

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 082/2014
ARISING FROM HCCCS No. 184/2014

AKONYE DAVID **CLAIMANT**

VERSUS

LIBYA OIL **RESPONDENT**

BEFORE:

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

PANELISTS

- 1. MR. EBYAU FIDEL**
- 2. MS. JULAIN NYACHWO**
- 3. MS. HARRIET MUGAMBWA NGANZI**

AWARD.

BRIEF FACTS.

The Claimant was head hunted by the Respondent Company's Managing director and Human Resources Manager. According to him he was formerly the Consumer Marketing Manager of UNI Oil (U) Limited. His appointment was on permanent basis and he was not subject to probation. He performed very well until the

termination of his contract. He was terminated and according to him the termination was unlawful because he was not given a hearing.

The Respondent on the other hand claims the Claimant was appointed on the 15/08/2013 and terminated on the 31/03/2014 which fell within the probationary period. They contend that the employment was subject to a probationary period and he was terminated for failing to demonstrate a satisfactory work progress among other failures.

ISSUES

- 1. Whether the Claimant was employed under a probationary contract?**
- 2. Whether the Claimant's employment was unlawfully terminated?**
- 3. Whether the Claimant is entitled to the remedies prayed for?**

SUBMISSIONS

The Claimant was represented by Mr. Brain Kirima of Katarikawe & Company Advocates and the Respondent by Mr. Kefa Nsubuga of M/s KSMO Advocates.

- 1. Whether the Claimant was employed under a probationary contract?**

Counsel for the Claimant cited section 2 of the Employment Act 2006, which defines a probationary contract to mean a contract of employment which does not exceed 6 months duration, is in writing and expressly state that it is for a probationary period.

He also cited section 67 which provides that the probationary period should not exceed 6 months except if it is extended for a further period of not more than 6 months with the consent of the employee.

It was his submission that in the instant case the Claimant was recruited on the 1/08/2013 in accordance with the appointment letter marked "A", and the contract clearly stated that he was employed on permanent basis. He was terminated on 31/03/2014.

According to him by the time of the Claimant's termination, he had worked for 8 months and therefore he was not under probation, because the Respondent did not adduce evidence of an agreement to extend the period.

Counsel further argued that the Claimant's appointment letter clearly stated that he was employed on permanent basis and not on probation and this was confirmed by the Respondents witness. According to him Black's law dictionary defines permanent employment to mean work under a contract of employment that is to continue indefinitely until either party wishes to terminate it for some legitimate

reason. In his view a Probationary Contract can therefore not be a permanent contract because it has a definite span of 6 months. He insisted that the Respondent was wrong to state that the contract was on permanent basis and then state that it was a probationary contract.

Counsel contended that the Respondent had uttered a false document in a bid to deny the Claimant his entitlements, because the Managing Director failed to produce the original document. He failed to produce the original copy of the Claimant's application letter, which was evidence that he was head hunted by the Respondent and given that he was head hunted he could not be the same as an employee who the Respondent intended to put on probation.

He further contended that the font size of the letters on the second page of the contract on which the Respondent relied to assert that the claimants contract was probationary were smaller than the front page making it suspect. He concluded that the page had been formatted to include the probation clause which was not there in the first place. He argued that this was a fraudulent attempt by the respondent to deny the Claimant what he was entitled to. According to him the Claimant's contract was consistent and it did not provide for a probation period. He asserted that the Respondent had the burden to prove that the contract, in accordance with Section 101 of the Evidence Act, which provides that whoever intends Court to prove the existence of certain facts must prove those facts. He submitted that the Respondent had failed to provide credible evidence to prove that fact when he relied on a photocopy of a false contract. He further cited section 60 of the Evidence Act to state that documents must be proved by primary evidence except where secondary evidence is admissible as provided under section 64 of the same Act. He insisted that none of the circumstances under section 64 of the Evidence Act were brought before court to justify why the Contract which the Respondent presented should be admissible in evidence and therefore it cannot be relied on as evidence because it is a forgery.

In reply Counsel for the Respondent also cited Section 2 (supra) to define a probationary contract of employment and 67(2) (supra) to state the maximum period of a probationary contract.

According to Counsel the Appointment letter Marked A1 indicated that the employment would commence on the 15/08/2013 and the claimant accepted on the 28/08/2013 as indicated in the Contract of employment marked as A2 and the

termination notice was 31/03/2014. According to him this was within the probationary period and not 8 months as alleged by the Claimant.

