

**THE REPUBLIC OF UGANDA  
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA  
LABOUR DISPUTE REFERENCE NO. 243 OF 2015  
(ARISING FROM LABOUR COMPLAINT NO. NCD/CB/176/2015)**

**MAGOBA EDITOR.....CLAIMANT**

**VERSUS**

**TUSKER MATTESSES (U) LTD.....RESPONDENT**

**BEFORE**

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha

**PANELISTS**

1. Mr. Bwire John Abraham
2. Mr. Mavunwa Edison Han
3. Ms. Julian Nyachwo

**AWARD**

**Brief Facts**

The claimant was an employee of the respondent company effective August 2010. According to her in 2014 and 2015, one John M. Ciira, Assistant Manager of the respondent consistently committed sexual harassment against her. When the said sexual harassment persisted despite having reported to the branch manager, she forwarded the same complaint to the Human Resource Officer and when she did this the respondent company claimed that she had tarnished the name of the respondent and terminated her employment without carrying out investigations.

In response to the above assertions, the respondent asserted that the claimant's performance deteriorated when against the code of conduct, she engaged in a relationship with one Ben Walira Gatunyu, the Human Resource Manager who connived with the claimant to maliciously frame Mr. Ciira and harass him outside office time. Because of this harassment, Ciira reported to the Country Manager where upon a disciplinary committee hearing was set at which evidence was led against the claimant who was subsequently terminated.

**Issues:**

Agreed issues were:

- (1) Whether the termination of the claimant's services by the respondent was fair and illegal.**
- (2) What are the remedies available to the parties?**

**Representation:**

The claimant was represented by Mr. Evans Tusiime of M/s. Pearl Advocates & Solicitors while the respondent was represented by Mr. Niyonzima of M/s. Ayigihugu & Co. Advocates.

**Evidence adduced:**

Both parties adduced evidence from two witnesses each. The evidence of the claimant was to the effect that she was consistently sexually harassed by one John Ciira who particularly on 18/04/2015 at 7.45 am as she entered the office approached her and started touching her and wondering what kind of man or boyfriend she had and what help he gave her as a boyfriend. According to her self-recorded statement exhibited as **respondent's Exh. D2**, she felt bad about the way Ciira was communicating with her. According to her when she reported the matter, the said Ciira having persisted in his sexual harassment, the respondent turned against her and claimed that she was tarnishing Mr. Ciira's name. Consequently the respondent organised disciplinary proceedings on 19/5/2015 which culminated into her being unfairly terminated.

The second piece of evidence was adduced by one Arinaitwe Dorah who testified that between April and May 2015, the claimant reported to her that Mr. John Ciira was sending seductive messages and that on 11/5/2015, he molested her by forcefully touching her breasts, as he promised to give her favours. She also complained that the claimant had asked her to engage in sexual intercourse at the workplace premises which she objected to. She then raised her concerns to the Manager who on 19/5/2015 set up a disciplinary committee to which she was Secretary. According to her the claimant informed the committee that she was sexually harassed on 11/5/2015 and that she had made a mistake in her complaint when she stated that it was on 18/5/2015. According to her the committee did not take a decision as they needed further investigations, only later the Chairman and Country Manager to terminate the claimant.

The first witness for the respondent was one Mpairwe Gideon who testified that the claimant's performance deteriorated and she appeared several times before the disciplinary committee and was given warnings. As for the charges of sexual harassment, he informed court that both claimant and one John Ciira were summoned before the disciplinary committee after both made self-recorded statements. According to him, at the hearing the claimant stated that she was sexually harassed on 18/4/2015 yet on that date John Ciira was at a training away from Ntinda branch, the alleged scene of sexual harassment. The witness informed court that, instead of reporting to the branch manager, the claimant reported to one Ben Gatunyu who was in a relationship with her and who initially mismanaged the complaint. According to him, the lies and accusations of the claimant against a fellow employee irretrievably damaged the working relationship between her and the respondent. He informed Court in his written witness statement that the country Manager heard about the sexual harassment allegations from other sources.

