

UGANDA / JUDGMENT

Dr Kiwalabye v Mutesa 1 Royal University (Labour Dispute 5 of 2017)

[2020] UGIC 34 (14 February 2020)

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COURT

Industrial Court of Uganda

CASE / FILE NUMBER

Labour Dispute 5 of 2017

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THE REPUBLIC OF UGANDA**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA****LABOUR DISPUTE NO. 005 of 2017****ARISING FROM LD. No. KCCA/CENT/LC/124/2016****DR, ELIZABETH KIWALABYE CLAIMANT****VERSUS****MUTESA 1 ROYAL UNIVERSITY RESPONDENT****BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. **MR. JOHN ABRAHAM BWIRE**
2. **MS. JULIAN NYACHWO**
3. **MR. MAVUNWA EDSON HAN**

AWARD**BRIEF FACTS**

On 1/11/2013, the Claimant was employed as the University Secretary on a 4 year renewable contract expiring on 1/8/2014. She was confirmed on 29/7/2014. According to her in the pretext of “Human resource downsizing and restructuring, she was terminated. She prayed for a

declaration that her termination was unlawful, recovery of Ugx.135,000,000/= being salary for the remaining part of her contract, a declaration that the Respondent breached the employment contract it had with the Claimant, general damages for unlawful and wrongful termination of her employment, Aggravated damages for suffering , embarrassment, fuel/transport refund of Ugx. 1000,000/= for the month of April 2017 and costs of the suit.

The Respondent on the other hand stated the Claimant was employed on 1/11/2013 to 30/10/2-17 and her confirmation was subject to good performance. According to the Respondent the Claimant was always aware of the downsizing and restructuring exercise which would affect her position and it was carried out in good faith. She failed to perform her duties as assigned, she was insubordinate towards her superiors and did not work well with other staff.

The Respondent also made a counter claim of Ugx. 6,315,000/- being the cost of repairs for its motor Vehicle Toyota Hilux UAJ in her possession as University secretary.

ISSUES:

1. **whether the Claimant's termination was lawful?**
2. **Whether the Claimant is liable to pay Ugx. 6,315,000/- being the cost of repairs for its motor Vehicle Toyota Hilux UAJ in her possession as University secretary as counter claimed?**
3. **what are the remedies to the parties?**

REPRESENTATIONS

Mr. Francis Katabalwa was for the Claimant and Ms. Celia Nagawa was for the Respondent.

SUBMISSIONS

Counsel for the Claimant submitted that it was claimant's evidence in chief that she always performed her duties diligently until her wrongful termination under the pretext of Human Resources downsizing and restructuring. According to her the letter of termination was issued to her on the 29/4/2016 requiring her to handover her office on 30/4/2016. In counsel's view this was very short notice given the position she was holding; therefore, the termination was done in bad faith and it amounted to dismissal. It was also her testimony that by virtue of her position, she was entitled to a vehicle which had to be fueled and repaired by the Respondent therefore she was not liable for repairs.

Counsel defined Contract of service as defined in the Employment Act to mean a contract whether oral or in writing, whether express or implied where a person agrees in return for remuneration to work for an employer and includes a contract of apprenticeship. He went on to cite the characteristics of a contract as stated in Law of contract in Uganda by D. J Bakibinga.

According to him the claimant entered into a 4-year renewable contract with the Respondent on 1/11/2013, subject to 6 months' probation. She was confirmed on 29/7/2014as University Secretary, which implied that her performance during probation was satisfactory.

He contended that given that the University and Tertiary Institutions Act provides for the office of University Secretary, her termination on the 24/4/2016, because of downsizing and restructuring was unlawful.

He argued that whereas the Respondents in its reply to the claim and through its witness Dr. Sebowa, created the impression that the Claimant was insubordinate, unsuitable and incompetent at her age of 69 years, these reasons were not stated in her letter of termination. He argued that this evidence was merely an attack on the Claimant especially given her advanced age, yet she was a big resource and asset. He asserted that the downsizing and restructuring ought to have taken into account the fundamental terms of the Claimant's contract, which would have necessitated her being given a hearing if her termination was due to misconduct on her part.

