THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE APPEAL NO. 034 OF 2019

[ARISING FROM LABOUR DISPUTE COMPLAINT NO. 241/2018]

BETWEEN

UGAFODE MICROFINANCE LTD.

(MDI)…….……...……..…..APPELLANT

VERSUS

MARK KYORIBONA…… ……...…….……..RESPONDENT

BEFORE

1. Hon. Head Judge Ruhinda Asaph Ntengye

PANELISTS

1. Mr. Bwire John Abraham
2. Ms. Julian Nyachwo
3. Mr. Katende Patrick

AWARD

This is an appeal against the decision of Mr. Mukiza Emmanuel Rubasha delivered as a labour officer sitting at Kampala City Authority. The appeal was filed by M/s. Nangwala, Rezida & Co. Advocates and M/s. Diana Kwesiga appeared for the appellant in court while Mr. Kyeyune Albert Collins of M/s. Mukiibi & Kyeyune Advocates appeared for the respondent when the matter was given dates for written submissions.

BACKGROUND OF THE APPEAL

The appellant was an employer of the respondent who was employed initially as an individual lending supervisor on 1/1/2013. Eventually the position of Credit Manager fell vacant and the respondent, after being interviewed was successful and was appointed as acting Manager but later on after being vetted by Bank of Uganda he was confirmed as Ag. Head Credit on 22/09/2017. In the course of his work he authorized a waiver on interest for one customer of the appellant and this raised queries demanding explanations which he did but which did not satisfy management culminating in an invitation to a disciplinary and later on a warning letter dated 6/6/2018 at the same time a re-designation of his position from credit manager to compliance manager which he rejected. According to the respondent this was as a consequence of a restructuring of the appellant

as a result of which various positions or roles were scrapped, separated, modified or merged including the position of Credit Manager.

The respondent having rejected the re-designation refused to report to work claiming it was a demotion and not the job description he had applied for and been appointed to, while the appellant contended that the respondent had abandoned duty and disrespected his employer's directive and assignment of duty. The labour officer decided in favor of the respondent in the following terms:

i. The Respondent (appellant) unfairly and unlawfully constructively terminated the service of the complainant (respondent).
ii. That the Respondent (appellant) pays the complainant (respondent) Ugx. 8,000,000/= as basic compensatory order for unfair termination and addition compensation of Ugx. 16,000,000/= (2 months) totaling to Ugx. 24,000,000/=.
iii. That the respondent (appellant) pays the complainant (respondent) untaken leave amounting to Ugx. 5,099,909/=.
iv. That the respondent (appellant) pays leave allowances not paid amounting to Ugx. 8,000,000/=.
v. That the respondent pays compensatory public holiday and weeks rest amounting to Ugx. 1,454,545/=.
vi. That the respondent (appellant) pays unpaid acting allowance amounting to Ugx. 4,100,000/=.
vii. That the respondent (appellant) [pays the complainant (respondent) severance allowance at a rate of one month per year worked amounting to Ugx. 8,000,000/= x 6 which amounts to Ugx. 48,000,000/=.
viii. That the prayer for payment of the costs and damages are referred to the Industrial court for determination.
ix. That the total award given amounts to Ugx. 98,645,454/=.

The appellant was dissatisfied and appealed to this court on the following grounds of Appeal.

(a) The labour officer erred in law in holding that the Appellant unfairly and unlawfully constructively terminated the services of the Respondent.
(b) Having wrongly found that the respondent was unlawfully constructively terminated, the Labour Officer erred in law in holding that the Appellant failed to give mandatory Notice or payment in lieu of Notice whereas the Respondent had actually abandoned work.
(c) The Labour Officer erred in law when he granted the Respondent the monetary awards which he did.
(d) The labour officer erred in law when he failed to properly evaluate the evidence thereby arriving at a wrong conclusion.
(e) The labour officer erred in law when he refused to refer Labour Dispute Claim No. 241 of 2018 to the Industrial court of Uganda at Kampala.

Both counsel chose to argue ground 1 and 4 separately. We shall discuss both grounds together since the question of evaluation of evidence which is ground No. 4 feeds into the question whether or not the labour officer was right to hold that the respondent was unlawfully and constructively terminated which is ground No. 1.

The position of the law on constructive dismissal

Section 65 of the Employment Act provides;

"65. Termination

(1) Termination shall be deemed to take place in the following circumstances –
(a) …..
(b) ….
(c) Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee; and
(d) …"

Unreasonable conduct of the employee can only be ascertained from the circumstances of a given case.

