**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT MBALE**

**LABOUR DISPUTE NO. 91 OF 2017**

**ARISING FROM LABOUR DISPUTE NO. CB 310/09/2017**

1. **TSOLOBI DAVID**
2. **BARASA PEKKE ALICE**
3. **NABWIRE MIRIA …………………………………….. CLAIMANTS**

**VERSUS**

**BUDUDA DISTRICT LOCAL G0VERNMENT ……………………………... RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1. MS. GIDONGO ROSE**

**2. MR. ANTHONY WANYAMA**

**3. MR. JACK RWOMUSHANA**

**AWARD**

**BREIF FACTS**

The 1st, 2nd, and 3rd claimants were employed by the Respondents in 2008 as District Community Development Officer (scale U1), Senior Assistant Secretary/Sub county Chief (scale U3) and Community Development Officer respectively. What is disputed however is that the said appointments were rescinded by the District Service Commission on the advice of the Public Service Commission, on the grounds that they were irregular?

The claimants contend that there is no legal basis for the rescission of the employments. They contend that they were duly appointed after applying, being shortlisted, interviewed and satisfying the required qualifications.

According to them their termination was done arbitrarily, highhandedly and without following due process for which they seek damages.

The respondents on the other hand claim that the claimants’ appointments were terminated because they were irregularly acquired and they were terminated after following due process including an investigation which established that the claimants lacked the required qualifications for the said positions.

**ISSUES**

1. **Whether the Claimants were employed by the Respondent?**
2. **Whether the claimants were regularly appointed into the District service?**
3. **Whether the rescission/termination of the claimants’ appointments /employment by the Respondent was unfair and unlawful?**
4. **Whether the Claimants are entitled to remedies?**

**REPRESENTATIONS:**

The Claimants were represented by Mr. Kiriahe Samuel of M/S MRK Advocates and the Respondents by Ms. Nakanaaba Barbra State Attorney of Attorney Generals Chambers.

**EVIDENCE**

It is the claimants’ evidence that they responded to an advertisement marked Ex. 8 on page 8-10 of the claimants trial bundle. They applied for and were shortlisted, interviewed and having satisfied the required qualifications, they were appointed to their respective jobs. They testified that the Chief Administrative Officer in a letter dated 14/10/2016 informed them that the Public Service Commission had advised the District Service Commission to rescind their appointments on the grounds that they lacked the required qualifications and experience. CW1 refuted the PSCs claim that in addition to the qualifications set out in the advert it was a requirement for the person vying for the post of Community Development Officer for which he applied, to have served at principal level for 3 years. All the Claimants admitted to having attended the DSC disciplinary meeting held on the 6/9/2013 where they were each asked to verify their qualifications. However they all denied that they were given any hearing before their termination. According to them, the DSC rescinded the appointments, in the DSC meeting of the 5/9/2014 vide minute 38/2014.

It was their testimony that they continued working uninterrupted from the 6/9/2013 until late November 2016 when they each received a termination letter dated 14/10/2016.

Ssemwogerere Fredrick, the Respondents witness, testified that his predecessor hand over to him included the claimants ‘pending’ cases. He said that he had been informed by a one Nambwila that the DSC that appointed the claimants was comprised by their relatives and friends. He however did not name any of the said relatives and friends. According to him the minutes of the DSC meeting of 6/9/2013 marked REX13, recommended that the claimants are redeployed but this could not be implemented because it depended on the availability of vacancies. He said that as CAO he was supposed to implement the recommendations of the DSC as long as the decisions that were made were lawful. He also said that the claimants could not be stopped from working until they received official communication about their termination which was given to them in November 2016.

**RESOLUION OF ISSUES**

1. **Whether the Claimants were employed by the Respondent?**

It was not disputed that according to exhibits C1, C2 and C3, C4 and C5, the claimants were employed by the respondent as follows; the 1st claimant on the 5/03/2008 and he accepted on 8/4/2008, the 2nd claimant on the 11/04/2008, and she accepted on 17/04/2008 and was confirmed on 25/10/2010 and the 3rd claimant on 23/04/2008.

1. **Whether the claimants were regularly appointed into the District service?**

Counsel for the claimants respondent to and for various positions which the respondent had advertised under exhibit C8. They specifically applied for the positions of Community development Officer (U1), Senior Assistant Secretary (U3) and Community Development Officer (U4) respectively. Each was shortlisted for the respective positions and invited for interviews, and subsequently they were appointed to the respective positions.

