THE REPUBLIC O F UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE CLAIM No. 52/2015
(Arising from HCT-CS NO. 367/2015)

BETWEEN

KABI GEOFREY..... CLAIMANT

AND

NATIONAL UNION OF PROTECTION AND AGRICULTURAL WORKERS UNION……..RESPONDENT

BEFORE

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

PANELISTS

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

AWARD

The claimant filed this claim against the respondent alleging that he was illegally dismissed from his job as General Treasurer of the respondent.

In a reply to the memorandum of claim, the respondent denied dismissing the claimant and pleaded that instead the claimant resigned from his job.

Briefly the facts are that the claimant originally employed as Accounts clerk was later on employed as acting National Treasurer and later on was elected to this post by the appropriate organ of the respondent.

In May 2010 he wrote to the respondent demanding payment of salary arrears and gratuity and this demand was interpreted by the respondent as resignation from his job and demanded that he vacates office. According to him the respondent created a hostile working environment that forced him to handover office to his deputy.

Representations:

Initially the respondent was represented by Mr. Munyamaso and the claimant by Mr. Okanya. However when the claim was called for hearing on 15/2/2019, none appeared for the respondent and being satisfied that counsel was aware of the date of hearing, this court proceeded exparte.

Issues

Because both counsel failed to get in touch to agree on scheduling, there are no agreed issues on the record. Even when counsel for the claimant proceeded exparte he did not frame any issues either at the beginning of the hearing or in his final submission. This notwithstanding, we hereby frame the issues as:

1. **Whether the respondent dismissed the claimant and if so whether the dismissal was illegal.**
2. **What are the remedies**?

Submissions:

Counsel made oral submissions immediately after leading evidence from the claimant who in his evidence had reiterated what was contained in his memorandum of claim as summarized above in the facts.

In his submission Counsel contended that the refusal of the respondent to accept an explanation from the claimant as to why he applied for salary arrears and gratuity and the respondent's demand for the claimant to handover office amounted to unlawful termination.

He argued that the standing orders for elected and fulltime employees entitled him to salary arrears and gratuity as provided for in **Section 16** thereof (**Exhibit 1)**. A request for payment by the claimant for his entitlement therefore could not be a reason for termination without hearing.

Decision of Court:

Section 16 of "the terms and conditions of service and standing orders for the elected and fulltime employees of the Union" provided as follows:

"Gratuity

Qualifying period shall be 5 years of unbroken service and shall be paid as under:-

(i) **The formula for calculation shall be 10% of annual salary per completed year of service X number of years served. This applies to elected full time officers**.

(ii) For Heads of Department, appointed employees and support staff the formula shall be 10% of annual salary per completed year of service X number of years served.

(iii) In the event of death before qualifying period, calculation of gratuity shall be on prorate basis based on annual salary.

(iv) Part-time employees of the Union, who are elected to the post of National Chairman. Branch Secretary, shall receive three (3) months part time allowance before they go for re-election.

In his letter addressed to the Chairman of the respondent dated 17/5/2010 the claimant stated:

"Dear Brother,

Re: GRATUITY AND SALARY ARREARS

I should like to request your indulgence in the preparation and authorization of the above mentioned subject accruing to me over the last 20 years and 5 months.

This is in accordance with section 16 of our terms and conditions of service. I shall be very grateful for your positive action.

In reply to the above letter the Chairman in a later dated 2/7/2010 replied…….

" I wish to take this opportunity to thank you for serving the organization. since you are no longer interested in serving the organisation therefore, I wish to inform you that with effect from 1st July, 2010 your resignation is accepted. You are therefore requested to handover to your deputy General Treasurer. Arrangements for paying your gratuity shall be discussed by NEC……."

In a follow-up letter dated 5/7/2010 the claimant denied ever resigning and insisted that he only requested payment of his gratuity and salary arrears **"before the forth coming Guinquinneal Delegates Conference, given the silent nature of**

Section 16(iii) of the terms and conditions of service as to when fulltime elected officers were to be paid".

The Chairman of the respondent by letter dated 23/7/2010 stated that:

> "**The request for payment of gratuity and salary arrears for the past 20 years and 5 months up to May 2010, the period you served the organisation, is a clear indication of no more interest to work with and hence resigning from the organisation…….."**

Gratuity in the work place ordinarily means a payment package arranged by the employer to their employee for the good work done over a period of time. The employer expresses his gratitude to the employee through this package. Ordinarily gratuity is provided for in the contract of service together with the details on how much it will be, how it will be calculated and when it will be payable.

