

UGANDA / JUDGMENT

Kyamukama v Makerere University Business School (Labour Dispute Reference No. 147 of 2019) [2020] UGIC 36 (24 April 2020)

[2020] UGIC 36

COURT

Industrial Court of Uganda

CASE / FILE NUMBER

Labour Dispute Reference No. 147 of 2019

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THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 147/2019

ARISING FROM LDA NO. CB.09/2019

GODFREY KYAMUKAMA CLAIMANT

VERSUS

MAKERERE UNIVERSITY BUSINESS SCHOOL RESPONDENT

BEFORE:

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

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI
2. MR. FIDEL EBYAU
3. MR. FX MUBUKE

AWARD

BRIEF FACTS:

The Claimant claims that he was the former employee of the Respondent University as a Trade development Representative (attached to MTN) on several short term renewable contracts between 16/05/2013 until 5/11/2018 when he was terminated.

According to him he was assigned duties as prescribed by MTN. He received an e- mail on 5/11/2018 stating that his services were no longer required by MTN and he was referred back to the Respondent. He stopped receiving his salary in November 2018 and nothing was communicated to him about his employment status after that, which he interpreted as an unlawful termination, hence this suit.

The respondents on the other had claim he was not their employee but an independent contractor recruited by the Respondent for MTN(U).

ISSUES:

1. **Whether the termination of the Claimant by the Respondent was unlawful?**
2. **What remedies are available to the Parties?**

EVIDENCE

The parties presented 1 witness each. The Claimant adduced his own evidence and the Respondent adduced evidence through Ms. Nakalembe Agatha, its Accounts Manager and the Claimant's immediate supervisor.

CW1, Godfrey Kyamukama, testified that he was the Respondents' employee on short term renewable contracts from 1/01/2012 until he was terminated on 5/11/2018. According to him the contract was renewed by the Respondent although it was MTN which assigned him duties. He was however supervised by Nakalembe Agatha and Abiba Nabisubi. His performance was reviewed by MTN (U) and sent to the Respondent which would then renew his various contracts. According to him, he was an employee of the Respondent and not of MTN(U). It was his testimony that he was not subjected to any disciplinary action or to an exit interview before the termination and neither did not receive any termination letter.

RW1 Agatha Nakalembe, testified that the Respondent recruits' staff on behalf of MTN and deploys them on its behalf, therefore claimants was supervised by MTN(U) as a Trade Development Representative.

MTN (U) referred the Claimant back to the Respondent grounds that they no longer required his services because, he received a token of Ugx. 400,000/- from one of the clients which he did not declare. He was asked to explain himself in a meeting between him and Abiba Nabisubi one of the Respondent's staff, but there was no record of the said meeting. She said the last payment made to the Claimant was payment in lieu of notice and it was done on 5/11/2018, while his contract was still running. It was further her testimony that the claimant was not the Respondent's employee but of MTN(U) Ltd, because the renewals of his contracts depended on their recommendations.

SUBMISSIONS

The parties were directed to file written submissions but because of the lockdown resulting from the COVID 19 Pandemic, Court closed before the submissions were received. We shall however proceed to resolve the matter based on the evidence on the record.

DECISION OF COURT

After carefully examining the evidence adduced in the pleadings and in Court, we think it is important to resolve the status of the Claimant's employment before resolving issue No.1.

It is trite that the relationship between an employer and an employee is governed primarily by a contract of employment and in case of employment in Uganda, the contract of employment must be in compliance with the Employment Act, 2006 and other related laws.