It was Counsels submission that Sections 55 and 58 of the Local Government Act Cap 243, empowered the District Service Commission to appoint the claimants and therefore the decision to rescind their appointments was baseless and illegal. He refuted the assertions made in exhibits C9 for the 1st claimant, C10 for the 2nd claimant and C11 for the 3rd, that the investigations that the Public Service Commission had made based on a complaint made by a concerned citizen a one Nambakh Abraham found that their appointments were irregular. According to him the record revealed that the PSC received the complaint on 23/11/2013 and considered it in their meeting held on the 29/10/2010, where they made observations and advised the DSC to rescind the claimants’ appointments. It was his submission that the inconsistency in the dates rendered the complaint and the decision arising therefrom illegal and baseless. Counsel stated that he was reinforced by the testimony of RW1 who testified that he did not know the said Nambakh, nor had he ever come across any letter addressed to or from Nambakh.

Counsel further refuted the assertions made by RW1 in paragraph 7 of his evidence in chief and the revelations in paragraph 3 (c) of the respondent’s memorandum in reply, that the DSC had been compromised by the claimants’ relatives and friends, because no evidence of such connivance and irregularity was adduced to that effect.

He argued that before their termination in late November 2016, the claimants had worked for almost 9 years and there was no evidence adduced regarding any complaint about their performance. He was therefore of the view that the allegation that they lacked the requisite qualifications and experience was unfounded. He argued that by letting the claimants work for that long, the respondent had acquiesced to it and it was estopped in law from stating otherwise. He prayed that court finds that the Claimants were regularly appointed.

In reply Counsel for the respondents argued issues 1 and 2 together. She contended that the claimants’ letters of appointments were subject to the Constitution of Uganda, the Public Service Act, and regulations and other Administrative Instruments.

According to her the claimants were not duly appointed in accordance with section 6 of the Public Service Act and that in their testimony they had unanimously admitted that according to the CAOs letter marked “C15”, the terms and conditions that governed their respective jobs were set by the Public Service Commission which was the only body mandated under Article 166 of the Constitution of Uganda, to set the standards and terms and conditions of Public Officers. She submitted that after the PSC scrutinized the claimants’ qualifications and experiences, it found them wanting and therefore recommended that the DSC rescinds the said appointments. She insisted that the terms and conditions prescribed under Section 61 of the Local Government Act had to conform to the standards set by the PSC and the claimants qualifications fell short of the required standards as prescribed by the PSC under exhibit C14.

She illustrated the irregularity by singling out CW3 who was listed as number 15 on the list of candidates under exhibit REX3 yet she was appointed as the best candidate for the position. She also took exception to the way the DSC had appointed the best candidate for the position of Community Development Officer (U1) a one Wolumeli Simon, to a lower U2 position of District planner, in favour of the less qualified 1st claimant. She argued that Public Service Jobs are acquired on merit and in accordance with the Public Service business process Manual, which provided for the application of the principle of the “the best qualified.” It was her submission that the DSCs had not applied this principle and other relevant laws when they appointed the claimants’ because they lacked the required qualifications and therefore the appointments were irregular. She cited **A.G VS NICO INSURANCE (U) LTD HCCS 240/2012,** whose decision was to the effect that any decision taken contrary to the law should not be condoned. She prayed that court finds that the claimants were not duly appointed by the PSC, therefore their claim should be dismissed.

**DECISION OF COURT**

After carefully listening to both Counsels submissions, scrutinizing the record and the law applicable, we find as follows;

It is not disputed that the District Service Commission is mandated to appoint persons to hold or act in any office in the service of a District or urban Counsel.

The Constitution of the Republic of Uganda under Article 166 (1) (d) provides that one of the functions of the Public Service Commission is ***“to guide and coordinate district service commissions.”***

Article 198(5) states that “***in the performance of its functions, a district service commission shall conform to the standards established by the Public Service Commission for the public Service generally”***

Section 61 of the Local Governments Act Cap 243 states that

***61. Terms and conditions of local government staff***

***1) The terms and conditions of service of local government staff shall conform with those prescribed by the Public Service Commission for the Public Service generally.”*** The Public service commission therefore plays an advisory role over the District Service Commission.

In the instant case, the respondents under exhibit C8 advertised for various positions. The record shows that save for the position of the Community Development Officer U1 under which the PSC had prescribed that in addition to other qualifications the candidate must have served 3 of the 9 years’ experience at principal level, the other 2 positions of Senior Assistant Secretary U3 and Community Development Officer, U4 conformed with the prescription of the PSC. The claimants applied for and were shortlisted for interviews for their respective positions. They were interviewed and found suitable and subsequently they were appointed. The appointments were rescinded on the 14/10/2014, and terminated in late November 2016, almost 8 years later on grounds that they were irregular. They were rescinded on the ground that the claimants’ lacked the required qualifications and experience as prescribed by the Public Service commission.

