

**Egesa Noah v Attorney General
(Civil Suit No. 678 of 2016) [2021]
UGHCCD 79 (24 June 2021)**

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL
DIVISION) CIVIL SUIT NO. 678 OF 2016 EGESA**

NOAH :: PLAINTIFF

VERSUS

ATTORNEY GENERAL :: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA JUDGMENT

The plaintiff filed this suit seeking for a declaration that he is no longer an employee of the Uganda People Defence Forces (UPDF), that he was constructively dismissed from UPDF, that his right to personal liberty was violated by the UPDF, general and exemplary damages and costs of the suit

The plaintiff was employed by the UPDF as an army officer vide RO 8524 and was promoted to several ranks. In January 2004, the plaintiff alleges that he was arrested and detained for being absent without leave and all UPDF properties in his possession were taken away from him. the plaintiff was later cleared by the Unit Disiplinary Committee of the UPDF of all charges whereupon he successfully sued in the Uganda Human Rights Commission for the violation of his rights to person property. The plaintiff was later struck off the UPDF data base and payroll. The plaintiff successfully sued the defendant in the Chief Magistrates Court of Mengo vide Civil Suit No. 217/ 2008 for non-payment of his salary from January 2004 to May 2007. However, from May 2007 to date, the plaintiff has never received any salary payment from UPDF nor been reinstated to the UPDF database.

It is the defendant's case that the plaintiff is an officer of the UPDF who willfully deserted the forces and he is therefore not entitled to the declarations and orders sought in his plaint before this court.

The plaintiff was represented by *Mr. Abawalino Arthur* whereas the defendant was represented by *Mr. Kallemera George*.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

- *1. Whether or not the plaintiff was unlawfully dismissed from employment.*
- *2. What remedies are available to the parties?*

The parties were ordered to file written submissions and accordingly filed the same. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Whether or not the plaintiff was unlawfully dismissed from employment.

Counsel for the plaintiff submitted that the plaintiff was an officer of the UPDF which fact was not disputed by the defendant hence the locus to bring this suit as observed by the Supreme Court in Attorney General v Senkali George and 4506 Others [2009] HCB Vol. 1pg. 3 and 4. Counsel submitted that it was the evidence of the plaintiff, PW1 that he was employed by the UPDF as an army officer vide RO 8524 and was promoted to several ranks. On the 30th September, he was given an open movement order No. UPDF/ 73 Battalion 11A-1 to move to Nebbi, Gulu and Kampala. He stated that he was arrested at that time for purportedly being absent without leave yet he was actually attached to Dwong Pacho Force. After being cleared by the Unit Disciplinary Committee of the UPDF of all charges, he reported to duty at CMI but remained undeployed and was later struck off the UPDF data base and payroll.

Counsel submitted that DW1, Colonel Moses Wandera during cross examination confirmed that indeed the plaintiff was a UPDF officer attached to the 73rd battalion and was transferred to the CMI. He stated that DW1 further confirmed that the plaintiff had an open movement order and was in the 17th battalion and not the 73rd and that there was no radio message acknowledging the plaintiff's transfer as alleged by the defendant.

Counsel submitted that the foregoing actions by the defendant are malicious and aimed at witch hunting the plaintiff and failing his employment as a UPDF officer.

The plaintiff defined unlawful dismissal as when the termination of one's employment is not governed by the terms of the contract of employment or applicable laws as was observed in Stanbic Ltd vs Kiyemba Mutale CA. No. 2 of 2010 that where a contract is governed by written agreement between the employer and employee, termination of employment services to be rendered depend on both the terms of the agreement and the law applicable. He stated that from the evidence, the plaintiff was on duty since he had an open movement order but was unlawfully

arrested and dismissed or struck off the pay roll. The

relevant messages the defendant was supposed to send before striking off were never sent yet it was meant to alert all the units that the officer was missing.

It was therefore the plaintiff's submission that the he was unlawfully dismissed from employment and prayed that this court finds so.

The defendant in its submission in reply stated that the plaintiff has never been dismissed from employment by the UPDF whether lawfully or unlawfully. He stated that in paragraph 3 and 4 of the witness statement of Colonel Moses Wandera, DW1 and the admitted annexures thereto, the plaintiff is an officer of the UPDF that joined in December 1998 whereupon he was first deployed as a staff at Joint Anti- Terrorism Task Force and rose through the ranks.

