

UGANDA / JUDGMENT

Muyimbwa v Ndejje University (Labour Dispute Reference No. 222 of 2015) [2019] UGIC 27 (28 June 2019)

[2019] UGIC 27

COURT

Industrial Court of Uganda

BEFORE

Ruhinda-Ntengye, J, Tumusiime-Mugisha, J

CASE / FILE NUMBER

Labour Dispute Reference No. 222 of 2015

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THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 222 OF 2015 (ARISING FROM MGLSD. NO. 335
OF 2015 KAMPALA)

MUYIMBWA PAUL..... CLAIMANT

VERSUS

NDEJJE UNIVERSITY.....RESPONDENT

BEFORE

- 1. Hon. Chief Judge RuhindaAsaphNtengye
- 2. Hon. Lady Justice Linda TumusiimeMugisha

PANELISTS

- 1. Mr. Ebyau Fidel
- 2. Ms. Harriet MugambwaNganzi
- 3. Mr. F. X. Mubuke

AWARD

By memorandum of claim filed in this court on 18/09/2016 the claimant alleged that the respondent having been his employer as Dean of Students, summarily and arbitrarily terminated his employment by transferring him from the position of Dean of students to that of Senior Assistant Registrar. In his claim he prayed for loss of expectation, gratuity, and payment in lieu of leave, allowances, general damages and NSSF savings respectively.

In reply the respondent in a written statement of defense filed on 16/10/2015 denied ever terminating the claimant. It alleged that the claimant failed in his duties as responsible for welfare of students who as a result were engaged in a strike. By recommendation of a probe instituted to investigate the case of the strike, the claimant was posted to another duty station where he could best offer his services as opposed to instituting disciplinary proceedings. According to the respondent, Instead of reporting to his new duty station, the claimant applied for leave, which was granted, but never came back to perform his duties and therefore he voluntarily absconded from work.

The claimant was represent by M/s. Nakakande of Kigozi & Partners Advocates and the respondent was represented by M/s. Mugenyi of Kalenge, Bwanika, Ssawa & co. Advocates.

The case for the claimant as we understand it from the evidence adduced, is that having signed a contract of service with the respondent as Dean of Students, transferring him to the duty station of Senior Assistant Registrar was in breach of contract and amounted to termination of employment. According to his evidence, he sought clarification on his posting but the respondent did not reply to his letter.

In his evidence, the issues leading to the strike had been brought to the attention of administration which did not take any appropriate action and therefore he was not to blame for failure in his responsibilities for welfare of students leading to the strike.

The case of the respondent as we understand it is that having found out through the probe committee that the claimant was inadequate in his responsibilities as Dean of student he was transferred in the ordinary course of business to a position where the respondent felt the claimant, could do better.

In the evidence of one Kiyangi Elijah, the strike was due to, among others, poor students' welfare and that following the probe committee investigations and recommendations, many staff were reshuffled including the claimant who was transferred as Senior Assistant Registrar (examinations) whereupon he applied and took leave never to return.

The issues as agreed at scheduling were:

- **1) Whether the transfer of the claimant from the position of Dean to the position of Senior Assistant Registrar was lawful.**
- **2) Whether the claimant was terminated and if so whether he was lawfully terminated.**

- **3) What remedies are available to the parties?**

As regards the first issue and second issues, the claimant opted to argue them together. In his submission, the evidence of PW2, Emuron Lydia, was to the effect that the claimant was an excellent performer. Counsel summarized the evidence of all witnesses including the respondent's evidence and indicated that the claimant had raised the issue as to whether the transfer was a demotion and why he was not consulted prior to his transfer to a position he never applied for. Counsel also submitted that the evidence was to the effect that the position of Senior Registrar was below the one of Dean of Students and that ideally before demotion he should have been referred for disciplinary.

From the submissions of counsel in relation to the 1st and 2nd issue, we form the opinion that he contends that the transfer of the claimant was unlawful because he did not get any warning, it was for the position lower than that provided in the contract of service and he was not afforded a hearing. It is for the same reasons that counsel contends that the claimant was terminated and the termination was unlawful.

For the respondent, counsel opted to argue the 2 issues separately. On the first issue counsel contended that the respondent had a prerogative of transferring any employee from one department to another or from one part of the institution to another provided the terms and conditions of service were not adversely affected.

