

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
**CIVIL SUIT NO. 88 OF 2003**

TUMUSIIME FIDELIS ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

**VERSUS**

ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::: DEFENDANT

**BEFORE: AG. JUDGE REMMY KASULE**

**JUDGMENT:**

The plaintiff together with nine others instituted this suit against the Attorney General claiming declarations that the retirement of each one of them as employee of the External Security Organisations is null and void, and that each one still remains an employee. They also claimed an order that the External Security Organisation continues to pay each plaintiff's salary and allowances plus interest on all arrears thereof due.

The pleaded facts of the are claim each plaintiff was employed by the External Security Organisation Under terms and conditions of The Security Organisations (Terms and Conditions of Service) Regulations No. 80 of 2002.

By the said terms and conditions each Plaintiff had security of employment tenure not determinable without one's consent under Regulations 15 and 32.

On 01.07.02 the Director General, External Security Organisation in the course of his employment, purported to retire the plaintiffs from their employment, purported to retire the plaintiffs from their employment because of organization restructuring. The plaintiffs contend that the Director General acted wrongfully and in breach of the Regulations and has no legal power to retire them except under Regulations 15 and 32. The plaintiffs' claims were denied by the Defendant, arguing that the termination of service was not due to incompetence or inability to warrant an opportunity for plaintiff to defend oneself before a disciplinary Committee.

Each plaintiff was lawfully retired under the executive mandate enshrined in the security organization Act. None of the plaintiffs was entitled to reinstatement or to any payment of arrears.

The formal case hearing started with conferencing on 17.06.05 before Tabaro J. on 01.08.03 a consent judgment was entered in favour of the other plaintiffs against the Defendant, except Ms Tumusiime Fidelis, the 5<sup>th</sup> plaintiff. In the Judgment the Defendant was to pay each plaintiff a sum of money being terminal benefits, interest of 10% per annum. Thereon starting 01.07.02 till payment in full, as well as the taxed costs of the suit.

The 5<sup>th</sup> plaintiff refused the terms of the settlement contending she is entitled to be paid for the nine years being the period she would have worked had her contract not been prematurely terminated. She insisted on court making a decision on the issue.

Both the 5<sup>th</sup> plaintiff and Defendant agreed on facts and there was no oral testimony from any witness. The agreed upon facts are that:-

The 5<sup>th</sup> plaintiff was appointed staff officer Grade 6 with External Security Organisation starting 02.03.91. The terms of her appointment are as per the Security Organisation Act, Cap 205, and The Security Regulations, made there under and the organisation's Administrative instructions. It was a term of her employment that she was to retire after 20 years of service or on attaining 50 years whichever is earlier. She worked from 02-03-91 to 01-07-02, when she was retired due to organization restructuring and re-organisation. She is entitled to some benefits under her terms of service.

The issue framed for determination is whether the 5<sup>th</sup> Plaintiff's contract of employment was for a fixed period of 20 (twenty) years of service, and if so, whether she is entitled to the benefits of the remaining 9 (nine) years.

Counsel for both parties filed Written Submissions. For the 5<sup>th</sup> Plaintiff it was submitted that under the Regulations her employment contract was of a fixed service period of 20 (twenty)

years. Since the contract had no provision for giving notice to terminate service before its expiry then the plaintiff has to be paid her entitlements 9 (nine) years, being the remainder of the fixed period of her employment contract.

The Defendant denied that the contract was for a fixed period. Though termination of the contract by notice had been provided for, the termination had been effected by executive mandate of His Excellency the President of Uganda, appointing authority of all employees in Public Service. The His Excellency President's executive mandate had been expressed by the Director General through the letter of retirement to plaintiff of 01.07.02. The plaintiff is only entitled to damages for unlawful termination of contract, the quantum of damages, being three month's salary in lieu of notice according to the Employment Act.