Section 2 of the Employment Act defines "employee" to mean; any person who has entered into a contract of service or an apprenticeship contract, including without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Public Service, a local authority or parastatal organisation but excludes a member of the Uganda Peoples' Defence Forces"

And **"Employer"** is defined to mean; **"any person or group of persons including a company or corporation, a public , regional or local authority, a governing body of an unincorporated association, a partnership, parastatal organisation or other institution or organisation whatsoever, for whom an employee works or has worked , or normally worked or sought to work, under a contract of service , and includes the heirs, successors , assignees, and transferors of any person or group pf persons for whom an employee works, has worked or normally works."***

Section 2 of the Employment Act, defines a contract of service as **"any 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."***

Courts have over time applied various tests to determine the status of a person's employment and the employers responsibility towards their employees. Tests such as the **control test**, where a person is subject to the command of the master as to the manner in which he or she shall do the work. This test however could does not apply to highly specialized workers such as doctors, lawyers and other professionals. The **integration test**; which was propounded by Lord Denning in **Stevenson Jordan and Harrisson vs MacDonald & Evans (1952)**, in which he held that:

"... under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."* According to Gwyneth Pitt in Employment Law 9th edition, this test is inappropriate to the more modern labour market which emphasizes flexibility and in circumstances where businesses have opted to maintain more permanent, full time employees with indispensable professional skills and who **"receive**

security elements traditionally associated with employment : pension and sickness schemes , structured career advancement and severance payments.”* The **economic or business reality test** ; which takes into account whether the worker is in the business or is an independent entrepreneur or works for another person who takes the ultimate risk of loss or chance for profit, and the multifactor test; which takes into account into account all possible relevant factors. In **Market Investigations vs minister of Social security (1969)** cited in Gwyneth(supra), Cooke J s refined the factors as follows: Whether or not the worker provides personal service(control) which will no doubt always have to be considered although it can no longer be regarded as the sole determining factor; whether the employer or the worker provide the tools and equipment; whether the worker hires his own helpers; what degree of financial risk the worker takes if any and how far the worker profits directly from good work. Cooke J summarized the position in the business reality test: is the person who has engaged himself to perform these services performing them in the business on his own account?

In **Ready Mixed Concrete Vs Minister of Pensions and National Insurance (1968)**,cited in **Gwyneth Pitt, Employment Law 9th edition**, *the company instituted a scheme whereby, the delivery of its concrete to customers would be carried out by a team of “owner drivers” the issue was whether the owner drivers were employees of the Company ; if so if the company was liable to pay National Insurance contributions in respect of them. It was the company’s position that they were self- employed and so they were described in their extensive written contracts. The drivers were the owners of the lorries and had to keep them and maintain them at their own expense. However, they were buying the lorries on hire purchase from a subsidiary company, they had to paint them in the company colours and the company had to instruct them to carry out repair work and specify where it should be done. Furthermore, they could not use the Lorries for any one but Ready mixed Concrete. Secondly as regards personal service the drivers could delegate the work to another competent driver but the company had the right to insist that the driver himself performing, thirdly control: the driver had fixed hours to work and could not choose their own routes. Yet they had to be available when required and to obey reasonable orders... (emphasis ours)*

Mackenna J held that; *that there were three conditions for a contract of service: first that the employee undertakes to provide his or her own work or skill to the employer in return for a wage or other payment, secondly the employee agrees to be subject to the employer’s control to a sufficient degree “to make that other master” and thirdly that the other provisions of the contract are consistent with its being a contract of service in the end, the Judge found that there was nothing inconsistent with the contention that the drivers were independently running their own small businesses as the company argued.* The Employment Act 2006, does not define an independent Contractor. However, this Court’s holding in **Charles Lubowa and Scovia Ayikoru vs Victoria Seeds LDR No. 185/2016**,is to the effect that, the distinction between an employee and independent contractor is primarily governed by the control test. That an independent contractor was a person who works under a contract but who is not in the same state of dependence on the employer as an employee is. whereas the Independent contractor controls the means and the manner in work is performed, the employee on the other hand, is subjected to the

organizations procedures, is expected to perform part of the regular business of an employer and he or she is must follow specific instructions on how to perform the work. An independent contractor usually has a fixed task and is paid on completion of the said task, an independent contractor normally has an independent business and is free to delegate work to other workers of his or her choice, without the knowledge or consent of the employer and he or she normally provides the tools, equipment and supplies required to do the job. An independent contractor and an employee both work for pay therefore, whoever gives either of them work, can be referred to as an employer. [Charles Lubowa (supra)]. It follows from these authorities that the status of employment will depend on different factors in each individual case.

