 months, this article must be ignored, because it is in violation of article 23, paragraph 2 of the law governing labour in Rwanda
- (2009) which provides that the employment has to be continued at the new employer as if he is the former employer. Therefore UWAMALIYA Floride had not to be considered to be in the probation period and she should not have been on probation. [14] The Court finds that the argument of the counsel of ABDC Ltd that the contract was terminated after the employer had evaluated the performance of the plaintiff with respect to her productivity

as agreed in the contract and found that she was not competent to fulfil her attributions, the letter UWAMALIYA Floride addressed to ARDI and copied ABDC Ltd that she would accept that transfer on condition that the new employer accepts to respect her rights as respected by the former employer, and he argues that this letter is not worth since it cannot take away the contract she concluded with ABDC Ltd on 01/06/2011 especially that she wrote that letter to ARDI on 15/06/2011 after she had concluded the contract with ABDC Ltd as the judge on the first instance explained well under paragraph 7 of the judgment appealed against, these are not founded since as explained, article 23, paragraph 2 of the law governing labour in Rwanda

(2009) does not permit that the transferred employee to be considered to be the new employee but rather he/she considered as if he/she pursuing the contract of the former employer. [15] The Court also finds that except the fact that the law governing labour in Rwanda clearly provides that the transfer of an employee to another institution does not terminate his/her contract, this was also held by courts from countries whose legal systems are similar to that of Rwanda. The 'Cour de Cassation' of France ruled that the employee there can be the probation

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period on the transferred employee (Cour de Cassation soc 13 novembre 2001: Il ne peut être imposé une nouvelle période d'essai au salarié transféré)¹¹. [16] The Court finds that as indicated in the contract that UWAMALIYA Floride concluded with ARDI on 6/06/2005, it was a contract of undetermined period. This is the very same contract that was transferred to ABDC Ltd, therefore UWAMALIYA Floride is considered to be governed by the contract of undetermined period in her relationship with ABDC Ltd since there has been the transfer of the employment contract. [17] The Court finds ABDC Ltd admits that it dismissed UWAMALIYA Floride without giving her a prior notice, because he was allegedly in the probation period. That is proven by the fact that UWAMALIYA Floride received a letter terminating the contract on 30/11/2011 notifying her that the contract is terminated with immediate effects on that date. However, as explained, UWAMALIYA cannot be considered as if she was under probation, because she completed the probation while she was in ARDI and as explained above ABDC Ltd was not allowed to conclude with her a new contract putting her under probation of six months (article 23, paragraph 2 of the law governing labour stated above). Therefore, the argument of UWAMALIYA Floride that she was unfairly dismissed because she was dismissed without a notice is founded, since article 1, paragraph 21, explains that unfair dismissal is the termination of an employment contract by the employer without a just cause or without respecting the prescribed procedures. The Court finds that even the grounds put forward in terminating the employment contract of UWAMALIYA Floride, was not given an opportunity to defend herself on them, since she was dismissed as an employee under probation period who does not have the right to defence, yet as explained above she was no longer under probation period. WITH REGARD TO DAMAGES UWAMALIYA CLAIMS [18] UWAMALIYA Floride claims 3.480.000 Rwf equal to 6 months of her salary of 580.000 Rwf. She claims the notice compensation, 3.480.000 Rwf (580.000 Rwf x 6) of her last salary, the

amount of the salary of the remaining period for the contract to be terminated (580.000 x 18), 10.000.000 Rwf of damages and 1.160.455 Rwf and 1.185.000 Rwf (197.500 Rwf x 6) deducted as contributions of RAMA yet she has never been the beneficiary. [19] The counsel of ABDC Ltd argues that UWAMALIYA Floride was not dismissed with a just cause as she alleges because the contract was terminated basing on article 4 of the contract. He argue that UWAMALIYA Floride should not have been give the prior notice since article 27, paragraph 3 of the law governing labour in Rwanda provides that there shall not the notice in case of termination of the probation contract. He argue sthat amount that UWAMALIYA Floride claims of the remaining period for the contract to be terminated should not be awarded to her because as stipulated under article 4 of that contract she concluded with ABDC Ltd there had to be the probation period of and that period has ended. The counsel of ABDC Ltd also argues that the amount of RAMA that UWAMALIYA Floride claims should not be awarded to her since this issue was solved before the inspector of labour, and she was restituted the amount equal to 315.000 Rwf and this was explained by the Intermediate Court under paragraph 24 of the

Judgment.

