



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 216 OF 2021
(Arising from Labour LD. 16.05.21)

OLANGO STEPHEN::CLAIMANT

VERSUS

HANDS OF LOVE S.S.S. KABAGA::::::::::::::::::::::::::::RESPONDENT

BEFORE:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,

PANELISTS:

1. Ms. ADRINE NAMARA,
2. Ms. SUSAN NABIRYE &
3. Mr. MICHAEL MATOVU.

AWARD

Introduction

- [1] On 5th June 2017, the Claimant was employed as a teacher with the Respondent. He was on a monthly salary of UGX 800,000/= and a weekly allowance of UGX.15,000/=. In January 2019, the Respondent defaulted on payment of salary and reduced the weekly allowance to UGX 8,000/=. Following none payment of 8 months' salary, the Claimant filed a complaint with the Wakiso District Labour Office. Having failed to resolve the dispute, the Labour Officer referred the matter to this Court.
- [2] The Respondent did not file a Memorandum in Reply.
- [3] On the 20th January 2023, the matter was called for hearing before this Court. Ms. Diana Kaziba, appearing for the Claimant, sought leave to proceed exparte. Upon perusal of the affidavits of service sworn by Ms. Kaziba and Mr. Fred Kigabwa, by an approved Court process server, we were satisfied that the Respondent had been

effectively served. We granted leave to proceed *ex parte* under Order 9 Rule 20(1) of the Civil Procedure Rules S.I 71-1 (*from now CPR*).

Issues for determination by Court

- [4] In the Claimant's scheduling notes filed on 2nd November 2022, three issues were framed for determination, viz:
- (i) Whether the Respondent breached her obligations under the employment contract.
 - (ii) Whether the Claimant was constructively dismissed by the Respondent.
 - (iii) What remedies is the claimant is entitled to.

Analysis and Decision of the Court.

Issue (i) Whether the Respondent breached her obligations under the employment contract.

- [5] The facts of the case are basically clear and uncontested. The Claimant filed a witness statement by which he testified to having been employed as a teacher with the Respondent on 5th June 2017 at a monthly salary of UGX 800,000/= and a weekly allowance of UGX 15,000/=. His contract of employment was exhibited in Court. The Respondent did not pay salary for January, June, July, August and December 2019. The Respondent did not pay salary for February, November and December 2020, as well. His weekly allowance was reduced to UGX 8000/=. He protested this reduction, unsuccessfully. He claims a grand total of UGX 22,400,000/= in unpaid salary, UGX 305,000 for weekly allowances, illegal deductions of mandatory tithe of UGX 2,160,000. He testified that other staff members were paid and he felt humiliated and embarrassed and had difficulty providing for his family. He prayed for payment of the arrears and illegally deducted monies, NSSF remittances, aggravated/punitive damages, costs of the claim and interest.
- [6] Ms. Kaziba submitted that **under Section 41(1) and (2) of the Employment Act, 2006 (*from now EA*)**, an employee is entitled to wages. The Claimant exhibited a contract of employment stipulating a monthly salary of UGX 800,000/= and a weekly allowance of UGX 15,000/=. A copy of the Claimant's bank statement also showed a funds transfer UGX 1,000,000/= from the Respondent on 1st April 2021. The Claimant also produced 3 separate reminder letters addressed to the Finance Office of the Respondent asking for payment of his salary arrears. This evidence was unchallenged and after objectively considering the evidence, we agree with the submission of Ms. Kaziba that the Claimant would be entitled to wages and answer Issue No. 1 in the affirmative. The Respondent breached its obligations by not paying the Claimant his wages.

Issue (ii). Whether the Claimant was constructively dismissed by the Respondent.

[7] Ms. Kaziba submitted that the Respondent constructively dismissed the Claimant by creating a hostile environment forcing the Claimant to quit his job. She cited S65 (1) (c) EA where termination is deemed to have taken place when the contract of services is a consequence of the employer's unreasonable conduct. Counsel cited the case of **Nyakabwa J Abwooli v Security 2000 Ltd LDC 108/2014** for the proposition that unreasonable conduct means illegal, injurious and impossible working conditions. The employer's conduct must amount to a serious breach.