It was his submission that whereas the employment was on permanent basis it was subject to clause 5 of the contract which provided for probation in which the claimant had to demonstrate a satisfactory work progress among other things failure of which he would be terminated.

He argued that upon being interviewed the Claimant was hired for the position of sales and marketing manager on a probationary contract which would be confirmed upon the review of the Claimant's performance. According to him the Claimant did not satisfactorily complete his probationary period as indicated in his performance reviews marked A3, A4, A5 and an email from his supervisor marked A6. Counsel argued that his unsatisfactory performance caused the Respondent to terminate him.

Counsel further submitted that the Claimant appended his signature to the contract making him legally bound to it because a person's signature on a contract meant that they have read it and agreed to the terms and conditions set therein. It means that they are legally authorised and competent to enter into the contract. He was of the view therefore, that the burden shifted to the claimant to prove that the said contract was a false document. He refuted the claim that the Claimant brought an original contract before court.

He refuted Counsel for the Claimant's allegations that the Respondent's witness Mr. Abdulbari. B. Abdirahman, uttered a false document. He contended that mere utterances by Counsel about the font sizes as they appear in the contract marked A2 is not adequate proof. And besides the Claimant signed the Contract

and he adduced no evidence to dispute how his signature got on to it. He made reference to the fact that Mr. Abdulbari stated in cross examination that he was not in the know about the existence of the Claimant's original contract because he was away from the respondent Company for 5 years. According to him the issue regarding the Application letter had been settled before the hearing, because Court had been informed that the search for it was still ongoing and when found it would be brought to Court. It was his argument that although Section 63 of the Evidence Act provides that documents must be proved by primary evidence except in exceptional circumstances as provided under section 64(supra), He argued that the witness's failure to produce the application letter and the Claimant's original contract was not conclusive evidence of the Contract the Respondent presented being forged as was claimed. He argued that the witness's failure to confirm the existence of the original copy of the Claimant's contract on account that he was away from the Respondent's Company for 5 years falls within the conditions in which secondary evidence can be relied on as provided under the Evidence Act.

He denied the contract Marked B1 adduced by the Claimant because it was different from the contract issued by the Respondent as and duly accepted by the Claimant and which made a provision for probation. He cited the Kenyan case of ***Abraham Gumba vs Medical Supplies Authority (2014) KLR*** whose holding is to the effect that the purpose of probation is to enable new employees learn the operations of their employers and a probationary employment had prospects of confirmation and permanency on the job, depending on one's performance during the probation period and for dismissal on grounds of incompetence. It was

his submission that the Claimants contract was subject to probation and he failed to complete it.

As already stated by both Counsel Section 67 (2) provides that the maximum length of probation 6 months, but it may be extended for a further period of not more than 6 months with the agreement of the employee. It was Counsel for the respondent's assertion that the Claimant having accepted the offer on the 28/08/2013, and having been terminated on the 31/03/2014, he was still within the probationary period which was provided for under his contract of employment.

Before we resolve this however we have to answer the question whether his contract was subject to probation?

Whereas the contract the Claimant submitted to court did not provide for probation the Respondent's witness provided one which had a provision for probation, although the provision was inscribed in a different font. When asked to produce the original contract document Mr. Abdulahi, the Respondent's witness, could not produce the same on the grounds that he had been away from the company for 5 years.

The burden of preparing a contract is placed on the employer because it is the employer who sets the terms and conditions of the employment. The burden of proving the provisions of any allegations regarding the terms of the employment contract therefore remain on the shoulder of the employer. The employer is expected to keep written records of all employees employed by him or her, even for a number of years after they have been terminated. We do not accept the argument that because he was away from the Company for 5 years he could not

trace the Claimant's contract and therefore the exceptions provided under section 64 of the Evidence Act (supra) do not apply to him. We expect that when he was away, the Company remained and continued in business, with the responsibility of ensuring that its "house" which includes its records are in order.

