

UGANDA / JUDGMENT

Munduga v Board of Governors of St. Daniel Comboni Collage Kasaala and Others (Labour Dispute Reference 251 of 2019) [2024] UGIC 68 (25 October 2024)

[2024] UGIC 68

COURT

Industrial Court of Uganda

BEFORE

Wabwire Musana, J, Musimbi, Panel Member,
Bigirimana penal member, Lapenga

CASE / FILE NUMBER

Labour Dispute Reference 251 of 2019

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THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA LABOUR DISPUTE REFERENCE NO. 251 OF 2019

(Arising from Labour Claim No. 367 of 2018 Nakawa)

MUNDUGA SIMON :::CLAIMANT**VERSUS**

- **1. THE BOARD OF GOVERNORS OF ST DANIEL:::::::::::::::::::::::::::::::::RESPONDENTSS
COMBONI COLLEGE KASAALA & 2 ORS**
- **2. THE CHAIRPERSON, BOARD OF GOVERNORS ST. DANIEL COMBONI
COLLEGE, KASAALA, LUWERO**
- **3. THE REGISTERED TRUSTEES OF VERONA FATHERS (COMBONI MISSIONARIES OF THE
HEART OF JESUS, UGANDA PROVINCE)**

Before:

The Hon. Mr. Justice Anthony Wabwire Musana:

Panelists: Hon. Jimmy Musimbi, Hon. Emmanuel Bigirimana & Hon. Can Amos Lapenga.

Representation:

- *1. Ms. Erinah Kawalya and Mr. Abner Nseko of Platform For Labour Action for the Claimant.*
- *2. Mr. Obed Mugizi of M/S Bwengye & Associated Advocates for the Respondents.*

Case Summary

Employment law-Constructive dismissal- Abscondment-This case details a labour dispute between a headteacher and a school in Uganda. The headteacher, the claimant, alleges he was unlawfully terminated after a memorandum of understanding between the school and the Comboni Missionaries expired. The claimant claims he was not given a hearing or proper notice, and the school argued that he abandoned his position. The court found that the headteacher was constructively dismissed and ordered the school to compensate him for lost wages, severance, general damages, and repatriation costs.

AWARD**Introduction**

- [1] The 1st Respondents, the governing body of an education institution started by the 3rd Respondents, the Registered Trustees of Verona Fathers, also known as the Comboni Missionaries, in 2007, employed the Claimant as head teacher on the 5th of January 2007. He served until the 24th day of January 2019, when he was instructed to hand over based on the expiry of a memorandum of understanding (MOU) between the Comboni Lay

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Missionaries and Comboni Missionaries. He felt this was unfair and lodged a complaint with the labour officer (the LO) at Luwero. The LO attempted ^a mediation, which was unsuccessful. The dispute was referred to this Court.

Factual Background

- [2] By letter dated 5th February 2002, the Claimant was appointed headteacher of the 3rd Respondent's School. The 2nd Respondent, Mr. Katureebe Kizito, Chairperson of the Board of Governors of St. Daniel Comboni College Kasaala, signed the letter. It was admitted in evidence as CEXH1. The Claimant diligently served in this role, demonstrating his commitment to the institution.
- [3] On the 14th of January 2019, the Claimant was invited to meet the Provincial Superior, and at this meeting, he was instructed to handover office immediately. On the 24th of January 2019, the Claimant handed over management of the school to ^a new headteacher, Lawrence Kalule Ssembajjwe, in the presence of Fr. Anthony Kibira, the Vice Provincial Superior, Brother Michael Auaga: Ms. Regina Nansubuga Mutyaba, Chairperson

Kiwanuka and five other persons. A copy of the handover report was admitted in evidence and marked REX6.