He relied on the case of **Albert O. Tinto Vs Smart Communications Inc. Alex O. Caeg & Anastacio Martinex, G. TR No. 171764, Supreme Court of Philippines** for this submission. He submitted that, the respondent having failed in his majorly duty of Student Welfare, the respondent exercised its prerogative to transfer him to another senior administrative position where his basic salary and housing allowance was increased, On the second issue, counsel for the respondent contended that the claimant was not terminated but merely transferred. Counsel referred court to **section 2 of the Employment Act which** defines termination. According to him, on being transferred, the claimant applied for leave but never reported back.

Decision of court:

Whether the transfer of the claimant from the position of Dean of Students to that of Senior or Assistant Registrar was lawful.

It is not disputed that the claimant was employed on a contract of 5 years as Dean of students. He had by letter dated 17/08/2009 been appointed deputy dean of Students but on a 5 year contract implying that the contract would end on 20/7/2014. By letter dated 6/11/2014, the claimant's contract as Dean of Students was renewed for another five years up to 1/8/2015. On 4/02/2015 he was transferred to the office of SeniorAssistant Registrar (Examinations) reporting to the Academic Registrar.

According to the Human Resource manual of the respondent, the Dean of students is "**responsible for the students' welfare and works with the responsible officers on administrative and financial matters affecting students' welfare and reports to the Deputy Vice Chancellor.**"

On the other hand the Assistant Registrar (Examinations) "**is in charge of all examinations ... conducts proper update of students examination records, attends to complaints**

pertaining to examination including marks, cheating and timetables; prepares issuance of academic transcripts and certificates He /she reports to Deputy Academic Registrar.

The respondent's contention is that the transfer of the claimant was as a result of his inadequacy in dealing with students' affairs which the claimant denies. Evidence especially from RW1 Simon Peter Kwagala which was not challenged in cross examination suggested that the claimant as Dean of Students was not able to cater for the welfare of the students. In paragraph 7 of his statement, the witness says

"He would make several promises but would never act on them. In fact he would not even report the grievances to the University management..."

and in paragraph 20 the witness says

"Personally I was shocked to hear that Mr. Paul Muyimbwa alleges that he was a very good Dean of Students who at all material times handled his responsibilities...."

It is trite law that evidence not challenged in cross examination is taken to have been admitted by the opposite party. Given this unchallenged evidence and given the recommendations of the probe committee, we do not fault the respondent to have found that the claimant was inadequate in his ability to hold the position of Dean of Students. This being the case, and taking the authority of **Albert D. Tinto Vs Smart Communications Inc.** (supra) as a persuasive authority, we find that the respondent or any other employer in the same position would be in position to transfer the claimant or any other employer in the same circumstances to another responsibility but of the same rank and scale.

We form the opinion that before we determine whether the transfer was lawful, it is important to determine the question: **of what effect was the transfer on the contract of service between the claimant and the respondent?**

The claimant was under a contract to serve as Dean of Students. He was responsible for the welfare of all students of the respondent university and reported to the Deputy Vice Chancellor. He was transferred to a position that dealt with specifically examinations and this limited the scope of his responsibilities. He was in the latter position to report to the Deputy Registrar in charge of examinations who was junior to the Deputy vice Chancellor to whom he originally reported as Dean of Students.

Although his salary and housing allowance were increased his headship allowance was no longer because, according to the respondent he was no longer Head and his domestic and Umeme allowance were no longer because of the nature of his new posting. His net pay therefore was reduced by 273,861/=. Given this state of affairs and the evidence of RW2, Kiyangi Elijah in cross examination that the letter of transfer marked the end of the claimant's job as Dean of students, we find that the effect of the said transfer was demotion.

Ordinarily, a person is demoted after a system of appraisal finds him/her lacking in capacity to handle the current responsibilities or after a disciplinary process has established that the employee has committed an infraction calling for the demotion.

In the instant case the demotion of the claimant was as a result of recommendations of a probe committee and not a disciplinary committee. The respondent admitted that they did not take out a disciplinary process against the claimant for the inadequacies/in competences that led to a strike of the students. We are of the firm conviction that before demoting an employee from his/her contractual responsibilities to a rank lower than that provided in the contract, such employee ought to be given a reason for the said action. The employee needs to have an opportunity to appreciate the reason for the demotion and make a decision whether to accept the demotion or try his/her talents elsewhere. Therefore although demotion is not necessarily termination of employment, the requirement of an employee to give a reason for termination under **section 68 of the Employment Act** equally applies when the same employer contemplates demotion of an employee.

