

THE REPUBLIC OF UGANDA
THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 327/2015
(ARISING FROM NAKAWA LABOUR OFFICE NCD/C.B/239/2015)

OCHWO JOHN..... CLAIMANT

VERSUS

APPLIANCE WORLD LIMITED.....RESPONDENT

BEFORE

1. The Hon. Chief Judge, Asaph Ruhinda Ntengye
2. The Hon. Judge, Linda Lillian Tumusiime Mugisha

Panelists

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

AWARD

The claimant by memorandum of claim filed this claim against the respondent alleging that the respondent unlawfully and unfairly terminated his services. He prayed the court to grant him a declaration that the termination was unfair and unlawful, severance pay, punitive damages, general damages, interest and cost of the suit.

Although the respondent filed a memorandum in reply, when the matter was called on 15/01/2019 for hearing, neither the respondent nor counsel were in court despite having been served. This court therefore proceeded exparte.

REPRESENTATIONS

Mr. Odomoi Simon represented the claimant, Previously on 10/05/2018, Mr. Ejoku holding brief for Mr. Tom Magezi had informed court that the respondent agreed to settle out of court. However on subsequent days of 3/07/2018 and 15/01/2019, neither the respondent nor counsel appeared.

Brief facts:

By letter of appointment dated 08/10/2014 the claimant was employed by the respondent on a 4 year renewable contract which would commence on 01/11/2014 and expire on 31/10/2018. He was to be on probation for 3 months. By letter dated 21/7/2015 the claimant was terminated “ **due to gross misconduct by asking Store keeper to release items to you for your personal use**”.

On 31/08/2015 the claimant through his lawyers lodged a complaint to the Labour Officer and eventually the matter was referred to this court.

Evidence:

The claimant filed a sworn written witness statement and in court he was once again to put to oath. In his statement he testified that after completion of probationary period he was

automatically confirmed and was earning Ugx. **2,175,000/=** per month until 24/7/2015 when he was terminated. According to him, a few days before his dismissal some of the workers were accused of causing loss of some property and were handed over to police. When he was dismissed he sought audience with the Managing Director over the allegations in the letter of termination but he was denied the opportunity. Neither investigations nor a hearing were carried out to establish his culpability.

Issues:

The issues as set out by the claimant in the scheduling memorandum are:

- (1) Whether the claimant's dismissal from employment was lawful.
- (2) What remedies are available to the parties?

Submission:

On the 1st issue, counsel submitted strongly that the reasons in the letter of dismissal were not proved as required by **Section 68 of the employment Act**, since the items alleged to have been demanded by the claimant were not even listed in the dismissal letter. According to counsel, the allegations in the letter of dismissal were speculative since the claimant was neither questioned by the responded nor handed over to the police. He submitted that the right to a hearing as prescribed by **Article 28 of the Constitution and Section 66 (1-3) of the employment Act** was abrogated by the respondent. He relied on the authorities of **Clovince Kalengutsa Tembo Vs Bugove Hydro Ltd. LDR 138/2015**, and **Akankunda Anne Vs Salam Vocational Centre Ltd. LDC 41/2016**. Consequently, he argued, the dismissal was not justified as it was unfair and unlawful.

On the issue of remedies, counsel argued that the claimant's contract provided for 18 days per year as opposed to 21 days per year provided for in **Section 54(1)(a) and (3)**. For this reason counsel submitted that the court ought to conclude that the claimant accrued 15.75 leave days in 9 months. It was counsel's submission that the claimant had asked to take leave but was advised to do so at the end of the year.

Counsel prayed for payment in lieu of notice in accordance with **section 58 of the Employment Act**, severance allowance, general damages, punitive damages, interest and costs.

Decision of court:

The letter of termination of employment reads **“while thanking for the time and effort expended during your time with Appliance World I regret to have to inform you that management decided to terminate your employment....due to gross misconduct by asking storekeepers to release items to you for your personal use.**

This termination is classified as summary dismissal without any terminal benefits and the notice is effective on receipt...”

Under **section 68 of the Employment act**, the employer is obliged to prove the reason for dismissal which reason must constitute matters which the employer believes genuinely to exist at the time of dismissal.

Under **section 66 of the Employment Act**, where an employee is accused of misconduct or poor performance, the employer is obliged to explain to the employee the reason for dismissal and allow the employee to explain himself. In other words the employer must institute a disciplinary hearing at which the charges are explained to the employee who is

given sufficient time to respond to the said charges before any action to dismiss or terminate him is made.

Under **section 69 of the Employment Act**, the employer is mandated to dismiss the employee summarily without any notice where the employee fundamentally breaches his/her obligations under the contract. Even then the Employer is required to provide a hearing as stipulated in **Section 66(4)**.

In the instant case the reason for dismissal as stipulated in the termination letter is “**gross misconduct**”. There is no evidence whatsoever on the court record that the claimant was formally informed of the aspects of gross misconduct he was accused of and that he was given an opportunity to explain himself as stipulated under **section 66 of the Employment Act**.

