THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM No.052 OF 2018
[ARISING FROM LABOUR COPLAINT No13.08.17 of WAKISO.]

BETWEEN

AJAMBO SYLVIA.....CLAIMANT

VERSUS

CALVARY CHAPEL OUTREACH MINISTRIES .....RESPONDENT

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

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

AWARD

Brief facts

By a memorandum of claim, the claimant alleged that having been an employee of the respondent under a contract of service, she was unlawfully suspended on 21/7/2017 and her salary for July unlawfully withheld. She also alleged that for the period she worked she was never given leave days despite asking for the same.

According to the claim, when the claimant reported the matter to the Labour office and the labour officer advised the respondent to compensate her, instead the respondent issued a back dated letter to her for a disciplinary hearing which prompted the labour officer to refer the matter to this Court. She prayed for salary of July 2017, and for the remaining part of her contract as well as 1 month's salary in lieu of notice.

In reply, the respondent denied having employed the claimant with an entitlement to salary though it was admitted that she was a volunteer entitled to a monthly allowance of 200,000/= from 2015-2017. The respondent alleged in reply that the claimant did not perform properly her duties and was caught up in acts of misconduct where upon she was warned and later on suspended pending investigations. The respondent alleged that these were interrupted by the Labour officer's proceedings despite which the respondent summoned the claimant for disciplinary hearing which she declined to attend.

According to the reply, the claimant's July allowance was not withheld but she only refused to pick it and as a volunteer she was not entitled to N.S.S.F.

REPRESENTATIONS

The claimant was represented by Mr. Mukasa Charles of M/s. Kakona & Kwotek Advocates while the respondent was represented by Mr. Ilukor Emmanuel who held a full brief of Mr. Oluka James of M/s. Ilukor Advocates & solicitors.

Evidence was led by each of the parties in support of their assertions in the memorandum of claim and reply as summerised above.

The issues agreed to by both counsel as picked from their submissions are:

1) **Whether the claimant was an employee or volunteer of the respondent.**
2) **Whether the claimant was lawfully suspended.**
3) **What remedies are available to the parties?**

SUBMISSIONS

As to whether the claimant was an employee or volunteer, counsel for the claimant stressed the fact that the evidence of the claimant narrated how she became part of the respondent company while she worked as a cook since 2011 until she was unfairly suspended in 2017. According to counsel, the claimant usually had salary increments and Awards for hard work and later on the respondent introduced contracts. In his submission **exhibits A1,A2,A3,C,D1, D2 ,E, H and J** were all testimony that the claimant was an employee of the respondent. In counsel's view the evidence of RW2, Nakhayima Robert corroborated the evidence of the claimant that she was working as a head of the cooks.

He strongly submitted that the evidence of RW1 that there was a **"Volunteer Contract Agreement"** could not be sustainable because the Employment Act

contains no such designation and only allows probationary contracts. Relying on **Section 23 of the Employment Act**, counsel argued that employment of a person other than in accordance with the Employment Act was prohibited. He contended that **Exhibit "A"** of the respondent was not relevant since **Section 26 of the Employment Act** provides for attestation of such a contract by either a magistrate or a labour officer.

In reply to the above submission, counsel for the respondent strongly argued that in accordance with the contracts exhibited **as "A", "B" and "C" by** the respondent, the claimant was not an employee but a volunteer who as evidence of RW1 showed was to be paid an allowance. Counsel argued that Section 26 of the Employment Act did not apply since in her evidence the claimant said she was trained in tailoring and catering and hence she was not illiterate.

On the second issue of suspension counsel for the claimant argued that the suspension letter was in fact a dismissal in its wording. He contended that **Section 5 of the Employment Contract** was categorical about termination of employment with the respondent. In his submission there was no suspension but rather dismissal. According to counsel even if this was to be a suspension, the claimant ought to have been informed about the reasons leading to suspension and the suspension ought not be more than 4 weeks and with ½ pay. He relied on **Regulation 2 (2) of schedule 1 of the Employment Act as well as section 62(2) and Section 63 of the Employment Act**.

