

THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE: CLAIM NO.008 OF 2012 ARISING FROM HCT-CS-0173 OF 2010

BUKENYA STEVEN AND
ANOTHER.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE
PROVINCE.....RESPONDENT

BEFORE

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

Panelists

1. **MS. ROSE GIDONGO**
2. **MR. BAGUMA FILBERT BATES**
3. **MR. EBYAU FIDEL**

FACTS

The 1st claimant Bukenya Steven was employed by the defendant as a Telephone operator on 7/02/1977 and he was promoted through the ranks to the position of Estates Officer/Administrative Assistant. His monthly basic salary was U. Shs. 408,000/-. The 2nd claimant Nabukera Harriet was employed by the defendant on 1/7/1985 as an Accounts Assistant and was promoted through the ranks to the position of Assistant Accountant. Her monthly basic salary was U. Shs. 429,000/-. The defendant found it was necessary to retire

claimants and did request them to retire. The respondent paid them U. Shs. 16,596,000/- and 11, 148,000/- as gratuity respectively.

ISSUES:

1. Whether the claimants' retirement was voluntary?
2. Whether the claimants are entitled to gratuity and if so at what rate?
3. Whether the respondent is entitled to special damages for the loss of rent from the 1st claimant?
4. Remedies available.

SUBMISSIONS

Only Learned Counsel for the claimants, Dr. John-Jean Barya made submissions which Court is appreciative.

On the first issue: Learned Counsel Dr. John-Jean Barya submitted that the claimants were forced into early retirement and did not retire voluntarily. This assertion was based on both oral and documentary evidence of the claimants and the respondent's witness, one Richard Obura Onyango and a letter to the claimants from the Provincial Secretary of the respondent, Rev, Canon Aaron Mwesigye. Counsel contended that the letter from the Provincial Secretary merely requested the claimants to retire. The Provincial Secretary's letter stated as follows;

“...

*Following our **discussion** in my office regarding the above subject, I wish to **confirm** in writing that after working at the Provincial Secretariat for 30 years , this Office has found it necessary to **request** you to retire by end of this month, 31st March, 2008. ...”*

The respondent's witness Richard Obura Onyango in his Oral evidence on retirement age, stated as follows;

*“... The Provincial secretary **requested** them to retire. The normal practice is to **request** workers to retire. **It was up to the employees to respond**. There is a mandatory retirement age of 65 years for Bishops and clergy and 60 years for ordinary employees, that is non- clergy, like the present claimants.”*

Counsel noted that both claimants were 51 years of age at the time they were terminated and had therefore not yet attained the mandatory retirement age of 60 years for non- clergy and

were therefore had been forced to retire. Counsel accordingly requires that we compensate the claimants with general damages to the tune of Ug.Shs. 10, 000,000/= for this retirement which was forced on them.

We however find no evidence by the claimants contesting the respondents request for early retirement but rather an acceptance of the request by both claimants, via similarly worded letters, to the Provincial Secretary of the respondent, dated 20th March 2008, stating as follows:

“... ”

Reference is made to your letter dated 18th March, 2008, requesting me to retire by the end of March 2008 as per discussions held with you on 12th March 2008.

I will retire and handover the office as requested in your letter but the following should be noted

... ”

It is our decision therefore that although the respondents made the request to retire before the claimants had had attained the mandatory retirement age of 60 for non- clergy, the claimants did not contest it and therefore they cannot claim that they were forced to retire. Counsel argued that they were forced to retire because no reasons had been advanced by the respondent for this forced retirement. It is implied in the Provincial Secretary’s letter to the claimants that a discussion on the matter had taken place and the matter resolved. The letter to them only confirmed the discussion which they did not dispute. The claims claim for damages therefore fails.

WHETHER THE CLAIMANTS WERE ENTITLED TO GRATUITY AND IF SO AT WHAT RATE?

