

Ogwal Onapa v Attorney General
(MISCELLANEOUS CAUSE NO. 268 OF
2019) [2020] UGHCCD 100 (15 May 2020)
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- 1. A declaration that the actions of the respondent in retiring the applicant and failing or refusing to pay him his full retirement benefits, was unfair, unconstitutional and illegal.
- 2. An order that the respondent pays the applicant:
 - a. Pension and gratuity; to be calculated at consolidated pay.
 - b. Payment in lieu of untaken leave for the 30 years of the applicant's full military service.

- c. Unpaid professional allowances from 4 th November 2010 to 31st July 2018
- d. General damages for the stress and inconveniences caused to the applicant as a result of the illegal and unconstitutional acts of the respondent's servants when they failed to pay the applicant his full retirement benefits.
- e. Aggravated damages for the illegal and unconstitutional acts of the respondent's servants.
- 3. Interest at 25% on a, b and c above from the date of retirement till payment in full.
- 4. Interest at 15% on d & e above from the date of judgment till payment in full.
- 5. Costs of this application be awarded to the applicant.

The main grounds upon which this application is premised are set in the Notice of motion and the affidavit of Samuel Ogwal Onapa are that;

- a) That on 22nd October 2001, the applicant joined UPDF as an officer cadet intake 08 large and was commissioned to officer core as 2Lt and served for 16years and 279 days of reckonable service
- b) That between the year 2006 to 2010 while actively serving in the UPDF, the applicant did pursue a bachelor of laws degree course from Kampala International University leading to an award of a Bachelor's Degree in Law on 4th November 2010.
- c) That while still in the service of the army, the applicant enrolled for a Master of laws degree from Kampala International University leading to an award of a Master of laws in Public International Law on the 16th November 2012.
- d) That between the year 2014 and 2015 while still actively serving in the UPDF the applicant proceeded for a Postgraduate Diploma in Legal Practice at the Institute of Legal Practice and Development in Rwanda which he successfully completed and he was awarded a Postgraduate Diploma in Legal Practice which entitled him to practice law.
- e) That on 31st July 2018 the applicant formally retired from service while at the rank of a captain in UPDF.
- f) That however upon retirement, the applicant was paid a sum of Ugshs 14,272,011 as his full retirement benefits which was far below his retirement benefits as required by law.
- g) That the applicant has on numerous occasions demanded that the UPDF pays him all his full retirement benefits but he has not received any response.
- h) That it would be in the interest of justice if this application is allowed.

The respondent did not file an affidavit in reply or opposition to this application. That means the application is not opposed on the facts as presented by the applicant but the same is opposed on points of law which do not require them to file an affidavit.

At the hearing of this application and in the interest of time court directed the parties to file written submissions which they both filed and I have considered them in this ruling.

The applicant was represented by *Wabwire Dennis* and the respondent was represented by *Ojamba Bichachi* from the Attorney General's Chambers.

The applicant's counsel raised the following issues for determination.

ISSUES

- i. Whether the applicant is entitled to payment of professional / qualification allowance.
- ii. Whether the applicant is entitled to calculation of his retirement benefits based on a consolidated pay.
- iii. Whether the applicant is entitled to payment in lieu of untaken leave.
- iv. Whether the applicant is entitled to general and aggravated damages,
- v. Whether there are any other remedies available to the parties.

Whether the Applicant is entitled to payment of Professional/qualification allowance.

The applicant in his submission contended that he is a lawyer by profession holding a Bachelor of Laws degree from Kampala International University which he obtained on 4th November 2010, the applicant is a holder of a Masters of Laws degree from Kampala International University which he obtained on 16th November 2012 and a Postgraduate Diploma in Legal Practice and Development Centre in Rwanda. The same qualifications are reflected on his Certificate of Discharge originated and signed by the respondent which shows his academic qualifications.

Regulation 29(3) of the UPDF(Conditions of service)(officers) Regulations provides that officers shall receive allowances as is specified in the sixth schedule to these regulations.

Item 12 category II of the UPDF(Conditions of service)(officers) Regulations provides for payment of professional/qualification allowances to advocates such as the applicant.

In the instant case, the respondent did not dispute the applicant's qualifications as a professional. It is therefore our humble submission that this honourable court be pleased to find that the applicant has adduced sufficient evidence to prove that at the time of his retirement, he was a professional who was entitled to payment of professional allowance as provided for by law.

The respondent's main argument in this case is that nowhere under section 92 of the Uganda Peoples Defence Forces that states that an officer or a militant who has professional or quasi-professional qualifications in the UPDF is entitled to a professional allowance.

Under Section 70(3) of the UPDF provides that rates of officers and militias, and allowances for them which exist in the public service, shall unless circumstances unique to the defence forces request otherwise, be same as those of their equivalents in the public service.

The respondent submitted that the Applicant did not at any one time serve and/or practice his profession to earn a professional allowance that is premised against one practicing his profession as set out in Regulation 24 and 29 of the Uganda Peoples Defence Forces (Conditions of Service) (Officers) Regulations S. I 301-2.

Regulation 24 of the Uganda Peoples Defence Forces (Conditions of Service) (Officers) Regulations opines that:

- *(1) When assessing professional qualifications of an officer for promotion, the board shall take into account the following-*
- *(a) result of professional examination at various stages;*
- *(b) reports made on the officer on specified courses;*
- *(c) confidential reports and recommendations made by the officer's commanding officer*
- *(d) professional experience in the profession; and (e) establishment.*
- *(2) in order to be considered as a professional in the army, the officer shall fulfill the conditions specified in the Ninth Schedule to these Regulations.* Emphasis mine.