In the instant case, the Claimant's Contract indicates that he was engaged by the Respondent as an independent contractor, to be deployed to work at MTN Uganda. The Respondent entered into a contract with MTN Uganda to recruit staff for on its behalf therefore the Claimant's contract with the Respondent was dependent on the continuity of the contract between the Respondent and MTN Uganda.

A perusal of the terms of the Contract, however showed that in addition to setting out the Claimant's job description, and its duration, the contract also detailed the working hours, the number of days to be worked per month, requirement to conform to a given schedule , it described the method to be followed when doing the work, the requirement to work every day, requirement for close supervision, remuneration to be paid on a monthly basis, and most importantly, it provided for the traditional security elements such as annual leave, sick leave and maternity leave.

The terms of this contract in our considered opinion, left no room for the Claimant to exercise any form of independence, it rendered him a servant of the Respondent, because there was nothing in the contract which gave him any control over the work to be done, how it was to be done, when it was to be done and with whom it was to be done, to warrant him being referred to as an independent contractor. In fact, he was required to render his personal service, solely on the Respondent's terms.

Therefore, even if the contract referred to him as an independent contractor, the terms of the contract reduced him to an employee, who was completely subject to the Respondent. The title of contract was framed a contract for services where there is an independent contractor/employer relationship, but the terms therein rendered it a contract of where there is an employee/ employer relationship.

In addition, the Claimant was to render his services to a 2nd entity MTN Uganda. This arrangement notwithstanding, the contract of service on the record, was issued by the Respondent as the employer and signed by the Claimant as employee. It was not disputed that it was the Respondent recruited him and issued him with the contract of service/employment, that provided that he was to be assigned duties by the 2nd entity MTN(U), payment though received from MTN was done by the Respondent. Although MTN(U) had a role to pay, it was the Respondent who had the primary responsibility over him as his employer. We are fortified by the

fact that when MTN ceased require his services it referred him back to the Respondent.

It follows therefore that the Claimant was an employee of the Respondent and not an independent contractor. The Respondent was therefore expected to abide by the terms of contract of service it issued to him and to the law governing employment, in any action regarding him. We shall now proceed to resolve issue 1.

1. Whether the termination of the Claimant by the Respondent was unlawful?

The Respondent alleged that the claimant was referred back to it by MTN Uganda, on grounds that his services were no longer required. Ms. Agatha Nakalembe the respondents witness testified that the Claimant received a token of Ugx. 400,000/- which he did not declare. She said the Respondent sent him an email informing him, about the fact that MTN no longer required his services. He was also asked to explain himself in a meeting with one of his supervisors but the minutes of this meeting were not produced as evidence. She also said that he was not subjected to any disciplinary hearing.

Section 66 of the Employment Act 2006, provides that before an employee is terminated, the employer must give the employee in issue a reason or reasons why he or she was contemplated for termination and an opportunity for the employee to respond to the reason or reasons and to be allowed to make such representations accompanied by a person of his choice. It is also a requirement under section 68 of the Employment Act, for the employer to prove that the reason or reasons existed before the termination and that they were justifiable reason/s.