Learned counsel for claimants submitted that the claimants were entitled to payment of gratuity computed as per the formula prescribed by the Provincial Board of Finance on the 10th of June 2005, as current basic salary x 20% x no. of months served (Minutes attached to claimants statement as annex. B). Therefore based on this formula the claimants were entitled to Ug.Shs.30,355,200/- and Ug.Shs. 23,423,200/= for the 1st and 2nd claimants, respectively. The claimants however were partly paid Ug.Shs.16,596,000/- and Ug.shs. 11, 148,000/= for the 1st and 2nd claimants, respectively. Due to the partial payment of their

gratuity the claimants maintain that the defendant still owes them part of their gratuity, to the tune of U. Shs.13, 459, 200/= and 12,275, 400/= for the 1st and 2nd claimant respectively.

In its statement of the defense the respondent denied ever directing the claimants to retire and that that the claimants were not entitled to gratuity and what was paid to them was *ex gratia*. In addition the respondent refuted the claimant's right over gratuity as computed since their terms of service did not cater for the payment of gratuity and therefore the respondent was not obliged to pay the claimants anything. The respondent asserted that what was paid to the claimants was actually done at the discretion of the respondent. The respondent vehemently refuted the assertion by the claimants that it had a gratuity scheme in its employment schemes and had communicated the same to them. The respondent denies having ever paid gratuity to any of its other retiring employees. It argued that its policy making body is the Provincial Assembly and not the Finance Board as per attached Provincial Constitution and Provincial Canon marked as annextures "A" and "B".

The respondent insisted that what had been paid to the claimants was reasonable terminal packages over and above their contractual and statutory entitlements and were inclusive of any existing rights to an employee, such as repatriation pay, notice pay, severance pay and any other employee rights.

It was their case therefore that no inconveniences and distress was caused since what was paid was final and nothing remained outstanding in favour of the claimants.

Is gratuity an entitlement?

We have considered both Counsel for the claimant's submission and the written statement of defence and find as follows:

In the case of Katurebe Eridad and Wanzala Ivan Vs Uganda Revenue Authority. H.C.C.S. No. 107 of 2010 Court relied on the dictionary meaning in L. B. Curzon 4th edition at page 171 to define Gratuity as money given in recognition of services. It has been further defined as part of salary that is received by an employee from his/her employer in gratitude for the services offered by the employee in the company. It is defined as a benefit plan and is one of the many retirement benefits offered by the employer to the employee upon leaving his /her job. An employee may leave the job for various reasons such as – retirement/superannuation, for a better job elsewhere on being retrenched or by way of voluntary retirement.¹

¹ <http://www.business-standard.com/investmentsyogi.com>

In this case the respondents assert that it was not their policy to pay their employees gratuity and what had been paid to the claimants was ex-gratia. The respondents during cross examination further labored to discredit the minutes of the Provincial Board of Finance held on the 10th June 2005 which made reference to the restructuring of salary scales applied by the Provincial Secretariat. The structure included a provision for gratuity and Pension to retired Bishop. The fact that **there was an existing structure which was the subject of review meant that the respondent actually had a scheme that catered for the payment of gratuity.** The old scheme referred to existed during the employment of the claimants. In light of this the respondents claim that it had no Policy to pay their employees Gratuity is not true.

In the written statement of defense the respondent further contended that its policy making body was the Provincial Assembly and Not the Provincial Finance Board (copies of the Provincial Constitution and the Provincial Canon were attached and marked ‘A’ and ‘B’.

We have scrutinized the Provincial Constitution and Provincial Canons on the record and found that indeed the Provincial Assembly is the policy making body. We however noted that the Constitution provides for the Assembly to execute its roles through Boards, commissions and committees such as the Provincial Financial Board. The Constitution further provides for the delegation of the Provincial Assembly’s powers to these institutions under its Canons.

The Provincial Constitution states in part as follows:

“...

(d) The Provincial Assembly may by decision, subject to this Constitution, make laws for the province, to be known as Canons, which shall be binding upon the Dioceses, Canons may provide for any of the following matters

...

(g) The Provincial Assembly shall have responsibility for the overall direction of the Church of Uganda as a Province; have power to formulate broad, basic policies and shall perform such other functions as may be consistent with the spirit and intent of this Constitution.