The Ninth Schedule to the Regulations sets out prerequisites of who professionals in the army are. It opines that;

To be considered a professional in the army, one has to fulfill the following conditions-

- *(a) he must declare that he wants to join the army as a professional and he should be ready to undergo basic military training.* Emphasis mine.
- *(b) he must possess a university degree or its equivalent from a recognized institution.*
- *(c) he should be a registered or registerable members of a recognized professional organization; except that a university graduate upon completion of basic military training should go for cadet course within one year of that completion; and*

(d) he must be a practicing members of that profession. Emphasis mine.

It is therefore the submission of the Respondent that the prerequisite conditions for one to be considered a professional and earn a professional allowance under the regulations; one has to satisfy all the conditions set out in the Ninth Schedule to the Regulations.

In addition to the above, it is the Respondent's submission that for one to be considered a professional under the army, he must join the army in a professional capacity as set out in Regulation 24 (2) of the Uganda Peoples Defence Forces (Conditions of Service)(Officers) Regulations or in the alternative declare that he wants to be employed in the army as a professional to benefit from this provision.

It was also the Respondent's submission that the Applicant does not meet the conditions precedent set out in the in clause (d) of the Ninth Schedule of the Uganda Peoples Defence Forces (Conditions of Service)(Officers) Regulations which is that he must be a practicing member of that profession.

Under regulation 2(g) of the UPDF (Conditions of Service)(Officers) Regulations; "Pensionable emoluments" means the rate of pay excluding additional pay, in issue to an officer or a man at the time of his discharge; except that where there has been a change in the rate of monthly pay within three years immediately preceding the date of retirement or discharge.

Under section 1(f) of the Pensions Act Cap 286, pensionable emoluments include salary but not professional allowances. He prayed that professional allowance claim be disallowed.

In resolving this issue court has critically analysed the facts and circumstances surrounding the applicant's case. He joined the defence forces in 2001 as a cadet officer and served through the ranks to Captain and undertook various courses.

The applicant for 16 years and 279 days has been a member of Army and acquired the necessary skills in the course of his employment as a member of the UPDF. He indeed pursued his additional qualifications while in employment but it is not clear whether it was upon recommendation of the Employer or not.

The applicant has not stated the nature of work or assignments he was doing in the course of his employment in order for this court to assess whether as a professional within the UPDF and is entitled to benefits of professional allowance.

The applicant has not stated the qualification which formed the basis of his recruitment as a cadet in 2001. By the applicant going back to school was his enhancing his earlier qualification and was it necessary or he decided to change profession for his personal benefit. All this was not stated in his affidavit in order to enable the court to evaluate the evidence.

The applicant has not adduced evidence to show whether he ever applied for promotion to any rank so that his qualifications could be considered by the Promotion Board as provided under regulation 24 and 29 of the Uganda Peoples Defence Forces (Conditions of Service)(Officers) regulations.

The court is not able to establish that the applicant was employed as a professional (lawyer) within the army.

The applicant's counsel has relied upon the case of *RO/8074 Major Noel Drago Nuwe (Retired) v Attorney General Miscellaneous Cause No. 428 of 2017* and indeed drafted the application in a similar manner (verbatim). The case is quite distinguishable on the facts and circumstances as presented and the arguments made in court.

In that case, the applicant joined the forces as a "kadogo" and rose through the ranks up to Major, went back to school and attained the qualifications of lawyer and was enrolled as an Advocate. The same academic qualifications were presented to the employers and he was deployed in that capacity as a personal assistant. There was ample evidence before court upon which his case was determined. In this case the applicant just attached his academic qualifications and in the courts view this was not enough to prove his status in the UPDF. It is not enough to throw academic documents to court without any explanation.

It is a well settled principle of law in a matter of applying precedents that the Court should not place reliance on decisions, without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed.

The observations of the Courts are neither to be read as *Euclid's theorems* nor as provisions of Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper, because one addition or different fact may make a world of difference between conclusions in two cases. See *Union of India v Arulmozhi Iniarasu [2011] AIR 2731; Bharat Petroleum Corp. Ltd v N. R. Vairamani [2004] 8 SCC 579*

A judgment/ruling of the Court must be read as a whole and the ratio therefrom is required to be culled out from reading the same in its entirety and not only part of it. Reliance on the decision, without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. See *Jitendra Kumar Singh v State of Uttar Pradesh [2010] SCC 119*

This issue is accordingly resolved in the negative.

Whether the Applicant is entitled to calculation of his retirement benefits basing on a consolidated pay.

This issue fails due to the resolution of the above issue.

Whether the Applicant is entitled to payment in lieu of untaken leave.

The applicant stated that he entitled to payment of leave not taken for 16 years amounting to 46,500,000/= which was not paid.

The applicant's counsel submitted that section 94(4) of the UPDF Act, 2005 provides that an officer or militant shall be paid cash in lieu of annual leave not taken by him or her. See also regulation 14 in the sixth schedule of UPDF (Conditions of Service)(Officers) Regulations SI 307-2

The respondent counsel submitted that the applicant failed to prove that he applied for leave and it was denied before he can lay claim for payment in lieu.

Since the respondent did not respond to the applicant's affidavit in reply, this court takes that the fact of not taking the leave was admitted and the same remained unchallenged. The applicant has a duty to prove his case on balance of probabilities.

The applicant is entitled to payment in lieu of leave for 16 years and 279 days of service.

Whether the Applicant is entitled to General and aggravated damages?

The applicant has not proved by evidence any general damages and there is no justification for the award of any aggravated damages.

Whether there are any other remedies available to the applicant?

- (a) The applicant is entitled to payment in lieu of untaken leave amounting of 16 years and 279 days.
- (b) The applicant is awarded interest of 15% on (a) since 31st July 2018 until payment in full.
- (c) Each party should bear their costs.

I so order

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

SSEKAANA MUSA JUDGE

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Prepared on 13 October 2026 · Esheria