- [4] By letter dated the 5th of March 2019, the Claimant, through Messrs. Stanley Omony & CO Advocates, protested his unlawful termination and dismissal, suggesting that he did not receive his three-month notice or payment in lieu of notice. It was also indicated that the Respondents had not remitted National Social Security Fund contributions, paid severance pay, general damages, repatriation and legal costs. The Claimant asked for a sum in the region of UGX 130,000,000/=. The demand letter was admitted in evidence and marked CEXH
- [5] By letter dated 27th March 2019, Messrs. Stanley Omony & Co. Advocates lodged a complaint with the labour officer at Luwero.
- [6] On the 29th March 2019, the Claimant prepared a statement addressed to the Senior Labour Office Luwero by which he recounted his appointment and said his termination began with an invitation to an appraisal by Fr John Bosco. To his surprise, at meeting the Provincial Superior at Mbuya on the 18th of January 2019, he was asked to hand over office because of the expiry of a memorandum of understanding(MOU) between the Comboni Lay Missionaries and Comboni Missionaries. He said he was forced to hand over on 24th January 2019. A copy of the statement was admitted into evidence and marked "CEXH5".
- [7] By letter dated the 5th of April 2019, the LO invited the Respondents to settle the complaint.
- [8] In the response through Messrs. Bwengye & Associated Advocates, dated 16th April 2019, the Respondents alleged that the Claimant had mismanaged the school, prompting the BOG to reorganise the school management and teaching staff. The Claimant had been invited to reapply but did not and abandoned the school. It was said a new headteacher had then been appointed. The Respondents alleged that the Claimant had left with a school motorcycle and was responsible for the non-remittance of NSSF contributions. It was suggested that the claim for unlawful termination was misconceived. The letter was admitted in evidence as CEXH 6.

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- [9] When Sarah Busingye Were, Senior Labour Officer (**the SLO**) at Luwero District Local Government, called the parties, it was agreed that the matter would be mediated. The Claimant, showing his willingness to resolve the issue, participated in the mediation process. However, despite his efforts, the parties failed to resolve the matter amicably and decided to refer it to this Court.

The Claim

[10] By memorandum of claim filed before this Court on the 27th of November 2019, the Claimant sought to declare that his employment termination was illegal, malafide, unfair and unlawful. In his case, he was summarily terminated and forced out of office without a hearing, prior warning, or explanation, and in violation of the rules of natural justice, the Respondents withheld his household property. He repeated his demands for three-month notice or payment in lieu of notice, unremitted National Social Security Fund contributions, unpaid severance pay, general, special and punitive damages, repatriation and legal costs, all over UGX 130,000,000/=.

The Response

- [11] In their memorandum in reply dated 9th of December 2019, the Respondents opposed the claim. It was pleaded that the Claimant was never terminated but abandoned work. That the Claimant was responsible for the non-remittance of NSSF contributions and was not entitled to any of the remedies sought. It was also pleaded that the Claimant had fronted the Lay Comboni Missionaries to head the Respondents's School. In 2018, when the MOU between the Comboni Lay Missionaries and Comboni Missionaries expired, a restructuring exercise was undertaken. The Claimant did not re-apply for the position of headteacher, abandoned the school, and a new headteacher was appointed.
- [12] By way of counterclaim, the Respondents/Counter-Claimants contended that the Claimant had built a permanent house on its land, depriving it of use thereof, had abandoned his goats, which were a nuisance to the Counterclaimants and neglected to remit NSSF contributions. The Counterclaimants asked for orders for the handover of school property, removal of the Claimant's goats and a declaration that the Claimant was liable for NSSF non-remittance.

Rejoinder

- [13] By rejoinder, the Claimant repeated his contention of illegal termination, suggesting that the Assistant Provincial Superior, Fr. Kibira, was an agent of the 3rd Respondents and acted on behalf of the 1st and 2nd Respondents in forcing him out of office. He attached an extract of the visitor's book. He contended that the BOG's Finance Committee was responsible for budgeting for NSSF remittance and did not do so. He claimed that he had submitted reports and, therefore, an allegation for failure to submit reports, incompetence, neglect of duty and abandoning work was not subjected to a hearing and intended to malign him. It was also contended that the Claimant was not privy to the MOU.
- [14] In reply to the counterclaim, the Claimant contended that he had purchased a kibanja next to the school, which was not part of the school land. He had constructed a poultry and goat shed on his land. It was contended that he had a right to buy and enjoy his land and that the counterclaim should be dismissed with costs.