In the instant case the qualifying period for payment of gratuity according to **Section 16** above mentioned was **5 years unbroken service**. There is no doubt that by the time the claimant requested to be paid he had qualified and therefore he was entitled to gratuity. He contended that he applied at the time he did because **Section 16** was silent about when the same was due. The claimant was a fulltime elected official of the respondent. On perusal of the terms and conditions of service **exhibit CI** there is no retirement age provided therein on which this Court could hinge gratuity . There is no provision that stipulated the time when any of the employees/officials of the respondent would be able to access their gratuity. It was not therefore uncalled for nor out of order for the claimant to have requested for this payment at the time he did. It is our considered opinion that the National Chairman should have advised the claimant as to when his gratuity would be payable in the absence of the time period in the terms and condition of service. This was especially so after the claimant clarified to the Chairman that his intention was not to resign but to get paid his gratuity.

Section 16 above mentioned is very clear on how gratuity is to be calculated and as to who qualifies for it.

The intention of the respondent in drafting these terms and conditions was that if any officer provided an unbroken service to the respondent for a minimum of 5 years, that officer was entitled to gratuity whether or not he/she resigned at the

end of the period served. The calculation of gratuity is provided for under **Section 16(i)** as follows:

> **"The formula for calculation shall be 10% of annual salary per completed year of service X number of years served. This applies to elected full time officer."**

The claimant was an elected fulltime officer, as General Treasurer of the respondent. As discussed above he was entitled to gratuity calculated in the manner provided for in 16(i) above. We therefore agree with the submission of counsel for the claimant that the demand for gratuity by the claimant did not constitute resignation.

The question is – **did the directive of the Chairman for the claimant to handover to his Deputy constitute dismissal?**

Section 65 of the Employment Act provides

> **"65 Termination**
>
> 1. **Termination shall be deemed to take place in the following instances**
>   **(a) ….**
>   **(b) ….**
>   **(c) 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.**
> 2. **The date of termination shall, unless the contrary is stated, be deemed to be -**
>   **a) ….**
>   **b) ….**
>   **c) In the circumstances governed by sub-section (1)(c) or subsection 1(d the date when the employee ceases to work for the employer.**

Once termination is said to have been effected in accordance with the above section of the law, it is said to constitute constructive dismissal.

In **Nyakabwa Abwooli vs Security 2000 Ltd LDC 108/2014** this court held that once the employer removes instruments of an office for which the employee is employed to occupy and instructs another employee take up such instruments

without providing an alternative to the employee, such act constitutes termination of employment by reason of the employer's conduct. (**see also LDR 233/2015, Suzanna Haarbosch Vs Kamtech Logistics**). In the instant case the claimant applied for what he was entitled to. Although the respondent recognized this entitlement it reacted as though the claimant had resigned. The conduct of the chairman of refusing to appreciate that requesting for such entitlement at the time the claimant did, did not constitute resignation was in our view unreasonable conduct on the part of the chairman of the respondent. This is especially so when the claimant explained that the request was in accordance with the stated terms and conditions of service.

As if that was not enough, the chairman, according to the claimant mounted a lot of pressure for him to leave office forcing him to handover to his Deputy. Just as held in the **Nyakabwa Case**, the respondent in the instant case ordered the claimant to handover the instruments of the office he was occupying without creating an alternative on the assumption that the claimant had resigned which was not the case. In both of the above cases this Court held that the termination was in accordance with **section 65(1)(c)** and that it constituted not only constructive dismissal but also that the dismissal was unlawful. We have no reason to depart from this position and we therefore find that the claimant was unlawfully dismissed.

REMEDIES:

1) **Salary Arrears:**
   There is no doubt that the claimant was employed by the respondent and that he was entitled to a salary. By letter dated 30/11/989, the claimant was appointed as an accounts clerk by the General Secretary at a Salary of 20,000/= per month. By letter dated 1/10/2008, the National Chairman of the respondent informed the claimant that his salary was increased from, 1,900/000/= to 2,300,000/= and that he was entitled to a vehicle /transport allowance of 750,000/= with effect from 1st October 20008. It is not clear from the evidence of the claimant from which date or month his salary raised from 20,000/= to 1,900,000/=. His written witness statement is silent and there is no document on the record suggesting either increase of salary or fresh appointment on different salary terms except the one dated 1/10/2008 above mentioned.

In his testimony the claimant informed court he was appointed acting treasurer in 1994 but there is no such appointment letter on the record. We have no double that he was elected treasurer since the claimant of the respondent in his communication of 2nd July 2010 addressed him as **"Bro Kabi Geofrey General Treasurer – NUPAWU"** as he reacted to the request for Gratuity and salary arrears.

Again it is not clear from the evidence which date or month his election as National treasurer was done and how much he was to earn from this date as treasurer. We do not see anything like specific terms and conditions of service as a National treasurer, except in the letter dated 1/10/2008 mentioned above.

In his written witness statement the claimant tabulated each year 1998-2010 with a corresponding figure of an amount in Uganda shillings without showing what it was for although this court can infer that what he meant was salary arrears.

On internalizing this table it shows that each year from 2007-2010 the arrears owed constituted a different sum implying that he was paid for some of the months. It is not indicated how much he earned and was paid per month and how much was in arrears.