Section 68 of the Employment Act provides:

"68 proof of reason for termination

- (1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, , and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of Section 71.
- (2) The reason or reasons for dismissal shall be matters, which the employer at the time of dismissal, genuinely believed to exist and which cause him or her to dismiss the employee.
- (3) In deciding whether an employer was satisfied this section, the contents of a certificate such as is referred to in section 61 informing the employee of the reasons for termination of the employment shall be taken into account.

The letter of transfer provided (among other things) that:

"One of the recommendations of the probe committee was urgent need to reorganize the welfare department of which you were the head. The top management committee that sat on 2/2/2015 accordingly decided to transfer your service to the academic Registrar's office as Senior Assistant Registrar with immediate effect. This has been done for the good of the University and your career in the University..."

In response to this letter of transfer the claimant raised pertinent issues which he sought the respondent to clarify and these issues are listed in the claimant's letter dated 23rd February and addressed to the University Secretary as:

- 1. As you are well aware and as stipulated in your said letter the University Council renewed my contract as Dean of Students Ndejje University with effect from 1st August 2014 to 31st July 2019. I dully accepted the offer. In the said contract which is still ongoing, this type of transfer is not provided for. I am therefore seeking clarification regarding the basis of this transfer.
- 2. Does this transfer, constitute award of a new contract or continuation of the ongoing transfer?
- 3. The position of the Dean of student is specifically provided for by the University and Tertiary Institutions Act 2001 and the Ndejje University charter 2009 as one of University Leadership positions unlike that of Senior Assistant Registrar(examinations). Does this transfer, therefore constitute a demotion? I need clarification on what happened to my contract as Dean of students?
- 4. I have never applied for the position of Senior Assistant Registrar (Examinations) neither have I appeared before the University Council Staff Appointments Board for such an appointment what were the considerations of the committee in making such a decision?
- 5. The letter transferring me does not stipulate the detailed terms and conditions of that appointment, other than specifying the salary. Does this transfer constitute a disciplinary action against me and if so what are the grounds for such action?

The respondent contended that the reason for the demotion (which they refer to as transfer) was the recommendation of the probe committee. The Kenyan case of **QUEEN VELLE ATIENO OWALA VS CENTRE FOR CORPORATE GOVERNANCE(Industrial Court of Kenya Cause 81/2012** which was relied upon by this Court in **DONNA KAMULI VS D. F. C. U BANK (Labour Claim 002/2015)** is authority for the legal proposition that any appraisals or discussions between employee and the employer related to performance are not sufficient for terminating the services of an employee but rather they ought to be part of evidence in a disciplinary process which may result in the termination and whatever records the employer holds against the employee must be subjected to a disciplinary hearing process before they are relied upon to terminate an employee. In the same way we are positive that the probe committee recommendations in the instant case ought to have been part of the process of a disciplinary hearing.

From the reading of the above letter, we form the opinion that the claimant rejected the position of Senior Assistant Registrar (Examination) and that the respondent owed a duty to give answers to the questions raised in the response. RW2, the author of the transfer when asked in cross-examination whether he replied to the letter demanding clarifications, he could not remember if he responded to the same and hence the issues raised in the letter were ignored by the respondent.

We take cognizance of the fact that the top management sat and took the decision to demote the claimant on 2/2/2015, on the same date (probably at the same sitting), the same top management appointed one Muhumuza as Dean of Students, the claimant received the letter of transfer (or demotion) on 23/2/2015 directing him to handover within one week but before such a week lapsed the office of Dean was handed over to another person. As we will discuss later on in this Award this was contrary to the Human Resource Manual and as already pointed out, the demotion of the claimant without a hearing contravened **Section 68 of the Employment Act** as well as **Section 66 of the same Act**, and therefore it was not lawful. The first issue is in the negative.

The Second issue is:

Whether the claimant was terminated and if so Whether he was lawfully terminated.

It was the submission of the respondent that the claimant was not terminated but merely transferred and that upon transfer he applied for leave, never to return to work. It was argued for the respondent that the failure of the claimant to return to work constituted absenting himself from work without permission.

The contention of the respondent seems to be that the claimant having applied for and having been granted leave on 19th March 2015 and having failed to return on 21/4/2015 from his leave as required, he cannot claim to have been terminated.

