**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE No.191OF 2015**

**ARISING FROM CB 180/2015**

**ADAM KAFUMBE MUKASA & 2 OTHERS ...………………………….. CLAIMANT**

**VERSUS**

**UGANDA BREWERIES LTD ……………………………... RESPONDENT**

**BEFORE**

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

**PANELISTS**

**1. MS. ROSE GIDONGO**

**2. MR. MAVUNWA EDISON HAN**

**3. MR. EBYAU FIDEL**

**AWARD**

**BACKGROUND**

The claimants Adam Kafumbe Mukasa, Herbert Egesa, and George Kawemba for and on behalf of 24 others, brought this claim against the respondents for a declaration that the claimants termination was unfair and wrongful, an order for general damages, interest on the above at a rate of 25% P.A from the date of termination till payment in full, costs of the suit and any other relief the Court deems fit.

**BREIF FACTS**

The claimants were employees of the respondent company under the sales department, until 29/04/204 when they there positions were declared redundant and their employment terminated. According to them prior to their termination they were subjected to an assessment comprising 3 sets of exams yet on the same day they began the exams their positions were advertised though designed under different titles.

The respondent’s case on the other hand was that following a restructuring process, the claimants were terminated because the Respondent was unable to find roles that best fitted the claimants’ skills and behavior.

**ISSUES**

The following were the agreed issues for resolution;

1. **Whether the claimant’s termination was unlawful?**
2. **Whether the Claimants are entitled to the relief sought?**

At the hearing the claimants were represented by Learned Counsel Mr. John Matovu and Mr. Emmanuel Kakenga and the respondents by Learned Counsel Mr. Moses Adriko and Mr. Timothy Lugaiyizi.

The claimant’s adduced evidence through 2 witnesses Adam Kafumbe Mukasa as CW1and Herbert Gilbert Egesa as CW2 and the respondents through 2 witnesses, Mrs. Priscilla Mwandha, the respondents Human Resources Business partner as RW1 and Mrs. Florence Bamwine, their Human Resources Director as Rw2.

**SUBMISSIONS**

**1. Whether the claimant’s termination was unlawful?**

It was submitted for the claimants that their employment with the respondents was governed by their various employment contracts and the Human Resources Policy. According to Counsel Clause 9.3.3 of the Human Resources Manual provided for redundancy and stated thus; “ ***an employee whose job is declared superfluous by abolition of office or responsibility shall be declared redundant…”.*** According to counsel the termination letters of the 3 representatives on page 38-46 of the respondents trial bundle confirmed that they were terminated by ***“redundancy.”*** It was his submission that according to Halsbury’s Laws of England 4th edition vol. 16, 460 paragraph 667, redundancy was explained as termination of employment attributed to;

1. ***the requirements of that business for the employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish***
2. ***the requirements of that business for employees to carry out work in the place where they were employed have ceased or diminished or are expected to cease or diminish.”***

He contended that the 24 claimants were required to undertake an assessment but on the day the assessment began, their positions were advertised in the newspaper attached on pages 30-31 of the respondent’s trial bundle. He contended that the assessment was not part of the claimant’s contracts and was therefore alien to them. That they had not been informed about the particulars of the assessment such as the targets they were working towards nor were they informed about their performance in it.

He further submitted that CW1 and CW2 had testified that while in respondents employment, the respondent was in the habit of changing job titles for various positions while maintaining the roles, job descriptions and salaries attached to them. CW1 testified in his evidence in chief that his job title had changed from Distributor Manager to Business development manager then reverted back to Distributor Manager. He stated that the respondent advertised his position under a new title of Regional Distributor Manager but the roles under it had remained the same. CW2 testified that his role profile under his former job of customer relations representative under bullet 5 at page 34 of the respondents trial bundle was exactly as the ones the position sales representative in the advert and it read as follows;

***“… develop brand building activities for the outlet to implement run retail promotion activities to plan and run UBL promotional activities in the outlet…”***

It was Counsels submission that RW1 had admitted that the job of customer relationship representative had been advertised in the newspaper on page 30 of the respondents trial bundle as SALES REPRESENTATIVE while the position of Business development manager was advertised as REGIONAL DISTRIBUTOR MANAGER and the respondent had advertised for more people to fill the positions than those that were supposedly declared redundant which was contrary to the definition of redundancy as stipulated in Halsbury laws of England. In his view therefore the jobs had not ceased or diminished or were not expected to.