He further contended that the claimant was given very short notice and the demand for her to pay Ugx. 6, 315,000/- for the repairs of a vehicle for which she was entitled to as University Secretary showed ill will on the part of the Respondent. He further submitted that the attack on her age was uncalled for given that the University Council in its meeting held on 15/4/2016 had waived the age limit on the grounds that it had failed to fill some positions. It was his submission that although the council resolved among other things as follows:

*“ ... *

1. *To terminate the University Secretary's contract to create harmony between staff and the management.*
2. *That since she was not un pensionable, that she is paid 1month salary in lieu of notice.*
3. *That the issue of accounting Officer was settled that the Vice chancellor is the accounting officer of the University which had challenges between the vice chancellor and the University Secretary. ...”*

It was not mentioned that the position of University Secretary was to be removed as purported by Rw1 Dr. Sebowa nor was it stated that she was incompetent unfit or insubordinate, therefore her termination because of downsizing and restructuring cannot stand. He contended that if her termination was as a result of poor performance and misconduct then the Respondent violated Section 66 of the Employment Act which provides for the right to be heard and therefore in light of **Florence Mufumbo Vs Uganda Development Bank LDC No. 128/2014**, whose holding was to the effect that termination of an employee must be for justifiable reasons, and downsizing and restructuring in this case did not include the removal of the office of university Secretary, the claimant's termination was unlawful.

In reply, Counsel for the respondent submitted that the Claimant was employed effective 1/11/2013 and terminated on 25/04/2016 when her position as university Secretary was affected by downsizing and restructuring exercise. It was her submission that the claimant was always aware of the downsizing exercise and that her position would be affected when it was communicated during a meeting held at Bulange mengo, as early as 21/12/2015, therefore she could not claim

that her termination was abrupt. She stated that the downsizing exercise was intended to prioritize and ensure effective resource use given that the University was faced with financial challenges due to low student enrollment and high human resources costs. She asserted that the plan to downsize and restructure was communicated to the Kampala District Labour Officer and Ministry of Gender labour and Social Development as is required under Section 81 of the Employment Act 2006 and regulation 44(part IX) of the Employment Regulations No.61of 2011 via letters dated 3/02/2016 and 17/2/2016. The lists of the affected staff were also provided to the respective offices as evidenced in R11 and R12 respectively, on the respondents Trial Bundle.

She asserted that the Respondent in accordance with section 68 of the Employment Act which requires proof of the reason for termination and section 66 which requires a reason for termination to be stated, was consistent in stating that downsizing and restructuring were the reason for her termination the reason was communicated to her.

She contended that as early as 7/01/2016, the Claimant was instructed to communicate the non-renewal of contracts for 42 staff whose contracts had expired because of the financial constraints the respondent was experiencing but the claimant failed to take these instructions from her Supervisor's as reflected in the letter to her marked exhibit 4 of the respondent's trial bundle. She later wrote an apology about the same on 8/1/2018, marked exhibit R9.

Counsel asserted that the claimant could not claim she was not aware about the downsizing yet it was her responsibility as the University Secretary to play the lead role in the administration of the University and providing effective and efficient coordination and management of its Human Resources. Besides she had testified that she was the direct supervisor of the Human Resources Department. Counsel further submitted that the claimant was notified by the Chairperson Appointment & Governance Committee of the Council by letter dated 11/02/2016 and she also had a one on one meeting with the Human Resources Consultant to discuss the impending restructuring process and her tenure of employment. She even produced a report about her interaction with the consultant on 16/02/2016 and she included her pending termination and laying off of staff due to poor financial situation that necessitates restructuring.

According to her the Consultant's report revealed that the claimant was not competent to handle Human Resources issues. She quoted the Consultant who stated that: **"University Secretary lacks competence for human resource management as* evidence *in the way she handled the situation when the staff wanted to strike."*

Counsel further submitted that the Consultant presented her report to the Appointment& Governance committee of the Respondent in the presence of the Claimant in a meeting held at Kakeeka Mengo on 15/04/2016, marked exhibit R45 on the Respondent's trial bundle. She asserted that the report indicated that 4 senior members including the claimant would be affected and she was counselled by the same consultant in preparation of her termination.

