THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA AND KATUREEBE JJSC.)

CIVIL APPEAL NO. 8 OF 2005

B E T W E E N

DOREEN RUGUNDU: :::::::::: APPELLANT

A N D

INTERNATIONAL LAW INSTITUTE: :::::::::: RESPONDENT

(An appeal from the decision of the Court of Appeal at Kampala (Okello, Kitumba and Byamugisha, JJA) dated…

JUDGMENT OF KAROKORA, JSC:

This is a second appeal. It arises from the decision of the Court of Appeal which overturned the judgment of the trial Judge, Mwondha, J, who had allowed a suit instituted by the appellant claiming damages for breach of contract and awarded her a sum of Shs. 10 million as damages for the breach with interest of 10% p.a., from the date of judgment till payment in full and costs of the suit.

The facts which led to the institution of the case in the High court were not in dispute. On 25th July 2000, the respondent interviewed the appellant for the post of Special Assistant to the Executive Director/Assistant Marketing Manager. She was successful. The respondent offered the post to the appellant in a letter dated 28th July, 2000. The commencement date was 3rd January, 2001. The appellant accepted the job and a contract of employment was executed between the parties. The appellant was to spend 4 days at the respondent's office familiarizing herself with its operations. On 29th August 2000, the respondent wrote to the appellant informing her that her services were no longer required. She tried to seek an explanation for this turn of

events and received no response. On 11th January 2001, M/s. Kateera & Kagumire, Advocates, wrote to the respondent demanding payment of damages and costs to the appellant for breach of contract. On 16th January 2001, M/s. Byenkya, Kihika & Co., Advocates, wrote to M/s. Kateera & Kagumire, Advocates, on behalf of the respondent, re-offering the appellant the job on the terms that had been stipulated in the contract. The appellant rejected the offer and filed the suit in the High Court, claiming the following reliefs:

(1) ***Salary for the period from January to December, 2001;***

(2) ***Health Insurance, performance related bond;***

(3) ***General damages for disappointment, embarrassment and inconvenience;***

(4) ***General damages for breach of contract;***

(5) ***Interest at the rate of 24% p.a. from the date of judgment till full payment in full;***

(6) ***Costs of the suit.***

The respondent in its written statement of defence denied the averments in the plaint and contended that the appellant did not suffer any loss or damage.

The issues to be determined at the trial were-

(1) ***Whether there was a valid contract between the parties.***
(2) ***And if so, who repudiated and or breached the contract?***
(3) ***Whether the defendant mitigated the breach, if at all.***
(4) ***What remedies or quantum is the plaintiff entitled to, if at all?***

The trial judge answered the first issue in the affirmative. She found that the respondent had breached the contract and therefore, gave judgment in favour of the appellant in the terms already stated. The respondent was dissatisfied with the decision of the High Court and therefore appealed to the Court of Appeal which allowed the appeal. The respondent being dissatisfied with the decision of the Court of Appeal has now appealed to this Court.

Before considering the grounds of appeal, it is useful to note the main features of the employment contract on which the suit turns. Further, it is also necessary to consider the Employment Act and determine whether or not the appellant's termination of contract before the date of its commencement was lawful or wrongful.

The letter of the appellant's appointment stated inter alia.....

"International Law Institute - Uganda
Legal Centre of Excellence

Doreen Rugunda
Dear Ms Rugunda

Re: APPOINTMENT AS SPECIAL ASSISTANT TO THE EXECUTIVE DIRECTOR/ASSISTANT MARKETING MANAGER

After careful consideration of your background and experience, the International Law Institute, Uganda (ILI - Uganda) is of the view that you will be an excellent addition to our team and would consequently like to hire you for the above position. The period of this employment will run from *January 3rd 2001, to December 31st 2001, and will include an initial 6 months probation period* ***(emphasis is added).***

Your gross salary per month will be Shs. 1,500,000= and will include added benefits such as health Insurance performance related bonuses and 20 days annual leave. A salary review will be carried out following successful completion of

the probation period in addition to satisfactory results in your staff evaluation. There will also be possibilities for upward adjustment based on your performance.

Kindly confirm your acceptance of this offer in writing at your earliest convenience

Sincerely,

S. Munyantwali

Executive Director ILU- Uganda."

The contract of employment between the appellant and the respondent was for a fixed period of 12 months and included an initial 6 months probation period. However, before the appellant commenced her service of the probationary period, the respondent terminated her services on 29th August, 2000.