Such unreasonable conduct may lead the employee to offer resignation or refusal to report to work thus terminating the employment relationship. This court in the case of **Nyakabwa J. Abwooli Vs Security 2000 Ltd, Labour Dispute 108/2014** held

> "**In order for the conduct of an employer to be deemed unreasonable within the meaning of Section 65 (1)(c) … such conduct must be illegal, injurious to the employee and make it impossible for the employee to continue working. The conduct of the employer must amount to a serious breach and not a minor or trivial incident and the employee must act in response to the breach not for any other connected reason and act in a reasonable time. What might be a serious breach in one case may not be necessarily a major one in another case and so each case must be decided on its particular facts."**
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> The authority of **Muyimbwa Paul Vs Ndejje University, Labour Dispute Reference No. 222/2015 i**s for the legal position that demotion of an employee without a hearing is a serious breach of contract constituting constructive dismissal once an employee refuses to return to work as a result of such demotion.
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> **SUBMISSIONS**

It was the contention of the appellant that the position of Credit Manager had ceased to exist as a result of restructuring when the respondent was re-designated to the position of compliance manager which was on the same terms and conditions.

According to counsel, the re-designation was not a change of job title amounting to variation of the contract and neither was it a demotion.

Counsel argued that this was a transfer from the position of Credit Manager to compliance manager which did not affect any of the privileges of the respondent. Relying on the authority of **Albert Tinto Vs Smart Communication Inc. (G.R No. (71764) of the Supreme court of Philippines c**ounsel submitted that mere title or positions held by employers do not determine whether transfers of such employees constitute demotion especially when such officers keep the same rank and salary.

Counsel contended that the transfer of the respondent was due to a valid corporate reorganization to streamline operations of the appellant.

Counsel criticized the labour officer for finding that the position of compliance manager relegated him to supervising five staff instead of the over one hundred staff he previously supervised. According to counsel neither the Employment Act nor the Human Resource Manual of the appellant provided for a number of employees to be supervised by or managed by a given fellow employee. Counsel contended that the appellant provided work to the respondent as commanded by **Section 40(1) of the Employment Act** but instead the respondent rejected and abandoned the same.

Counsel was also not happy with the labour officer's finding that it was not proper for the appellant to issue a warning letter and a re-designation of his job at the same time with disciplinary proceedings as he argued that there was no law that barred the employer to do so.

Counsel faulted the labour officer for finding that the respondent resigned as a result of the appellant's unreasonable conduct. According to counsel **Section 65(1)(c)** requires an employee to resign with or without notice and in his view an employee cannot just allege constructive termination whilst he/she continues to engage the employer without properly resigning. He relied on the authorities of **Jones Vs F Sirl & sons (Furnishers) Ltd (1997) IRLR493 and Kenya Labour relations case No. 702/2016, Lear Shigadi Sinoya Vs Avtech system Limited** for the legal proposition that without a formal resignation there cannot be constructive dismissal.

In response to the above submissions, counsel for the respondent argued that the respondent had a contract for the position of Credit Manager which the appellant terminated and demoted him without notice.

According to counsel, the appellant's witnesses confirmed during cross-examination that the respondent had an option to take the offered promotion or exit which was not only illegal and hostile but in breach of the contract.

Relying on **Sections 59(1) 4, 5 and 6 Section 60 of the Employment Act,** counsel argued that the title and job description of an employee are fundamental particulars of an employment contract which cannot be varied without agreement except under **Section 27**where the variation is to the advantage of the employee. According to counsel the re-designation of the respondent amounted to demoting him in grade, status, dignity responsibilities, leadership and clout given that there was a requirement of fresh approval by Bank of Uganda a midst a warning letter that disadvantaged him.

Relying on a South Africa case of **Steven Raymond Vs WYK Vs Albany Bakeries Ltd & Others No. JR 1658/01** counsel submitted that a demotion happens even where an employee retains salary, attendant benefits and rank but suffers a reduction or demotion in dignity, importance, responsibility, power or status.

Counsel for the respondent maintained that the re-designation was done without informing him the reasons for so doing which in his view amounted to termination of his contract (of credit manager) contrary to **Article 4 of the Termination of Employment Convention** which provides for reasons for termination and the authority of **Blanche Byarugaba Kaira Vs Africa Field Epidemiology Network LDR No. 131/2018** which held that reasons must be given before termination and not in the termination letter.

