

**THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE NO.063/2014
(ARISING FROM HC.C.S 75 OF 2014)**

MUGERERE ABUDUMOSH & 3 OTHERS COMPLAINANT

VERSUS

KAMPALA CITY COUNCIL AUTHORITY (KCCA).....RESPONDENT

BEFORE

- 1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
- 2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

Panelists

- 1. MR. ANTHONY WANAYAMA**
- 2. MR. MICHEAL MATOVU**
- 3. MR. EBYAU FIDEL**

AWARD

The claimants jointly and severally brought this claim against the respondent for:

- a) Special damages for unlawful termination and over time.
- b) General damages for wrongful dismissal or unfair termination
- c) General damages for the defamatory publication made on the 21st day of November 2012.
- d) Severance Allowances s. 87(1) of the Employment Act
- e) Interest on (a) and (b) at court rate from the date of publication and termination till payment in full.

The claimants were employed by Kampala city Council Authority(KCCA) on temporary terms on 30th December 2011 effective 2nd January 2012, as officers on a task force to support the

Executive Director during the transition period. Their contracts of appointment stipulated that the employment could be terminated by either party giving 14 days' notice of intention to terminate.

On the 13th November they all received letters terminating their employment. The letters indicated they would receive payment in lieu of notice.

The claimant's dismissal was published in Bukkedde and the Red Pepper to which the claimants alleged defamation. Before the hearing, on the 9/05/2016, the claimants withdrew the claim for defamatory publication and the issues relating to it, that is; issue

Issue 2. Whether the claimants have a cause of action in defamation. Issue 3. Whether the claimants suffered any loss, damage or injury of reputation.

These issues shall therefore not be considered in this award.

The claimants contended that their dismissal amounted to unfair and unlawful dismissal because they were not given a reason for terminating them nor were they given a hearing before the termination.

The matter was mediated but the parties failed to agree on whether the termination of employment was unfair and unlawful.

ISSUES

- 1. Whether the claimants were unlawfully terminated.**
- 2. Whether the claimants are entitled to the reliefs sought.**

The claimants were represented by Learned Counsel Kwotek Geoffrey and kakona Joel and the respondents by learned Counsel Jackline Helen Atugonza. Evidenced was adduced for the claimants by two witnesses CW1 Abdu mosh Mugerere and CW2 Sadiq Byaruhanga and the respondents by one witness RW1, Mr. Richard Lule, the Respondents human Resources Manager.

In his evidence in chief and in cross examination, CW1 Mugerere Abdu mosh told Court that his contract took effect on the 2/01/2012 although he had worked for the Respondent from August 2011 without a contract. He stated that was paid Ugx. 3,030,345/- per month. He claimed he was entitled to leave and overtime pay although he did not apply for either. He

told court he only worked 13 days for the month of November 2011 but was paid more than 13 days' worth that is Ugx. 2,108, 724/-. According to him the claimants termination was directed by the Executive Director Jennifer Musisi in a report "CL12", dated 9th November 2012 in which they were alleged to be poor performers and corrupt, but they had not been given an opportunity to be heard.

He did not dispute the fact that his contract stipulated that it could be terminated by either party giving 14 days' notice or payment in lieu of notice. He claimed he was neither given notice nor paid in lieu of notice. He acknowledged receipt of excess payment but expressed ignorance of why it was paid to him he said he did not know whether it was payment in lieu of notice. He believed that the termination was due to the EDs allegations not in accordance with the contract and was therefore illegal, unlawful and oppressive because their letters of termination did not state the grounds for the termination.