According to counsel, this was a dismissal which did not follow procedures stipulated under **Section 66 of the Employment Act,** which provided for a fair hearing and this violated the claimant's right to be heard in accordance with **Article 28 of the constitution**. He relied on **Akankunda Anne Vs Salam Vocational Education Centre Ltd, LDC 041/2016.**

In response to the above submissions, counsel for the respondent argued strongly that the claimant was suspended in accordance with **Section 63 of the Employment Act**. He argued that the claimant's apology for the wrong she committed against Nakhayima Robert was an admission of misconduct as held in Kabojja International School Vs Godfrey Oyesigye Labour Dispute Appeal 003/2015.

According to counsel the claimant was suspended after allegations of her practice of witchcraft and warnings as depicted in **exhibits "D1" and "D2"** and after abusing Nakhayima Robert and apologising to him. She was suspended

Pending investigations but within 19 days of investigations she issued a notice of intention to sue which complicated the process. According to counsel the claimant was summoned for hearing but she declined to attend claiming she was already before the labour officer.

Decision of Court

1) **Whether the claimant was an employee of the Respondent.**
   The case for the claimant as we understand it, is that she was working as an employee of the respondent under a contract of service as provided for under the Employment Act and therefore she was entitled to all benefits and protection clauses provided thereunder.
   On the other hand, the case for the respondent is that the claimant was a volunteer under a volunteer arrangement and not an employee as provided for under the Employment Act since she was volunteering as much as the respondent was paying tuition for her children as charity. If this was true, then the claimant would not be entitled to invoke certain provisions that protect employees under the Employment Act and the Respondent would not be bound to meet obligations mentioned under the Act.

   Section 2 of the Employment Act defines Employee as:
   "any person who has entered into a contract of service or an apprentice ship contract, including without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Public Service, a local authority or a parastatal organization but excludes a member of the Uganda Peoples' Defense Forces".

   The same Section of the same law defines Employer as:

   "any person or group of persons, including a company or corporation, a public, regional or local authority, a governing body of an unincorporated association, a partnership, parastatal organization or other institution or organization whatsoever, for whom an employee works or has was worked or normally worked or sought to work, under a contract of service and includes the heirs, successors, assignees and transferors of such person or group of persons for whom an employee works has worked or normally works "

The Same Section of same law defines "contract of service" as

"any contract whether oral or in writing, whether express or implied, where a person agrees in return of remuneration to work for an employer and includes a contract of apprenticeship".

From the above definitions, a contract of service under the Employment Act, just like any other contract has to be characterized by constitution of 4 elements which are: offer and acceptable, intention to create legal relations, consideration and legal capacity.

A volunteer is generally understood to be a person who freely offers to take part in an enterprise or freely undertakes a given task. The purpose for volunteering is generally not to earn a living but to be connected to various people and organizations which may in the long run lead to such volunteer getting a secure and permanent engagement. It is also for the purpose of satisfaction of the volunteers' passion in doing certain things. Unlike in a contract of service under the Employment Act, payment for the service in volunteerism is not a significant element.

A contract of service therefore under the employment Act is a contract between an employee and an employer which like any other contract is entered into by the parties with an intention that should any of them breach any of the provisions of the contract the same would carry legal consequences.

A volunteer arrangement (or volunteer contract?) exists where a relationship created between the parties is only in so far as the exact services the volunteer is expected to offer are concerned. Consideration for the services is only to the extent affordable by the other party without any intention of legal consequences on either of the parties. In other words, whereas in a contract of service under the Employment Act, consideration is an essential element, in a volunteer arrangement consideration is not a binding/essential element. A volunteer unlike a worker or employee is usually a part time worker who donates time for the purpose for which she/he is volunteering which is at no or very little

cost which may be only a reimbursement of what such volunteer has expended while at work.