1 1 Got from <http://www.ldh.com.fr/restructuration.html>, in the document called « Point Droit Social, Les conséquences des restructurations

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[20] The Counsel of ABDC Ltd also argues that 3.840.000 Rwf UWAMALIYA Floride claims as her last salary, accompanying allowance transport and communication fee should not be assessed as they were among the object before the labour inspector. He argues that in case the court may deem it necessary to analyse them 3.480.000 Rwf of her last salary should not be awarded to her since she does not deserve it, 1.160.455 Rwf of accompanying allowance as she had not worked for 12months for ABDC Ltd. As for 10.000.000 Rwf of damages should not be awarded to her since ABDC Ltd has never committed any fault against her. [21] The Court finds that as explained, UWAMALIYA Floride was dismissed without a notice yet she should have been given it. Article 27 of the law governing labor provides that the notice period is 15 days when the employee has worked for the period less than one year, and 1 month when the employee has worked for one year or more. Article 32 of the law governing labour in Rwanda (2009) provides that any termination of employment contract of undetermined period without notice or without due regard to the notice period, compels the terminating party to pay damages of the salary and other benefits she should have received during the notice period. UWAMALIYA Floride must be paid 580.000 Rwf because she dismissed without a notice, yet she had the right to a notice period of 1 month, since as explained above she started to work in 2005 in ARDI, her contract was transferred in ABDC Ltd, therefore, having been dismissed in 2011, she had more than a year working. [22] The Court finds that 3.480.000 Rwf of 6 months of her monthly salary of 580.000 Rwf, as she was unfairly dismissed she should be awarded this amount, since explained above, she was unfairly dismissed because she was dismissed without a notice like an employee under

probation yet she was not in probation irrespective of its stipulation in the contract. Article 33 of the law governing labour in Rwanda, states that damages awarded to an employee unfairly dismissed shall not be less than the salary of 3 months and more than the salary of six months. The Court finds that damages UWAMALIYA Floride claims equal to 3.480.000 Rwf (six months of her monthly salary of 580.000 Rwf) should be awarded them and the court finds that they are excessive considering the fault ABDC Ltd committed against her of dismissing as a newly appointed employee under probation. [23] The Court finds 10.400.000 Rwf of the salary of the period that was remaining for the termination of the contract between UWAMALIYA Floride and ABDC Ltd (580.000 x 18) should not be awarded to her because as explained above was not the one that governed her employment relationship with ABDC Ltd, because the employment contract that was between her and ARDI was transferred to ABDC Ltd and that contract was of undetermined period. Moreover, UWAMALIYA Floride cannot argue that the clause relating to probation period provided under article 4 of that contract should be ignored and then the clauses relating to the duration of the contract be considered, because the reason why the probation clause is not valid renders even that article not valid because the new contract is not valid as long as it modifies the contract concluded between ARDI and UWAMALIYA Floride. [24] The Court finds that 3.480.000 (580.000 Rwf x 6) UWAMALIYA Floride alleges that it is of her last salary should not be awarded to her because she does not explain its basis because normally the final payment is the amount that the employer owes the employee upon the termination of the contract like the notice compensation in case it is owed, leave compensation, unpaid salary, the accompanying allowance, etc. Arguing that she requests the final payment (her

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salary of six months) does not suffice as long as she does not prove what that final payment is comprised of in fact. [25] The Court finds that 1.160.455 Rwf of accompanying allowance that UWAMALIYA Floride claims should be awarded to her because the argument of ABDC Ltd's counsel that UWAMALIYA Floride has not worked for 12 months, as she was dismissed after completing six months of probation only is not founded, as explained above UWAMALIYA Floride did not start working by the time she started to work with ABDC Ltd but rather by the time she was recruited by ARDI, that contract with ARDI was the one transferred to ABDC Ltd and it was concluded in 2005, therefore she meets requirements to be awarded the accompanying allowance. [26] The Court finds that the argument ABDC Ltd that that amount should not be awarded to UWAMALIYA Floride since she did claim that before the labour inspector is not founded because although there is no word 'accompanying allowance' in the affidavit drafted by the labour inspector, it is obvious that UWAMALIYA Floride's claim was relating to unfair dismissal. She did not explain in details what did those words include the same that she did not explain the amount she claimed against her employee. But this cannot be considered as if she did claim the accompanying allowance yet the unfair dismissal include dismissing an employee without paying him the accompanying allowance yet he qualified for that. However, the accompanying allowance that has to be awarded to UWAMALIYA Floride is 1.160.000 Rwf, since