He asserted that the respondents had not applied the 2 common law tests that are used to determine that an employee’s job had been declared redundant. The contract test and the function test. According to Counsel in the contract test focus was placed on the definition of the employee’s duties under the contract of employment and where the employer ceased to demand for them, the employee would be redundant. While in the function test focus was on the actual duties performed by the employee and when the employer ceased to demand for the employee to perform the duties the employee would be redundant. He also cited **SAFEWAY STORES VS BURRELL (1997) IRL where** the 2 tests had been applied to determine a redundancy as follows;

1. was the employee dismissed?
2. if so had the requirements of the business for employment to carryout work of a particular kind ceased or diminished or were they expected to do so
3. if so was the dismissal caused wholly or mainly by the state of affairs.

Counsel was of the view that the instant case was the same as BURREL (supra).

Counsel further stated that RW1s testimony had revealed that the claimants had been terminated because their skills and accountabilities did not match the new challenges which required more aggressiveness in the market and the respondent’s new goals. The witness had also revealed that the new recruits had the same training as the claimants. He contended that the construction of the claimant’s termination letters laid emphasis on the method of work which was contrary to clause 9.3.3 of the human resources manual which laid emphasis on abolition of the job. Therefore the claimants were right to assert that their job/positions were never abolished nor declared superfluous within the meaning of clause 9.3.3 of the Human Resources manual and thus “redundancy” which was the reason given for their termination was false.

He argued that the respondents were mandated to prove the reason for termination as provided under section 68 of the Employment Act, failure of which would render the termination unfair within the meaning of section 71 of the Act.

Counsel concluded that given that the reason for the termination of the claimants was false and contrary to their terms and conditions of service, the Respondents should be held liable for their unlawful dismissal.

In reply Counsel for the Respondents did not dispute the facts of the case as stated above. He cited Section 2 of the Employment Act No.6 of 2006 which defined “termination of employment” as;

***“… termination of employment” means the discharge of an employee from employment at the initiative of employer for justifiable reasons other than misconduct…”***

According to him the question for determination was whether the claimants’ employment was terminated for *justifiable reasons?”* In his view it was.

It was his submission that the Respondent being part of the Diageo group of companies which produces and supplies various beverages and therefore the sole distributor of the Diageo brands in Uganda, they had to participate in a restructuring process that involved all the Diageo businesses in all 21 markets to enable them deliver more efficiency in order to achieve what was referred to as their ***“performance ambition.”*** The restructuring process resulted in the termination of the claimants’ employment.

Counsel submitted that the claimant’s termination letters explicitly provided the reasons for their termination as failure by the Respondents to find them roles that best fitted their skills and behavior in light of the new sales structure.

In counsels view the letters clearly showed that as a result of the restructuring there were no suitable positions for the claimants in the new structure therefore the respondent was justified to terminate them. He relied on the explanation given by RW2 who said that the restructuring had been necessitated by a decline in the respondent’s market share which rendered the respondent less competitive in its business. The restructuring was therefore intended to make the respondent more competitive and efficient hence focusing on the sales team because it had to function at it best if the Company was going to achieve its **“*performance ambition.”*** The claimants were part of this team.

It was his submission further that RW1 had briefed the claimants about the restructuring process which required them to undertake a 3 stage assessment and through e-mail she had invited them to ask questions on the subject.