It seems to us that at the time of his transfer or demotion, the claimant's leave was due. It follows that with or without the transfer/demotion he was entitled to his leave. Having failed to get answers to the pertinent issues that he raised, the claimant decided to take his leave and before end of his leave he instructed his lawyers who wrote a letter of intended suit to the respondent. We form the opinion that the claimant having officially

taken leave without a response from the respondent about the pertinent issues he raised and having informed the respondent before end of his leave of his intention to go to the courts of law, he was under no obligation to return to work without the issues raised answered either by courts of law or by the respondent. Failure to return to work on 21/04/2015 therefore cannot be described as absconding. By virtue of the notice of intended suit served onto the respondent, they were aware as to why the claimant was not able to return to work. Consequently unless disciplinary proceedings were commenced (for the reason that the claimant's explanation for failure to return to work was not sufficient) we are not in position to hold that failure to return from leave in the instant case constituted absconding or being away from the job without permission.

Section 65 of the Employment Act provides for various circumstances when termination of employment will be deemed to take place and **Section 65(1)(c)** provides for

"Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee"

In **NYAKABWA VS SECURITY 2000 (Labour claim 108/2014)** this court held that once an employer removes the instruments of an office for which the employee is employed to occupy and instructs another person to take up such instruments without providing an alternative to the employee, such act constitutes termination of employment by reason of employers conduct and is referred to as constructive dismissal.

In the instant case, the respondent demoted the claimant without giving him an opportunity of being heard, he raised pertinent issues concerning his contract of service and the way he was demoted, the respondent never replied to these issues and instead appointed another person to his job. The claimant took a decision to take leave and decided not to return to the job after issuing a notice of intended suit. Although unlike in the **Nyakabwa case** the claimant was given an alternative job, such alternative was a demotion done without following due process, and therefore did not constitute the alternative envisaged in the said case. Consequently we are of the firm conviction that this state of circumstances show clearly that the conduct of the respondent was unreasonable leading to the claimant's termination of the contract by refusing to return from leave and take on the lower ranked job of a Senior Assistant Registrar (Examinations) and therefore we hold that the claimant was constructively terminated as provided under **Section 65(1)(c) of the Employment Act**.

Was the termination unfair/ unlawful?

The answer is yes. This is because as already pointed out it was contrary to **Sections 66 and 68 of the Employment Act** which provide for reason for termination and a hearing respectively. The demotion of the claimant from his job as Dean of Students to the lower rank without any hearing constituted breach of contract and therefore unlawful termination of the claimant's job of Dean of Students. As RW2 stated in cross-examination, the letter of transfer marked the end of the job as Dean of Students, yet the said letter was written as a result of circumstances that were not only contrary to the **Sections of the law** above mentioned but also contrary to the Human Resource Manual of the respondent as to recruitment of staff and termination of contracts of employment.

On perusal of the Human Resource Manual of the respondent, recruitment of staff is by the **Staff appointment and Welfare board** which in the instant case was not responsible for appointment of the Acting Dean of Students to replace the claimant (see **Article 1.1 and 1.2** of the Resource manual. **Article 1.7(ii)(b)** of the same Manual provides for temporary appointment which we believe was the case in the instant case but again this ought to be done by the vice chancellor on the advice and authority of the staff Appointments and Welfare Board. We have not found anywhere in the Human Resource Manual a provision allowing Senior Management to appoint any staff. Article 6 of the Human Resource Manual provides for a detailed disciplinary procedure which was not complied with in the instant case. There was no reason whatsoever for the respondent to ignore its own set disciplinary procedure in its own Manual.

Accordingly the constructive termination/dismissal of the claimant for the above reasons was unlawful.

The last issue is **what remedies are available to the parties.**

In his memorandum of claim, the claimant prayed for certain sums of money for loss of expectation, gratuity, in lieu of annual leave, allowance, general damages and NSSF savings respectively. He also prayed for costs.

(a) Loss of expectation

The claimant prayed for 475,821,648 being loss of expectation (4 years' salary). The claimant did not support this claim with any legal authority, but in our view this claim could easily be covered in general damages. This is because salary is only payable to someone who has performed duties under a contract of service for a certain period (in this case for a month), yet the claimant having been terminated did not perform those duties under his contract. The claim for loss of expectations is therefore rejected.

(b) Gratuity

The claimant claimed 25,048,595/= being gratuity for 5 years. Once again counsel for the claimant did not elaborate to show court the basis of this claim. Gratuity is normally provided for in the contract of service but on perusal of the contract we do not find any provision related to gratuity. The closest provision is an advice to the claimant for him to acquire the university Terms and Conditions of service relating to gratuity. On checking the Human Resource Manual (provided by the respondent), **Article 5.15** provides

"Staff who have been confirmed and are on unbroken contracts beyond one year will be entitled to annual gratuity remuneration An extra month's (thirteenth month) pay annually from the first year of recruitment ... payable at the end of each contract period and shall be based on one's gross pay."

