

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT
KAMPALA

Civil Suit Number 0067 of 2008

Patrick Nyabiryo And 1117 Others ::::::::::
Plaintiffs

VERSUS

Uganda Revenue Authority ::::::::::::::::::::
Defendant

BEFORE: HON JUSTICE V.F. MUSOKE-
KIBUUKA

JUDGEMENT

The plaintiffs sued the defendant seeking the following reliefs from this honourable court:-

- a) a declaration that the taxation of PAYE on the terminal benefits of the plaintiffs was unlawful and illegal and ought to be refunded;
 - b) an order awarding Shs. 979,083,919/=, as special damages;
 - c) interest on b) at 21% from the time of filing till payment in full;
 - d) an order awarding general damages to the plaintiff;
- and

e) an order awarding the costs of this suit to the plaintiffs.

PLEADINGS:

The plaintiffs claim to be former employees of the defunct Uganda Electricity Board (UEB). They were laid off during the retrenchment exercises between the years 1998 and 2001. UEB paid to each of them a retrenchment package. It was based upon the formula of basic salary multiplied by the number of years worked by each retrenched employee. The defendant charged PAYE on each package. The total amount that was deducted is Shs. 987,266,321/=. The plaintiffs seek an order requiring the defendant to refund to the plaintiffs the sum of Shs. 987,266,321/= which they claim to have been unlawfully deducted from their refreshment packages.

The defendant, on the other hand contends that the taxation of the plaintiffs' retrenchment packages, in the form of PAYE, was justified under section 19 of the Income Tax Act Cap 340, and that no refund of the money deducted is due to the plaintiffs.

ISSUES:

Court and counsel agreed upon three issues for determination of this rather technical suit:

- a) whether the taxation of the plaintiff terminal benefits was lawful;
- b) If so, whether there was over-taxation; and

c) What remedies are available to the parties?

Whether The Taxation Of The Plaintiffs' Terminal Benefits Was Lawful

This court, very recently, dealt with a similar issue. It was an issue in **Pari material**. That was in the case of **Siraje Hassan Kajura Vs. Dairy Corporation Ltd. And Uganda Revenue Authority, HCCS No. 117 of 2009.**

In that case, the defendant, in this suit had charged PAYE amounting to Shs. 1,171,778,814/= from the retirement benefit of 161, former employees of Dairy Corporation.

Court discussed in **extenso** whether it was lawful for the defendant to charge PAYE on the retirement packages of those plaintiffs either under section 19 (1) (a) or 19 (1) (d) , of the Income Tax Act, Cap. 340. In either case, court found that it was not lawful for the defendant to have done.

Without going into any detail of the discussion contained in the judgment in **Hassan Kajura's case**, since the issue to be decided was in **pari material**, court would adopt it's reasoning in that case to the instant case. The inevitable conclusion would be that the defendant could not lawfully charge PAYE on the retirement packages of the defendants in the instant case either under the provisions of section 19 (1) (a) or 19 (1) (d), of the the Income Tax Act.

In addition to what this court stated in **Siraje Hassan Kajura's case**, court adds the following:-

There appears to be no dispute upon the fact that the plaintiffs' were retrenched. In **Bagamuhunda And Others Vs. UEB (IN LIQUIDATION) HCCS No. 1044 of 2001**, this court, per Egonda Ntende J., as he then was, found that the purpose of retrenchment was re-organizing and streamlining the enterprise concerned. Any payments made to any employee owing to his or her retrenchment is post-employment payment. They were a "thank you" or gratuitous payments. They could not be taxed in terms of PAYE. But even if they were liable to be taxed under any other different tax they would be exempt by virtue of the provision of Article 254 (2) of the Constitution. This position appears to have been confirmed upon appeal. Indeed, section 21 (1), of the Income Tax Act exempts pension by way of implementing Article 254 (2) of the Constitution.

Section 129 (2) of the Electricity Act, 1999, Cap. 145, provides that:-

"(2) All employees of Uganda Electricity Board who may be retrenched as a result of the implementation of this Act shall, on the date of retrenchment, be paid in full the calculated and ascertained retrenchment benefits and pensions.

The UEB standing Instructions which embodied the terms and conditions under which the plaintiffs' had served until their retrenchment provided for payment of pension and gratuity. The Managing Director's letter attached to the letters written to the plaintiffs, upon retrenchment, as exemplified by those of Nyabiryo P and Kamuli J.H. shows that each retrenchee was to receive a retrenchment package arrived at as follows;

" agreed monthly package 2.25 x years served plus 600,000/= in lieu of repatriation. "

It is a matter of general knowledge that Uganda Electricity Board had a home grown retirement benefits scheme. It was non contributory scheme which had come into force on the 1st day of January, 1973. The purpose of that scheme was to provide pension for UEB employee upon retirement. The regulations of the Uganda Electricity Board Retirement Benefits Scheme provided in the relevant parts:-

"2. (a) Pension and gratuities may be granted by the Board in accordance with the provisions of the scheme.

b) Any pension or gratuity under the scheme shall be completed in accordance with the provisions on the employee's retirement or his death in the Boards service as the case may be.

(5) No pension shall be granted under the scheme to any employee except on his

retirement from the service of the Board in one of the following cases:-

i) having attained the age of 55 years;

ii) on abolition of office;

iii) on compulsory retirement to facilitate re-organization of the Board's administration;

iv) on medical evidence satisfactory to the Board that the employee is incapable by reason of any infirmity of mind or body, of discharging the duties of his office and such infirmity is likely to be permanent. (Emphasis added).

