

**THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO.72 OF 2018
[ARISING FROM KCCA/NAK/062/2017]**

BETWEEN

**PATRICK
MUSAKIRIZA.....CLAIMANT**

VERSUS

AFRICAN VENDING SYSTEMS LTD.....RESPONDENT

BEFORE

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

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. FX Mubuke
3. Ms. Harriet Mugambwa

AWARD

Brief facts

By memorandum of claim the claimant complained that the respondent irregularly, wrongfully and unlawfully terminated him from employment. He complained that having been commissioned to work in Cameroon, the conditions of work were filthy contrary to what had been agreed upon and that in addition to denial of allowances and commission the respondent refused to renew his visa after expiry. The Claimant prayed for

- i. Salary arrears of USD 2,550
- ii. Commission due and outstanding company sales
- iii. General damages of 250,000,000/=
- iv. Punitive damages
- v. Costs

In reply to the above complaint, the respondent filed a memorandum in reply stating that when there was an opportunity to work in Cameroon, the claimant requested to be allowed to take it up which was granted. According to the respondent, Easy Pay

South Africa Ltd was the company based in Cameroon which was independent, separate and distinct from the respondent. The memorandum in reply states that the claimant was aware that his employer in Cameroon was responsible for his flight, visa, travel and work arrangements including accommodation and that it was out of good will that the respondent continued to pay the claimant 1,000,000/= from September 2016 to December 2016 when he was terminated because of financial difficulties and the necessity for restructuring.

Issues

- 1) Whether the respondent unlawfully terminated the Claimant's employment**
- 2) Whether the Claimant is entitled to the remedies sought.**

Evidence adduced

The claimant in his written statement testified that as an employee of the respondent he was promoted to Country Manager in 2016 and was put in charge of all Franchises of the respondent which included Zambia, Burundi, Rwanda and Cameroon. He was initially assigned to Cameroon as a representative of the respondent to carry out Human Resource work and to grow the Cameroon Franchise. In a meeting he was informed that the respondent would cater for transport, feeding, accommodation and a salary of 600USD or 2,000,000/= which would be revised on return. He testified that on arrival in Cameroon and for 5 months he was only paid 300USD while for the month of April he received less. At his hotel in Cameroon he was exposed to filthy conditions with no food or transport or any up keep allowance and he raised these and other issues to the Managing Director, through skype conversations. He stated that he was promised 10% commission if the Franchise grew its sales and that indeed it grew by over 40% but he was not paid the commission. On his return to Uganda he was given a new assignment to start a new department and asked to train one Maclean who unknown to him at the time was positioned to replace him and indeed on his termination she was retained.

The second testimony for the claimant was from on Enock Nsubuga who informed court that he worked for the respondent under very hard and harsh conditions which forced him to resign from the job.

The respondent adduced evidenced from two witnesses. The first witness was one George Matua who was the Managing Director of the respondent. According to him, the opportunity to transfer employment to a company called Easy Pay S.A in Cameroon with the terms thereof was communicated to employees of the

Respondent at a staff meeting and the claimant voluntarily requested to be allowed to take it up. Under the terms the claimant was to take up the position of a Country Manager of Easy Pay S.A Cameroon at a salary of 2,000,000/= or 600USD although there was an arrangement for the respondent to subsidize this expense and pay ½ this cost. All necessary arrangements for the claimant's travel were paid for by the host company. He denied any undertaking by the respondent to pay any commission or be responsible for the full salary and emoluments of the claimant while he was in Cameroon. On the claimant's return he was employed once again by the respondent but later on because of the need to downsize the staff, the claimant was terminated.

The second respondent witness was one Atuhairwe Cynthia whose evidence in chief only concentrated on conditions of work without mentioning emoluments. She also referred to circumstances under which Nsubuga, the second claimant's witness, left the respondent and the character of the claimant. We did not find this evidence very useful.