Counsel also stated that both RW1 and RW2 in their testimonies, had articulated the purpose of the assessment exercise which was to look for individuals with particular skills and behavior that would serve the respondents “***performance ambition”.*** He stated that they looked out for certain attributes such as an enterprising mind-set, being self-motivated, having leadership quality, a drive for results, commercial and financial acumen, distributor engagement skills, discipline and process adherence, being a good negotiator and an influential person all referred to as ***“the attributes.”*** According to him, RW2 had also explained that whereas the claimants as sales people previously had to ***“Push”*** that is they got the product to the distributor who was a third party in the hope that the distributor would ensure the product got to the market, under the new structure they were required to ***“push and Pull”*** that is to get the product to the distributors , but also to identify the best distributors to ensure the product is put on the best market routes and ensure that it is effectively sold in the right quality and quantity. Therefore the claimant’s roles substantially changed to emphasize a more active as opposed to the previous passive role of the sales team. Counsel asserted that this evidence had not been controverted by the claimants.

He submitted that CW1 had testified that the assessment had found him lacking in innovation. He argued that even though both CW1 and CW2 had testified that some of the roles they held before had been retained, the new roles under the new structure had been modified and the assessment proved that the claimants did not qualify to execute them to the satisfaction of the respondents. He insisted that with the modification the claimants jobs ceased to exist thus the claimants became redundant. It was his view therefore that their termination was justified.

He refuted the claimant’s argument that the importation of the assessment which was not part of their contracts was a breach of contract. He asserted that the respondents had undertaken the assessment process for purposes of restructuring its business and retaining those employees who could fit within its new structures and this was done in accordance with the law.

He further stated that by their letter dated 18/03/2014 the respondents had notified the Commissioner, Ministry of Gender, Labour and Social Development about their intention to undertake a restructuring and later on 10/7/2014 they sent the list of the staff that had been terminated, as required of them under Section 81 of the Employment Act.

He noted that the claimants had been paid in excess of their entitlements because they were paid 3 months in lieu of notice instead of 1 month in lieu of notice and they were also paid other benefits such as, severance pay, transport expenses, retirement benefits medical package and “share save option” contributions where applicable.

Counsel refuted the claimants’ reliance on **SAFEWAY STORES VS BURRELL (1997) IRL** because in that case the appellate tribunal did not dismiss the appeal against the finding that Mr. Burrell had been unlawfully dismissed on the basis of redundancy as claimed, but referred it back to the trial tribunal for re-hearing the alternative reason for his dismissal which was reorganization.

He was further of the view that the decision was not binding on this court and it would only be persuasive if it was decided on the basis of shared common law and uncodified principles which was not the case.

He concluded that the decision was arrived at on the basis of a codified Employment law in England which is the **Employment Protection (consolidation) Act 1978** of England which clearly provides for redundancy and “justifiable dismissal” in England. He noted that Section 81 of the Employment Act 2006, also provides for termination which may result in redundancy and the claimants were terminated in accordance with this provision.

He argued that this court in **DAVID KALYANGO VS RAKAI HEALTH SCIENCE PROGRAMME, LDC No.038/2016** held that “*… restructuring is one of the justifiable reasons envisaged under the above section. It is clearly a reason given by the respondent in accordance with section 68 of the Employment Act cited above as well as in accordance with the decisions of this court cited above.”* And in **OMODING SIMON VS RAKAI HEALTH SCIENCE PROGRAMME DEPARTMENT, LDC No.39/2016,** on pages 3 and 4 of the Award of this Court stated that;

*“It is indeed true that the position of security supervisor was not made extinct by restructuring. In the words of the director of the respondent, “the position of Security supervisor was not closed. There were other security personnel on grants that were continuing. They needed someone to oversee them. Mr. Okware served for about 1 year and left. He was among the existing staff.” We do not accept the contention of Counsel for the claimant that merely because the position of security supervisor was not rendered extinct by restructuring, the claimant was not terminated through the same process.*

*…*

*In the circumstances we do not find it inconceivable that the claimant was one of those that were eventually terminated as a result of restructuring. The story would have been different in our considered opinion, if there had been no restructuring process before the theft of the motorcycles.”*

In light of these authorities counsel asserted that the respondent was entitled to restructure its business and if the claimants lost their jobs as a result of the restructuring (whether or not their jobs became extinct) that termination was lawful.