LDR 251 of 2019 Award. Anthony Waiw**The proceedings and evidence**

- [15] The parties filed a joint scheduling memorandum on the 6th of October, 2022. At the scheduling conference held on the 22nd of November 2022, two issues were adopted for determination:
- (i) Whether the Claimant was unfairly terminated by the Respondents?
- (ii) What remedies are available to the parties?

Claimant's evidence.

- [16] The Claimant testified to his appointment on 5th January 2007, his dutiful service, the subsequent renewals of his contract and his exit salary of UGX 700,000/= per month. He said on the 14th of March 2019, Rev. Father John Bosco, the Provincial Bursar, asked him to meet the Provincial superior at Mbuya for appraisal with all the school administrators. He told us that he attended ^a meeting on the 18th of January 2019, at which the Provincial Superior informed him of the appointment of a new headteacher. He was ordered to hand over. He asked that his termination be put in writing and was promised a letter on 24th January 2019. He was told that the termination was due to the expiry of the MOU between the Comboni Lay Missionaries and the Comboni Missionaries. He told us that on the 24th of January 2019, he was thrown out of the school by the Assistant Provincial Superior. There was no hearing, prior explanation, or notice, and he was not allowed to remove his possessions from the staff house. After that, he lodged a complaint with the Luwero District LO.
- [17] Under cross-examination, he told us that the Assistant Provincial Superior called him to attend an appraisal in Mbuya on the 18th of January 2019. He also confirmed running the school as Headteacher from November 2018 until 24th November 2019.
- [18] In re-examination, he told us that his appraisal did not occur on the 18th of January, 2018. He was told that someone else had been appointed in his place.
- [19] Joseph Kiwanuka(CW2) testified next as Chairperson of the school's Parent and Teachers Association(PTA). He confirmed the Claimant's appointment in 2007 and his excellent school leadership. He told us that Fr. James Jjumba Patrick brought one Lugambwa Julius as bursar. Mr. Lugambwa mismanaged the school funds and was removed. Mr. Ahwera Lazarus was also brought in as administrator and mismanaged school property. He told us the Claimant was forced out of the school in his presence without following procedure. He also said the ground of abandonment was not true.

- [20] In cross-examination, CW2 could not recall the date he seized being PTA Chairperson. He also said that private schools needed to advertise. He told us that in the BOG's assessment, the school's difficulties were caused by the foundation body, which recruited staff without advertising. He also said that the Claimant did not abandon the school as he was managing the October to December 2018 examinations.
- [21] In re-examination, he clarified that he was appointed Chairperson BOG in 2007 and was asked to leave in 2019. He said the former recruitment process involved advertising

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vacancies and applications made to BOG. The BOG would conduct interviews and appoint staff. He also said that on the 18th of January 2019, the Claimant informed him that he was being forced out and was eventually forced out of office on 24th January 2024.

- [22] The Respondents filed witness statements of the Provincial Superior Fr Achilles Kiwanuka, Mr. Kizito Katureebe, Ms. Regina Nansubuga, Brother Michael Avaga, Mr. Joh Patrick Musinguzi, Ms. Namata Rossette and Mr. Michael Tumwesigye. These witnesses did not come to Court despite Mr. Obed Mugizi Esq. appearing in Court on the 31st of May 2023 when the matter was fixed for hearing of the Respondents' case on the 25th of October 2023. Pursuant to Order CPR, owing to their non-appearance in Court, the witness statements are hereby expunged for the record.
- [23] At the close of the Claimant's case, we invited the parties to file written submissions.