SUBMISSIONS

Relying on **Section 2 and 68(1) of the Employment Act** as well as the authority of **Florence Mufumba Vs Uganda Development Bank, Labour Dispute Claim No. 138/2014** and other authorities, counsel for the claimant argued that the termination of the claimant was unlawful since there was no reason or justification given by the respondent and no notice was given to the claimant before termination.

As to the remedies, counsel for the claimant strongly argued that whilst the claimant was in Cameroon he remained an employee of the respondent because he was under the control and direction of the respondent. According to counsel the claimant was paid 300USD while in Cameroon by the respondent as partial salary and according to him, this is the reason the claimant's contract lapsed while he was in Cameroon (as admitted by the respondent) and not upon going to Cameroon. According to counsel the fact that RW1 as Managing Director was the one who negotiated the terms of engagement with the Cameroon Company without participation of the claimant was reason to believe that the claimant was still employed by the respondent and accordingly he was entitled to salary arrears of USD 2,550.

In counsel's submission, the claimant was entitled to 10% commission because it was not logical that he could leave the country and go to Cameroon at a lesser pay. Counsel vehemently defended the prayer for general damages.

In response to the above submissions, counsel for the respondent strongly contended that the claimant was not entitled to argue that his termination was as result of failure

by the respondent to give a reason since this was a departure from pleadings. He argued that the pleadings revealed under **paragraph 8 (x)** that his claim was for alleged failure to give notice and hearing. He further contended that in terms of **Section 65(1) of the Employment Act** no reason is necessary at the time of termination.

He contended that it is only when termination is **under Section 66 (1) of the Employment Act** that an employer is required to explain the reason. According to counsel, the court of Appeal in **Uganda Development Bank Vs Florence Mufumba, Civil Appeal 241/2015** *“did not uphold the Industrial Court’s ratio decidendi that a reason must be given at termination, Instead the termination was found to be unlawful because it was a dressing up of facts and due to failure to give notice”*

He vehemently argued that since the termination was as a result of downsizing because of financial obligations and discovery of fraud, the reason for termination was not necessary at the time of termination although it could be given, if the claimant requested for it, in the certificate of service.

According to counsel, the claimant was not entitled to notice under **Section 58 of the Employment Act** since he had been employed for 2 months and 3 weeks before termination, even though the respondent graciously paid in lieu of notice.

Counsel for the respondent argued that the remedy of declaring termination unlawful could not be sustainable in law because it would be based on a claim contrary to **Section 25 of the Employment Act** and **Section 10 (5) of the Contracts Act**. According to counsel all Employment Contracts worth more than 500,000/= must be in writing.

About salary arrears, counsel contended that the claimant was aware before taking up the job in Cameroon that the respondent would pay them ½ the emoluments and that his employer was Easy Pay South Africa which was responsible for any salary arrears that could arise but even then the claimant regularly received money from Easy pay South Africa as evidenced by RE7 F, RE7G, RE7 M, RE7 P, RE7 R and RE7 T.

It was argued for the respondent that the claimant was not entitled to 10% commission in the absence of evidence that the respondent promised to pay such commission.

As regards damages counsel argued that since the claimant did not suffer at the hands of the respondent, no damages accrue to him from the respondent.

Decision of court.

The first issue: **whether the respondent unlawfully terminated the claimant's employment.**

The contention of the claimant is that the termination was unlawful for failure to disclose a reason for termination while the contention of the respondent is that disclosure of a reason in the instant case was not a prerequisite and that even if it were, the claimant was not entitled to rely on it since it was not pleaded.

Whereas we agree with the respondent that in accordance with **Interfreight Forwarders (U) Ltd Vs East African Development Bank, (1990-1994) 1 EA 117** and **Twed Consulting Company Ltd Vs Springwood Capital Partners Ltd, HCCS 550/2014**, that a party is not entitled to rely on or prove claims that are not disclosed in his /her pleadings, we do not agree that in the instant case this is the position. The claimant under **paragraph 3, of the memorandum of claim** pleaded that the termination of his employment was irregular, wrongful and/ or unlawful. The argument that the respondent did not give a reason for termination was not a pleading but an argument to support the pleading that the termination was irregular, wrongful and unlawful. It was not a claim outside pleadings.