[8] Section 65(1)(c)EA provides as follows:

" (1) Termination shall be deemed to take place in the following instances:

(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;"

The essential element under this provision is that the employers conduct must be unreasonable. The Industrial Court has applied the provisions of the section in a range of decisions. In the case of **Ugafode Microfinance Limited (MDI) V Kyoribona**¹ the Court posited that Section 65(1)(c) allows the employee to terminate the contract when the employer exhibits unreasonable conduct towards him. The Court held that 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. The Court found the case of **Lear Shighadi Sinoya Vs Avtech System**² to be persuasive on the point that failure to pay salaries was a breach of contract and placed an employee in unfair and unwarranted circumstances.

[9] A particularly clear definition of constructive dismissal was made by Lord Denning in the following words:

*'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'*³

¹ Labour Dispute Appeal 34 of 2019 [2021] UGIC 26

² Kenya Labour Relations Cause No. 702/2016

³ Western Excavations (ECC) Ltd v Sharp [1978] IRLR 27 CA as quoted in "Employment Law" 5th Edn by Malcom

In the matter before us, we have found in the resolution of issue (i) that the Respondent was in serious breach of the contract of employment. The duty to pay wages is statutory under Section 41EA. It is illegal not to pay salary. It is also injurious to the employee. ⁴ In the Nyakabwa case, the Industrial Court was of a firm view that failure to pay salaries of an employee without justification or reason is a serious breach that constitutes unreasonable conduct of the employer under Section 65(1)(c). We agree with this proposition. In the matter before us, we find that by failure to pay the Claimant's salary over a period of 8 months amounted to constructive dismissal. We would answer issue (ii) in the affirmative.

Issue iii. What remedies is the claimant entitled to?

[10] The Claimants sought various remedies.

Unpaid Wages

[11] Under **Section 41(1) and (2) of the Employment Act, 2006**(*from now EA*), an employee is entitled to wages. The Claimant claimed UGX. 800,000/= per month unpaid for a period of 8 months. This would amount to UGX. 6,400,000/=. Absent of any evidence to controvert this claim, the Claimant is awarded UGX. 6,400,000/= as unpaid wages.

Illegal deductions

[12] Ms. Kaziba submitted that the weekly allowance was reduced from UGX 15,000/= to UGX 8000/= without the Claimant's consent. Over a period of eight months at a monthly rate of UGX 28,000/=: the Claimant would be entitled to UGX 224,000/=. The Claimant also sought a refund of illegally deducted mandatory tithe of UGX 80,000/= per month. This would total to UGX. 640,000/= over the eight months period. Under Section 46EA, permitted deductions include a tax, rate, subscription or contribution imposed by law, a deduction for purposes of contribution to a provident or pension fund with the express written consent of the employee, a charge for rent agreed upon by the employee, union dues or an attachment by operation of law. The provisions relating to these deductions are very clear. We do not think the deductions of tithe are within the parameters of permitted deductions under the Employment Act. For this reason, the Respondent shall refund the sums of UGX 224,000/= and UGX 640,000/= to the Claimant.