Counsel submitted that the position of compliance manager required fresh approval by Bank of Uganda and yet the warning letter would influence the approval or non-approval. According to counsel evidence on the record in **Exh. UM3 at page 123-137** confirmed the labour officer's finding that the position of compliance manager was inferior to that of credit manager.

On the second issue, counsel for the appellant submitted that there was no evidence of termination of employment by the appellant and therefore the holding that the respondent was entitled to payment in lieu thereof before termination as provided for in **Section 58 of the employment Act** had no merit. According to counsel after a finding of constructive dismissal, the labour officer was wrong at the same time to find the respondent entitled to payment in lieu thereof.

In reply, counsel for the respondent contended that his client did not abandon work but had no work to perform his contract having been terminated and therefore he was entitled to notice. Relying on **Abigaba Lwanga Vs Bank of Uganda LDC No. 142/2014**, counsel argued that even in restructuring an employee is entitled to notice. He informed court that in the absence of the specific modes of resignation in the Human Resource Manual, it was sufficient for the respondent to serve a notice of complaint to the appellant.

Counsel for the appellant on ground 3 contended that all the monetary awards by the labour officer had no legal basis. For severance allowance his submission was that the respondent having not been unlawfully terminated he would not be awarded severance allowance. As for leave allowance counsel argued that the respondent having not proved that he applied for leave, he could not be awarded the same. Relying on **Clause 6.6. of the Human Resource Manual**, counsel submitted that the respondent failed to prove that he was entitled to the leave allowance. For the same reasons as in severance allowance counsel argued that the respondent was not entitled to any additional compensation.

For the same reasons as in leave allowance counsel contended that the respondent was not entitled to accrued leave for the year 2018 especially so when he had not yet officially handed over the office.

It was counsel's submission that in the absence of a formal resignation, the respondent having abandoned his work, he could not be entitled to any salary in lieu of notice and in the absence of evidence that he worked on any weekend or that his normal leave had been affected in any way, he was not entitled to compensatory leave.

As for unpaid acting allowance for August 2017, counsel asserted that the respondent forfeited the same and that in consideration of this forfeiture he was paid an increased salary compared to his contemporary managers.

In response to the above submissions counsel for the respondent strongly submitted that the respondent was entitled to all the remedies granted by the labour officer.

Decision of court

Ground one and four. These two grounds in our view can conveniently be framed into the following issue:

> **Whether the labour officer properly evaluated the evidence on the record so as to reach a decision that the respondent was unlawfully constructively terminated.**

We earlier on stated the position of the law on constructive dismissal as envisaged in **section 65(1)(c)** and as stated in Nyakabwa Abwooli vs Security 2000 Ltd. (supra) as well as Muyimbwa Paul Vs Ndejje University (supra).

The evidence on the record is clear, and the appellant does not dispute it, that the respondent was invited and was interviewed, appointed and later on confirmed for the job of Credit Manager. By letter of the chief executive Director addressed to the respondent dated 7/7/2015 the respondent was confirmed in the appointment. The letter at page 136 of the record of Appeal reads as follows:

"**We refer to your appointment as Acting Credit Manager. Following approval of your appointment by the central Bank; you are hereby confirmed in the position of credit manager with effect from 1st July 2015."**

It was not disputed that a warning letter together with a re-designation letter to the job of compliance officer addressed to the respondent were dated the same day of 6/6/2018 and received by the respondent on 11/06/2018. We find it necessary to reproduce the warning letter here below:

"Dear Mark,

Re: Outcome of Disciplinary Hearing – warning letter

I write to confirm the outcome of the disciplinary hearing that was held on 1/06/2018.

After careful consideration of all the facts presented, the panel felt that it had no alternative but to issue you with a written warning for having acted in breach of the credit policy clause 2.28.7.2 where you authorized an interest waiver of Ugx. 12,800,000/= for Allan Aisu over and above your approval limits, as per the current Credit Policy Manual.

UGAFODE Management will not tolerate violation of policies in anyway, so be warned if anything like this happens again, you can be sure that we will deal with this in a more severe manner."