Determination

issue 1: UNLAWFUL TERMINATION

Claimant's submission

- [24] The Claimant submitted that the Claimant was constructively dismissed under Section 65(1) (c) of the Employment Act, 2006.¹ Counsel relied on *Nyakabwa Abwooli v Security 2000 Ltd[2](#page-4-0)*. Citing Section 68(now 67) EA, it was submitted that the Respondents had not proven the reason for termination. We were asked to find that the termination was procedurally and substantively unlawful. The Respondents did not file any submissions.

Determination

- [25] It is trite that the Court cannot fetter the right of an employer to terminate and dismiss if the employer follows procedure. The Court's role is to ensure the procedure is fair and lawful. Counsel for the Claimant made a case for constructive dismissal. Constructive dismissal occurs when the employee ends the contract with or without notice due to unreasonable conduct on the employer's part towards the employee. The principles of constructive dismissal were expounded upon in *Lubega v Tropical Bank Limited[3](#page-4-1) 4*where

we cited Lord Denning's most helpful definition of constructive dismissal from **Western Excavations (ECC) Ltd v Sharp*²² in the following terms;

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*¹***

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[&] Following the revised edition of the laws of Uganda, this is now Section 64(1)(c) of the Employment Act Cap.226

² LDR 108 of 2014

³ [2024] UGIC39

⁴ [1978] IRLR 27 CA as quoted in "Employment Law" ^m Edn by Malcom Sargeant and David Lewis at page 96

- [26] Constructive dismissal also means that all the elements of dismissal are present except for the dismissal itself. In **Edotun v Okra Beverages Limited*^[5](#page-5-0)*** we cited the Kenyan case of **Moses Kiplagat Changwony V Tana And Athi Rivers Development Authority*^[6](#page-5-1)*** where it was observed that the employee must show that there has been no actual dismissal, but all the elements of dismissal are present.
- [27] This Court set the threshold in **Nyakabwa*^{*} in that the employer's conduct must be illegal and injurious to the employee, making it impossible for the employee to continue working. In both **Lubega*^{*} and **Olango v Hands of Love SSS Kabaga* ^[7](#page-5-2)*** we held three conditions to be material in establishing constructive dismissal;
- (i) First, the employer must conduct himself to show that he does not wish to be bound further. In other words, there must be a fundamental or significant breach of the employment contract.
- (ii) Secondly, it must be shown that the employer does not wish to be bound by the employment contract and
- (iii) Thirdly, the employee must be entitled to treat himself as discharged.
- [28] In the present case, the evidence of CW1 and CW2 is that the Claimant was forced out of office on the 24th of January 2018. On the 18th of January 2018, he attended before the Provincial Superior, who informed him that the position of the headteacher, which the Claimant was holding, had a new appointee. It would follow, therefore, that the Claimant's portfolio was handed over to another person during the subsistence of the Claimant's employment. He did not have gainful employment with the Respondents from the 18th day of January 2018. In our estimation, by appointing another person to the position of

headteacher, the Respondents did not wish to be bound to its obligations to the Claimant. It had severed the relationship. The Claimant was left with no option but to treat himself as discharged. Indeed, in his evidence, CW2 told us that the Claimant called him to say he was being forced out. The Handover Report, which was admitted as CEX 5 and REX6, had ^a degree of finality. It meant that the Claimant had ceased to be a headteacher. It would be our finding that all the elements of dismissal were present without a formal act of dismissal. In other words, there was no letter to accompany the forcing out. These elements of dismissal include the appointment of another person as headteacher in place of the Claimant and the instructions to hand over the office. In our view, this was constructive dismissal, and we would so find.