**The question however is who was responsible for ensuring that the claimants terms and conditions conformed to the prescriptions of PSC?**

Section 61 of the Local Governments Act, makes it the responsibility of the DSC to ensure that before advertising any position, the terms and conditions of the position/job shall conform to the prescriptions of the PSC.

Although the letter from the PSC marked C15, indicated that the claimants’ appointments were irregular on the grounds that the terms and conditions as advertised under exhibit C8, did not conform to the standards prescribed by the Public Service Commission, and that the claimants lacked the required qualifications and experience, Section 61 of the Local governments Act (supra) clearly provides that it is the responsibility of the District Service Commission to ensure that they conformed to the PSC standards and in accordance with Section 58 of the same Act, that the candidates selected for these positions qualified for them.

In the circumstances, given that it was the DSC which advertised these positions, invited the claimants for interviews and having found them qualified appointed them, the same Commission cannot rescind the same appointments almost 9 years later on the stated grounds. We are buttressed by the reasoning in **A.G VS NICO INSURANCE (U) LTD (supra)** cited by counsel for the respondents, which we think is applicable to the instant case. In that case the defendants failed to make good the amount guaranteed when the supplier failed to supply Government in accordance with the contract, on the grounds that they suspected fraud on the part of the government officials. Citing **EDWARD OWEN ENGINEERING LTD VERSUS BARCLAYS BANK INTERNATIONAL LT (78) 1 QB 159,** Madrama J, resolved that the Defendants were not concerned with the underlying dispute between the Government of Uganda and the supplier because the payment under the bond was supposed to be made on demand or upon the written demand of the Ministry of local government, unconditionally. Similarly in the instant case it would be against the fundamental principles of justice to attribute the irregularities caused by the DSC on the claimants who were not responsible for setting the standards on which they were to be graded or the process and method to be applied during their grading before being appointed. Therefore the District Service Commissions’ failure to abide by the set laws and guidelines in the recruitment process cannot be visited on the claimants. Section 58 of the Local Governments Act empowers the District Service Commission to be independent of any person or authority. Therefore by placing the advert as they did in C8, they did so in exercise of their independence and the claimants were entitled to believe that the qualifications as set out in the advert conformed to the relevant Public Service Commission standards.

In the circumstances the failure of the District Service Commission to comply with the PSC standards did not amount to such an illegality that would warrant the declaring of the appointments null and void as the Respondent seeks Court to believe and therefore the claimants were regularly appointed.

1. **Whether the rescission/termination of the claimants’ appointments /employment by the Respondent was unfair and unlawful?**

It was submitted for the claimant that under common law rescission means unmaking a contract between parties – it amounts to cancellation of a contract. However unilateral cancellation amounts to breach of contract. Counsel cited **SIRAH SINGH SANTOKH VS FAULU (U) LTD HCCS NO.57/2014** and submitted that rescission envisages a breach of a fundamental term or terms of a contract by one party so that the innocent party would be entitled to rescind it. He argued that C9, C10 and C11 did not indicate which fundamental term/s of their contracts the claimants had breached. It was his argument that the claimants had worked for almost 6 years after they were each confirmed in service without any allegations of breach on their part. In his view it was the respondents who had breached the claimants’ contract when they abruptly terminated them and this amounted to an unfair termination which was contrary to the provisions of the Employment Act, 2006. He contended therefore that the respondents were precluded from rescinding the appointments.

He refuted the assertion that a hearing had been conducted by the DSC on the 6/9/2014 because the minutes of the said disciplinary meeting did not indicate what offences had been leveled against the claimants and even if the respondents had considered it to be a hearing, it did not meet the tenets of a fair hearing. He contended that by denying the claimants a fair hearing the respondents had violated Articles 28, 42 and 44 ( c) of the Constitution of Uganda and **BENON KANYANGOGA VS BANK OF UGANDA LDC NO. 164/2014, MARY PAMELA SSOZI VS PPDA AND DONNA KAMULI VS DFCU LDC NO. 007/2015.**

He argued further that Section 62(5) of the Employment Act barred the respondents from imposing any disciplinary penalties against the claimants 15 days after they became aware of the employees infractions and that the standing orders under section A-n did not provide for rescission as one of the methods for terminating the employment of Public Officers therefore Court should disregard it.

He concluded that the DSC had not proved any reasons against the claimants as provided under Section 68 and 69 of the Employment Act, therefore rescinding their appointments amounted to unfair and unlawful termination or summary dismissal.