Further, this being an employment contract based on a confidential relationship between the employer and the employee, the same cannot be enforced through reinstatement of plaintiff. The only remedy is damages; and damages must be reduced by reason of the plaintiff's failure to take any steps such as getting another job, to mitigate the loss. The court has to decide what is the correct positions as between the submissions of plaintiff and the defendant.

Uganda's law of employment is provided for in the employment Act, cap. 219, an act to regulate employment and for other matters connected there with. Section 9 of the Act makes it mandatory of any contract of service to be in accordance with the Common Law the principles of Law of employment Act.

It has to be appreciated however, that conditions of employment in Uganda are different from those of England, the origin of the common Law. For example Uganda has no official policy of provision of full employment, the unemployed receive no state payment for being out of work, jobs are scarce and there is rampant unemployment it is not easy to leave one job and relocate to another. The national pension schemes and Trade Unions do not offer much relief in case of one losing a job. The country has no prescribed minimum wage. Generally wages and pensions are small and insufficient to meet basic needs.

Therefore loss of a job in Uganda often leaves one with no means of support to oneself and family. This is not necessarily the position in England, from where we obtain the common law principles to shape our law of employment.

There is therefore need not to apply common law principles wholesale in Uganda. Section 14(2) of the Judicature Act, Cap. 13, minimizes the reliance by the court on common law principles. It provides:-

**“14 (2) subject to the Constitution and this Act, the Jurisdiction of the High Court shall be exercised-**

- (a) in conformity with the written law, including any law in force immediately before the commencement of this act;**
- (b) subject to any written ..... ( some work to add here my lord)**

Therefore according to section 14(2) (a) (b) (i) of the Judicature Act, principles of common law may be relied upon by court in absence of express provisions of the written law on the matter. thus with regard to employment law, the common law principles should be relied upon of the Employment Act does not expressly provide for a situation.

Bearing the above observations in mind this court finds that the statutory law possessing the 5<sup>th</sup> plaintiff’s employment contract is the Employment Act, Cap 219, The Security Organisations Act, Cap. 305, and the Security Organisations (Terms and Conditions of Service) Regulations, 2000, setting out the terms and conditions of the plaintiff’s employment. There were also administrative instructions, but none of these has been brought to court’s attention as being relevant to this case.

The plaintiff was appointed to the External Security Organisation by Director General on the advice of His Excellency the President pursuant to section 6 of the Act i.e Cap. 305.

The terms and conditions of employment are those contained in the Letter of appointment of 01.09.91 and those set out in The Security Organisations (Terms and Conditions of Service) Regulations, 2000 SI 2000 No. 80.

By the Regulations non pensionable (R.4(5)) an employee serves a probation period of one year (R.6) before confirmation (R.14). Services may be terminated for incompetence or inability to perform duties, but after one had defended self before a disciplinary committee, and on termination one receives all benefits that accrue on retirement. (R.15 (1) (2) & (3)). An employee may be dismissed upon conviction of a felony, or for behavior prejudicial to the organization. On such dismissal the employee forfeits rank and all retirement benefits. (R.15 (4) (5) (6)).

Regulation 16 entitles an employee to such privileges, exemptions, immunities and other benefits commensurate the appointment. As to remuneration, an employee is paid a consolidated salary package of an approved salary structure; an annual increment for every year served (R.22) and is entitled to annual leave of thirty days with leave allowance.

By Regulation 32 an employee is to retire on attaining age of 50 years or after 20 years of active service, whichever is sooner. On retirement an employee is given transport to home village and an ex-gratia payment of 5% of gross earnings for period served.

A gratuity of 30% of gross salary earnings for a very completed year of service is paid after every three years of service.

The Regulations do not provide for notice to be given for termination of service.