As I have already stated earlier on, the appellant's suit in the High Court for the breach of contract and damages was successful. However, the Court of Appeal reversed the High Court decision hence this appeal.

There are three grounds of appeal before this Court. Mr. Adriko, counsel for the appellant argued grounds 1 and 2 together and argued the 3rd ground separately. He argued the grounds in that order. I shall deal with the grounds in the same order.

Grounds 1 and 2 complained that:

"(1) The learned Justices of Appeal erred in law and fact when they held that the appellant had no accrued rights in the employment contract simply because she had not commenced work under the employment contract.

(2) The learned Justices of Appeal erred in law and fact when they held that the appellant had suffered loss or damage, which ought to attract an award of damage."

Counsel for the appellant submitted that the holding by Byamugisha, JA, with whom the other two Justices concurred to the effect that a person has no accrued rights in a contract of service which has been terminated before the date when it was supposed to commence is flawed, because the holding did not take into account the principle of anticipatory breach. He referred to the following cases: ***Universal Cargo Carriers Corp - vs - Citati [1957] ALLER 84, Gunton - vs - Richard - Upon Thames London Borough Council [1981] 1 Ch 448 at 467, Laws - vs - London Chronicle [1959] 2 ALLER 285*** and ***Hochester - vs - De Lar Tour [1843- 60] ALLER Reprint at page 14,*** for the proposition inter alia - that the accrued rights in service contract, which has been breached, commences immediately after the execution of the contract by the aggrieved party who has not accepted the dismissal.

Therefore, counsel submitted that the appellant had the accrued rights to sue immediately after the respondent terminated her contract of employment despite the fact that its date of commencement had not yet arrived.

On the other hand, Mr. Kihika, counsel for the respondent opposed the appeal and submitted that the Justices of Appeal were alive to the principle of anticipatory breach when they held that the respondent had terminated the contract before it was operationalised. Counsel further submitted that the Justices of Appeal were right when they held that at the time of termination of the contract of service on 29th August, 2000, no rights under the contract had accrued to the appellant as an employee of the respondent. Counsel further submitted that the respondents were right on mitigation of damages when they offered to re-engage her on the same terms which she refused to accept because at that time she had already secured another job.

This was a contract of personal service between the respondent and the appellant. The appellant was to commence work at the respondent's Institute on 03-01-2001. But before that time of performance arrived the respondent told the appellant that they

would not employ her. The respondent repudiated their promise to employ her 4 months before the commencement date of the contract.

Section 24(1) of the Employment Act which is relevant to the termination of a contract of probationary period of service provides as follows:

"(1) A contract for a probationary period of service may be terminated by either party giving to the other seven days' notice or payment of seven days' wages in lieu of notice."

Clearly, as provided in Section 24(1) of the Employment Act, a contract for probationary period of service may be terminated by either party giving to the other seven days' notice or payment of seven days' wages in lieu of the Notice. In the instant case, the respondent gave 4 months notice of their repudiation of the contract to the appellant which was more than 7 days notice prescribed by the Act. However, when the appellant threatened to sue the respondent for what she claimed to have been wrongful termination of her contract of employment, and the respondent in order to mitigate damages, offered to re-engage her on the original terms of contract, which the appellant rejected and demanded to be awarded full remuneration she would have earned if she had performed the contract plus other benefits under the contract.

There are decided cases which are relevant to this appeal. In ***Vine - vs -National Dock Labour Board [1956] 1 QB 658*** Jenkins LJ, stated:

"It has long been well settled that if a man employed under a contract of personal service is wrongfully dismissed, he has no claim for remuneration due under the contract after repudiation. His only money claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them."

Later Salmoud LJ stated in - ***Decro - wall International SA - vs -Practitioners in Marketing Ltd. [1971] 1 WLR 361*** that:

"If a master in breach of contract, refused to employ the servant, it is trite law that the contract will not be specifically enforced. As I hope I made plain in the *Denmark Production case [1969] I QB 699,* ***the only result is that the servant albeit he has been prevented from rendering services by the master's breach, cannot recover remuneration under the contract, because he has not earned it. He has not rendered the services for which remuneration is payable. His only money claim is for damages for being wrongfully prevented from earning his remuneration. And like any one else claiming damages for breach of contract, he is under a duty to take reasonable step to minimize the loss he has suffered through the breach.***

He must do his best to find suitable alternative employment. If he does not do so, he prejudices his claim for damages----------"

I agree with the above opinions, which in my opinion, give the correct position of the law.