as she herself wrote it, her salary was 580.000 Rwf, when multiplied 2 it is equal to 1.160.000 Rwf in lieu of 1.160.455 Rwf. [27] The Court finds that 1.185.000 (197.500 Rwf x 6) that was deducted for the contributions of RAMA yet she did get the medical care on that insurance, should not be awarded to her because the deducted amount was reimbursed to her as can be on the duplicated copy of the check 315.000 worth Rwf of 29/03/2011 and she signed for it on 9/04/2011 and she does not prove the difference between the amount she receive and the amount she claims. [28] The Court finds that 10.000.000 Rwf of damages UWAMALIYA Floride claims should not be awarded to her because she been awarded the damages of unfair dismissal and she does not prove the distinction between those awarded to her and its basis. WITH REGARD TO THE COUNSEL'S HONORARY AND THE PROCEEDINGS'EXPENSES [29] The counsel of UWAMALIYA claims 2.500.000 Rwf of the counsel's honorary at the first instance, and 1.000.000 Rwf of the counsel's honorary at this instance and 1.000.000 Rwf of transport, communication fees and others. [30] The Counsel of ABDC Ltd argues that 1.000.000 Rwf she claims of transport, communication and others should not be examined because they were claimed before the inspector of labor. [31] The counsel of ABDC Ltd argues that it is it instead that should be awarded 2.000.000 Rwf of abuse of procedure, 1.000.000 Rwf of proceedings expenses and the counsel's honorary,

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and at the appellate level he claims 1.500.000 Rwf of proceedings' expenses and the counsel's honorary. [32] The Court finds that the argument of ABDC Ltd that 1.000.000 Rwf of transport, communication and other the counsel of UWAMALIYA Floride claims should not be examined because they were not claimed before the inspector of labour is no founded because even she did not claim for them she can claims the proceedings 'expenses, because that amount like the counsel's honorary differ from the amount arising from labour disputes, but rather they are in effect of the fact that the claim filed before the court and that amount is borne by the losing party. [33] The Court however, finds that 1.000.000 Rwf of transport and communication UWAMALIYA Floride claims should not be awarded to her because it is excessive and she cannot prove its basis, hence, this should be awarded in the discretion of the Court and she is awarded 1.00.000 Rwf. [34] The Court finds that 2.500.000 Rwf of the counsel's honorary at the first instance and 1.000.000 Rwf at this instance UWAMALIYA claims should not be awarded to her all, but rather it should be awarded in the discretion of the court, therefore she is awarded 3.000.000 Rwf of the counsel's honorary at the first instance and 2.00.000 Rwf of the counsel's honorary at this instance. [35] The Court finds that the counsel' honorary that ABDC Ltd claims should not be awarded to it, since it is the cause of these proceedings since it id itself that dismissed UWAMALIYA Floride not in accordance with the law, which led her to resorting to courts. COURT DECISION [36] It rules that the appeal of UWAMALIYA Floride is founded. [37] It rules that the incidental appeal of ABDC Ltd is not founded. [38] It rules that the judgment RSOC 0066/12/TGI/NYGE rendered by the Intermediate Court of Nyarugenge is changed in its entirety. [39] It rules that UWAMALIYA Floride was unfairly dismissed. [40] It orders ABDC Ltd to UWAMALIYA Floride 3.480.000 Rwf of damages of unfair dismissal, 580.000 Rwf of notice compensation, 1.160.000 Rwf of accompanying allowance, 100.000 Rwf of transport, and 5.00.000 Rwf of the Counsel's

honorary. [41] It orders ABDC Ltd to pay the court fees equal to 75.000 Rwf, should it fail to pay it after this judgment got the force of res judicata, it will be forcibly recovered against its assets by the State.

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