By failing to adduce the original copy of the Claimant's contract the Respondent failed to disprove the Claimant's contract. He also failed to adduce evidence to prove that the Claimant actually applied for the job to warrant him being placed on a probationary contract and that he was not head hunted from a position of experience that did not require a probationary contract. The Claimant asserted he was working as a Consumer Marketing Manager at UNI Oil Ltd when the Respondent's Managing Director and its Human Resources Manager approached him to join the Respondent. In the absence of evidence to the contrary and the respondent having failed to produce an original copy of the Claimant's contract, we are inclined to believe that he was head hunted, therefore he did not require to be subjected to a probationary period. In the circumstances we shall consider the Claimant's marked B2 as the correct contract of employment.

In the alternative even if he had been subjected to a probationary contract, the maximum duration of 6 months for a probationary contract had expired, given that he accepted the position on the 28/08/2013 and he was terminated on 31/03/2014 which was 7 months and 3 days. We are persuaded by the holding in the Kenyan case of ***Agnes Yahuma Digo vs PJ Petroleum Equipment Limited Industrial cause Number 2049 of 2011[2011] LLR 182(ICK) Ndolo J***, which is the effect that *"an employee serving his probationary period has legitimate expectation that the employer will communicate on his status before the expiry of*

the probation period. If there is no communication at the expiry of the probation period and the employee continues working for the employer, the employer is estopped from re-opening up the issue of probation at a later stage and the presumption is made that the employee was confirmed upon expiry of his probation period.”

Given that no evidence was adduced to show that the Claimant was consulted and he agreed to extend the probationary period as required under Section 67(4) of the Employment Act and he continued working after the expiry of the probationary period, the Respondent is estopped from re-opening the issue of probation after its expiry. In the circumstances we presume him to have been confirmed by the date of his termination on the 31/3/2014. The first issue is therefore decided in the negative.

Issue2. Whether the Claimant’s contract of employment was unlawfully terminated?

It was submitted for the Claimant that the Respondent’s Managing Director called him to his office and told him he was going to terminate him for poor performance and he did. According to Counsel he did not follow the law as provided under section 66 of the Employment Act, 2006 which provides for a right to be given a reason for termination and an opportunity to respond to the reason before termination, therefore he did not give him a hearing. He cited **Akankunda Ann Versus Salam Vocational Education Center Limited LD NO. 41 of 2016**, to support his argument that the failure to comply with the provision of Section 66(supra) renders the termination illegal. He contended that using the appraisals to indicate that the Claimant was a poor performer and therefore as basis of

termination could not hold because the appraisals indicated that on the contrary he was a good performer. 'According to counsel even if the Respondent had cited the issuance by the Claimant of credit worth 400million to a customer who failed to pay, the appraisals still showed that the Claimant's quality of work was good therefore his contract was unlawfully terminated.

In reply Counsel for the Respondent stated that given that the Claimant was under a probationary contract, section 67(4) of the Employment Act provides that provided section 66 (supra) would not apply. It was his submission that section 67(4) provided that a probationary contract could be terminated by either party giving 14 days' notice or by paying the employee 7 days in lieu of notice. According to Counsel the Claimant was paid 1 month in lieu of notice which the Claimant neglected to pick from the Respondent. He said a duly signed cheque for 1 month's gross salary was prepared but the Claimant refused to pick it and it could not be banked because he had not cleared with the Company. Counsel cited ***Barclays Bank vs Godfrey Mubiru SCCA No. 1 of 1998*** which held that where a contract of service is governed by a written agreement between the employer and employee, termination of the employment or services would depend on the terms of the contract and the law applicable, therefore the Claimant's contract was terminated lawfully.

We have already established that the Respondent failed to prove that the Claimant was employed on probation and even if he had by the time of his termination the probationary period had expired. In the circumstances section 67(4) regarding the inapplicability of section 66 to his termination did not apply.

Section 66(1) and (2) and section 68 of the Employment Act applied. Section 66(1) and (2) provide as follows:

“66. Notification and hearing before termination

(1) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation,

(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.

It is not disputed that the Respondent’s Managing Director told the Claimant that he was going to terminate him for poor performance and he did terminate him. He however did not give him an opportunity to respond to the allegation of poor performance. He did not prove the poor performance as provided under section 68 of the Employment Act 2006. Section 68 provides as follows:

68. Proof of reason for termination

(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71

(2) The reason 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....”