The re-designation letter (inter alia) provided

"**Following changes in the organizational structure, management hereby informs you that you have been re-designated to the position of compliance manager, reporting to the Executive Director with effect from 1st July 2018. Management believes you will be of added value in this new role given your past experience in handling compliance, Credit and Risk roles…….attached is a copy of your new job description."**

A job title can be described as the position in the hierarchy of an organization given to the employee by the employer either at the time of the contract or later in the course or employment. It denotes one's seniority or one's level within the organization and whatever the employee actually does in the organization is referred to as his/her role. Whereas a job title is one of the particulars under **Section 59 of the employment Act** required to be availed to the employee by the employer, no job description or roles are mentioned under the same section. To our minds this means that whereas a job title is a fundamental component of the contract of services which may not be altered without the consent of the employee, the job descriptions or roles of the employee are totally in the discretion of the employer so long as they are associated and directly connected with the employee's job title. A job title ordinarily changes either on promotion or demotion of an employee.

We associate ourselves with the submission of counsel for the respondent that the job title is a fundamental term of the contract envisaged under **Section 59(1) and (2) of the Employment Act** and that an alternative job title could only be given to an employee upon his/her consent short of which the employer would be liable for breach of contract and the labour officer was correct when he stated so at page 449 of the record of Appeal.

Although we agree with the holding in the Philippines case of Albert O. Tinio Vs Smart Communications, Inc.(supra) cited by counsel for the appellant that a mere title or position held by an employee does not determine whether a transfer constitutes a demotion, we still form the opinion that change of a title of an employee as envisaged in the contract of service unless by consent of the employee is a fundamental breach of the contract of service.

Counsel for the appellant vehemently argued that unless an employee formally tendered his resignation there would not exist constructive dismissal. According to counsel **Section 65(1)(c)** required an employee to resign with or without indication of any notice. In our considered view nothing is further from the truth. **Section 65(1(c)** allows the employee to terminate the contract when the employer exhibits unreasonable conduct towards him and we consider involuntary resignation as one of the methods of terminating the employment under this section. Resignation is not the only method required of an employee under Section **65(1)(c).** Mere refusal by the employee to report to work may in certain circumstances be interpreted to fall under **Section 65(1)(c)** once the employee convinces court that he/she refused to report because of unreasonable conduct of the employer. We have carefully perused the Kenya judgment in the case of **Lear Shighadi sinoya Vs Avtech system Kenya Labour Relations Cause no. 702/2016** relied upon by counsel for the appellant on his submission about the requirement of resignation. We are not persuaded by the statement in the judgement that

> "**Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation…..where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised."**
>
> We are not persuaded especially because the same judgement earlier on pointed out
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> > **"…the respondent was in breach of contract when they failed to pay the claimant her due salaries as agreed at end of the month. Such was to put the claimant into circumstances that can only be termed as unfair and not warranted. The defence that the respondent had financial problems and other employees were attending work save for the claimant is not sufficient reason to warrant the breach of contract. There was no communication to the claimant on such problems in finances and in any event, the law allows an**

employer faced with financial constraints and is unable to keep employees to follow due process."

Following the decision of this court in Nyakabwa Abwooli Vs Security 2000 Ltd.(supra) as earlier quoted but for emphasis stated:

> "T**he conduct (of the employer) must be illegal, injurious to the employee and make it impossible to continue working….it must amount to a serious breach and not a minor or trivial incident and the employee must act in response to such breach not for any other unconnected reason and act in a reasonable time"** we are firm that failure to pay salaries of an employee without justification or reason earlier given to the employee is a serious breach that constitutes unreasonable conduct of the employer under Section 65(1)(c) and that an employee need not tender a formal resignation under the same section of the law**.**

The labour officer in the instant case did not necessarily wrongly conclude that there was constructive dismissal simply because there was no formal resignation from the respondent. The bigger question is whether or not the labour officer's finding of constructive dismissal in the instant case was correct.

There is no doubt, on the evidence adduced before the labour officer, that the respondent was confirmed in appointment of the job of Credit Manager after approval by Bank of Uganda. There is no doubt also that the letter of re-designation was served onto the respondent together with a letter of warning from the respondent. The re-designation of the job title was, according to the appellant caused by the restructuring of the operations of the appellant which process was only known to the appellant. Although the letter of warning purports to have been written after a disciplinary hearing no evidence was adduced as to the existence of such a disciplinary hearing.

Although the appellant explained that the re-designated job of Compliance Manager carried with it the same salary and benefits as the job of Credit Manager, from the job descriptions of both, it is clear that whereas the job of Credit Manager was a grade level 2 category that of Compliance Manager was of a grade 3 category. Whereas as Credit Manager the respondent was to supervise Branch Managers and all Credit staff, as a Compliance Manager he was to supervise Compliance Officers.