In the instant case the contract of employment was terminated long before the date of its due performance. In her lead judgment of the Court of Appeal, when re-evaluating the evidence of both parties and making its conclusion, Byamugisha, JA, with whom the other 2 Justices concurred stated, inter alia:

"It is not disputed that the appellant terminated the contract before it was operationalised. In my humble opinion no right had accrued to the respondent as an employee of the appellant. She was therefore not dismissed from employment. In order to get any damages for breach she had to adduce evidence of damages she suffered as a result of the alleged breach. At the trial she gave evidence and stated what she wanted from the respondent was the salary she would have earned if she had worked with the respondent, damages she would have received under the Health Insurance, damages for embarrassment and anguish which made her

return to her mother's home. The respondent was not entitled to remuneration of salary because she had not commenced her work with the appellant so the principle of restitution integrum does not apply. I do not agree that by re-offering her the job, the appellant was accepting that there was a breach or that any damages had been occasioned by the termination of the contract. The notice that was given to the appellant satisfied the requirements of the law. That means that the termination was made with due notice and therefore, not wrongful."

I am unable to fault the above re-evaluation of the evidence and the conclusion reached by Byamugisha, JA. Clearly, the appellant had not commenced work of the 6 months probationary period under the contract and rendered any services for which remuneration would be payable. Having been prevented from commencing the contract of service, the appellant should have mitigated damages by accepting the re-engagement that had been offered.

The respondent as an employer had a right under the provisions of Section 24(1) of the Employment Act to terminate the contract by giving the appellant seven days' notice or pay her seven days' wages in lieu of notice. In this case, the respondent gave the appellant a notice of over 4 months which was over and above the period prescribed by the Act or a reasonable period stipulated under common law rule. Therefore, the respondent rightly terminated the appellant's contract of employment.

In the result, the appellant had no accrued rights under the contract of employment which was terminated before it was operationalised. Further on the facts, the appellant had suffered no loss or damage that could attract damages. Therefore, grounds one and two ought to fail.

In my view, disposal of grounds 1 and 2 disposes of the 3^{r} ground, because the appellant had been served with notice of termination of the contract of employment. Therefore, this ground also ought to fail.

In the result, this appeal has no merit and ought to be dismissed with costs here and in the courts below.

JUDGMENT OF TSEKOOKO, JSC.

I have had the benefit of reading in daft the judgment prepared by my learned brother, Karokora, JSC.

I agree with his conclusions and the proposed orders that the appeal ought to fail and that the respondent should get the costs of this appeal.

The facts of this case are summarised by my learned brother who has also reproduced the grounds of appeal. I am unable to appreciate the reasoning of the learned trial judge, Mondha. J, to the effect that termination of the contract of employment was arbitrary when the respondent in effect served a four months notice of intention to terminate the contract. By the time the notice was served the appellant had not started working. By any standards that was reasonable notice considering that according to S.24 (1) of the Employment Act, where an employee was on probation, the respondent could terminate a contract on notice of 7 days. Indeed in this case the appellant had not even assumed duty so that even the issue of probation could not arise to entitle her to a long notice.

Again I am not persuaded by the reasoning of the learned trial judge when she opined that the respondent did not act in good faith when it reoffered the same job to the appellant who deliberately chose not to accept the fresh offer. Her refusal to accept that offer is tantamount to failure to mitigate damages on her part.

I therefore agree with the opinion of Byamugisha, JA, that the trial judge erred in holding that the respondent did not give notice. I also agree with Byamugisha. JA. , in

her conclusion that in this case, it was the appellant who should have mitigated damages by accepting the fresh offer.

In my opinion since the time for the appellant to assume duty was four months away before the termination, the appellant had no accrued rights entitling her to any damages. This is one of those cases in which I believe that if she had succeeded in her appeal she could only be entitled to some nominal damages.

Therefore the Court of Appeal was entirely justified in dismissing the appeal. I would dismiss this appeal which has no merit whatsoever.

As the other members of the Court agree with the judgment of and orders proposed by Karokora, JSC, this appeal is dismissed with costs to the respondent in this Court and in the courts below.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Karokora, JSC and I agree with him that this appeal ought to be dismissed and I would award costs in this court and the courts below to the respondent

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the Judgments of my learned brothers Karokora, JSC and Tsekooko, JSC.

I fully agree with their conclusions and orders for the reasons they have ably explained in those Judgments. I have nothing useful to add.

Dated at Mengo this 3rd day of October 2006.