THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 014 OF 2014
(ARISING FROM MGLSD – 230 ACL/I/2014)

NAFUNA CATHERINE ……..CLAIMANT

VERSUS

DOTT SERVICES LIMITED ……..…RESPONDENT

BEFORE

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

PANELISTS

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Mr. Anthony Wanyama

AWARD

Brief Facts

The claimant filed this claim against the respondent claiming that under a contract of service she was employed by the respondent on 12/01/2011. In August 2014, she was granted a 14 days leave but having fallen sick she returned to work 3 days late where upon she was terminated without any hearing or any reason. According to her, she was informed to report to the Human Resource Manager where she was handed 1,307,700/= as her terminal benefits.

In reply the respondent denied having ever employed the claimant and claimed that the claimant was a sub-contractor providing labour service on a piece of work basis. Once work was completed she was informed to "**keep at bay"** and wait for more work at an appropriate time.

Although the parties did not file any scheduling memorandum to frame the legal issues, in their submissions they both pointed out issues as:

1) **Whether the claimant's dismissal was lawful**
2) **Whether the claimant was paid her full terminal benefits**

3) What remedies available to the claimant?

From the facts of the case we would like to re-frame the first issue in the following manner: **whether the claimant was an employee of the respondent and if so whether she was dismissed unlawfully**?

It was the evidence of the claimant that by **"Annexure A"** she was appointed to the position of Office Engineer on 12/1/2011 and that she immediately started to work.

On the other hand it was the evidence of the respondent that **"Annexure A"** was only a notification for the claimant to start work which she started after executing a retainer sub-contract agreement.

Annexure "A" on the record is a letter addressed to the claimant and it reads

RE: LOT D: STAGED RECONSTRUCTION OF TORORO – MBALE ROAD CONTRACT NO: UNRA/WORKDS/2009 – 10/00001/02/04

SUB: REPORTING FOR WORK

Dear Catherine,

In consideration of the referral by the main office and after careful evaluation of your CV and academic transcript, we are considering you for the position of office Engineer to handle matters with regard to quantity, document control, and other related office works which may be assigned from time to time.

Your work at DOTT Camp site in Busiu, Mbale starts on this date.

This is for your information.

"RI" on the court record, in the respondent's trial bundle, is a **"Retainer sub-contract Agreement for offer of labour contract work services**. The services according to the document are of office Engineer on the site location of Mbale-Soroti Road project and the claimant is said to be the "sub-contractor**".**

On careful perusal of **"Annexure A"** we form the opinion that the letter was advising the claimant that while the respondent was considering officially to offer her a position in the organisation she could begin working as office Engineer. As

the claimant clearly stated in her evidence she got the job through connections that her father had with officials of the respondent. It was through these connections that the contracts manager one Ferdie Reburiano wrote the offer in **"Annexure A"** in anticipation of a regularisation of the appointment. It is our position that **"Annexure A"** was not an appointment letter or a contract for work but as the respondent witness put it, it was a notification for her to start work and in our view, as the respondent regularised the appointment.

Although the claimant denied ever signing the sub-contract agreement we form the opinion that she signed it. When she was asked about her signature in cross examination she said **"This is my signature but I don't know how it occurred there"**

Given the circumstances under which she was employed, we do not rule out the possibility that the claimant signed the sub-contract agreement. We do not find any reason on the part of the respondent to impose or forge the signature of the claimant onto the sub-contract agreement. This especially so when we believe that **"Annexure A"** was a notification of her job pending regularisation of the job offer that the claimant received by virtue of **"Annexure A"**.

The question however is whether the claimant performed the duties as prescribed under the sub-contract agreement as a sub contractor or whether she performed her work as an ordinary employee of the respondent?

Article I of the sub-contract provided:

The purpose of this sub-contract is to assist in quick expedition of works by providing sub-contract labour services to execute assigned sub contract piece works. And to attend to any defects arising from executed piece works by the sub-contractor until approved by the supervising Engineer ……..."

Article 2 A, of the sub-contract provided

> **"This sub-contract will serve for a period effective from the date of the sub-contract set forth to the date when assigned piece of works of the project are approved by either supervising Engineer in charge or the project consultant whichever deems necessary.**

Article 5 of the sub-contract provided

> **"Payment of the sub-contractors assigned piece works shall be on submission of verified and approved measurement sheets and payments to be effected by the site accountant.**

Article 7 provided for terms of service and stated

> **"It is understood that the sub-contractor will provide labour services on a piece work basis to Dott Services limited. The sub-contractor further acknowledges that he/she engaged labourers are not employees of Dott Services limited."**

The claimant testified that she was paid by the respondent as office Engineer 500,000/= per month and that this was for a continuous period of 45 months. It was not disputed that she was on the payroll for 500,000/= per month, although the respondent disputed the period of 45 months. The witness for the respondent one Ssentumbwe testified that the purpose of the sub-contract was to assist the respondent execute assigned contract works and that the claimant would be paid for completed assignments.

On perusal of the subs-contract Agreement and the evidence related to the nature of the work of the claimant and the method of her payment, it is difficult to comprehend how she executed her work strictly under the sub-contract agreement. There was no evidence suggesting that she was engaged for **"an assigned piece of works"** as provided for in the sub-contract. As a sub-contractor for labour services, this court would expect the claimant to have been a sub-supervisor of a number of people providing labour who would be answerable and payable by her from the sub-contract arrangement. She would not be expected to draw a monthly salary from the respondent without a specified work piece load.