- [29] We are fortified in adopting this view by the decision of this Court in **Lubega,** where the abolition of office was considered a fundamental breach of the employment contract that entitled the employee to treat himself or herself as discharged. Further, under Section 39(1) EA, the employer has a duty to provide work. In **Changwony,** the Court found failure to give work to be an element of constructive dismissal. Similarly, in the South African case of **Mkhutshulwa v Department of Health, Eastern Cape and Others*[8](#page-5-3)* failure to provide work was a basis for a finding of constructive dismissal. Under Section 39(2) EA, the exceptions to this duty are frustration of the contract, suspension of performance, an act of God or termination. None of these exceptions obtained in the matter before us. As such, the Respondents would be found in breach of the duty to provide work.

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⁵ [20231 UGIC4B

⁶ (20131 KEELRC 286(KLR)

⁷ (20231 UGIC 71

⁸ [2023] ZALCPE 5; [2023] 8 BLLR 809 (LC) (4 April 2023)

- [30] The Respondents also ventured that the Claimant had absconded from work. This is not a believable proposition for several reasons: First, the Respondents elected not to present their evidence in Court. They did not come to Court to prove the Claimant's abscondment. Secondly, in **Betty Wenene v The Management of Anna Maria Day and Boarding Primary SchooPwe** quoted a most persuasive decision from the Industrial Court of Botswana, **Molosiwa v E. S. O.9¹⁰** in which Lady Justice M. Ebrahim-Carstens¹¹</sup> quotes the foremost employment, labour and workplace law author, John Grogan, on **Dismissal*[12](#page-6-0)* the author maintains that for abscondment or desertion, the employee has a right to be heard where the employer knows the employee's whereabouts. In **Wenene,** we concluded that for an employer to assert that an employee has absconded or deserted, it must be established that the employee had a permanent intention not to return to work. It must also be shown that the employee must have been accorded a hearing on the

allegation of absconding. It is not enough or indeed not open to an employer to assume absconding or desertion of an employee if the employee's whereabouts are known. The employer would still be expected to adhere to the principles of natural justice to afford the employee a right to a fair hearing.

- [31] In the present case, the venture into the realm of misconduct by abscondment on the part of the Claimant would not succeed in light of the threshold for proof of abscondment. The Respondents did not provide evidence that any effort was expended in bringing disciplinary proceedings against the Claimant for absconding. The Respondents' difficulties would be compounded by the lack of a hearing as provided under Section 65EA if the dismissal was for abscondment or any other performance or misconduct-related reasons. We are, therefore, unable to accept the Respondents' argument that the Claimant abandoned his work or was a deserter. He had a piece of land neighbouring the school, and his goats were said to be trespassing on school land. In our view, his whereabouts were known, and no evidence of bringing him for disciplinary proceedings for abscondment was placed before us.
- [32] Given the evidence and the provisions of law above, the conclusion has to be that the Claimant was constructively dismissed from his employment with the Respondents. He would be entitled to a declaration to that effect. Issue one is answered in the affirmative.

Issue II. What remedies are available to the parties?

- [33] Having found that the Claimant was constructively dismissed, he would be entitled to remedies.

Payment in lieu of notice.

- [34] The Claimant sought three months' pay in lieu of notice. Section 57(3)(d)EA provides for notice of not less than three months when an employee has been employed for more than ten years. It was common cause that the Claimant was first employed on the 5th of February 2007. He was constructively dismissed in March 2018. This is eleven years. He would, therefore, be entitled to not less than three months payment in lieu of notice. According to the salary payment sheet for November 2018(w/wc/) *was admitted in evidence as CEX8),* he

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⁹ LDR 120 of 2015(Industrial Court of Uganda) 18th October 2024

⁰ [2006] BWIC 8

Justice Carstens served on the United Nations Dispute Tribunal.

¹² (Juta & Co. 2002, Reprinted 2004) page 107

was earning a gross salary of UGX 700,000/= per month at the time of his dismissal. We therefore award him the sum of UGX \$2,500,000/\$ = as payment in lieu of notice.