Counsel for the respondent contended that the claimant was terminated lawfully because the employer was undergoing financial difficulties after discovering a fraud and it was necessary to downsize the staff. Whereas an employer is entitled to restructure his/her organization whether it is for purposes of downsizing, capacity building or complete institutional reconstitution, it is a requirement in the law that employees likely to be affected be informed of the impending restructuring.

Section 81 of Employment Act provides guidance in the event that an employer contemplates termination of not less than ten employees for reasons of economic, technological, structural or similar circumstances and the Section provides for 3 weeks' notice to those to be affected unless the Employer can show cause why this is not possible.

In the case of **Dr. Elizabeth Kiwalabye vs Mutesa 1 University L.D.C 005/2017** this Court held that **"Section 81 is very explicit in the requirement for the workers contemplated for termination as a result of restructuring to be notified through their representatives"** see also **Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha LD Appeal 035/2018**

The question whether an employer has an option to terminate an employee without giving a reason under Section 65 (1) of the Employment Act has been discussed by this court in several cases including **Florence Mufumba Vs Uganda Development Bank LDC 138/2014**, and **Okou R. Constant Vs Stambic Bank, LDC 171/2014**. The issue was also extensively covered in the Supreme Court case of **HILDA MUSINGUZI VS STANBIC BANK, SCCA 05/2016**.

In the Florence Mufumba case this court held that whether the employer is contemplating termination or dismissal of an employee, such employer must prove a reason as to why he/she is contemplating the same.

The contention of the respondent that the Court of Appeal in the **Florence Mufumba Vs Uganda Development Bank LDC 138/2014** case did not agree with the **ratio desdendi** of this court is not supported by the decision itself. Nowhere in the decision did the court of Appeal point out that this court was wrong in deciding that in order for a termination /dismissal to be lawful, the employer must show justification for the dismissal before the dismissal is effected. The reference to inclusion of the reason for termination in the certificate of service by the court of Appeal was not to dispel the principle that a termination/ dismissal could only be legal if done with prior reason given to the employee in accordance with Section 68(1) of the Employment Act and a justification in accordance with the definition Section 2 of the Act.

In the Supreme Court case of **Hilda Musinguzi VS Stanbic Bank, SCCA 05/2016** the court held

“The right of the employer to terminate a contract cannot be fettered by the court so long as the procedure for termination is followed to ensure that no employee’s contract is terminated at the whims of an employer and if it were to happen the employee would be entitled to compensation.”

We understand the procedure for termination referred to in the above case to include the procedure as expounded under the Employment Act:

Section 2 (which defines termination and dismissal)

Section 68(which stipulates reason for termination)

Section 65(which stipulates the various methods of termination) and Section 66 (which stipulates a hearing before termination)

This is especially so when the decision is read in the context of the provisions of the **International Labour Organization (I.L.O) convention No. 158 – Termination of Employment convention**, to which the government of Uganda is signatory and which was ratified. The convention states categorically that an employee can only

be terminated with a reason connected with such employee's conduct or capacity related to the operational requirements of his job.

This court in the case of **Okou R. Constant Vs Stanbic Bank, LDC 171/2014**, after re-echoing the above convention held *“Consequently it is no longer tenable that an employer will wake up one morning and pay in lieu of notice or give notice to an employee and end the employment without legal consequences even if that was in accordance with the contract of service”*

In conclusion of the discussion on the first issue we find that the termination of the claimant was not in accordance with the law and that therefore the termination was unlawful.

The second issue is **whether the claimant is entitled to the remedies sought.**

1) Salary arrears of USD 2,550

It was the evidence of the claimant that he was told in a meeting that while in Cameroon he would get salary of 600USD or 2M (Two Million Uganda Shillings). While the respondent conceded to this figure through the witness statement of one Georgia Matua, the same witness informed court that the respondent was only obliged to pay ½ of this which they religiously did. In cross examination the claimant informed court that he was made aware that Easy pay, South Africa was responsible for his salary and in the submission of the respondent this exonerated the respondent from any salary arrears commitment, having paid ½ the salary as agreed between Easy pay South African and the respondent.