The arrears during 1998-2006 are dumped together and totals to 18,161,000/-. The total claimed from 1998-2010 is 40,893,000/=.

It is only in the supplementary written submissions that an attempt is done to show the specific arrears in specific months from 1999-2010.

As already shown above, the claimant was appointed on 30/11/1989 at a salary of 20,000/=. In March 1998 according to the table made by counsel in his submission, the claimant was owed 350,000/= and in July the same year he was owed 400,000/= making a total of 750,000/= as arrears during the year 1998. The question for this court is when and how did the salary rise from 20,000/= to 350,000/= in Mach and then to 400,000/= in July?

In our considered opinion the claimant owed this court evidence to explain the inconsistencies in the salary arrears in each of the months as put in the submissions of his advocates.

Apart from the inconsistencies in the amounts owed per month in arrears, it is our considered opinion that the claimant needed to do more than claim that he was not paid in 1998 and the continued working without pay until July 2010 when bad blood started oozing from both claimant and respondent. This state of affairs, without any further explanation is not believable by this court.

In the absence of evidence that the claimant was entitled to a certain salary other than the 20,000/= as Accounts clerk, in the absence of evidence of which month the claimant started earning 1,900,000/= as put in the letter of the National Chairman dated 1/10/2008 increasing salary from 1,900,000/= to 2,300,000/=, and given the discrepancies in the claim of arrears above, it is our considered opinion that the claimant has not proved that he earned a total of 40,893,000/= in salary arrears and this claim is hereby rejected.

Gratuity:

Section 16 of the Terms and Conditions of Service and standing orders of the respondent provided.

"16. Gratuity:

The formula for calculation shall be 10% of annual salary per contested year of service and number of years served".

The claimant worked from 1/12/89 up to 2nd July 2010 when according to his witness statement, paragraph 18, he was forced out of service when he had made 20 years and 06 months. Using the above formula calculated at the claimants salary of 2.3m at the time of his dismissal he is hereby awarded 57,500,000/= for the 20 1/2 years that he had worked.

Annual Leave:

Although by virtue of **Section 54 of the Employment Act,** the claimant was entitled to leave, such entitlement only ensues once an employee

expresses interest in taking the same and the employer programmes the leave so as to plan for somebody else to do the work of such employee who is on leave. In the event that an employee does not show interest in taking his leave he is estopped from denying that he took a personal choice not take his leave and in the event of dismissal or termination he cannot claim for payment in lieu of leave that he/she in first place was not interested in and opted not to take (**see Edace Michael vs Watoto Child Ministries L.D.Apeal 21/2015)**

In the instant case, no evidence was shown by the claimant that he applied for leave and that the employer denied him to take it. Consequently this prayer is denied.

Vehicle allowance:

According to the letter of the National Chairman dated 1/10/2008 increasing the salary of the claimant to 2,300,000/= per month, the claimant was entitled in addition, to 750,000/= with effect from 1/10/2008. We interpret this to mean an addition to the salary payment unless the contrary is proved. Accordingly we allow the same allowance from 1/10/2008 – 2/7/2010 which is 21 months at a total of 15,750,000/=.

According to the **Terms and Conditions of Service and Standing Orders** of the Respondent, **Clause 24**, persons who were to be terminated would be entitled to 4 months' notice if they had served for 10 years and above. Since the claimant falls in this category and he was not provided with any notice, we allow 4 months in lieu of notice which is 9,200,000/=.

NSSF Savings & or Contribution:

The **NSSF Act Section 12** obliges an employer to deduct 5% of an employee's salary and also an employer to contribute 10% of the salary of the employee and deposit it with NSSF for the Social Security of the employee.

Although the claimant in his memorandum of claim prayed for 113,002,500/= he did not elaborate on how this figure accumulated. Neither did he do so in his evidence. In his witness written statement on

oath he did not show court whether the money was deducted from his salary and not remitted to NSSF.

In the case of **AIJUKYE STANELY VS BARCLAYS BANK (U) LTD, LDC 243/2014** this court held

> **"In order for an employee to sustain a claim under Section 12 of the NSSF Act, he must prove that 5% was deducted from his salary and that it was not remitted to the Fund, thereby depriving him of part of his own wage that he is entitled to …… failure on the part of the employer to deduct the 5% and to contribute 10% therefore paying the 100% to the employee, only constitutes a criminal offence under Section 44 of the NSSF Act but such failure does not create a cause of action against the employer by the employee, the latter having received all his emoluments".**

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

BEFORE

1. Hon. Chief Judge RuhindaAsaphNtengye ……..
2. Hon. Lady Justice Lillian Linda TumusiimeMugisha ……..

PANELISTS

1. Mr. Ebyau Fidel ……..
2. Mr. F. X. Mubuuke ……..
3. Ms. Mugambwa Nganzi Harriet ……..

Dated: 12/04/2019