Demotion of an employee is not only reflected in the salary and other privileges but also in the stature and responsibilities attached to the assignment as compared to the previous assignment.

In answering the question of constructive dismissal the labour officer considered the circumstances of the case from page 13-20 and stated (inter alia).

> **"It is my finding that the respondent's decision of concurrently serving the complainant with a warning letter for non-compliance and the mandatory re-designation to Compliance Manager subject to approval by Bank of Uganda went to the root of the employment contract amounting to constructive dismissal."**

In view of this court's earlier holding that the re-designation of the job title without the consent of the respondent was a fundamental breach, we entirely agree with above finding of the labour officer. Indeed the re-designation in the instant case was illegal and injurious to the respondent having been subject to approval by Bank of Uganda and having been caused by an unknown restructuring. It was also of a lesser stature and carried with it lesser responsibilities as reflected in the supervisory functions which in our view constituted demotion. Accordingly, grounds (a) and (d) of the appeal hereby fail.

Ground (b) refers to a criticism of the Labour Officers decision that the respondent was entitled to notice.

Whereas under **Section 58 of the employment Act**, the employee is entitled to notice before his employment is terminated, we do not think that this section applies as and when the employee terminates the employment under **section 65(1)(c) of the Employment Act.** We do not appreciate the argument of counsel for the respondent that constructive dismissal is as good as ordinary termination demanding notice by the employee in any event. This is because constructive dismissal falls under the relief of duties by the employee himself due to the unreasonable conduct of the employer.

The dismissal becomes unlawful because of the conduct of the employer otherwise the employee terminates his own contract and for that matter whether or not such employee is entitled to notice will always depend on the nature and circumstances of the constructive dismissal. In **Tibenkana Edith Vs London Distillers (U) Ltd. LDR 146/2019** this court awarded payment in lieu of notice because the court found that **"the transfer was as a result of a demotion since she would be earning less than from the previous designation…. The fact that subsequently she reported to her new station and found the station under lock and key gave an impression that the transfer was used as subterfuge by the employer to rid himself of an undesirable employee".** Having been offered no work to do even in her demotion meant that the employer had effectively decided to terminate her.

In **Allen Namuyiga V Export Trading Co. Ltd. LDR 049/2020**, this court allowed payment in lieu of notice because the claimant was "a**ssigned to the coffee department where she worked for 4 years and 2 months, before she got pregnant and fell sick. On return after sick leave she was placed in the accounts department and given no work. Her duties in the coffee department were given to another person without offering her any reason and her email was disabled…"** just like in the Tibenkana Edith case, the employer by refusing to give her work, had decided to terminate her.

In the instant case, however, the offended employee refused to work in a designation and job description that appeared a demotion from his contracted job title and job description. He terminated his own contract in circumstances different from the above cases. Accordingly we agree with the appellant that the respondent was not entitled to notice or payment in lieu of notice. This ground of Appeal succeeds.

Ground (e) was about remedies granted by the labour officer.

(a) **Severance pay**

As we have held above, the respondent was constructively dismissed and therefore the termination of employment was unlawful/unfair. Accordingly in accordance with **Section 87 of the employment Act,** he was entitled to severance allowance. Since there was no contestation as to the amount ordered by the labour officer to be payable, the same is hereby allowed.

(b) **Leave allowance**

It was argued for the appellant that in the absence of written request for leave which was accepted or deferred, the respondent could not be awarded leave allowance. According to the respondent the labour officer relied on clause 6.6. of the appellant's Human Resource Policy and the contract of service in allowing leave allowance. The Policy provided;

> **"6.6. leave allowance**
> **All employees shall be entitled to leave allowance of 20% of their monthly gross pay and this will be taken at the time of the staff anniversary. Human Resource will prepare a leave allowance schedule for all staff and will also keep track of all leave allowance paid out to staff."**

In our interpretation, the above provision in the Human Resource Manual was meant to provide for an additional privilege to all employees of the respondent. It cannot have been an attempt to restrain individual employees to apply for annual leave by providing for a 20% gross pay at a staff anniversary. Leave is an entitlement of an employee as provided for under **Section 54 of the employment act.** The due date of the leave allowance under clause 6.6. of the Human Resource Policy not being clear, the labour officer was entitled to find that it was an entitlement to every employee since the mandatory provision of leave under **Section 54 of the Employment Act** provides for a full pay at the rate of seven days in respect of a continuous four months service taken at a convenient time during a calendar year. This is in contrast to the 20% of monthly gross pay to be taken at a staff's anniversary.