Section 25 of the Employment Act which provides that an employment contract of indefinite duration, not being a contract under sections 12 and 14 of the Act may be terminated by notice as provided in the section is 5<sup>th</sup> not applicable to the plaintiff's contract, since the same is covered by section 12 of the Act. The submission that the plaintiff's employment was terminated by executive mandate of His Excellency The President, thus implying that the plaintiff was

dismissed at Will by the prerogative powers of the Head of State, on the basis of the decision in *Opoloto V. Attorney General* [1969] EA 622 at 633 para is no longer the law in Uganda.

Those prerogative powers remained vested in the President by the 1966 and 1967 Constitutions.

By those powers, the state has the power to dismiss at will officers in its service without justifying why and the officer affected had no cause of action for unlawful dismissal. See: *Terrell V. The Secretary of State for the Colonies*, [1953] 2 Q.B. 482, and *Dunn V. The Queen* [1896] 1Q.B. 116.

The 1995 Constitution has fettered these powers. Its Article 173 provide:-

“A public officer shall not be -

- (a) Victimized or discriminated against for having performed his or her duties faithfully in accordance with this constitution; or
- (b) Dismissed or removed from office or reduced in rank or otherwise punished without just cause.”

Just cause is now the ground for termination of a public officer’s employment.

It is not contended, no evidence was adduced that the termination of the plaintiff’s employment was by the Head of state and for a just cause.

That no notice of termination of employment was given to the plaintiff is conceded by the Defendant. The defence accepts that Regulation 32(1) applies to plaintiff. She was to retire on attaining 50 years of age or after serving 20 years whichever is sooner. She had served 11 years and had 9 years remaining by the time of her termination. She had not yet reached 50 years of age.

On the basis of the above facts the court makes a finding that the 5<sup>th</sup> plaintiff’s contract of employment was one for a fixed period and had no provision for termination prior to the expiry of the fixed period. The court also finds that no notice to terminate the employment was served

upon the plaintiff and the termination was not based on reasons, let alone procedure stipulated in the Regulations. The same was unlawful by reason thereof.

The law in case of unlawful termination of a contract of employment, with no provision for termination prior to expiry of the fixed period is that the employee is entitled to recover as damages the equivalent of remuneration for the balance of the contract period. This is in contrast to unlawful termination of a contract that has a stipulation of termination by either party. In such a case the wronged employee is entitled to recover damages, the equivalent of remuneration for the period stipulated in the termination notice. Justice Mulenga J.S.C in his majority judgment of the Uganda Supreme Court in SCCA 6 of 1998 **GULABALLI USHILLANI VS. KAMPALA PHAMACUTICALS LTD.** Unreported, stated the law and its rationale thus:-

“I respectfully agree that this is the correct statement of the law. I would add that it is premised on the principle of restitution in tegrum. Damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. Thus, in the case of employment for a fixed period which is not terminable, if there is no wrongful termination, the employee would serve the full period and receive the full remuneration for it. And in the case of the contract terminable on notice, if, the termination provision is complied with, the employee would serve the stipulated notice period and receive remuneration for that period, or would be paid in lieu of the notice.”

Justice Karokora, J.S.C; who, dissented on the issue of criteria to be used for the measure of damages in the same case, went even further. His considered view was that justice demands that a broader, liberal and purposive interpretation be given to the provisions of the Employment Act, particularly sections 9 and 17 thereof; in his view, a liberal interpretation of Section 17 is that unless the employee has committed breach of the contract of service or the contract has been frustrated, the employer has to provide the employee with work in accordance with the contract of employment for the period expressly spelt out in that contract. Where the employer fails to provide work to the employee in accordance with the terms of the contract the employer is obliged to pay to the employee in respect of everyday on which the employer fails to provide work, wages at the same rate as if the employee had performed the contract for the entire

contract period. To Justice Karokora, JSC, sections 9 and 17 of the Employment Act just the common law principles of repudiation of contract and mitigation of loss where the employer commits breach of contract.

