

THE REPUBLIC OF UGANDA

THE INDUSTRIAL COURT OF UGANDA HOLDEN AT KAMPALA

LABOUR DISPUTE APPEAL NO. 016 OF 2015

CONSOLIDATING LABOUR DISPUTE APPEAL NO. 016 and 21of 2015

(ARISING FROM LABOUR DISPUTE NO. 39 OF 2 015 OF KCCA LABOUR OFFICE)

BETWEEN

ED ACE MICHEAL.....APPELLANT

AND

WATOTO CHILD CARE MINISTRIES..... RESPONDENT

BEFORE

**1. The Hon. Chief Judge, Asaph Ruhinda
Ntengye**

**2. Hon. Judge, Linda Lillian Tumusiime
Mugisha**

Panelists

1. Mr. Ebyau Fidel

2. Mr.Habiyalemye Dominic

3. Ms. Tukamwesiga Peninnah

AWARD

This is an Appeal against the decision and orders of M/s. Kulabako Ruth, a Labour Officer at Kampala Capital City Authority (KCCA). The said Labour Officer acted under sections 12 and 13 of the Employment Act which sections empower the Labour Officer to settle grievances under the said Act and to investigate and dispose of complaints under the Act.

The Appeal is brought to this court under section 94 of the Employment Act which empowers the court to entertain Appeals from the Labour Officer.

Briefly the facts as we understand them are:

The appellant was employed as a driver of the respondent and was (among other things) responsible for fueling generators (and vehicles).

According to the respondent, the complainant was fraudulent in the purchase of fuel and when his supervisor, one Ebong Musa asked him to explain the fraud, he, the claimant stopped working. Since he did not go to work for 7 days he was terminated for abscondment summarily.

According to the appellant, he was orally suspended without reason and while he was on suspension, he was terminated without reason.

The Labour Officer found that the decision to dismiss the claimant was unlawful, unfair and unjustified and gave the claimant the following reliefs:

- 1. That the respondent pays 1,491,600/- being wages for November and December 2014.**
- 2. That the respondent pays 1,491,600/- being two months' pay in lieu of notice.**
- 3. That the respondent pays 745,800/- being four weeks' pay for failure to give the claimant a hearing.**
- 4. That the respondent pays 745,800/- being 4 weeks' pay as basic compensation.**
- 5. That the respondent pays the claimant 4,325,640/- being 174 days leave for 2009, 24 days of 2010, 2011, 2012 and 2014.**
- 6. That the respondent pays 1,491,600/- being two months' pay as additional compensatory order.**
- 7. That the respondent pays 1,491,600/- being two months' pay severance allowance.**
- 8. That the respondent gives the claimant a certificate of service.**

On careful scrutiny of the grounds of Appeal, we hold the view that the Appeal seeks to grant the appellant more than what the Labour Officer granted in her

orders.

We note that in laying out grounds of Appeal in the submission, counsel for the appellant did not follow the sequence of the grounds in the memorandum of Appeal.

For example ground No. 1 in the submissions has nothing to do with ground No. 1 in the memorandum of Appeal. Ground No. 2 about severance pay does not exist in the memorandum of Appeal.

We will consider only grounds raised in the memorandum of Appeal and in the sequence they are in the memorandum.

The first ground in the memorandum of Appeal relates to failure by the Labour Officer to order reinstatement of the appellant. This ground was not argued and we take it that it was abandoned.

The second ground in the memorandum of Appeal relates to the Labour Officers failure to grant the appellant money arising from the provident fund. This ground was argued, we believe, as ground one in the submission.

Counsel for the appellant argued that the Labour Officer erred by ordering payment of the contribution of the claimant to the provident fund excluding the contribution of the respondent as employer. The respondent did not contest the unlawfulness of the termination of employment. Neither did they deny that they contributed to the provident fund money for the benefit of the employees.

We do not subscribe to the submission of the respondent that “The respondent maintains its position that the appellant is only entitled to recover Ug. 2,489,262/= as provident fund being the balance of the amount that was saved by him exclusive of the Employers contribution as seen in Michael Edace’s summary of the provident contribution”.

On the contrary we agree with the submission of counsel for the appellant that the

Labour Officer having found that the dismissal of the appellant was unlawful; she ought to have ordered full payment out of the provident fund because Rule 6(b) of the supplement Trust Deed and rules of the Watoto Ministries provident fund relating to one forfeiting balance of the fund for being summarily dismissed did not apply to the appellant. Ground No. 2 succeeds.

Ground No. 3 in the memorandum of Appeal relates to the award of 161,092,800/- as special damages for loss of employment this ground was argued as ground No. 5 in the submissions.

It was argued on behalf of the appellant that in accordance with this court's decision in FLORENCE MUFUMBA VS UDB LDC No. 138/2014, the Labour Officer should have calculated special damages from the dismissal date to the award date.

In his submission, counsel for the respondent argued that this court could not rely on the case of FLORENCE MUFUMBA VS UDB and OMUNYOKOL AKQL JOHNSON VS A.G. S.C.C.A NO. 60/2012 since both were dealing with public institutions as opposed to the respondent who is in the private sector.

In our considered opinion whereas in MUFUMBA and TINKAMANYIRE the employers were public statutory organizations established by government to play a part in the private sector under the watchful eye of government, in OMUNYAKOL the matter involved a civil servant employed by the Public Service Commission just like any other public servant employed under the various service commissions without any iota of private sector or if any, so remote that it could easily be said not to exist.

The Respondent, a private non-governmental organization, in as far as labour related issues are concerned, is in our view, in the same category' as UGANDA DEVELOPMENT BANK and BANK OF UGANDA in the cases of MUFUMBA and TINKAMANYIRE respectively.