In the instant case, we have perused carefully exhibit **"A1",** and **"A2"** contained in the claimant's trial bundle. These exhibits are **"Volunteer Contract Agreements"** which stipulate terms and conditions of engagement between the claimant and the respondent. The claimant is referred to as **"employee"** and the respondent is referred to as **"employer.** The fact that the body of the two contracts uses the words **"employee" and "Volunteer"** interchangeably speaks volumes about the intention of the parties at the time of execution of the contracts.

Another factor that speaks the same language as to the intention of the parties in reference to the above words, is the fact that in the same contract agreement the **"employer is mandated by Uganda law to remit fractions of the salary earned by the "employee"** to the Uganda Governments various departments and agencies.

In addition to all the above, **paragraph 6 of the contract** describes the relationships between the claimant and the respondent as **"employment".**

Given the above factors, the evidence of the claimant that she initially was orally employed at 100,000/= per month and subsequently in 2015 got employed by written contract at 200,000/= per month is believable. There would be no reason for a volunteer agreement to provide for a termination clause or to refer to the parties as **"employer" and "employee"** unless the same agreement intended to be interpreted to mean **"a contract of service"** as defined by the **Employment Act.** Accordingly, we read into the contract an intention on both parties to create legal obligations unlike in a volunteer arrangement.

We do not accept the evidence of the respondent that the contract between the parties was not a contract of service under the Employment Act. The evidence of Pastor Isaac Wabomba that the claimant was

entitled to a volunteer allowance was contradicted by **clause A, B. C and D of the Agreement** which referred to the claimant as Employee entitled to a salary a fraction of which was to be remitted as tax obligation of the claimant. The issuance of a staff identity card to the claimant is further evidence of the fact that the claimant was an employee of the respondent. Consequently, it is our finding from all the above analysis that the fact that the Agreements in **exhibits A1, A2 and A3** were titled **"volunteer contract agreement"** did not make them what they purported to be. On the contrary the body and spirit of the contracts was a "**contract of service**".

We have read the authority of **Adam Grinholz Vs FootBall Federation Inc.** of **Melbourne, Australia**, as exhibited by counsel for the respondent. The weight of this authority is not binding but persuasive on this court. Even then, the facts in the case are distinguishable from the facts in the instant case. Under the contract of Adam in the Australian case, the plaintiff was to be paid an honorarium but in the instant case the claimant's emoluments are described as **salary** in **Section D of the Contract** and as **volunteer allowance** in **paragraph's 1 and 2 of the contract.** In the contract of Adam, there is no description of the plaintiff as employee but the contract of the claimant in the instant case describes her as such. Adam as a plaintiff was at the same time a member of the defendant football federation yet there was no evidence in the instant case that the claimant was a member of the respondent organization. Given these strong distinctive features, whereas the court in the Adam case found that **"the mutual intention of the parties in the formal legal contract is clearly to establish a volunteer relation and not an employee relationship"** in the instant case we find the reverse position as already intimated earlier on in this Award. We therefore hold that the claimant was an employee of the respondent and the first issue is in the affirmative.

The second issue is: **whether the claimant was lawfully suspended.**

The letter of suspension is found in the **claimant's trial bundle at page 7** and it is marked **as CEXH "B".** The letter stated the reason of suspension

as being acts of indiscipline by use of abusive language and threatening violence. The suspension was effective 21/07/2017 until further notice.

Counsel for the claimant strongly argued that because the suspension was pursuant to Section **5 of the Contract of service** which provided for a termination clause, the purpose of the suspension letter was in fact a termination. According to counsel the suspension was contrary to what is provided for under **Section 62(2) and (3) of the Employment Act, Regulation 2(2) of the Disciplinary code in Schedule1** to the **Employment Act,** as well as **Section 63 of the same Act.**

Counsel asserted that the suspension was a termination without a hearing as provided for under **Section 66 of the Employment** which made it illegal.