CW2, SadiqByaruhanga in his evidence in chief and in cross examination told Court that like CW1 his contract took effect on 2/01/2012 although he worked as a volunteer from August 2011. He confirmed he was employed on temporary terms and that he would be paid on a monthly basis until his post would be filled substantively. He said he was terminated on the 13th of November 2012 and he would have been entitled to Ugx. 1.3m not Ugx. 2,108,724/- which was paid to him. He said he did not know whether the excess amount paid to him was payment in lieu of notice. He also told court that he was entitled to overtime pay and leave but he had not claimed them until now, because he did not know he was supposed to apply for them. He claimed he worked 7 days a week and over time which could be confirmed by looking at the clocking in and out book. He said the book had been established by their supervisor one Lukambuzi Jacob who did not sign the book. He reiterated CW1s claim against the ED and added that he demanded an explanation for his termination but received no response. He claimed they worked contrary to the Employment laws and therefore they should be awarded the reliefs sought.

The respondent in his evidence in chief and cross examination on the other hand confirmed to Court that the claimants were indeed terminated from the employment of the respondents. He said the terminations were effected because the positions the claimants had been assigned had been substantively filled by public officers recruited by the Public Service Commission.

He refuted the assertion that the claimants had been terminated because of allegations of poor performance and corruption against them. He told court that the claimants did not have to undergo any disciplinary hearings because they were terminated in accordance with the terms of their temporary employment, by paying them in lieu of notice.

He told Court that during the transition KCCA had been given authority to recruit staff on temporary terms and that's how the claimants had been recruited otherwise the substantive staff had to be recruited by the Public Service Commission.

He refuted the Claimants assertion that they had worked over time and 7 days a week as opposed to 5 days a week. He insisted that they had actually worked 5 days a week from 8.00 am to 5 pm because after 5.00pm the premises would be closed. He insisted that during the transition and currently an employee works overtime with the approval of one's supervisor. The employee was expected to fill a designate overtime form request which was endorsed by the supervisor which according to him, the claimants did not do. He said in the absence of that formal claim it would be difficult for to justify overtime. He also refuted the existence of a clock in and out book. He confirmed that the claimants had worked under the supervision of one Lukambuzi Jacob who had set up a mechanism to monitor them but that was at department level and not by management.

He confirmed that the claimants earned a monthly salary and that leave had to be taken within the calendar year that is between January and December, although this could only be differed by the Permanent Secretary Ministry of Public Service. He told court that the claimants never applied for leave because they had worked for less than a year they were not entitled to leave. In his opinion the claimants had been terminated according to the terms of their temporary appointment and therefore they were not entitled to any of the reliefs sought.

SUBMISSIONS

1. Whether the claimants were unlawfully terminated.

Counsel for the claimants asserted that it was not disputed that the claimants were employed by the Respondents as per their appointment letters dated 31/12/2011 exhibited as "CL2 to CL6", in the Monitoring and Inspection department. That the claimants worked diligently and executed their duties in spite of poor working conditions posted positive outputs. In spite

of this he contended that the claimants on the 13/11/2012, were unlawfully terminated on allegations of poor performance and corruption as per the Respondents Executive Directors report dated 9/11/2012, “**CL12**. He contended that they had not been given a hearing and that the procedure of merely issuing them with termination letters was in breach of the well-established Principles of natural justice. He argued that the EDs allegations of poor performance, bribery, corruption and unprofessional handling of clients among others, warranted a formal and fair hearing before termination. He emphasized the essence of a fair hearing by citing the case of **KAMURASHI CHARLES VS ACCORD LTD & ANOTHER CIVIL APPEAL NO 3 OF 1996**.

He insisted that the EDs report was not a coincidence as the respondents would want this court to believe and the claimants were actually terminated based on the report and not clause (d) of their contracts by giving 14 days’ notice or payment in lieu of notice. Even then he asserted that the provision was not even followed.

He further argued that the letter of termination had not given any reason for the termination which was contrary to Section 68 of the Employment 2006. He however strongly insisted that the respondents had actually terminated the claimants on the basis of the EDs report dated 9/11/2012. It was his argument that the legal department’s non-response to the CW3s demand for an explanation were confirmation of the respondent’s high handedness.