Consequently we think that just like we held in the case of FLORENCE MUFUMBA the Labour Officer having held that the claimant had been unlawfully

terminated (and the respondent having not contested this finding) the claimant is entitled to salary arrears from the date of termination to the date the Labour Officer gave the award.

In the same wave length we find that in accordance with the case of DONNA KAMIJLI VS DFCU BANK labour dispute claim No. 002/2015, the appellant specifically pleaded special damages although the labour officer did not allow all that was pleaded. This is contained in the letter of complaint to the Labour officer dated 11/02/2015 and therefore die submission of the respondent on this point is unacceptable to us.

Ground No.4 was abandoned and it is so abandoned.

Ground No. 5 was about award of general and aggravated damages.

The labour Officer declined to pronounce herself on the award of damages because according to her, she had no jurisdiction.

In his submissions counsel for the appellant faulted the Labour Officer for not awarding general and aggravated damages. Counsel went a long way in his submission to justify why the Labour Officer should have granted his client 100,000,000/=.

Section 78 of the Employment Act is about compensation of the employee for having been unfairly terminated. It is the section that the labour Officer uses to order that the employer pays to the Employee some form of compensation arising from die illegal termination.

The section in our view covers whatever damages that could have arisen from the illegal termination although section 78(3) provides for the maximum amount of additional compensation which in our view is equivalent to damages.

Unlike the industrial court, the discretion of the Labour Officer to award such damages under section 78(3) is limited to 3 months wages of a dismissed employee. In granting additional compensation, the labour officer said.

“Section 78(2) of the Act provides that; an order of compensation to an employee whose services have been unfairly terminated may include additional compensation of the Labour Officer. I have considered the length of service of seven whole years, the suffering the complainant has been subjected to, the expenses he has incurred in hiring the service of a lawyer and other incidental costs and I have awarded him two months’ pay being additional compensatory order of Ugx. 1,491,600/=”.

We agree with the Labour Officer as to the provision of section 78(2) which gives the Labour Officer factors to take into account in order to calculate the compensation/damages payable to the employee.

It is our considered opinion that the said section actually grants jurisdiction to the Labour Officer to award damages except that the said damages are referred to as “compensation”.

As a Labour Officer, the maximum she could award was damages worth three months wages. She awarded 2 months wages which was within the law but given the circumstances it is our considered view that she would have awarded the maximum and therefore the order for 2 months wages is hereby substituted for the order for 3 months wages.

The sixth ground of Appeal according to die memorandum of Appeal concerns salary' in lieu of leave for 18 years.

According to the labour Officer “counsel for the complainant stated that he still demands for leave of 2009, 24 days of 2010, 2011, 2013 and 2014 to wit Ugx.

4,325,640. He did not include 2007 and 2008. I will assume that these years are no longer in issue.

On scrutinizing the documents, I have also come to notice that they were never signed by the complainant and no other document has been adduced to prove that these leave days were actually taken therefore the complainant is entitled to 174 days being leave accrued to wit 4,325,640/=”.

Counsel for the appellant was in agreement with the above assessment of the Labour Officer. Counsel for the respondent however in his submission referred us to leave application forms submitted by the appellant to the Labour Officer indicating that the appellant had taken all his leave.

Whereas it is clear under the law that an employee is entitled to leave in the course of his employment, it is our considered opinion that it is incumbent upon such employee to apply for such leave. Should the employer not be able to grant such leave for some reason, then if the employee deems fit, he may forfeit such leave and instead accept payment in lieu of such leave.

It follows therefore that should an employee not exercise his right to apply for leave in the course of the year, the presumption is that he/she has personally forfeited such leave unless the contrary is provided for in the terms of the contract of employment or unless the employee proves to the satisfaction of the court that the employer never made him/her aware of such right for leave.

In the instant case, the appellant himself filed application leave forms indicating leave in May 2010, June 2010, August 2012 March 2013 and July 2014. It is not clear from the record how the labour Officer got a total of 174 days leave, even if this court was to agree that from 2009 - 2014 the claimant was entitled to 24 days per year as indeed the Labour Officer seems to suggest, having left out the period of 2007 and 2008. Be that as it may, it is our considered opinion that as the leave forms on the record indicate, the claimant took leave in 2010(twice), 2012, 2013 and 2014. As already stated unless the claimant proved that he applied for and was not granted leave or that he was never informed of his right to apply for leave, (which he did not) we can only deduce that he forfeited his leave for the rest of the time.

Accordingly we find that the Labour Officer erred in law to hold that the appellant was entitled to 174 days at 4,325,640/= and therefore the orders related to this ground are set aside.

The last two ground of Appeal according to the Memorandum of Appeal relate to costs and interest and we shall handle them together.

In submission of counsel for die appellant the matter took long before the labour Officer and since the law provides for the appearance of advocates before the labour Officer, costs and interest in that regard should have been awarded.

It is considered opinion that the proceedings before the Labour Officer arc intended to be as less costly as possible for both parties. We also agree with the respondent's counsel that the provision under section 78 of the Employment Act for compensation order relates to all excuses including advocates expenses awardable by the labour Officer, which as already intimated earlier on in the

judgment, the labour Officer considered as additional compensation in accordance with the said section of the law, particularly section 78(2) and (3). we must also state that even then under the law the award of costs or interest is always in the discretion of the court We accordingly reject both grounds.

All in all the Appeal is allowed in part and disallowed in part and for that matter each party shall bear own costs of the Appeal.

Signed

1. Hon .Justice Ruhinda Asaph Ntengye, Chief Judge

2. Hon. lady Justice Iinda Lillian Tumusiime Mugisha,

PANNELISTS

1. Mr. Ebyau Fidel...

2. Mr, Habiyalemye Dominic

2. Ms. Tukamwesiga Pcnninah.

Dated the 23rd day of June 2016