In reply counsel for the respondent insisted that the suspension was in accordance with **Section 63 of the Employment Act.** Counsel then went on to discuss the apology of the claimant arguing that an apology meant that she admitted the wrong doing. He asserted that her suspension was pending investigation which were interrupted by the labour complaint.

Section 63 of the Employment Act provides

"63 suspension

(1) Whenever an employer is conducting an inquiry which he or she has reason to believe may reveal a cause for dismissal of an employee, the employer may suspend the employee with a half pay.

(2) Any suspension under subsection (1) shall not exceed four weeks or the duration of the inquiry, whichever is the shorter.

On internalising the suspension letter in the instant case we find;

(a) The suspension was because of alleged acts of indiscipline after several warnings.
(b) Suspension was without pay and for an indefinite period.
(c) Suspension was pursuant to **Section 5 of the contract dated 1/1/2017.**

We note that the contract referred to is of 1/2/2017 under which **Sections 5** reads

> **"Either party may terminate this Agreement by giving the other notice detailed in Section G of the employer's ministry handbook."**

No handbook was tendered in evidence and so we shall not refer to it. However, it is clear that the **Section** referred to in the suspension letter relates to separation of the relationship between the two parties. When this is read together with the fact that the suspension was indefinite C/s 63 above mentioned, we find no alternative but to agree with the claimant that the suspension was nothing but a termination of services. It was not intended to act as a temporary measures pending investigations as it ought to have been in accordance with **Section 63** and as submitted by counsel for the respondent. The fact that the claimant was subsequently invited for a disciplinary hearing on 20/09/2017, 60 days after the indefinite suspension, and after receipt of a notice of intention to sue, did not regularise the suspension.

We therefore do not accept the submission of counsel for the respondent that the suspension was pending investigations which were interrupted by litigation before the labour officer. We accordingly find that the suspension was contrary to **Section 63 of the Employment Act** and therefore illegal. The second issue is in the affirmative.

The last issue is **what are the available remedies to the parties?**

The claimant prayed for (inter alia) remaining five months of the contract work 1,000,000/=, and untaken leave of 126 days amounting to 1,200,000/=.

An employee in our considered opinion is paid a salary as agreed in the contract for the period that such employee works. It is important that the employer pays for what has been done by the employee as agreed and this, in our view, is very essential in employee and employer relationship. Consequently, any other entitlement outside this can only be by way of damages i.e. compensation to the extent of the loss. We therefore decline to grant salary for the remaining period under the contract because it is a futuristic claim based on the presumption that the claimant would have remained in the employment of the respondent come rain, come sunshine, yet we take judicial notice that anything could happen in the future to prevent the claimant from continuing serving as employee of the respondent.

As for leave days, we decline the same because there was no evidence that the claimant sought leave and such leave was denied by the respondent.

Given the nature of the contract of service and the remuneration attached to it, we find that 700,000/= will be sufficient for general damages.

Accordingly, the claim succeeds with the following declarations/orders.

(1) The claimant was an employee of the respondent and not a volunteer.
(2) The alleged suspension of the claimant was in fact an unlawful termination from employment of the respondent.
(3) The claimant is entitled to 700,000/= as general damages.
(4) The claimant is entitled to 200,000/= as payment in lieu of notice in accordance with Section 58 of the Employment Act.
(5) The claimant is entitled to 200,000/= for the month of July which in any case the respondent admitted.
(6) The clamant is not entitled to NSSF contributions since there was no evidence that it was deducted and not remitted.
(7) In accordance with Section 61, the claimant if she so wishes, will be entitled to a certification of service.
(8) The amounts awarded shall attract an interest rate of 15% from the date of this Award till payment in full.
(9) No order as to costs in made.

Delivered & Signed:

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

PANELISTS

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

Dated: 17/07/2020