Justice Mulenga, JSC, for the majority judgment, was of a different view as to the meaning of section 17 of the Act. To him, the purpose of the section is to protect an employee from exploits of an employer who may wish to withhold pay on the ground that on any given day there was no work available to be done and that none was done. The section does not apply to a contract of employment which has been terminated albeit by repudiation. He therefore held, and this was the majority; holding that the section 17 does not change the common law. To the extent that, The majority of their Lordships expressed no disagreement of the considered remarks of His Lordships Justice Karokora of giving a broader, liberal and purposive interpretation to the Employment Act, this court adopts such attitude in considering the Employment Act.

The Defendant has submitted that the 5<sup>th</sup> Plaintiff has not mitigated her loss by getting another job and by turning down the terminal benefits offered by the Defendant, which the other plaintiffs accepted.

The principle of mitigation of loss of damages resulting from the defendant's breach of contract is stated in SUTTON & SHANNON on contract, 7<sup>th</sup> Edition, at page 4.5 as:

**“A party to a contract who suffers by reason of a breach committed by another party must take reasonable steps to mitigate the loss. He should not sit back and make no attempt to repair it. If he believes in that way, he cannot hold the defendant responsible for more than the loss which he would have suffered if he had done his best to mitigate it.” See also: DENMARK PRODUCTIONS LTD V. BOSCOBEL PRODUCTION LTD [1968] 3 ALLERS 513, at 533.**

The burden of proving that suitable other employment was available to the 5<sup>th</sup> Plaintiff lies on the Defendant: See: the **GULABALL, USHILLANI** case (Supra): See also: **SOUTHERN HIGHLANDS TOBACCO UNION LTD. VS. McQUEEN**: (1960) EA 490 at 494.



This court adds that the discharge of this burden is the more important in Uganda for the reasons stated earlier, on differentiating the employment situation from that of England, though both countries rely on the same common law principles.

Before court there is no evidence that the Defendant has discharged this burden. The refusal of the 5<sup>th</sup> plaintiff to accept the terms of settlement accepted by her co plaintiffs cannot be used against her as her failure to mitigate loss. It was her right to refuse term of settlement that did not satisfying her claim. The court holds that the 5<sup>th</sup> plaintiff has not been proved to have failed to mitigate her loss.

There were general prayers set out in the plaint. By the issue and the agreed upon facts, nature of the framed. It seems to be agreed that the other prayers are not being pursued. The 5<sup>th</sup> plaintiff with agreement of the defence, has settled for a prayer of being paid terminal benefits by way of annual salary of 10% of annual salary being annual leave, gratuity of 30% and an ex0gratia payment of 5% of the 9 years of contract that the 5<sup>th</sup> plaintiff had yet to serve before termination, as well as interest and costs.

The court determines the issue framed, by holding that the 5<sup>th</sup> plaintiff's contract of employment was for a fixed period of 20 (twenty) years service and this being so, the 5<sup>th</sup> plaintiff is entitled to the benefits of the remaining 9 (nine) years. That remained of the contract period before its termination.

As to interest payable, the court note that interest is a return or compensation for use and for retention of money by a person while that money belongs to or should have belonged to another.

The principle is that interest is payable for deprivation suffered by the person to whom payment should have been made : See: **RICHES V. WESTMONT BANK LTD** [1947] AC 390 at 400.

See also H.C.C.S No. 1100/98 **Ruth Alien & others Vs. Attorney General**. It is a fact that the 5<sup>th</sup> plaintiff has suffered some deprivation of the use of her money since the termination of her employment until such a time as she will be paid in full. On the other hand it has to be appreciated that if she were to work the full contract period, she would not receive all the money

at one go. Payment would be monthly over the remaining period of the contract. The plaintiff has not adduced any evidence that she uses her earnings for some commercial enterprises.

Bearing the above considerations in mind the court awards interest at the court rate on the total sum payable and the interest is to run as from the 01.07.02 the date of retirement till payment in full.

The plaintiff shall also have the taxed costs of the suit.

**Remmy Kasule**

**Ag. Judge**

**17<sup>th</sup> March 2006**