(h) ...

*(i) The Provincial Assembly shall have power to delegate to a Board committee any of its powers under the constitution for the exercise of which a decision of the Provincial Assembly is not specifically required by this Constitution. **In any matter affecting the***

Dioceses, ratification by the provincial Assembly standing Committee shall be necessary.

....

Under Canon 1.12

....

(v) Enact laws which put all financial resources of the church under the accountability/responsibility of the Provincial Board of Finance.

(vii) Use the art of delegation by use of Boards Commissions and Committees in the administration of its resources.”

The Provincial Constitution and its Canons therefore empower the Provincial Board of Finance to administer the resources of the respondent and therefore its decisions are binding on it. There is no specific provision in both the Provincial Constitution and the Canons to the contrary.

The Provincial Finance Board minutes of the 10th June 2005, that proposed and approved the retirement and dependants' benefits scheme for the Bishops, clergy and employees within the church were therefore in consonance with the Provincial Constitution and therefore binding on the respondent. The Canons under (iii) provides for the setting up and administration of schemes for retirement and dependants benefits for Bishops, clergy and employees and under (iv) terms of service for Bishops, clergy and employees.

It is therefore not true for the respondents to state that it was not their policy to pay gratuity yet it's Constitution and Canons provide for it. The claimants therefore were entitled to the payment of Gratuity.

At what rate?

We have already decided that the Provincial Board of Finance has powers to make decisions that are binding on the Provincial Assembly. Therefore their approval of a new salary structure as set out in their minutes of the 10th of June 2005 was binding. The claimants were staff at the time and thus were beneficiaries of the new salary structure.

Their gratuity should have been computed in accordance with the new structure. It is our decision therefore that their gratuity is computed based on the new structure. The claimants should be paid the remaining part of Gratuity at the new rate.

WHETHER RESPONDENT/DEFENDANT IS ENTITLED TO SPECIAL DAMAGES FOR LOSS OF RENT FROM 1st CLAIMANT/PLAINTIFF?

Learned Counsel for the claimants submitted that Section 43 sub section (5) of the Employment Act 2006 provides as follows:

“Where the employee is being housed by the employer, the employee shall not be required to vacate the premises until he or she has been paid his or her terminal benefits.”

Following the provisions of this Section the 1st claimant, Steven Bukenya made a hand over report which was exhibited as a annexure “A” to reply to written statement of defence and counter claim or annexure G4 to the 1st claimants witness statement. In the Handover Report page 4 the last paragraph but one and he stated as follows:

“I am unable to handover the residence yet in view of my inability to secure other accommodation. I will appreciate to receive my full gratuity promptly to enable me secure alternative accommodation.”

Counsel further submitted that the handover report was given to the Provincial Secretary who received it and indicated that the properties had been “checked”, dated 1st April 2008. This report was copied to the Archbishop of the Church, the Provincial Treasurer, the Accountant and the Procurement and Investment Committee. None of them objected to his request to stay in the house/residence.

Indeed in his witness statement the Provincial Treasurer Mr. Richard Obura Onyang accepted that the claimant was properly in the residence and when asked by his own advocate why the Church had not evicted the claimant, he responded truthfully as follows:

“my understanding is that when a matter is in Court, you don’t take action to evict the complainant. We as employers we wouldn’t take any action. We had to respect this letter (G4, the Handover Report by Steven Bukenya) tendered by the plaintiff/claimant. We had to respect it”.

Mr Richchard Obura Onyang further admitted that neither the church nor its officials had ever demanded in writing Mr.Bukenyas vacation of the premises/residence contrary to his statement which stated as follows;

“I am also aware that the 1st plaintiff has never left these premises and has been living there free of charge despite numerous demands to vacate the premises”

This inaction by the respondent therefore conformed with the provisions of section 43 (5) of the Employment Act, 2006 in ensuring that the complainant remained in the residence provided by it until all his terminal benefits were paid in full.