He argued that although the respondents cannot be forced to take back the claimants they can compensate them adequately, he relied on the Supreme court case of; **BANK OF UGANDA VS BETTY TINKAMANYIRE SCCA NO.12 OF 2007 AND BARCLAYS BANK OF UGANDA V GODFREY MUBIRU C.A NO. 1 OF 1998**.

He also relied on the case of **ALEX METHODIOUS BWAYO VERSUS DFCU BANK LIMITED** in which Justice Elizabeth Musoke holding was to the effect that before terminating an employee an employer must give a justifiable reasons for the termination in accordance with Section 68. Which she quoted as follows

Proof of reason for termination

(1) *In any claim arising or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee.*

He reiterated the importance of abiding by the principles of a fair hearing as laid down in the case of **JUMA & OTHERS VS ATTORNEY GENERAL** quoted with approval in the case of **ISAAC NSEREKO VS MTN HCCS No. 156 OF 2012** that;

“... it is an elementary principles in our system of the administration of justice that a hearing, within a reasonable time is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with fundamental principles of Justice....”

He emphasized that the right to a fair hearing is now constitutional under Article 42.

Counsel for the Respondent on the other hand did not deny that the claimants were appointed on temporary terms as monitoring and inspection officers in their Internal Audit Directorate effective 02/01/2012, neither did he deny that they were terminated from the respondent's employment on the 13/11/2012.

He however contended that the termination was premised on the claimant's contracts and not on allegations that they were poor performers and corrupt. He made reference to RW1 s written and oral testimony which was stated that the claimants had been appointed on temporary terms to support the Executive Director during the transition period and until the positions were filled substantively. He drew courts attention to the claimants appointment letters marked RE1, RE2 RE3, RE4, and RE5 respectively, which had not been disputed by the claimants. He argued that the instant case was distinguishable from the case of **BANK OF UGANDA VS. TINAMANYIRE BETTY SCCANO.12 OF 2007. WHEREAS IN BETTY TINKAMANYIRE**; in which it was held that;

“... it is trite law that a Court of law should not use its powers to force an employer to retake an employee it no longer wishes to continue to engage. However, depending on the circumstances an employee who is unfairly or unlawfully dismissed as in this case, should be compensated adequately in

accordance with the law. Be that as it may, on dismissal, whether unfair or unlawful.”

In the instant case, the relationship was founded on contract of employment which stipulated a specific time frame within which the employment would exist and the terms of its termination which was followed by the respondent. It was the respondents' case that the termination was done upon the positions being filled substantively and in accordance with paragraph (d) of the contract. Paragraph (d) stipulated that the contract could be terminated by giving 14 days' notice. He quoted the letter of appointment as follows;

“...your appointment effective on 2nd January 2012 is on temporary terms until the position assigned to you is substantially filled...”

He noted however that the contract did not provide for giving reasons for the termination and therefore none were given. He further submitted that CW2s demand for an explanation was not responded to because he sought the same after the employment relationship between him and the respondent had ceased to exist. He argued that the claimants had failed to prove that they were terminated contrary to the terms of their employment. He invited court to treat the relationship between the claimants and the respondents as one that was contractual and thus establish whether the respondent breached this contract.

He refuted the testimony of the claimants' representatives that the termination had been based on the allegations of the ED and not on the contracts of employment. He reiterated that because there was nothing to warrant a disciplinary hearing and therefore the respondents did not institute one. He insisted that the termination was as a result of substantially filling the positions that the claimants had been temporarily assigned to and nothing else.