It was not disputed that the Claimant only received an email from the Respondent to the effect that his services were no longer required. He was not given the reason why the services were no longer required before, he was terminated. The reason was only mooted by the Respondent during the hearing in Court. In **Akeny Robert Vs Uganda Communications Commission....** This court held that:

*“... It is not the role of Court to supervise the disciplinary/grievance process between the employer and employee as Counsel would like us to believe. The role of the Court is to ensure that the disciplinary process is undertaken before the termination or dismissal and that it is done in accordance with the law. The fact that Section 66(supra) makes it a requirement that the employee is given a reason for the termination or dismissal and is also given an opportunity to respond to the reason “****before****” *the employer makes a decision to dismiss or terminate him or her, supposes that the employer must substantiate the reason or reasons he or she is contemplating the termination or dismissal hence the provision of Section 68(supra). In any case it is trite that he who alleges must prove. Therefore, the burden shifts to the employer to prove the reasons although, we hasten to state that the standard of proof in such cases is not the same standard in as envisaged in Criminal cases. The standard is premised on the preponderance of evidence. ...*“

It was the Respondent's testimony that the Claimant was informed that his services with MTN Uganda were terminated on grounds that he received a token of Ugx. 400,000/- which he did not declare. It was also the Respondent's testimony that the Claimant was not subjected to a disciplinary hearing before he was terminated. He was called by phone to come and explain himself and his salary was abruptly stopped on 5/11/2018 and no termination letter was issued to him. These actions were clearly contrary to Sections 66 and 68 of the Employment Act, 2006(supra), thus rendered the termination unlawful.

What remedies are available to the Parties?

Having established that the Claimant was unlawfully terminated he is entitled to some remedies.

He prayed for general damages, punitive damages, Aggravated damages, Severance allowance, 2 months salary in lieu of notice, Annual leave days of 14 days, cost of the claim and interest at court rate on all the claims.

1. General Damages

It is trite that the only remedy for an employee who is unlawfully dismissed is damages. See **STANBIC BANK VS KAKOOZA MUTALE C. A No. 2 OF 2010**, which cited **VIRES VS NATIONAL DOCK LABOUR BOARD (1958) 1 QB 658** cited with approval that; **"It has long been settled that if a man employed under a contract of personal services is wrongfully dismissed he has no claim under the contract after repudiation. His only claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them. ..."**

Having already established that the claimant was unlawfully dismissed, he is entitled to damages. The quantum of damages to be awarded are determined at the discretion of Court and depending on the merits of each case. General Damages are compensatory in nature, intended to bring an aggrieved party to as near as possible in monetary terms to a position a Claimant was in before the injury occasioned to him or her by the respondent occurred. Given that the claimant was earning Ugx.1,720,781/- per month on a 2-year contract and he had served 12 months, we think that the award of Ugx. 9,000,000/- as General Damages is sufficient.

1. Aggravated Damages

In **ROOKES VS BARNARD [1964] ALLER**, it was established that:

"... there are only three categories in which exemplary damages are awarded:*

- 1. *Where there has been oppressive, arbitrary or unconstitutional action by the servants of government.***
- 2. *Where the defendant's conduct has been calculated by him to make profit which may well exceed the compensation payable to the plaintiff and***
- 3. *Where some law for the time being in force authorizes that award of exemplary damages.***

We did not find any aggravating circumstances to warrant the award of aggravated damages. Although the Claimant was terminated without notice or a hearing, he did not adduce any evidence to prove any oppressiveness, callousness, malice or arrogance on the part of the Respondent. The prayer for aggravated damages is therefore denied.

3. Punitive damages

Punitive damages are awarded in order to punish the respondent for outrageous conduct as a measure to deter others from conducting themselves in a similar manner. They are not intended to compensate the claimant. We did not find any evidence on the record to warrant an award for punitive damages. It is therefore denied.

4. Severance pay

Section 87(a) of the Employment Act, entitles an employee who has been in an employer's continuous service for a period of 6 months but is unlawfully dismissed to severance pay. Section 89 of the Act provides that severance allowance should be negotiable between the employer and employee. However, where it has not been negotiated and there is no provision for a method to calculate it, this court in **DONNA KAMULI VS DFCU BANK LDC 002 OF 2015**, held that the reasonable method shall be payment of 1 month's salary for every year the employee has served. In the instant case the Claimant served the Respondent for 1year. We therefore award him 1 months salary of Ugx. 1,720,781/-as severance pay for the 1year served under the contract.