The letter by the Managing Director of the UEB to the plaintiffs opened with the following words:-

"The Board of Directors has decided to restructure UEB in order to make it more efficient, effective and more commercially viable

As a result of the above mentioned restructuring exercise, therefore, it has been decided that your services will not be required in the restructured Board. You will therefore cease duty on 15th February, 1998 and will be paid a retrenchment package arrived at as follows; agreed monthly package x 2.25 x years of served plus 600,000/= in lieu of repatriation, which package will be paid to you within four weeks of your termination of service."
(Emphasis added).

It is clear, and court agrees with learned counsel for the plaintiffs' that terminal benefits based upon the UEB standing Instructions should have been classified as pension. In that regard, it should have been exempt from taxation both under Article 254 (2) of the Constitution on and section 21 (1) (n) of the Income Tax Act. The plaintiffs lost their jobs they were or retired compulsorily in order to facilitate re-organization of the Boards' administration. They were therefore, entitled to pension under UEB's non contributory Retirement Benefits Scheme out-lined above.

Learned counsel, for the defendant argued that the Shs. 600,000/= paid to each plaintiff in lieu of repatriation was lawfully liable for taxation under section 19 (1) (d) of the Income Tax Act, as compensation for loss of contract of service. Court with due respect to learned counsel the defendant, is unable to agree with that submission. It does not appear to be well founded. It would be repugnant even to mere ordinary common sense to regard payment for repatriation as constituting compensation for loss of contract upon which Parliament intended to charge PAYE.

Compensation has always an element of proportionality as to what has been lost and what is being provided to replace the loss. That important element cannot be ascertained in a repatriation allowance.

This court stands by the same interpretation it gave to section 19 (1) of the Income Tax Act, in **Sirage Hassan Kajura's case (Supra)** to the effect that the kind of compensation for loss of contract of employment upon which Parliament intended to levy PAYE under section 19 (1) (d) of the Income Tax Act, is the kind of compensation which Kanyeihamba JSC, clearly categorized in **Barclays Bank of Uganda Ltd. vs. Godfrey Mubiru (1998-2000) HCB 18.** Terminal benefits cannot legally be the target of PAYE under section 19 (1) (d) of the Income Tax Act.

The answer to the first issue is, therefore affirmative. The charging of PAYE upon the terminal benefits of the plaintiffs was unlawful.

Whether There Was Over-Taxation

This issue is partly answered under the first issue. Ordinarily, it would appear that since the charging of PAYE was unlawful, there was, therefore, no over-taxation. However, one can also argue that there was over taxation not only because the payment that constituted pension was also taxed but also wholly because everything constituting the terminal benefits paid to each plaintiff was not liable to PAYE yet that tax was charged upon each package.

From a different angle, even if it is assumed that the plaintiffs' terminal benefits were liable to taxation under section 19 (1) (d) of the Income Tax Act, (although in courts view those terminal benefits could not be lawfully taxed under that provision of the Income Tax Act) then the provisions of subsection (4) of section 19, of the Income Tax Act should have been applied to some of the plaintiffs. The subsection provides as bellows:-

“ (4) where the amount to which subsection (1) (d) applies is paid by an employer to an employer who has been in the employment of the employer for ten years or more, the amount included in employment income is calculated according to the following formula:-

A x75%

Where A is the total amount derived by the employee to which subsection (1) (d) applies. “

In other words, the law provides that the taxable income under section 19 (1) (d), of the Income Tax Act, is 75% of the amount derived by an employee as compensation for loss of a contract of employment if that employee had worked with the employer for ten or more years.

In the instant case, there were several plaintiffs who had worked with UEB for ten or more years. Their terminal benefits packages were taxed without taking into account

the 25% allowed by the law as untaxable part of their compensation. That would have been over-taxation.

If court had found that the terminal benefits (paid to the plaintiff) constituted compensation for loss of contract of employment and, therefore, taxable under section 19 (1) (d), of the Income Tax Act, it would have ordered a refund of that over-taxation. But because court holds the view that no income tax at all should have been charged on the terminal benefits of the plaintiffs, either under section 19 (1) (a) or 19 (1) (d) of the Income Tax Act.

Court will, instead, order the refund to the plaintiff of the total amount of money, Shs. 987,266,321/= charged as PAYE upon their terminal packages.

What Remedies Are Available To The Parties.

Following the brief analysis set out above, court finds that the plaintiffs have proved their case upon the balance of probabilities. Court, accordingly enters judgment in their favour against the defendant. It makes the following declaration and orders:-

- a) a declaration that the taxation of PAYE upon the terminal benefits of the plaintiffs was unlawful and quite illegal, and the amount taxed from the package of each plaintiff ought to be refunded to him or her,

- b) an order awarding Shs. 979,083,919/= to the plaintiff' as special damages;
- c) an order awarding interest on (b) above, at the rate of 8% per annum, from the date of the filing of this suit till the date of payment in full;
- d) an order awarding Shs. 1,200,000/= to each plaintiff as general damages
- e) an order awarding interest on (d) above, at 8% per annum, from the date of judgment till the date of payment in full; and
- f) an order awarding the costs of this suit to the plaintiff'

V.F. Musoke-Kibuuka

(JUDGE)

27.12.2012