The Respondent relied on the performance appraisals as a basis for the terminating the Claimant but he did not put them to him to respond to. In **AKENY ROBERT VS UGANDA COMMUNICATIONS COMMISSION LDC No.023/2015**, it was settled that, ***“... Appraisal and discussions held between employees and their employers touching on the employees work performance do not add up to a disciplinary hearing and can only be evidence in support of good or poor performance at a disciplinary hearing.”*** Therefore, the Respondent’s failure to give the Claimant an opportunity to respond to the allegations of poor performance in accordance with section 66(supra) and his failure to prove the allegations as provided under section 68(supra) render his termination unlawful.

Issue 3. Whether the Claimant is entitled to Remedies prayed for?

General Damages

Counsel for the Claimant cited ***Adonia Tumusiime and others vs Bushenyi District Local Government HCCS No.32 of 2012*** and ***James Fredrick Nsubuga vs Attorney General HCCS No. 13 of 1993***, to support his assertion that the award of General Damages is at the discretion of Court and Court will always presume they are a consequence of the Respondent’s actions and in the assessment of the quantum of damages, Courts are guided inter alia by the value of the subject matter, the

economic inconvenience that the party must have been put through and the nature and extent of the breach. He argued that in the instant case, the Claimant had a Job with UNI Oil before he was head hunted by the Respondent's Managing Director and the Human Resources Manager and this was not controverted by the Respondent. He spent 3 years without a job and his integrity and credibility were tainted. He prayed that Court should order the Respondent to compensate the Claimant for his loss to a sum of Ugx. 300,000,000/=.

In reply Counsel for the Respondent contested the prayer for an award of General damages because the Respondent did not breach any legal right of the Claimant because the Claimant's termination was lawful and was in accordance with the law and the contract issued to him Marked A2, therefore he did not deserve an award of damages.

We have already established that the Claimants termination was unlawful, therefore he is entitled to remedies. This Court in many cases has decided that the only remedy for a person who was unlawfully terminated is damages, see **Akeny Robert vs Uganda Communications Commission LDC No. 023/2015** and **Richard Kigozi vs Equity Bank LDC No. 115/2014**. It is trite that, damages are awarded at the discretion of Court and are intended to return an aggrieved party to the position he was in before the injury caused by the Respondent. Therefore given that the claimant was head hunted and he worked for the Respondent for 7 months the Respondent did not prove he was a poor performer and he was, earning Ugx. 5,500,000/= per month ,he tried to mitigate his loss of employment, by getting another job which he secured 3 years after termination, we think an award of Ugx. 25,000,000/= is sufficient as general damages.

Payment in lieu of Notice

Counsel made reference to the admission by the Respondents that it was willing to make the payment in lieu of Notice therefore they should pay Ugx. 5,500,000/= in lieu of notice.

In reply Counsel for the Respondent Contended that that was in excess of the 7 days' pay provided for under section 67(4) of the Employment Act but the Claimant failed to pick the cheque. He insisted that the Cheque was still available for him to pick.

Section 58 (3) (a) provides that:

"58. Notice periods

....

(3) The notice required to be given by an employer or employee under this section shall be-

(a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;..."

Given that the Claimant worked for the Respondent for 7 months and 3 days he is entitled to 2 weeks payment in lieu of notice amounting to Ugx. 2,750,000/=.

Punitive damages or Exemplary damages

No evidence was adduced to prove Punitive damages which as stated by Counsel for the Claimant, are awarded where the Respondent's actions against the Claimant were high handed, capricious and illegal. In the premises they are denied.

Costs

Counsel for the Claimant cited Section 27(2) Of the Civil Procedure Act to the effect that costs follow the event unless for some reasons court directs otherwise.

In reply Counsel for the Respondent prayed that costs should be denied because the Claimant failed to prove his claim.

As stated by Counsel for the Claimant costs are awarded at the discretion of the Court and in therefore in this case they are denied.

In conclusion an award is entered in favour of the Claimant in the following terms.

1. A declaration that he was not employed under a probationary contract.
2. A declaration that he was unlawfully terminated.
3. An Award of General Damages of Ugx. 25,000,000/- for unlawful termination.
4. An award of Ugx, 2,750,000/= being payment in lieu of notice.
5. Interest of 20% per annum on 3 and 4 from date of award until full and final payment.

Delivered and signed by:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE
.....

2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA
.....

PANELISTS

1. MR. EBYAU FIDEL

2. MS. JULAIN NYACHWO

.....

3. MS. HARRIET MUGAMBWA NGANZI

.....

DATE: 19TH JULY 2019