Gratuity is, in our considered view, a gratuitous token offered to an employee for exemplary service given to the employer. Gratuitous as it may be, once embedded in the contract of service or terms and conditions or in the Human Resource Manual it becomes a contractual obligation on the part of the employer.

In the instant case, the claimant was employed as deputy Dean of students on 17/08/2006 at a monthly salary **"ranging from Ug. Shs. 805,250/= to 1,226,250/= per month"** although the entry point was at 806,250/= per month before taxes. It was for 4 years. On 29/07/2009 the claimant was promoted to Dean of students on a five year contract at a salary ranging from 1,632,000/= to 2,516,100/=.

Evidence on the record suggests that the claimant on his 4 years contract as Deputy Dean of students served beyond 1 year and therefore was entitled to gratuity having served from 17/08/2006-29/07/2009. He completed probation on 17/02/2007 and worked as confirmed staff from then till 29/07/2009.

Since the claimant was promoted before the end of his contract period the assumption is that the period he served was the contract period for purposes of gratuity because he was given another contract altogether.

Therefore he is entitled to gratuity from his first year of recruitment to the end of the contract period, in this case, 29/07/2009. Accordingly he will be paid

1,226,250/= per year from 17/08/2006 – 29/07/2009 which amounts to 3,678,750/=.

The claimant also under the contract of 5 years was on 29/07/2009 employed as Dean of students at a monthly salary ranging from 1,612,000 per month to 2,516,000. He completed his five year contract which was renewed effective 1/8/2014 to 31/7/2019. He will therefore be entitled to gratuity under his contract which ended on 29/07/2014. He is entitled to $2,516,100 \times 5 = 12,580,500/=$.

(c) Annual Leave

Although in accordance with **Section 54 of the Employment Act**, every employee is entitled to annual leave days, such entitlement can only be binding on the employer only if the employee shows interest in taking it.

Consequently the employer will only be bound to pay in lieu of leave if the employee's request for leave was rejected for whatever reasons. (**SEE EDACE VS WATOTO CHILD CARE MINISTRIES, LABOUR DISPUTE APPEAL NO. 21/2015/16/2015 (consolidated) and Mbiika Denis Vs Centenary Bank Labour Dispute Claim 023/2014**).

In the instant case no evidence of the interest of the claimant in taking his leave nor that of his employer in rejecting his request to take leave is reflected on the record. The claim is therefore denied

(d) Allowances

The claimant prayed for 67,200,000 USD as travel allowances. No evidence was adduced to suggest how these allowances accrued and neither did counsel for the claimant make any submission in reference to the same in an attempt to justify them. Accordingly the prayer on allowances is rejected.

(e) General Damages

These are damages that arise from the wrongs committed against a successful litigant. It is in the discretion of the court to grant the same and how much to grant. They represent compensation in terms of the loss or injury or damage caused by the unsuccessful litigant to the successful litigant. Damages are not a way of profiteering from litigation but a way of putting the successful litigant in the position he would have been had the wrongs not been committed against him/her.

The claimant's contract had just been renewed by the respondent for the next 5 years. He was forced out of office even before the time he was expected to leave and did not properly hand over. He was ignored when he raised pertinent issues after he was demoted. We think demoting him without a disciplinary hearing caused him humiliation and eventually loss of his job to the detriment of self and family. Accordingly we allow 30,000,000/= as general damages.

(f) NSSF Savings

The claimant prayed for 45,087,480/= as NSSF savings for 5 years. Nothing in the submission of counsel nor in the evidence suggested how much was deductible and whether it was in fact deducted and not remitted to the NSSF.

In the case of **Aijukye Stanley Vs Barclays Bank (U) Ltd, LDC 243/2914** this court held that although an employee could successfully sustain a civil claim against his employer for the recovery of NSSF contributions, such employee must prove that the sum claimed was deducted from his salary and was not remitted to his account in NSSF, and that failure on the part of the employer to deduct 5% and to contribute 10% only constituted a criminal offence under **Section 44 of the NSSF Act** and did not create a cause of action against the employer by the employee, the latter having received all his emoluments.

Accordingly this prayer of NSSF savings is disallowed and the claimant advised to be in touch with NSSF authorities.

All in all the claim is allowed in the above terms with no order as to costs.

Signed by:

- 1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2. Hon. Lady Justice Linda Tumusiime Mugisha

Panelists:

- 1. Mr. Ebyau Fidel
- 2. Ms. Harriet Mugambwa Nganzi
- 3. Mr. F. X. Mubuke

Dated:28/06/2019

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