The second witness for the respondent was one Hassan Bin Ali who testified that he heard from several employees that the claimant, John Ciira and Ben Gatunyu (Country Manager at the time) had issues that had caused disharmony within the respondent company. Gatunyu denied any involvement but the claimant informed him that she had been sexually harassed by John Ciira who denied. According to this witness, Ben Gatunyu was husband to the claimant the reason he was handling the issue informally.

The witness corroborated the evidence of the 1<sup>st</sup> respondent witness to the effect that on the alleged sexual harassment date John Ciira was at a training and did not move to Ntinda branch the alleged scene of sexual harassment. According to him, the claimant could no longer get along with other employees and superiors because she felt untouchable since she was having an affair with the Human Resource Manager.

### **Decision of Court:**

Wikipedia defines sexual harassment as “**a type of harassment involving the use of explicit or implicit sexual overtones, including the unwelcome or inappropriate promise of rewards in exchange for sexual favours. Sexual**

harassment includes a range of actions from verbal transgressions to sexual abuse or assault.”

Section 7 of the employment Act provides

**“7. Sexual harassment in employment**

**(1) An employee shall be sexually harassed in that employee’s employment if that employee’s employer, or a representative of that employer-**

- a. Directly or indirectly makes a request of that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains-**
  - i. An implied or express promise of preferential treatment in employment;**
  - ii. An implied or express threat of detrimental treatment in employment;**
  - iii. An implied or express threat about the present or future employment status of the employee.**
- b. Uses language whether written or spoken of a sexual nature;**
- c. Uses visual material of a sexual nature; or**
- d. Shows physical behaviour of a sexual nature**

**which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that, either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction.**

**(2) If an employee is sexually harassed in any way described in subsection (1) by the employer or employer’s representative, the employee is entitled to lodge a complaint with a labour officer and the labour officer shall have the powers to make all of the orders he or she could have made if the complaint was a complaint about unjustified disciplinary penalty or unjustified dismissal.**

**(3) For purposes of this section, an employer’s representative is a person who is employed by that employer, who either has authority over the**

**employee alleging sexual harassment or is in a position of authority over other employees in the work place of the employee alleging sexual harassment.**

**(4) Every employer who employs more than twenty-five employees is required to have in place measures to prevent sexual harassment occurring at their work place.**

Upon close scrutiny and internalisation of the above section of the law, it is clear that any person who is sexually harassed and in the process or as a consequence such person is either terminated or otherwise loses his/her job, such termination or loss of job can only be unlawful. If the loss of job is by resignation the same would be held to be involuntary and constituting constructive dismissal.

The aggrieved employee must however prove that the employer or his/her representative

- (1) Made a request for sexual intercourse, sexual contact or any other form of sexual activity.
- (2) The request contained a promise of preferential treatment in employment, or a threat of detrimental treatment in employment or a threat about the present or future employment status of the employee.
- (3) Used language or visual material of a sexual nature.
- (4) Showed physical behaviour of a sexual nature.
- (5) Each or all of the above actions were not welcome or were offensive and had a detrimental effect on the employee's job performance or job satisfaction.

In the instant case, the claimant in paragraph 6 of her written witness statement testified that the respondent's representative one John Ciira between November 2014 and March 2015, sexually harassed her on various occasions by sending unwelcome phone text messages with sexual requests, verbal threats about her employment, an welcome touching of her body, offensive flirtation requesting for sexual favours with promises of improving her working conditions and calling her at night.

We have internalised the evidence on the record regarding the above sexual harassment testimony. The phone print outs referred to **as Exh C5** but which was

admitted as **ID5** in cross examination, does not help this court to establish sexual messages from the respondent 's Assistant Manager, one Ciira. The document only shows the time and date a call was made or received and the telephone numbers involved. The evidence of Ciira having been called on phone or having himself called the claimant is not by any imagination itself evidence of sexual harassment. There was need for the claimant to adduce evidence of a voice and consequently proof that such voice was the voice of the perpetrator directed at her with sexual intonation as provided for under **Section 7(b) of the Employment Act**. She was expected to adduce evidence of the actual messages sent to her.