Counsel stated that as seen under paragraphs 11, 12, 13, 14 and 15 of DW1's witness statement, the plaintiff willfully absented himself from duty in the forces without official leave. He submitted that the plaintiff habitually absented himself from duty at his own volition first in January 2004 where upon he was charged with being absent without official leave for a period of more than 21 days pursuant to sections 146 and 148 of the UPDF Act. The plaintiff disregarded normal military procedure and left his unit of deployment and joined the Internal Security Organization headed by Brig. Elly Kayanja thereby being absent from his unit of deployment. Although the charge was withdrawn, the defendant submits that it brings forth the plaintiff's irregular conduct which contravened the UPDF Act and Regulations thereunder.

The defendant submitted that the plaintiff further disappeared from duty in the forces as evidenced in DW1's witness statement, para. 11, 12, 13, 14 and 15 after he was transferred to Chief Military Intelligence Headquarters as a Platoon commander. He never reported to his new unit of deployment prompting the appointment of the Board of Inquiry to investigate his whereabouts and report the matter in line with section 26 of the UPDF Act, 2005. It was found that the plaintiff refused to report to his new unit and was therefore declared absent without authority thus struck off the UPDF pay roll in June 2004 because he was not interested in serving his country. The plaintiff in his statement, DXL/DX12 alleged that he was frustrated and decided to stay away from military service for around two months in total disregard of the UPDF service law and regulations.

The defendant submitted that this is willful desertion and that the plaintiff is still an army officer subject to military law within the meaning of sections 28, 118 and 119 of the UPDF Act, 2005 since desertion does not change status.

He therefore submitted that the plaintiff is unwarranted to allege dismissal from service in the UPDF as there has never been a discharge, release and / or resignation of the Plaintiff from the UPDF.

Counsel therefore submitted that except with written permission or appointing authority, the plaintiff's wilful desertion does not amount to a discharge from employment with the UPDF.

In rejoinder, counsel for the plaintiff submitted that the defendant by his conduct indicated that he constructively dismissed the plaintiff from service. he relied on the Black's Law Dictionary to defined constructive discharge to mean a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to quit. He further relied on the case of *Re Rubel and Metal Co. and Vis* [1918] KB pg. 315 where court observed that where the dismissal is not formally made, the employer's act is referred to as constructive dismissal.

Counsel submitted that the plaintiff was unlawfully or constructively discharged by the defendant from service as observed by the Chief Magistrate court of Mengo on the 23rd June, 2014 vide Civil Suit No. 217/ 2008 wherein court directed the defendant to pay and reinstate the plaintiff.

Analysis

I have looked at all the evidence and submissions on court record in respect to the plaintiff's claim. The plaintiff alleges to have been unlawful dismissed from the Uganda Peoples Defence Forces having remained undeployed and removed from the pay roll.

However, from the reading of the evidence on the court file and the pleadings of the plaintiff, it is very clear that he has never been dismissed by the defendant nor has he brought before this court any evidence proving so.

The *Uganda People's Defence Forces Act, 2005* under *Section 65* provides for the dismissal of officers that;

* (1) No officer or militant shall be dismissed from the Defence Forces except by sentence of a military court or by reason of the provisions of paragraph (b) of subsection (4) of section 2.*

* (2) Notwithstanding subsection (1), the Chief of Defence Forces may dismiss from the Defence Forces, with or without disgrace, an officer or militant who-*

- *a) is found guilty of any offence by a civil court; other than a traffic offence; or*
- *b) has been sentenced by a court martial to a term of imprisonment to which paragraph (b) of subsection (4) of section 221 does not apply and he or she has been advised by the Board that in the interest of the discipline of the Defence Forces, the officer or militant should accordingly be dismissed.*

The plaintiff has not adduced any evidence to support his claim of dismissal on which this suit is hinged. Furthermore, the defendant's witness DW1 in his evidence was very clear that the plaintiff has never resigned, been dismissed and or discharged from the Uganda People's Defence Forces.

The plaintiff seeks to rely on the judgement in Magistrates court to suggest that he was unlawfully discharged by the defendant. However, from the reading of that judgement, it is very clear that court found that the plaintiff has never been discharged from the Army since he had an open movement order.