Severance pay

[35] The Claimant sought UGX 7,700,000/= as severance pay. Under Section 86 EA, an unfairly dismissed employee is entitled to severance pay. In **Donna Kamuli v DFCU Bank Ltd**¹³ the Court held that the calculation of severance shall be at the rate of monthly pay for each year worked. As the Claimant worked for eleven years at a salary of UGX 700,000/=, we hereby award him UGX \$7,700,000/\$ = in severance pay.

General Damages

- [36] Counsel for the Claimant proposed UGX 30,000,000/= citing *Luzinda v Ssekamatte & 3 Others*¹⁴. In **Luzinda* Ssekaana J*, upon stating the law on general damages, was considering a botched land transaction of a value of UGX 140,000,000/= where the Plaintiff travelled from the Netherlands to enforce his rights.
- In the employment sphere, the Supreme Court in **Uganda Post Limited v Mukadisi** has settled [37] the principles regarding- an award of general damages¹⁵. The apex Court observed that general damages can be awarded in addition to the payment in lieu of notice given to an employee who has been unlawfully dismissed from employment. As the claimant was constructively dismissed, he is entitled to general damages. In *Stanbic Bank (U) Ltd v Constant Okou*¹⁶ Madrama, JA (as he then was) held that general damages are based on the common law principle of **restitutio in integrum** and take into account future employment prospects or employability. In the matter before us, the Claimant lost his job and source of income. He did not tell us how old he was or provide evidence showing dwindling employment prospects. He also led evidence to show that he was not permitted to collect his personal effects. We think that the Claimant has made a case for general damages, and considering all circumstances and the Claimant's monthly salary, we would grant the Claimant the sum of UGX \$8,400,000/\$ = in general damages.

Repatriation

Citing Section 39(3)EA, the Claimant sought UGX 3,000,000/= for the repatriation of his family [38] from Luweero to Arua, approximately 296 Kilometers away. Under Section 38(3)EA, an employee who has been in employment for at least ten years is entitled to be repatriated at his employer's cost, irrespective of his or her place of employment. According to *Travelmath*¹⁷, the distance from Luweero to Arua is 389 Kilometers. In **Kabagambe v Post* Bank Uganda Limited*¹⁸ we awarded UGX 3,000,000/= for a repatriation from Lira to Mubende District, a road distance of 354 Kilometers.¹⁹ Therefore, we think the sum of UGX 3,000,000/= will suffice, and we award the Claimant the reparation cost.

¹³ DFCU Bank Limited v Donna Kamuli (Civil Appeal 121 of 2016) [2019] UGCA 2088 (30 October 2019)

¹⁴ [2020] UGHCCD 20

¹⁵ [2023] UGSC 58

¹⁶ Civil Appeal No. 60 of 2020

¹⁷ <https://www.travelmath.com/drive-distance/from/Luwero,+Uganda/to/Anua,+Uganda> last accessed 22.10.2024 at 10:41pm

¹⁸ [2023] UGIC 50

¹⁹ <https://www.travelmath.com/drive-distance/from/Lira.+Uganda/to/Mubende.+Uganda> last accessed 22.10.2024 10:47 pm

Final Orders

- [39] Finally, we make the following orders:
- (i) We declare that the Claimant was constructively dismissed from employment by the Respondents.
- (ii) We order the Respondents to pay the Claimant the following sums:
 - (a) UGX 2,500,000/= as payment in lieu of notice,
 - (b) UGX 7,700,000/= in severance pay,
 - (c) UGX 8,400,000/= as general damages, and;
 - (d) UGX 3,000,000/= as repatriation.
- (iii) The Respondents are also ordered to deliver the Claimant's certificate of service to him within 30 days of this award.

25th September 2024.

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9:52 am

Appearances

1. For the Claimant:

Ms. Martha Apolot, holding brief for Ms. Erinah Kawalya

Parties absent.

Mr. Samuel Mukiza.

Court Clerk:

Ms. Apolot

Matter for award, and we are ready to receive it.

Court: Award delivered in open Court.

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