Consequently, in the absence of evidence that the phone print outs exhibited in court were from the alleged perpetrator, in the absence of actual messages that alleged to have carried sexual advances with them and in absence of corroborative evidence to prove the general assertions of the claimant in paragraph 6 of her statement, we find it very difficult to accept the said evidence. In our considered view sexual harassment at work is so serious an infraction that it cannot be taken lightly and therefore the acts constituting the same must be proved.

It was the evidence of the claimant in a self-recorded statement exhibited by the respondent as **Exh. D2 at page 6 of the trial bundle**, that one Ciira, an assistant manager sexually molested her on 18/4/2015 at Ntinda branch of the respondent. The date of the statement is not recorded and no evidence was adduced as to the date when the said statement was made. However in cross examination, the claimant insisted that the date of sexual molestation was mistakenly said to have been 18<sup>th</sup> April 2015. Mr. John Ciira the alleged perpetrator, in a self-recorded statement exhibited as **D4** by the respondent, at page 10 of the trial bundle, stated that on 11/05/2015 he was informed by one Wilson about the allegation that he had attempted to rape the claimant. The self-recorded statement did not mention the date on which the alleged sexual molestation or attempted rape occurred.

From the evidence of one Hassan Abdi, RW2, there was anxiety and disharmony amongst employees of the respondent company caused by the relationship between John Ciira and Ben Gatunyu over the love affair between the two. Although the claimant denied any relationship beyond the work-related matters,

it is our finding that Ben Gatunyu and the claimant were closer to each other than they were to other employees. This closeness must have raised suspicion that both were engaged in a love affair which may or may not have been true.

It is our finding that John Ciira, suspicious that the claimant was having an affair with Gatunyu attempted as well to seek a love affair with the claimant, the reason RW2 noticed anxiety and disharmony. On internalising the self-recorded statements of John Ciira and the claimant it is clear that the former was alleged to have uttered statements with sexual connotations or to have displayed actions with sexual connotations.

In his own self-recorded statement, John Ciira said that on 11<sup>th</sup> May 2015 he was informed of an allegation that he had tried to rape the claimant and according to him Gatunyu wanted the matter discussed outside office which was not acceptable to him.

Although the claimant mentioned the date as having been 18/04/2015, in cross-examination she insisted that she had been mistaken and that the correct date was 11/05/2015. **Could she have indeed been mistaken about the exact date or was she a deliberate liar??**

According to Dora Arinaitwe who took the disciplinary hearing minutes, the claimant during hearing clarified that she was molested on 11/05/2017 and that she had made a mistake when she mentioned 18/04/2015. According to her, the chairperson edited the minutes and removed this part of clarification.

On perusal of the original minutes in ink written by the said Dora Arinaitwe, we do not find any clarification as to the date the sexual molestation ought to have occurred. The original minutes, though in incoherent English suggest that the sexual molestation was on a Saturday. At one stage during the proceedings the claimant insisted that it was a Saturday and that John Ciira the perpetrator had a meeting that day at the Headquarters.

When this is put together with the claimants own self recorded statement that the sexual harassment occurred on 18/4/2015 at 7.15a.m, it makes sense to conclude that the said Ciira passed by the Ntinda office very early in the morning before he left for the meeting at the Headquarters. But the claimant shoots herself in the foot when she insists that the sexual harassment happened on

11/05/2015 and not on 18/4/2015. Whereas this court was prepared to believe that the claimant had mistaken the dates and that the respondent had taken advantage of this, the fact that the recorded original minutes show her insisting that it was a Saturday and yet 11/05/2015 was a Monday, reversed our opinion. In addition to this fracas, the allegation that the chairperson of the disciplinary hearing doctored the minutes could not be proved given that the original minutes did not include the alleged original version. Nonetheless, when RW2 informed Court that the claimant herself told him that Ciira had sexually harassed her contrary to RW1's testimony that RW2 heard it from other sources, the contradiction left us wondering if it was not meant to push the point that the claimant did not report the incident to the relevant authority. This is especially so when we take cognisance of the fact that RW2 claims to have heard from other employees not mentioning any one of them before allegedly asking the claimant who then informed him about the same. It is our finding that management was aware of the allegations of sexual harassment against Ciira.