Sargeant and David Lewis at page 96

⁴ Nyakabwa Abwooli Vs Security 2000 Ltd

Payment in Lieu of notice

- [13] It was submitted that where a Claimant is constructively dismissed, he would be entitled to payment in lieu of notice. Counsel cited S58(3)(b)EA and the case of **Mbikka Dennis v Centenary Bank LDC No.23 of 2014** in support of the proposition that payment in lieu of notice is payable in a case of constructive dismissal. In our view, the facts in the case of Mbikka are not on all fours with the present case. In that case the Claimant resigned as a result of the unreasonable behavior of the Respondent. It was on the basis of the resignation that the Court found that no notice was given to the Claimant. In the present case, the Claimant did not formally resign from his employment. He simply stopped working.
- [14] In the Ugafode case (supra) the Industrial Court posited that whether or not such employee is entitled to notice will always depend on the nature and circumstances of the constructive dismissal. Referring to the case of **Tibenkana Edith Vs London Distillers (U) Ltd. LDR 146/2019** the Industrial Court awarded payment in lieu of notice because the Court found that having been demoted and offered no work to do meant that the employer had effectively decided to terminate her. And in **Allen Namuyiga V Export Trading Co. Ltd. LDR 049/2020**, the Court granted payment in lieu of notice because upon the claimant's return to work his duties had been given to another person without offering her any reason. By refusing to give her work, the employer had decided to terminate her.
- [15] In the present case, we think that the Claimant would be entitled to payment of notice because the Respondent constructively dismissed him by failing or refusing to pay his salary. His dismissal was without notice. In the circumstances, considering that the Claimant commenced work on the 5th June 2017 and claimed payments for December 2020 he would have served a period of 2 years and 6 months. The applicable provision would be Section 58(3)(b)EA which provides for payment of one month's notice where an employee has worked for more than twelve months but less than five years. We would therefore award the Claimant the sum of UGX 800,000/= in lieu of notice.

Severance Pay

- [16] Severance pay is awardable under Section 87(a) EA where an employee who is unfairly dismissed is entitled to severance allowance. Having found that the claimant was constructively dismissed, we adopt the well settled position in the case of **Donna Kamuli Vs DFCU Bank Ltd**⁵ where the Industrial Court held that severance pay is computed at a month's pay for every year of service. From the uncontested facts in the present case, the Claimant served for 2 years and 6 months.

⁵ LDC 002/2016. The Court of Appeal maintained this position in **DFCU Bank Ltd vs Donna Kamuli C.A.C.A No 121 of 2016**.

At a monthly rate of UGX 800,000/= he would be entitled to UGX 2,000,000/= in severance pay, which we hereby award.

General Damages

- [17] Ms. Kaziba contended for an award of UGX 50,000,000/= in general damages. She suggested that this sum would cater for the economic inconvenience, humiliation and mental distress that the Claimant went through. Counsel relied on the case of **Food for the Hungry vs Ongaya Daniel LDA No. 18 of 2020** in support of the proposition that the Court may take into account loss of future earnings in the determination of general damages. The current jurisprudence on damages posits a common law approach of *restituto in integrum*. The Court of Appeal's recent guidance on the principles to take into account in assessing general damages held that the appropriate general damages should be assessed on the prospects of the employee getting alternative employment or employability.⁶ In assessing a quantum of damages in an employment dispute, the case of **Donna Kamuli v DFCU**⁷ is instructive. In that case, the Industrial Court considered the earnings of the Claimant, the age, the position of responsibility, and the duration of the contract. In the case before us, we find that the Claimant is entitled to damages. Counsel for the Claimant asked for UGX 50,000,000/=. The Claimant was earning UGX 800,000/= per month. He had worked for the Respondent for two and a half years. No evidence was led as to his age or position of responsibility at the time he was constructively dismissed or indeed of his employability. Based on his monthly salary, the period he had served and the number of months unpaid, for the humiliation, inconvenience and suffering, we would award the Claimant **UGX 10,000,000/=** as general damages.

Aggravated damages

- [18] Ms. Kaziba contended for the sum of UGX 20,000,000/= as aggravated damages. She premised this prayer on impunity of the Respondent. The refusal to pay wages. In a broad range of decisions, the Courts of Judicature have found aggravated damages to be awardable where the employer is culpable for egregious conduct.⁸ In the Stanbic case (*ibid*) citing the Betty Tinkasimire case, the Honourable Mr. Justice Madrama found that the Appellant subjected the Respondent to disciplinary proceedings after he had filed an action for constitutional relief.