It was contended by the claimant that the degree of control of the claimant by the respondent was such that there existed an employer- employee relationship between the two. Although the claimant was made aware of the fact that his salary would be paid by Easy pay South Africa, there was no direct contractual relationship between the two. The arrangement for the respondent to pay ½ of the salary according to George Matua, the Managing director was between Pay Way Software House Ltd and Easy Pay South Africa. The email exhibited as **RE VI** does not, in our view, suggest that the claimant was employed by Easy pay South Africa as counsel for the respondent seems to suggest.

The email reads

“My name is Patrick Musakiriza, working with Pay way Uganda. I will be joining you and your team soon to strengthen on the

Partnership and running of business in Cameroon. I hope we shall effect a paradigm and flawless shift in business. ”

There is no denial by the respondent that at the time the claimant was deployed in Cameroon and for some of the period the claimant was in Cameroon, his contract as employee of the respondent was running. It thus becomes very difficult for this court to be convinced that there was another contractual arrangement between the claimant and Easy Pay South Africa relating to employment just before he flew to Cameroon. This is especially so when it is evident that the respondent paid ½ the salary of the Claimant with an arrangement unknown by the claimant that the other ½ would be paid by Easy Pay South Africa. Given that the discussions of the claimant's terms of employment in Cameroon were negotiated by the respondent without clear participation or clear evidence that the claimant was involved, given that it was the respondent who informed the claimant that his salary would be paid by Easy Pay S.A yet the respondent paid ½ of it and other ½ was not paid, and given that all the while the contract of employment between the respondent and the claimant was running, it is our position that the respondent cannot run away from the responsibility to pay the salary arrears. Accordingly, this prayer is allowed.

Commission from company sales

It was the claimant's evidence that he was promised 10% commission. The respondent denied having made such a promise. The evidence is not clear what the 10% was equivalent to and how much exactly the claimant was entitled. The court is left in the dark as to which multiplier can be used to arrive at the exact figure claimed. Although the claimant in paragraph 22 of his witness statement says that sales on MTN were between 5 million CFA and 6 million CFA each week at the time he joined, and that he increased the Franchise to 25-30 Million, there was need for some other evidence not only to corroborate and give weight to his own evidence but also to prove that there was a promise by the respondent to give him commission.

In the absence of such evidence, this court cannot grant this prayer which is in the class of special damages and which by law has to be strictly proved.

General damages:

As pointed out earlier, the claimant was unlawfully terminated from his employment. According to the respondent on the claimant's return to Uganda from Cameroon, his contract expired and he was re-engaged by the respondent at 1,000,000/= per month from October 2016 until he was terminated in

December 2016. It is not clear when exactly the contract lapsed, but **exhibit RE2** suggests that the contract was for 3 years beginning 01/7/2013. It was expected to end on 01/7/2016. In the absence of evidence that the engagement of the claimant in Cameroon terminated the contract, and given the evidence of RW1, George Matua, that the respondent did not terminate the claimant but that the contract expired, it can be safely emphasized that while in Cameroon he was an employee of the respondent.

We take note of the inconvenience he suffered while living in Cameroon without his family only to come back and unlawfully lose his job. Given the circumstances, we hereby grant him 10,000,000/= as general damages.

Punitive damage : We have not found any extra ordinary circumstance to warrant such damages. This prayer is denied.

All in all, the claimant has proved his case against the respondent and an Award is entered against the respondent and in favor of the claimant in the above terms with no orders as to costs but with 15% interest per year accruing from the sum granted as general damages from the date of this Award till payment in full.

Delivered & signed by:

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

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. Fx. Mubuke
3. Ms. Harriet Muganbwa

Dated:28/04/2021