It was the submission of the claimant that in the absence of a sexual harassment policy, and in the absence of a sexual harassment committee, the disciplinary committee of the respondent had no legal mandate to entertain a sexual harassment complaint making the decision illegal.

Part III of the Employment (Sexual Harassment) Regulations 2012 SI No. 15 provides:

**“Part iii- Sexual harassment committee**

**10. Sexual harassment Committee.**

- 1. An employer shall establish a sexual harassment committee composed of representatives of management and employees or labour union representatives selected annually by each party.**
- 2. The committee shall comprise four members, including the chairperson designated by the employer.**
- 3. Members of the committee shall be persons knowledgeable in and sensitive to gender and sexual harassment issues.**
- 4. A member of the committee may receive a written or verbal complaint and where a verbal complaint is made the committee member receiving**



it, shall reduce it into writing and read to the complainant who shall sign it and the member of the committee shall countersign it.

## **11. Functions of the committee**

The committee shall-

- a) Receive and register complaints of sexual harassment in a form prescribed in the First schedule;
- b) Initiate internal investigations into complaints;
- c) Keep a record of the nature of sexual harassment offences, proceedings, documents, information and action taken;
- d) Respond to complaints within fourteen days from the date of lodging the complaint with recommendations to management for appropriate action;
- e) Review the provisions of the policy to convey a responsive and supportive attitude that builds faith and trust;
- f) Prepare and provide reports under the complaints procedure to the labour commissioner or labour officer; and
- g) Carry out any other duties as may arise for the prevention of sexual harassment”.

Whereas the sexual harassment committee is mandated to receive and register complaints, to keep records of sexual harassment complaints, and report to the commissioner, nothing in the regulations gives it the sole mandate to entertain the sexual complaints and nothing stops the ordinary disciplinary committee from entertaining the same complaints. Consequently, although it is desirable that a sexual harassment committee handles sexual complaints to conclusion, a properly constituted disciplinary committee may as well handle the same complaints and in the absence of a sexual harassment policy or of a sexual harassment committee, the decision of such a disciplinary committee is not thereby rendered illegitimate or illegal.

Despite all the above observations we take cognisance of the fact that the conclusion reflected in the original minutes of the disciplinary committee in ink is not the same conclusion reflected in the typed minutes. Whereas in the typed record it is said that both parties are to receive the verdict on Thursday 21/5/2015, nothing like this is reflected in the original minutes in ink. In the typed

minutes at page 4 there are a number of additions not mentioned in the original minutes and these are:

**“Basing on the hearing and further investigations arrived at,**

- 1. On 18<sup>th</sup> April 2015 John M. Ciira the accused never reported to Ntinda branch evidenced by HIPORA’s branch operation report.**
- 2. On 18<sup>th</sup> April 2015 there was occupation Health and Safety training which the accused attended the whole day, evidenced by staff attendance register and group photos taken on the same day.**
- 3. On 18<sup>th</sup> April 2015, Banking slip was signed by Joseph Gathuke and NOT John M. Ciira.**
- 4. Basing on the allegations of the complainant (Magoba Editor) that the accused used to send her messages, there was NO evidence produced to support the allegation.”**

The absence of the above in the original minutes speaks volumes about what transpired during the hearing. The same applies to the following which is the concluding paragraph in the handwritten minutes but absent in the typed minutes.

**“Basing on the hearing John has no case to answer because Editor has no enough evidence to support the allegation. However awaiting for statements from the personnel mentioned from the hearings namely:**

- Joseph Gahuka**
- Grace Tumuhaise**
- Kalungi Pamela**
- Mwangi B.”**

It is not farfetched to conclude that the disciplinary committee was only to make a decision after getting evidence from the above personalities. The letter of termination exhibited as C6 on the claimant’s trial bundle shows that it was dated 20/05/2015, yet the typed record provides that the verdict will be on 21/05/2015.