Counsel stated that given that she had served 30 months of her contract she was paid her salary and 1 month's salary in lieu of payment. She cited **Peter Waswa Kityaba vs African Field Epidemiology Network(AFNET) LDR No.084 /2016** in which this court stated that reasons for

termination could include restructuring and bankruptcy or dissolution of the respondent or any other reason that may not be attributed to misconduct of the employee and **Musekura Irene vs Aid Africa LDR No. 045/2018** which was to the same effect and emphasized the requirement for the employer to give justifiable reasons before termination.

It was her submission that the Claimant in the instant case was lawfully terminated. the termination was not abrupt or malicious nor due to bad faith on the part of the Respondent or any other staff that was affected.

DECISION OF COURT

It is not disputed that the claimant was employed as the Respondent's Secretary from 1/11/2013 until her termination on 25/4/2016. Her termination letter stated the reason for termination as downsizing and restructuring. She was paid 1 month in lieu of notice.

Her contention however was that downsizing and restructuring were used as a pretext to terminate her because in its reply to her claim the Respondent and RW1's testimony insinuated that she was insubordinate and incompetent to hold the position of University secretary more over the termination was done very abruptly.

From a careful perusal of the record, it seems to us that the process of downsizing and restructuring commenced at the beginning of 2016 because the Respondent notified both the Kampala labour officer and the Ministry of Gender about the contemplated termination of employees through a restructuring and downsizing exercise to align its systems structures to its priorities and resources in February 2016. It was the Claimant's testimony that she was involved in discussing the downsizing and restructuring process although she was not officially informed that she was among the persons affected. She denied any knowledge about the letters notifying both Kampala District labour officer and Ministry of Gender, Labour and Social Development about the persons contemplated for termination. She also stated that the Counseling given to her was merely window dressing and it did not specifically reveal to her that she would be terminated.

Section 81 of the Act provides that:

***"Collective Terminations"**

Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months for reasons of an economic, technological, structural or similar nature, he or she shall;

1. ***Provide the representatives of the labour union, if any , that represent the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect , except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated ,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried**

out, and the information in paragraph (a) shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;*

2. *Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out*

(2) An employer who acts in breach of this section commits an offence.*

In **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha** LD Appeal no. 035/2018, this court stated that

*“Our**interpretation of this section is that for a termination to amount to Collective termination it must be due to economic, technological structural or reasons of a similar nature, and not less than 10 employees should be contemplated for termination. The section makes it mandatory for the employees contemplated for termination to be informed through their representatives (unions) and in our view where they are not unionized or represented, to be informed individually, at least 1 month before the terminations takes effect.**

Secondly the Commissioner labour must be notified in writing of the reasons for the terminations, the number and categories likely to be affected and the period over which the terminations will take place.

It is clear therefore, that a collective termination can never be a summary termination and it cannot be done without a justifiable reason. Although the Employer is at liberty to restructure his or her business or organization, he or she is expected to think through the process, because by so doing some of his or her employees are likely to lose their jobs. Therefore the employer has to prepare the employees for any eventuality and the choice of those to be affected must be justifiable.

For emphasis therefore in collective termination due to economic, technological or financial reasons, the employer must to notify his or her staff generally about the intention to terminate for these reasons/ downsize or restructure. The employer must also ensure consultation between him or her and the employees or their representatives before the termination take effect.

In the instant case, it is clear from the record that the Claimant was consulted about the downsizing process and she was equally counselled, therefore she was aware about the process. What the respondent is faulted for however is its failure to explicitly notify her that she was one of the senior staff contemplated for termination as a result of the downsizing and restructuring process. Section 81 is very explicit on the requirement for the workers contemplated for termination as a result of restructuring, to be notified through their representatives and this court in **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha** LD Appeal no. 035/2018, **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha** LD Appeal no. 035/2018(supra), went further to state that even in cases where workers are not represented, for such workers to be individually notified about their intended termination at least 1 month before the termination occurs. This was not

done in the instant case.

Although the notification to the labour officer and the Ministry regarding the restructuring were in line with Section 81 of the Employment Act, nothing on the record showed that the employees contemplated for termination including the claimant were equally notified. Both letters were written by a one Professor Arthur Sserwanga, the Respondent's Vice Chancellor and both were copied to the Council chairperson, Muteesa 1 Royal University and not to the Claimant or the other affected staff.