⁶ Per Madrama JJA(as he then was) in Stanbic Bank (U) Ltd v Constant Okou Civil Appeal No. 60 of 2020. The principle of *restituto in integrum* follows the decision of the Supreme Court of Uganda in the case of Gullibhai Shillingi v Kampala Pharmaceutical Ltd S.C.C.A No. 6 of 1999 per Mulenga JSC(as he then was). The dictum reinforces the decision in Bank of Uganda v Betty Tinkasimire S.C.C.A No. 12 of 2007.

⁷ LDC No. 002 of 2015

⁸ Frederick Zaabwe vs Orient Bank and 5 others S.C.C.A No 4 of 2006.



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The Appellant had been a Stellar Performer and was victimized by the Respondent which conduct attracted the award of aggravated damages. In the Tinkasimirie case, the Central Bank was cited for impunity, callous and degrading treatment of their former employee. In the case of **Basiima Kabonesa v A.G and Another**⁹ the Supreme Court cited malice and arrogance on the part of the defendant and humiliation and suffering on the part of the plaintiff as considerations for a grant of aggravated damages. In the case before us, the Claimant exhibited 3 letters requesting his salary arrears. It was submitted that he had difficulty fending for his family. However, and as is discernible from the cases cited above, aggravating factors are those that relate to the conduct of the employer. Indubitably, in the case before us, while the Respondent was shown to have failed to pay the Claimant's salary, no evidence of malice, callous and degrading conduct, arrogance and impunity on the part of the Respondent was properly led. In our view, the humiliation is compensated by the award of general damages. In the result, we find no aggravating circumstances to warrant an award of aggravated damages.

Costs of the Claim

- [19] Regarding costs of the claim, we have ruled in the case of **Joseph Kalule v GIZ**¹⁰ that whereas costs follow the event, in labour disputes, the award of costs is the exception rather than the rule. The exceptions include some form of misconduct by the unsuccessful party. In the matter before us, the Respondent did not attend Court at any stage of the proceedings. Additionally, the action arises out of non-payment of wages. We find the present case to be deserving of an order for costs. As such, the Claimant shall have costs of the claim.

Final orders of the Court

- [20] In the final analysis, the orders of this Court are as follows:

- (i) It is declared that the Respondent was in breach of the employment contract.
- (ii) It is declared that the Claimant was constructively dismissed by the Respondent.
- (iii) The Respondent is ordered to pay to the Claimant the following sums:
 - a. UGX. 6,400,000/= as unpaid wages,
 - b. UGX. 864,000/= in refund of illegal deductions
 - c. UGX. 800,000/= in lieu of notice,

⁹ S.C.C.A No 16 of 2021. The Supreme Court considered the dictum from Frederick Zaabwe vs Orient Bank and 5 others S.C.C.A No 4 of 2006.

¹⁰ LDR No. 109/2020(Unreported)


- d. UGX. 2,000,000 as severance pay,
- e. UGX. 10,000,000/= as general damages and;
- f. The monetary awards in paragraph 20(iii)(a)-(e) above shall attract interest at the rate of 15% per annum from the date of this award until payment in full.
- g. The Claimant shall have costs of the claim.

It is so ordered.

Delivered at Kampala this 14th day of April 2023.

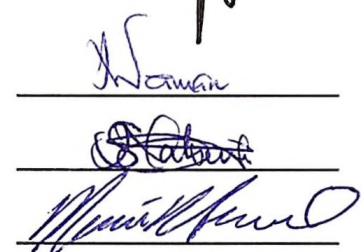
SIGNED BY:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,
JUDGE, INDUSTRIAL COURT



THE PANELISTS AGREE:

- 1. Ms. ADRINE NAMARA,
- 2. Ms. SUSAN NABIRYE &
- 3. Mr. MICHAEL MATOVU.



Delivered in open Court in the presence of:

For the Claimant:	Ms. Diana Kaziba
Claimant:	Present.
For the Respondent:	None.

Court Clerk:	Mr. Samuel Mukiza.
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