On whether the claimants had been paid in lieu of notice he invited Court to note that the claimants had been receiving Ugx. 3, 030,345/= per month and therefore approximately Ugx. 101,000= per day hence the 13 days worked in November amounted to Ugx, 1,457,055/- and the remaining Ugx 1,571,290 /- covered payment in lieu of 14 days' notice. He made reference to the pay slips on the record marked RE13, RE14, RE15, RE16 and RE17 and to support his argument he cited the case of BARCLAYS BANK OF UGANDA VERSUS GODFREY MUBIRU, C.A NO.1 OF 1998 in which it was held that;

“... In my opinion where a contract of employment, like the present stipulates that a party may terminate it by giving notice of a specified period, such a contract can be terminated by giving the stipulated notice for the period. In default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no period for notice is stipulated compensation will be awarded for reasonable notice which should have been given, depending on the nature and duration of employment”

He also cited the case of **LEES VS ARTHUR GREAVES LTD (1974) I.C.R, 501** in which it was held that;

“... Payment in lieu of notice can be viewed as ordinary giving notice ... The right of the employer to terminate the contract of service, whether by giving notice for the duration stipulated or implied by the contract cannot be fettered by the courts. An employee is entitled to full compensation only in those cases where the period of service is fixed without provision of giving notice...”

On the issue of over time counsel relied on the evidence of RW1 to show that the respondent’s policy on over time was that overtime was only authorized by ones supervisor. He contended that the cloak in and out book had not been authorized by management and this was supported by the testimonies of CW1 and CW3 who said it had been instituted by their supervisor and not management. According to RW1 the claimants were expected to work 8 hours a day and if they did extend they did so on their own because the respondent ceased to supervise staff at 5.00pm every day, although they were not forced out of the building after working hours.

Counsel noted that in their testimony CW1 and CW2 acknowledged that the book had been instituted within their department by their supervisor a one Lukambuzi Jacob who neither signed in it nor booked overtime for them.

On the issue of leave counsel was of the opinion that leave had to be taken with a calendar year and since the claimants did not work for a full year they were not entitled to leave until November 2012. He relied on the case of **BUILD TRUST CONSTRUCTIONS LTD VS MARTHA RUGASIRA HCCS NO. 288OF 2005**. He invited court not to hold the respondents liable for the claimant’s failure to apply for leave.

He concluded by submitting that the claimants were terminate within the terms of their employment, they were paid in lieu of notice and they were neither entitled to overtime or leave.

RESOLUTION

ISSUE 1

We have carefully heard the oral testimonies of both parties, perused the record and considered both counsels submissions and found that indeed the claimants were employed by the respondents on temporary terms effective 2/01/2012. The claimants contended that the termination was unfair and unlawful because they believed they were terminated based on the EDs report that alleged they were poor performers and corrupt and not because the respondent had substantively filled the positions as stipulated in their terms of employment. The letter of appointment stipulated as follows;

“ ... Iam glad to inform you that you have been appointed on the above named task force with effect from 2nd January 2012....

a) Your appointment effective 2nd January 2012 is on temporary terms until the position assigned to you is substantively filled...

b)

c)

d) This appointment may be terminated by either party giving 14 days’ notice on intention to terminate.

e) Please indicate your acceptance of this offer by signing the acceptance clause attached.”

The termination was done with immediate effect and instead of notice the claimants were offered payment in lieu of notice. The respondents insist that the termination was done in accordance with the claimant’s contract of service, because the positions assigned to the claimants had been filled by the Public Service Commission.

It is not in dispute that he claimants were employed on temporary terms neither is it disputed that the duration of the contract was until the positions assigned were substantively filled. What we

understand to be in dispute is whether the termination was lawfully done. We shall resolve this by having recourse to the law, which is the Employment Act 2006.

Section 2 of the Act, defines a contract of service to mean

“ ... any contract , whether oral or in writing , whether express or implied , where person agrees in return for remuneration , to work for an employer

Termination of employment on the other hand means;

“... the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc...”

The claimants labored to create a nexus between their termination and a report in which the Ed made uninvestigated allegations against them. They did not adduce sufficient evidence to convince us that the termination was indeed as a result of the EDs allegations. We did not see any connection between the termination of the claimants and the EDs report. The claimants did not controvert the respondents assertion that the positions they were assigned under their contracts had not been substantively filled by the Public Service commission. We therefore find their assertion that they were dismissed because of poor performance and corruption untenable.