The claimant having adduced evidence that she was employed as office Engineer at a salary of 500,000/= per month, the respondent was under the burden to prove that in accordance with the sub-contract Agreement there were pieces of works assigned specifically for the claimant to handle and that payment was only for such specific works. By Annexure **"B"** dated 25/2/2012, the claimant requested for performance evaluation and increase of salary and one Roy Ruiz commented on the request that the claimant deserved an increase of salary. The respondent's witness confirmed in cross examination that a monthly pay was

agreed to be paid to the claimant although he would rather call it a retainer remuneration and not a salary. In ordinary terms a sub-contractor is an individual or a business that signs a contract to perform part or all of the obligations of another's contract. It is not clear whether the claimant was hired by the respondent to perform certain aspects under a main contract involving the respondent and another party. It was clear that she was paid a monthly remuneration by the respondent for her work as an office Engineer.

Section 2 of the Employment Act defines an employee as:

> **"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 a parastatal organisation but excludes a member of the Uganda People's Defence Forces**

Given the above definition of an employee, and the method of engagement of the claimant by the respondent in the work that she did as office engineer,and given that she was paid directly by the respondent a monthly remuneration and was considered competent for an increase of salary upon her request, we find that she was indeed an employee of the respondent and not a sub-contractor.

Was she then dismissed unlawfully?

There is overwhelming evidence on the record which is admitted by the claimant that she did not work for 14 days. Although she applied for leave for these days there is no evidence that the leave was granted. In cross examination she testified that the grant of leave was by her supervisor one Joash Nyakango who verbally approved the leave. Her supervisor was not called either to deny or accept that he participated in this process. Whereas under **section 54 of the Employment Act** an employee is entitled to leave, such leave is ordinarily applied for and granted by the employer depending on the availability of other employees to be deployed to handle duties of whoever is on leave. If necessary the employer has a right to defer one's leave to an appropriate time during the course of the calendar year or to provide payment in lieu if the employee accepts such proposal.(see: **MBIIKA DENNIS vs CENTENARY BANK L.D.C.023/2014 and**

EDACE MICHAEL vs WATOTO CHILD CARE MINISTRIES L.D Appeal 21/2015) . Unlike in FRORENCE MUFUMBAVS U.D.B LDC 138/2014, the move to go on leave in this case was initiated by the claimant whereas the move in the **MUFUMBA case** was initiated by the respondent who advised the claimant and other staff to take leave by a certain date and for that matter this court held that the fact that the claimant did not get a signed approval of the chief executive officer could not vitiate the claimant's having officially taken leave.

In the instant case it is clear that by "**Annexure D"** the claimant formally applied for 14 days of prelate leave on 20/08/2014. It was expected that her employer would either accept or defer her leave. The application was not information to management that the claimant was proceeding on leave. It was seeking for permission to be on leave and the claimant had not right to proceed on leave without such permission by grant of the leave she sought. We do not accept her evidence that she was orally granted leave by one Nyakango because there was no independent evidence to corroborate her evidence. An employee's leave days under **section 54** are so central in the relationship between the employee and the employer since it may affect the general production of the employer whose employees goes on leave without planning for alternative labour. An employee's denial of leave during the course of the year may also affect production. Therefore evidence about compliance or non-compliance of **Section 54 of the Employment Act** has to be strictly evaluated. Accordingly we find that the claimant proceeded on leave without being granted permission to do so. The claimant having gone on leave without permission, returned to work 3 days later because she was sick.

Under **section 55 of the Employment Act** sickness is a reason for someone to be absent from work but ordinarily the employer needs to be informed of this inability of the employee to come to work, unless the employee is too sick to inform his/her employee or the circumstances are such that such information cannot be relayed to the employer. The claimant was not admitted and courtesy demanded that she informed her employer that she had a bout of malaria or pregnancy complications that would not enable her to return to work in time.

Every employee who is engaged on a contract of service is expected to report every working day at his/her work place at the agreed time and leave the working

place at the agreed time. The claimant having initially proceeded on leave without permission and having overstayed on the self-imposed leave for 3 days without informing her employer, in our view constituted a fundamental breach of the obligation of the claimant to report to work every working day.

Section 69 of the Employment Act provides

Summary termination:

(1) Summary termination shall take place when an employer terminates the services of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he or she has fundamentally broken his or obligations arising under the contract of service.

We accordingly find that the respondent lawfully terminated the service of the claimant as it was justifiable under the above section, for fundamentally breaching her obligations.

Remedies:

Ordinarily after finding that the respondent lawfully terminated the services of the claimant, no remedies would ensue for the claimant.

However, it is clear from the evidence that the claimant was not given any opportunity to explain why she went on leave without permission and why she overstayed on leave.

Section 66(4)provides

Notification and hearing before termination:

“Irrespective of whether any dismissal which is a summary dismissal is justified or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks net pay.”

Consequently we allow the claimant a net pay for 4 weeks in accordance with the above section of the law. The claim fails and it is dismissed with no orders as to costs.

Singed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye ……

2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha ……

Panelists:

1. Mr. Rwomushana Reuben Jack ……
2. Ms. Rose Gidongo ……
3. Mr. Anthony Wanyama ……

Dated: 30/04/2019