In our view there was a presumption embedded in clause 6.6 of the Human Resource manual of the appellant that every employee had an anniversary to celebrate every year at which celebration such employee would be entitled to the allowance.

However, the burden was on the respondent to prove that his anniversary fell on a given date and that his allowance was not paid. The record reveals that his relationship with his employer started to sour in June 2018 when he was served with a warning letter and a re-designation of his job title. In the absence of proof of the anniversary date, we reject the submission of the respondent that he was entitled to this allowance.

(c) **Compensatory allowance**

Section 78 of the employment Act provides

> **"78. Compensatory Order**
>
> **(1) An order of compensation to an employee who has been unfairly terminated shall in all cases, include a basic compensatory order for four weeks' wages."**

Counsel for the appellant's rejection of this allowance was on the ground that the respondent was not constructively terminated or dismissed and that he had been paid the July 2018 salary. Since this court has found that the respondent was constructively dismissed, there is no reason why this section of the law cannot be invoked. Accordingly we confirm the order as granted by the labour officer.

(d) Accrued leave days for 2018

It was argued for the appellant that the respondent having not proved that he requested for leave and that such leave was due in November 2018, he was not entitled to the same. In the alternative counsel argued that without the respondent finalizing the exit process leave entitlement could not be addressed.

Counsel for the respondent contended that under **Article 12 of the termination of Employment convention**, it was mandatory for an employer to pay all benefits including leave at separation. According to him, he arranged to take his leave in November 2018 but the contract was terminated before the due date for taking leave.

As earlier pointed out **Section 54 of the Employment Act** provides for leave of an employee at a rate of 7 days for a continuous four months' service to be taken during a calendar year at an agreed time between the employer and the employee.

This court has held before that an employee is only entitled to payment in lieu of leave if he proves that he intended to take leave and that he applied for it but for one reason or the other his/her employer denied him or her to take the leave (**see Mbiika Dennis vs Centenary Bank LDC 023/2014).** This holding is effective for leave not taken during previous calendar years. **Section 54(5) of the Employment Act** provides

"**An employee is entitled to receive upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday or compensation in lieu of the holiday."**

This means in our view that if before a given calendar year elapses and an employee is terminated having not taken his leave, such employee is entitled to the number of days he ought to have taken up to the time of termination.

The respondent was effectively terminated in July 2018 meaning that he had worked for 7 months in the calendar year of 2018. He was entitled to 4 days for each period of a continuous 4 months service. This means he was to get 4 days for January-end of April 2018 because it accrued for this period. The next accrued leave days would have been up to August 2018 but unfortunately for the respondent he got out of the job before the continuous next four months which could not accrue leave days in terms of **Section 54(1).** The respondent was therefore entitled to only 7 days accrued leave making Ugx. 1,866,669/=.

(e) **Additional compensation**

Under **Section 78(2) of the Employment act,** while taking into account factors named therein, a labour officer is authorized to award in addition to a basic compensatory order under **Section 78(1),** compensation not exceeding 3 month's wages of an employee.

The labour officer in his wisdom awarded 16,000,000/= which is 2 months wages. Given that there was no submission from the appellant on this award, there was no reason to disturb it. We are not convinced either by the prayer of the respondent to increase it to 3 months since there is no justification by the respondent for the increase.

(f**) Unpaid allowance for the month of August 2017 for acting as Head Credit.**

The objection by the appellant to this allowance is based mainly on the contention that the respondent forfeited the allowance by an agreed arrangement that his salary would be raised to 8,000,000/= in the month of September 2017.

It was the evidence of the appellant at page 150 of the record of Appeal that following a compromise between the respondent and the appellant a salary of 8,000,000/- was issued to the respondent. However, on perusal of the evidence of the appellant at page 63 of the record of Appeal, and on perusal of both appointment letters to the acting position dated 4/8/2017(page 157, record of appeal and 22/09/2017 (page 158, record of appeal) it is apparent that the 4,100,000/= acting allowance was in addition to the salary entitlement. The gross salary of 8,000,000/= mentioned in the letter of 22/09/2017 did not in any way affect the acting allowance in the previous month of August 2017 and nothing on the evidence suggested that there was an agreement for the respondent to forfeit his acting allowance. Accordingly the award of 4,100,000/= as acting allowance of August 2017 is sustained.