He was accused of asking store keepers to release some items to him for his personal use but as counsel submitted, there is nothing on the record to substantiate this allegation since no items are mentioned and no store keeper is on the record for the purpose of revealing the gross misconduct. This was in total disregard of **section 66 of the Employment Act** which is fundamental and therefore amounted to an illegality and unfairness of the dismissal.

The termination letter also described the dismissal as summary dismissal. As pointed out above, summary dismissal is only legal if it is done within the meaning of **Section 69 of the Employment Act**. This means that the employer must prove that by his conduct the employee fundamentally breached the terms of his contract. For example, if a guard employed to guard a residential home, sleeps on the job and thieves break into the house, he/she may be dismissed summarily since his fundamental duty is to watch over the property of the employer. Note that even in this case there must be evidence of the laxity of the guard and as noted above it is a requirement that the guard be given a hearing.

In the instant case no evidence is on the record to show that the claimant was in breach of a fundamental duty imposed on him by his contract. Nothing showed that he breached any of his duties as prescribed in the contract of employment. The dismissal therefore was classified wrongly as a summary dismissal and there being no evidence of breach of **section 69 of the Employment Act** it mounted to illegal and unfair dismissal.

In his submission counsel for the claimant argued that it was mandatory to give the claimant a notice of 3 months.

The claimant had worked for 9 months before he was dismissed. However **section 58(3)** provides:

**“The notice required to be given by an employer under this section shall be
(a) Not less than two weeks where the employee has been employed for more than 6 months but less than one year”.**

The above section of the law provides for a minimum period of notice before termination. The employment contract of the claimant provided

“In the event that either party would like to terminate the contract prior to its expiry ... the following notice period applicable to ether party will apply.

- **One (1) months’ notice during the first month of employment.**
- **Two (2) months’ notice during your probation period but after the first month.**
- **Three (3) months’ period after your probation period.”**

Given the above express provisions relating to periods of notice, and given that the claimant had worked for 9 months including a three months' probationary period in accordance with the contract, we agree with counsel for the claimant that his client was entitled to 3 months' notice.

The dismissal having been in breach of the terms relating to notice periods amounted to illegal and unfair dismissal.

All in all the dismissal having been in breach of **sections 68, 66, and 69 of the Employment Act** as well as in breach of the contract of employment relating to notice periods, we find that it was unfair and unlawful. The first issue is in the negative.

The second issue is about **remedies**

(a) Leave allowance

Counsel argued strongly that the claimant was entitled to leave days not taken during his 9 months of employment. However this court has held that although leave periods are an entitlement of an employee, once an employee does not express interest in taking his/her leave days and the employer does not either encourage or force the employee to take such leave days, the employee forfeits the leave entitlement. This is premised on the fact that the employer is entitled to plan leave days of his employees so that once one employee is on leave an arrangement is put in place as to who will perform the duties of the one on leave. The employer will only be required to pay in lieu of leave if the employee applies for leave and the employer rejects the application on the ground that there is no sufficient personnel or on any other ground (see: **EDACE MICHAEL VS WATOTO CHILD CARE MINISTRIES L.D. APPEAL 21/2015**)

Nothing on the record shows that the claimant expressed a wish to go on leave and the respondent rejected the same. On this ground alone leave allowance is disallowed.

(b) Payment in lieu of notice

As discussed above, the claimant was entitled to 3 months' notice in accordance with his terms of the contract of service. Since he was not given such notice, we allow 3 months' salary in lieu of notice which is Ugx. **6,525,000/=**.

(c) Severance

Under **section 87(a) of the employment Act**, the claimant is entitled to severance allowance and **section 89 of the same Act** leaves the calculation of the amount of severance in the hands of both the employer and the employee. Given this state of affairs this court in **Donna Kamuli Vs DFCU Bank** held that for every year worked the employee would be entitled to 1 month's salary. The claimant worked from 8/10/2014 up to 21/07/2015 making 09 months and therefore at 2,175,000shs per month he is entitled to **1,631,250shs**. This was the position taken by this Court in **Labour Miscellaneous Application 70/2019** which took into account the fact that under section 87 above mentioned an employee who has been in continuous service for at **least 06 Months** is entitled to severance allowance.

(d) General damages

We agree entirely with the submission of counsel for the claimant on the factors to be considered in awarding damages to the claimant. Yes, the claimant had reasonable expectations of continuous service for 4 years and he reasonably expected the contract would be extended as provided for in the same contract. Yes, this arrangement was brought to an abrupt end without any terminal benefits. Taking into account all these factors and the fact that there is no evidence that the claimant tried to mitigate the loss

by searching for another job, we form the opinion that Ugx. **20,000,000/=** is sufficient as general damages.

(e) Punitive damages

We do not find any reason to award punitive damages.

Interest

The amounts awarded above shall attract an interest at 20% per year from the date of this award till payment in full. No orders as to costs is made.

BEFORE

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DATED 05/04/2019