We have considered Counsels submissions on this issue and find that the 1st claimant Mr. Bukenya was entitled to remain housed by the respondent in accordance with Section 43 sub section 5 of the Employment Act 2006(Supra).

On the issue of whether the respondents were entitled to recover rent from the claimant we now turn to the counter claim and find as follows:

The respondents counter claim was to the effect that the 1st claimant/counter-respondent, Mr. Bukenya was resident and continued to reside in a house owned by the respondent/ counter-claimant. The Counter-respondent by virtue of his employment with the counter claimant received a subsidy on rent for his residence and he paid Ug. Shs 153, 321 per month.(a copy of the payroll for March 2008 marked ‘D’ was attached as evidence to that effect). The counter-respondent was expected to hand over these premises to the counter- claimant on retirement. The counter claimant averred that it had demanded for the vacation of the premises to them in vain and as a result had lost a monthly rental income of Ug. Shs. 500,000/= from April 2008 to date had the counter- respondent vacated the premises, for which the counter – claimant sought special damages.

Learned Counsel for the counter–respondent/claimant submitted that the respondent/counter – claimant is not entitled to the counter claim on rent from Mr. Steven Bukenya because it is a requirement under section 43 sub-section 5 of the Employment Act 2006, for the Counter – claimant to provide housing to the first claimant/ counter – respondent until all his terminal benefits are paid in full and that this claim should be dismissed with costs. Counsel declares that once Mr.Bukenya has been paid all his benefits by the respondent, he will hand over the residence.

We have considered the counter claim and Counsel for the counter respondent's submission on the issue and find as follows.

It is indeed the responsibility of an employer who housed an employee to continue providing this housing until he / she has paid the employees terminal benefits.

In this case the counter –claimant provided the 1st claimant/counter-respondent Mr. Bukenya, housing at a subsidized rate of Ug.shs. 153,321/= and was thus obliged to continue providing the same until full and final payment of his terminal benefits. The counter-respondent therefore had an obligation to pay the subsidized rent after full and final payment of his terminal benefits.

The counter-claimant would therefore be entitled to the payment of Ug. Shs. 153,321/= from April 2008 until the full and final payment of the counter respondents terminal benefits. This would be in conformity with section 43(5) of the Employment Act of 2006 and the terms of the contract relating to the housing of the counter-respondent which was not disputed. In addition the counter-respondent should hand over the premises after the resolution of the payment of his terminal benefits.

It is our decision therefore that the counter claimant would not be entitled to damages because the issue of full and final payment of the counter – respondent's terminal benefits was in dispute and had not been resolved until now. Further, there is no evidence on record to the effect that the counter- claimant had actually demanded vacant possession of the premises from the counter respondent as claimed. The respondent's only witness, the Provincial treasurer had earlier admitted that the counter- claimant had never made any demand to the counter-respondent, for the vacation of the premises. But even if the counter- claimant had demanded for the premises, the counter-respondent would still be entitled to remain in the premises until full and final payment of his gratuity in accordance with section 43(5).

The Counter- respondent/ 1st claimant should pay the subsidized rent of Ug.shs 153, 321/= from April, 2008 until the full and final settlement of his terminal benefits. The Counter-claimants/respondents claim for damages fails.

REMEDIES

The claimants to be paid the balance of gratuity at the new rate, from the time of filing suit in the high court until payment in full at the court rate.

The Claimants claim for general damages for forced retirement fails because the claimant's acquiesced to the respondents request for them to retire early.

The 1st claimant Mr. Bukenya should vacate the house he is occupying on receipt of full and final payment of his terminal benefits. He should also pay the respondent Ug. Shs 153, 321/= per month from April 2008 until full and final payment of his terminal benefits.

General damages for the claimants for the delay in payment of the full amount of gratuity at Ug.shs, 1, 500,000/= each

We find no reasons for granting punitive and exemplary damages.

The respondent to pay costs of the suit.

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

Panelists

1. **Ms. Rose Gidongo**
2. **Mr. Baguma Filbert Bates**.....
3. **Fidel Ebyau**

DATED 5TH FEB 2015