In reply Counsel for the respondents submitted that the rescission was lawful and was done in accordance with Section 6 of the Public Service Act. She insisted that the claimants were not part of the Public Service because their respective appointments did not meet the requisite requirements as set by the PSC. According to her the submissions made by counsel for the claimants only applied to person’s who were employed in the Service and the claimants’ were not.

She argued that regulation 54 of the PSC regulations did not cover rescission as one of the disciplinary measures because it was not foreseen that there could be irregular appointments such as the claimants’ appointments. According to her it was for this reason that the DSC termed the meeting in which decision to rescind the appointments was made, a disciplinary meeting for want of a better word.

She refuted counsel’s assertion that the claimants’ had worked uninterrupted because according to C15, C14 and C18 the claimants’ were notified about the irregular appointments and the DSCs intention to rescind them. She asserted that the claimants were not informed about their termination because there was an ongoing processes to ensure that the termination was lawfully done including giving the claimants an opportunity to appear before the DSC on the 6/9/2013 and 5/9/2014. She argued therefore that the respondents did not condone or acquiesce to claimants’ staying on the jobs as claimed.

According to her, Article 166 of the Constitution mandates the PSC to advise the DSC and in this case it was up to the DSC to undertake the necessary processes of hearing the claimants and deciding whether to adopt the advice of the PSC or not. She cited the minutes of the DSC dated 5/9/2014 marked as Rex 14.

In response to the argument that the unilateral decision to rescind the claimants’’ contracts amounted to a breach of contract, Counsel submitted that the purported contracts were not enforceable because there were no valid contracts in the first place and therefore the issue of breach of contract does not arise.

She further argued that the issue of limitation did not apply in the instant case because the process of rescinding the contracts started way back in 2010 when the PSC advised the DSC about the claimants’ irregular appointments. In her view the claimants had been given an opportunity to adduce evidence against the advice of the PSC which they did not. There was no need to call witnesses to testify since the PSC had already made a report.

She concluded that the rescission was therefore lawful and prayed that court finds so.

**DECISION OF COURT**

According to the record, the claimants’ appointments were rescinded by the respondents on the 14/10/2014 and they were eventually terminated on the 16/10/2016. We have already found that notwithstanding the irregularities arising out of the District Service Commission’s omissions regarding the claimants’ appointments the claimants could not be faulted for them therefore their appointments were regularly done.

**What remains is to establish whether the termination was lawful?**

Section 66 (1) and (2) of the Employment Act provides that;

***“66. Notification and hearing before termination***

***(1) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation,***

***(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.***

It is clear from the testimonies of both parties and from the record that the claimants’ were invited to appear before the DSC on the 6/9/2013 and 5/9/2014. There is no evidence however to show that the claimants were actually given a hearing or that they were informed about the infractions leveled against them, and advised about their right to come with a person of their choice or given adequate time to prepare to respond to any infractions leveled against them and given an opportunity to appear to explain their case. Rex 13 and Rex 14, the minutes of the DSC meetings of 6/9/2013 and 5/9/2014, respectively, only show that the claimants’ were asked to verify their qualifications.

In our view the said meetings though referred to as disciplinary hearings did not meet the tenets of a fair hearing as already described above and as counsel for the respondents had submitted they were only termed so for lack of a better word.

In the premises we find that the claimants were not given a fair hearing in accordance with Section 66(1) and (2).

Section 68 of the Employment Act provides;

***68. Proof of reason for termination***

***(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71***

***(2) the reason or reasons for dismissal shall be matters, which the employer, at the tie of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee….”***

This section makes it mandatory for an employer to prove the reasons for which he or she is terminating an employee. An analysis of the minutes of the “disciplinary” meetings of the 6/9/2013 and 5/9/2014 led us to the conclusion that there were no infractions leveled against the claimants, save for the allegations that they had been irregularly appointed.

We have already found that it was the DSCs that was responsible for the irregularity and not the claimants’. In the absence of evidence to show that the respondents proved any other reason for terminating the claimants’ we find that the termination was contrary to Section 68(supra).

In conclusion, we find that the respondents having not given the claimants a fair hearing, and having not proved any reason for terminating the claimants’, their termination was unfair and unlawful.

4. **Whether the Claimants are entitled to remedies?**

Counsel for the claimants submitted that claimants were entitled to the reliefs sought for being unlawfully terminated. He prayed for the following;

That Court makes a declaration that the rescission of the claimants’ appointments was unlawful and unfair.

He prayed that the claimants are reinstated to their respective offices in accordance with the law because they were illegally terminated and that they are paid from the date of termination to the date of judgement. In the alternative to reinstatement counsel prayed for full benefits for the claimants from the date of the rescission to date, as guided by section 61(2) of the Local governments Act cap 243.