In the circumstances it would not be farfetched to believe that even if the Claimant was aware about the downsizing and restructuring process, she did not know that she was one of the staff contemplated for termination. In addition, the information provided under minute 9.2.6 in the University Council meeting held on 15/04/2019 only listed the categories of staff to be terminated including 4 senior staff but it did not state the names of the actual staff contemplated for termination. Therefore she was not given the required 4 weeks notice as provided under section 81(a) of the employment Act.

The claimant also contended that she was terminated because the Respondent and its witness Dr. Ssebowa insinuated that she was insubordinate and incompetent but she was not subjected to a hearing as provided for under section 66 of the Employment Act. We respectfully disagree with this contention. It is our considered opinion that an employer may take into account the history of the employee's performance or his or her conduct when deciding who to terminate during a downsizing or restructuring process, but he or she is under no obligation to inform the employee so chosen why he was contemplated for termination. All the employer is required to do is to notify the entire staff about the downsizing or restructuring process, consult with the staff about the process and then notify those that are contemplated for termination at least 1 month before the termination occurs. The requirements of the business of the organization are exclusively defined by the employer and in the instant case, for economic reasons the employer decided to reduce costs by reducing the number of staff and decided that the Claimant was not required although the work of University Secretary still remained to be done.

Therefore, the argument that the downsizing was a sham simply because the position of University secretary was not abolished and therefore, she was unlawfully dismissed cannot hold. The downsizing was addressing surplus labour as opposed to the structure of the organization or the tasks to be done in the organization.

In conclusion although her termination on the ground of downsizing and restructuring was substantially lawful, the respondent's failure to notify her about the intended termination rendered it procedurally unfair. Her remedy in this case is payment in lieu of the notice prescribed under section 81 and any other terminal benefits that accrued before the termination.

2. **Whether the Claimant is liable to pay Ugx. 6,315,000/- being the cost of repairs for its motor Vehicle Toyota Hilux UAJ in her possession as University secretary as counter claimed?**

It was submitted for the Respondent that the Claimant had a duty to ensure that all University items in her possession were handed over to the Vice chancellor not later than 30th April 2016 and that they were generally kept in good condition. In this case the Claimant was in possession of an official Vehicle which she did not handover until 13/06/2016 in a dilapidated state. It was her submission that in a bid to preserve the Respondent's assets the Respondent went ahead and had the vehicle repaired thus incurring the costs stated in the counter claim.

In reply, Counsel for the Claimant stated that it was her entitlement to have an official vehicle during the course of her employment. In his view the Vehicle is expected to wear and tear and it was not her duty to maintain it at her cost. He insisted that the Respondent had not adduced any evidence to show that the Claimant was responsible for the dilapidated condition the vehicle was in, to warrant the payment of Ugx. 6,315,000/- as cost for its repairs. Therefore, the claim should be dismissed.

DECISION OF COURT

It was not denied that the claimant kept the Respondent's vehicle beyond the date stipulated in her termination letter. She testified that she kept the Vehicle but asked her driver to return it and it was returned to the Respondent on 13/06/2016, 2 months after her termination. Although we do not condone the manner in which she handed over the vehicle and the delay in handing it over, we do not think it would be fair to order her to pay the monies counterclaimed for the repair of the vehicle, she was not involved in evaluating its damage. We think the Respondent should have put it to her to undertake the repairs and return it in a serviceable condition or involve her in evaluating the damage before it was repaired. In the premises the counterclaim is denied.

3. what are the remedies to the parties?

Having already found that her termination as a result of restructuring was substantially in line with the law. Her only remedy is payment of 1 month's salary in lieu of the notice envisaged under Section 81 of the Employment Act and any terminal benefits that may have accrued at the time of the termination. It was however not disputed that when she was terminated, she was paid 1 month's salary in lieu of notice in addition to the salary for the month of April, therefore she can only claim outstanding terminal benefits accrued before termination if any.

In conclusion the Claim fails save for any outstanding terminal benefits. No orders as to costs is made.

Delivered and signed by:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE
2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. MR. JOHN ABRAHAM BWIRE

2. MS. JULIAN NYACHWO
3. MR. MAVUNWA EDSON HAN

DATE: 14TH FEBRUARY 2020

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