Section 101 of the Evidence Act, Cap. 6 provides that he who desires court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove their existence. The plaintiff has not adduced any evidence to prove that he was discharged from duty by the defendant.

The plaintiff alleged that he was constructively dismissed from service by the defendant as he struck off the pay roll and relied on the case of Gen. David Sejusa –vs- Attorney General is distinguishable from the facts of this case. In this case, Gen David Sejusa applied to be retired from the Uganda People's Defence Forces in 2014 and until 2016 (one and a half years later) had not received a reply as the Respondent had refused/ neglected to retire the Applicant. Thus failed to act in their duty and or acted unreasonably. The Applicant; Gen. Sejusa applied to resign and had been patiently waiting for a reply but it was not forth coming. In addition to this, the Respondent's failure to respond to him while retiring other officers both at his rank and lower was a clear manifestation of discrimination against the Applicant. It is upon this that the court found that Gen. Sejusa was entitled to the remedy of constructive discharge.

In the circumstances before this court, the plaintiff has never applied to the defendant for discharge, resignation and or retirement. He instead opted to leave the forces/ his unit at his own volition which thereby led to the striking off his name of the pay roll and undeployment. He can therefore not claim to have been unlawfully dismissed from service without any evidence to the effect or claim to have been constructively dismissed as per the case of General David Sejusa (supra).

I therefore find that the plaintiff was not unlawfully dismissed from employment by the defendant but absconded from duty on his own volition. The initial actions of the plaintiff amounted to Absent Without Leave (AWOL). In military AWOL means you are not where you are supposed to be at a particular time or a person is considered AWOL if he or she fails to go to an appointed place, leaves that place, or is otherwise absent from his or her unit appointed place of duty. After a certain period of time the AWOL status turns to a desertion status.

The plaintiff refused to report to his unit of deployment which prompted the appointment of the Board of Inquiry (BOI) to investigate his whereabouts and report on the matter in line with section 26 of the UPDF Act, 2005. The Board investigated the matter and found that the plaintiff refused to report to his new unit and was therefore absent without Authority.

This court agrees with the defence counsel submission that the plaintiff is misguided to think that desertion of the forces gives him an opportunity to exit unofficially without seeking leave from the appointing authority. An employee like the plaintiff is barred from claiming to have been constructively dismissed because of his own prior material breaches of the contract of employment and the army code of conduct.

Claims for constructive dismissal are based upon two tests: The contract test and reasonableness test. The contract test ascertains whether the employee's deeming of constructive dismissal arose as a consequence of a breach of contract by the employee. While the reasonableness test evaluates whether the actions of the employer were so unreasonable that the employee was left with no option but to deem a constructive dismissal. The plaintiff's conduct prior takes him away from the two tests standard since he had issues against the code of conduct of the UPDF.

Desertion should not be categorized as one of the ways of leaving employment as the plaintiff seems to suggest. Secondly, the alleged non-payment of salary does not take away an employee's legal obligation incidental to their contract of service and does not necessarily determine one's employment status at law. An

employee who fails to use all available procedures to resign cannot invoke the principles of constructive dismissal.

Exiting the army by way of desertion in criminal conduct and would set a bad precedent of condoning indiscipline in the armed forces. Discipline among the army or military members promotes their competency and efficiency of any planned and unplanned military operation. The military discipline is unique for every country and are established for the benefit of military members and civilians. Therefore to allow constructive dismissal principles premised on misconduct or indiscipline of the army officer and without cogent reasons may be recipe for disaster and may groom unmanageable army officers. Breaches of discipline in the army must be dealt with in a manner unique to the military establishment which is quite different from civilian system or contract of employment.

Therefore, the existence of military discipline and conduct is quite different from civilian justice system such that military personnel do not enjoy the same rights as other members of society under the Employment Act. Section 3(2)(b) provides;

This Act does not apply to –the Uganda Peoples' Defence Forces, other than their civilian employees.

The plaintiff is a public officer required to follow the strict provisions of the Constitution and the Uganda Peoples Defence Forces Act and the regulations made thereunder. He has never followed the due process for a formal resignation, discharge or release from the Army.

The suit is dismissed with costs to the defendant.

I so order.

SSEKAANA MUSA JUDGE 24 th June 2021

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