We accept the submission of counsel for the claimant that the Disciplinary hearing did not show fairness when in one breath both claimant and the alleged

perpetrator of sexual harassment were given one-day leave to pave way for more investigations but in another breath a termination was effected before the said investigations were over – awaiting statements from certain people. The disciplinary hearing in our view was not meant to prove any charges against the claimant but to establish whether she had been sexually harassed as she alleged. As it turned out the disciplinary hearing seemed to suggest that the claimant was the one on trial and this is the reason that the typed record was fundamentally different from the original ink record. It is our considered view that this fundamental difference makes the result of the hearing inconsequential and the finding that the termination was illegal and unfair inevitable. The first issue is in the positive.

The second and last issue is:

### **What are the remedies available to the parties?**

(a) It is hereby declared that the dismissal of the claimant was illegal and unfair.

(b) 3 months' salary in lieu of notice

Counsel conceded that the claimant was sufficiently paid for the notice period.

(c) Compensation in lieu of re-instatement

Relying on **Section 71 (5) of the Employment Act**, counsel for the claimant prayed for 10,000,000/= as compensation in lieu of re-instatement since he conceded to the fact that in the circumstances an order of re-instatement would not be possible.

**Section 71 (5) of the Employment Act, provides**

**“If court finds that a dismissal is unfair, the court may-**

**(a) Order the employer to reinstate the employee**

**(b) Order the employer to pay compensation to the employee**

This court has in a number of cases declined to grant a compensation order under **Section 78 of the Employment Act** on the ground that such compensation is catered for in the powers of the court to grant general damages. (see: **Robert Taylor vs Toyota Uganda LTD, LDC 033/2015** and **Tumusiime Richard & 5 others vs Mukwano Personal Care Products.**) It is our considered opinion that in the

same way compensation under **Section 71(5) of the Employment Act** is sufficiently catered for under the general powers of the court to grant general damages. In our view, grant of both compensation under this section as well as damages under the general powers of the court would constitute unnecessary double remedies for the same wrong. Accordingly, this prayer is denied.

**(d) Severance allowance**

Having declared that the claimant was unfairly dismissed, and since she worked for more than six months, she is entitled to severance allowance in accordance with **Section 87 of the Employment Act**. The case of **Donna Kamuli Vs DFCU, LDC 02/2015** is of the legal proposition that in the absence of an agreed formula of calculation of severance allowance in accordance with **Section 89 of the Employment Act**, the severance allowance shall be equivalent to one month's salary per 1 year worked. Thus the claimant shall be paid  $873,600 \times 5 = 4,368,000/=$ .

**(e) Certificate of service**

In accordance with **Section 61 of the Employment Act**, the respondent shall issue a certificate of service to the claimant.

**(f) General damages**

We take cognisance of the fact that the claimant unfairly lost her job which provided for her and her immediate family. She was earning 873,600/= per month and this income was prematurely illegally halted. As a result she suffered mental anguish. In our considered opinion 8,000,000/= will be sufficient to cover general damages.

**(g) Punitive damages:**

We have not found any circumstances warranting punitive damages. This prayer is denied.

**(h) Accrued leave**

This court has held in the case of **Mbiika Denis Vs Centenary Bank, LDC 23/2014** and **Chandia Christopher Vs Abacus Pharma (Africa) Ltd., LDR 237/2016** that the claimant can only be entitled to payment in lieu of leave if he/she showed that he/she applied for leave and that such leave was refused. The claimant has to show that he was interested in taking his

leave but his employer rejected. In the instant case, this was lacking and therefore the prayer is denied.

**(i) Interest**

Given the inflationary nature of the currency, the claimant shall be entitled to interest of 15% per year on all the above sums from the date of this Award till payment in full.

**(j) Costs**

No order as to costs is made. Each party shall bear own costs.

In conclusion, An Award is hereby entered for the claimant and against the respondent in the above terms.

**Delivered & Signed:**

1. Hon. Chief Judge Ruhinda Asaph Ntengye .....
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha .....

**PANELISTS**

1. Mr. Bwire John Abraham .....
2. Mr. Mavunwa Edison Han .....
3. Ms. Julian Nyachwo .....

**Dated: 27/11/2020**