5. Payment in Lieu of Notice

The claimant prayed for payment of 2 months' salary in lieu of notice. Section 58 of the Employment Act provides that a contract of service shall not be terminated without giving the employee notice and sets down the notice periods to be considered as follows:

"58. Notice periods

a)A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-

- (b) where the contract of employment is terminated summarily in accordance with section 69; or (b) where the reason for termination, is attainment of retirement age.
- (2) The notice referred to in this section shall be in writing, and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.
- (3) The notice required to be given by an employer or employee under this section shall be-
 - (a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;
 - (b) not less than one month, where the employee has been employed for a period of more than twelve months, but less than five years;

- (c) not less than two months, where the employee has been employed for period of five, but less than ten years; and
- (d) not less than three months where the service is ten years or more.
- (4) Where the pay period by reference to which the employee is paid his or her wages is longer than the period of notice to which the employee would be entitled under sub section (3), the employee is entitled to notice equivalent to that pay period.
- (5) Any agreement between the parties to exclude the operation of this section shall be of no effect, but this shall not prevent an employee accepting payment in lieu of notice.
- (6) Any outstanding period of annual leave to which an employee is entitled on the termination of the employee's employment shall not be included in any period of notice which the employee is entitled to under this section.
- (7) During the notice period provided for in subsection (3), the employee shall be given at least one-half day off per week for the purpose of seeking new employment."

The record in the instant case shows that the duration of the Claimant's appointment was 2 years commencing 1/11/2017. He ceased to receive any salary on 5/11/2018, therefore, he served for 1 year. In light of section 58(3)(b) he was entitled to 1 month's notices or payment of 1 month's salary in lieu of notice.

It was Ms. Nakalembe's testimony however, that the Claimant was paid his last salary on 5/11/2018 and in the same vain stated that it was payment in lieu of notice. She said: *"...We stopped paying on 5/11/2018, it was for the end of the month... the purpose of the money was payment in lieu of notice..."*

We believe that the Claimant was not paid in lieu of notice, but for Salary for the month of November 2018. In the circumstances we award him 1 month's salary as payment in lieu of notice amounting to Ugx. 1,720,781/-

6. Annual Leave

He prayed for payment in lieu of 14 days leave at Ugx. 650,000/-

It is trite that the employer is obliged to grant his employees rest days every calendar year. The rest days however can only be taken at such time as may be agreed between the employer and employee. Therefore, leave or rest days are an entitlement to be granted to the employee by the employer at an agreed time. The employee is expected to apply for leave and be granted the leave by the employer on an agreed date. A claim for untaken leave would only succeed where leave was applied for and expressly denied.

Section 54 of the Employment Act provides that Section 54(1) (a)

1. Subject to the provisions of this section-

2. “*An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months’ service to be taken at such* *time during such calendar year as may be agreed between the parties.* (emphasis ours).

The claimant did not adduce any evidence to indicate that he applied for leave and it was denied. Therefore, we have no basis of making an award for payment in lieu of untaken leave. It is therefore denied.

7. Interest

An interest of 15% per annum shall be paid on all the pecuniary awards above from the date of judgment until full and final payment.

No order as to costs is made.

In conclusion the Claim succeeds with the following awards:

1. Declaration that the Claimant was unlawfully terminated.
2. An award of Ugx.9,000,000/- as General damages.
3. An Award of Severance pay of Ugx. 1,720,781/=
4. An Award of I Month’s salary in lieu of notice Ugx. 1, 720,781/=
5. Interest of 15% per annum on 2-4 from the date of judgement until payment in full.
6. No order as to costs.

Delivered and signed by:

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

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI
2. MR. FIDEL EBYAU
3. MR. FX MUBUKE

DATE: 24TH APRIL 2020

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