(g) **Compensatory Leave**

We have perused carefully communication from the respondent dated 9/03/2018 to one Emma Concerning compensatory leave. There is no denial that the respondent was entitled to this leave except that the respondent limited the leave to 1 day yet it is clear the respondent was instructed to work on 4 public holidays.

Accordingly the award of 1,454,545/= is maintained.

We have perused the submissions of both counsel on the cross appeal, most of the concerns in the cross appeal have already been disposed of in the main appeal. We will only consider the additional remedies not mentioned in the appeal.

REPATRIATION:

Section 39 of the Employment Act provides:

(1) An employee recruited for employment at a place which is more than one hundred kilometers from his/her home shall have the right to be repatriated at the expense of the employer to the place of engagement in the following cases
   a) On the expiry of the period of service stipulated in the contract;
   b) On the termination of the contract by reason of the employee's sickness or accident;
   c) On the termination of the contract by agreement between the parties, unless the contract contains a written provision to the contrary; and
   d) On the termination of the contract by order of the labour officer, the Industrial court or any other court.

It is our considered opinion that unless termination was as a result of one or more of the above circumstances repatriation under **Section 39 of the Employment Act** does not arise. In the instant case termination was as a result of the unreasonable conduct of the employer constituting constructive dismissal which is not in any of the above categories. Consequently we disallow the prayer for repatriation.

Penalty for non-payment of severance allowance

Section 92 of the Employment Act provides

"92 failure to pay severance allowance

(1) An employer who is liable to pay severance allowance and who willfully and without good cause fails to pay the allowance in the manner and within the time provided under this Act commits an offence.
(2) An employer who commits an offence under this section shall pay a fine calculated at two times the amount of severance allowance payable, and the fine shall be payable to the same person and in the same way as the severance allowance is payable.

The above Section of the law provides that a person is only guilty of failure to pay severance once she/he is liable to pay and once he/she has willfully and without good reason failed to pay. It is our considered opinion that the employer cannot have committed an offence against this section of the law if he/she has not paid because the question whether or not the ability exists is still pending in the courts of law. By lodging an appeal against the decision of the labour officer, it is apparent that the liability to pay severance was contested and it is only on appeal that this court has confirmed the decision of the labour officer**.** The penalty therefore did not arise before the labour officer. In **Umeme vs Harriet Negesa LDA 0072/2018** it was held that no employer can be said to have committed an offence under **Section 92(2) of the Employment Act** during the period when both the question of unlawful termination and severance were undergoing the court process.

(3) <u>General Damages</u>

We agree with counsel for the appellant that the labour officer was right in referring the issue of damages to this court since he had no jurisdiction to entertain the same.

We take cognizance of the fact that the labour officer granted the respondent compensation in accordance with **Section 78 of the Employment Act.** Given the nature of the job of the respondent and how much he was earning, and given that he was employed on permanent terms, we find that the compensation awarded by the labour officer was not sufficient.

Accordingly, we agree with the submissions that he was entitled to general damages. We consider Ugx. 20,000,000/= sufficient.

In conclusion the appeal fundamentally fails and the following orders ensue:

(1) The finding of the labour officer that the respondent was constructively dismissed is hereby sustained.
(2) The order of severance allowance of 48,000,000/= in favour of the respondent is sustained.
(3) The order 1,600,000/= of leave allowance is set aside.
(4) The order of basic compensation of 8,000,000/= in favour of the respondent is sustained.
(5) The order of additional compensation of 16,0000 is sustained.
(6) The order of accrued leave of 5,090,909 is hereby set aside and substituted with an order of 1,866,669/=.
(7) The order of compensatory leave of 1,454,545/= is hereby sustained
(8) An order for payment in lieu of notice is hereby set aside.
(9) In accordance with Section 61 of the Employment Act, the labour officer was correct to order a certificate of service to the respondent and such order is hereby sustained.
(10) The appellant shall pay 20,000,000 as general damages
(11) The amounts awarded in this appeal shall attract interest of 12% from the date of this Award until payment in full. No order as to costs is made.

Delivered and signed by:

1. Hon. Head Judge Ruhinda Asaph Ntengye …….

PANELISTS

1. Mr. Bwire John Abraham …….
2. Ms. Julian Nyachwo …….
3. Mr. Katende Patrick …….

Dated: 17/9/2021