He asserted that the claimants suffered mental anguish because of the respondent’s high handed conduct towards them and prayed that each claimant is paid Ugx 80,000,000/-.

He also prayed for punitive damages as well as exemplary damages and that all the claims are awarded with interest and costs.

In reply counsel for the respondents insisted that the claimants’ were not unlawfully terminated and were therefore not entitled to any of the remedies sought. According to her, Section 61(2) of the Local Governments Act cap 243 did not apply to the claimants’ because the rescissions of their appointments was done in accordance with the advice from the PSC.

She further argued that the claimants’ were not barred from getting employment elsewhere and the irregular appointment of the claimants had also denied the rightful candidates the opportunity for employment in the public service.

She reiterated her submission that the rescission of the claimants’ appointments and their termination was lawful and prayed that Court dismisses the claim with costs.

Having found that the rescission of the claimant’s appointments and their termination was unlawful we think they are entitled to remedies as follows:

1. **Reinstatement**

Section 59 (1) (b) of the Local Government Act provides that:

1. ***A district officer or employee shall not be –***

***...***

***b) dismissed or removed from office or reduced in rank or otherwise punished without just cause.***

It is our considered opinion that in the current circumstances, there is no trust and confidence between the parties to enable a healthy employee employer relationship. We therefore think that reinstatement is not possible. It is therefore denied.

In the alternative we find no reason not to grant them the remedies as provided under Section 61(2) of the Local Governments Act which provides that;

(2) Notwithstanding sub section (1), an employee whose services are terminated by the council contrary to the terms and conditions shall be entitled to the following benefits-

1. One year’s gross pay in lieu of notice;
2. Pension in accordance with the pensions Act;
3. Basic salary in lieu of all earned and officially carried forward leave;
4. Severance package equivalent to his 6 months’ basic pay for every completed year of service;
5. Transport expenses at the rate equivalent to one currency point for every five kilometers from duty station to the employee’s home district headquarters;
6. Transport expenses at the rate equivalent to fifteen currency points from the home district headquarters to the employee’s home village.

Accordingly we grant all the claimants the reliefs as prescribed in the above section of the law.

1. **General damages**

General damages are awarded at the discretion of court. They are intended to return a claimant to as good a position so far as money can do it, as if the wrong done to him or her had not occurred. In other words general damages are the direct probable consequence of the act complained of. They are therefore compensatory and not a punishment. We believe the claimants deserve to be awarded general damages for being terminated without justifiable cause, for not being given a hearing and for the hardships associated with the loss of their jobs.

According to the evidence on the record, the claimants worked for almost 9 years without any complaint from the respondents about their performance and or conduct. We believe that this was because they competently executed their responsibilities under their respective jobs. They however lost these jobs abruptly with no notice or a hearing. They are therefore entitled to general damages for the unlawful rescission and termination of their appointments in addition to the remedies provided under section 61(2) of the Local Governments Act (supra) as follows;

1. The 1st claimant was 58 years and had worked for 8 years. We think Ugx, 35,000,000/- is sufficient.
2. The 2nd claimant was 58 years and had worked for 8 years. We think ugx.35, 000,000/- is sufficient.
3. The 3rd client was 37years of age she had worked for 8 years and all things remaining equal she had the potential for serving another 15 years and given that the high rate of unemployment we think Ugx 45,000,000/= is sufficient.
4. **Exemplary and Punitive damages**

The claimants’ jobs were rescinded without giving them an opportunity to defend themselves. They were then left in suspense for 2 years and then abruptly terminated without notice and yet they had a good track record. We are convinced that the respondent’s actions amounted to arbitrariness and high handedness to warrant the payment of punitive damages. We therefore award the claimants Ugx. 5,000,000/- each as aggravated damages.

In conclusion an award is entered in favour of the claimants in the following terms:

1. **A declaration that that the rescission of the claimants’ appointments was unlawful and unfair.**
2. **An Award of the remedies prescribed under Section 61(2) (a-f)of the Local government Act Cap 243(supra)**
3. **An award of General damages of 35,000,000/- each for the 1st and 2nd claimants and Ugx. 45,000,000/- for the 3rd claimant respectively**
4. **Aggravated damages of Ugx. 5,000,000/- each.**
5. **Interest of 18% per annum on b-d from the date of judgement till full and final payment**
6. **No order as to costs is made**

Signed and delivered by:

**1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ...……………**

**2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA …………….**

**PANELISTS**

**1. MS. GIDONGO ROSE ……………….**

**2. MR. ANTHONY WANYAMA ………………..**

**3. MR. JACK RWOMUSHANA ………………..**

**DATE……………………………**