The employment was temporary until the positions the claimants had been assigned were substantively filled. The evidence that the positions had been substantively filled was not refuted by the claimants.

We therefore find no reason not to agree with the respondents that the termination was done in accordance with the terms of the employment and specifically clause (d) of the letter of appointment (supra).

On whether they received payment in lieu of notice, the wording of the contract was clear, termination would be by either party giving 14 days' notice or payment in lieu of notice. The claimants worked 13 days for the month of November that is from the 1st to the 13th of November when they were terminated. The letter of termination stated they would be paid in lieu of notice and the money would be posted on to their Bank Accounts. CW1 and CW2 testified that all the claimants had received more than their 13 days of work which in essence meant the balance was

the payment in lieu of notice. They had testified that their pay was approximately Ugx. 100,000/- per month while RW1 estimated it at Ugx.101, 000/- per month. CW2 said 13 days' worth was Ugx. 1,300,000/- therefore 14 days' worth would be Ugx. 1,400,000/- which adds up to Ugx. 2,700,000/-. The Claimants received Ugx. 2,108,724/- less taxes which in our view adds up to the estimated Ugx 2,700,000/=. It is our considered opinion therefore that the claimants were terminated lawfully and they received payment in lieu of 14 days notice.

REMEDIES

The claimants claimed overtime pay and leave pay.

On overtime pay the respondents showed that overtime had to be booked through ones supervisor and through an established procedure of filling a form to be endorsed by the supervisor. The claimants did not produce any documentation to show that they had actually booked overtime and it had been denied. They said that they had a cloak in and out book which the respondents confirmed had been set up at departmental level and not by Management. The claimants did not dispute this evidence. We are therefore not convinced that they booked overtime and it was denied. The prayer for over time therefore fails.

On leave days not taken; Section 54(1)(a) of the employment Act provides that,

“ (1) Subject to the provisions of this section-

a) an employee shall, once in every calendar year, be entitled to a holiday with full pay at the rate of seven days in respect of each period of a continuous four months' service , to be taken at such time during such calendar year as may be agreed between the parties....

(3) Subject to subsection (2), any agreement to relinquish the right to the minimum annual holiday as prescribed in this section, or to forgo such a holiday, for compensation or otherwise shall be null and void..

(5) An employee is entitled to receive, upon termination of employment a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.”

It was not disputed that the claimants were entitled to take leave within a calendar year. The claimants alleged they had never taken leave and this fact was not disputed by the respondents. The respondents however argued that the claimants had not applied for the leave and that therefore they should not be held liable for the claimants omission. Counsel for the respondents went further to argue that because the claimants had not worked for a full calendar year they would not be entitled to leave.

We do not agree, with the argument that because the claimants did not make a formal application for leave, they were not entitled to leave. The claimants had rendered their services to the respondent for over 10 months and according to Section 54 (1)(a) and 54 (5) of the Employment Act (supra) they were entitled to leave. The claimant's contracts were terminated before the calendar year ended that is on the 13th of November and not outside the calendar year therefore if they had not been terminated they would have been within time to apply for leave. The respondents did not dispute this entitlement. Their contention was that the claimants did not apply for leave so they should not claim it now.

The claimants were terminated within the calendar period and it is our considered opinion that they still had time to apply but for the termination. Our interpretation of sections 54(1)(a) and 54(5), is that for the continuous 10 months and the 13 days that they worked for the respondents, the claimants are entitled to 14 days leave with full pay.

CONCLUSION

As already decided the claimants were lawfully terminated and paid the 14 days in lieu of notice in accordance with the terms of their temporary employment. They are awarded 14 days leave at full pay. Their prayers for other remedies however fail.

No order as to costs is made.

- 1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
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- 2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**
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Panelists

4. MR. ANTHONY WANAYAMA

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5. MR. MICHEAL MATOVU

.....

6. MR. EBYAU FIDEL

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Date 14/10/2016