He submitted that the claimant’s jobs became extinct as a result of restructuring and in any case the respondents substantially changed its structure and could not genuinely fit the claimants in the new structure. The claimants were in the alternative terminated as a result of restructuring and the said termination was justified.

In rejoinder it was submitted for the claimants that respondents terminated the claimants on the ground that their jobs/positions had been rendered obsolete and therefore made redundant whereas not. Counsel was of the view that the respondent’s main concern as conceded by RW1 was to change internal strategies in order to meet new challenges hence advertising for the same jobs and for more people to fill them. He asserted that the termination letters concentrated on the claimant’s skills and behavior yet their performance or lack of skills had never been an issue during their employment. He reiterated that the Respondents Human Resource Manual provided for a performance management process but no evidence was adduced to show that prior to their termination any of the claimants was on a performance improvement plan. Counsel insisted that the assessment process that was used was not part of the claimant’s terms and conditions as confirmed by the testimonies of RW1 and CW1, therefore the respondents in their submissions had shifted from redundancy as the reason for terminating the claimants to lack of the skill required to fit the new structure. He insisted that according to RW1s testimony, the claimants had been terminated in accordance with Section 9.3.3 of the Respondents human resources manual which states that;

***“…*** ***An employee whose job is declared superfluous by abolition of office or responsibility shall be declared redundant and shall be served with appropriate notice to cease employment …”*** but in actual fact there had been no abolition of any office or responsibility and therefore the claimants had not been rendered redundant as alleged. In the premises he concluded that the respondents had not given a justifiable reason for their termination contrary to section 68(1) of the Employment Act.

Counsel also insisted that although the Employment Act of Uganda provides for termination by way of restructuring, section 9.3.3 of the respondents human resources manual clearly described redundancy. He argued that their reference to **BURRELL** (supra) was for purposes of persuasion on the question of redundancy and the definition of redundancy under 9.3.3 (supra) was in pari-materia with the definition in BURRELL**.**

Counsel insisted that **DAVID KALYANGO** (supra) was distinguishable and did not apply to the facts in this case. According to Counsel whereas in **Kalyango** the claimant had been accused of a criminal offence while in the employment of the respondents and he was subsequently acquitted of the criminal charges during an ongoing restructuring process, the question was whether his termination was a result of the criminal charges that had been preferred against him or the restructuring. He asserted that the claimant’s letter of termination had clearly stated that his job had become redundant due to improved technology therefore his job and responsibility had become superfluous. While in the present case

1. the claimants jobs were not abolished nor were their responsibilities diminished, they were actually expounded
2. more people were recruited which meant an increased budget
3. no new jobs were created
4. no change in technology to require specific skill occurred
5. there was no requirement for new skills for the staff that retained their jobs were required or for the new recruits as testified by RW1

According to counsel in **OMODING** (supra) focus was placed on restructuring although it had not rendered the claimant redundant as is claimed in the instant case, where the respondents alleged the claimants jobs had been rendered redundant in the restructuring whereas not. He insisted that the claimants had been unlawfully terminated.

**DECISION OF COURT**

After careful analysis of the record, both submissions and the evidence, we decided to first consider the definition of redundancy. Unfortunately the Employment Act 2006 does not define redundancy. We were however persuaded by **R VS INDUSTRIAL COMMISSIONER OF SOUTH AUSTRALIA EXPARTE ADELAIDE MILK SUPPLY CO. LTD (1977)16 SASR 6** in which BRAY J defined redundancy as

***“… simply this, that a job becomes redundant when the employer no longer desires to have it performed by the employee. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him but because the employer no longer wishes the job the employee has been doing to be done anymore.”***

Therefore there has to be a diminution or cessation in the employer’s requirement of the employee or employees to carry out the work for which they had been employed.

The respondents argued that they terminated the claimants by reason of redundancy. Although the respondents in accordance with section 81 of the Employment Act had a right to terminate their employees for reasons of an economic, technological, structural or similar nature the question remained whether there was a diminution/cessation in the respondents requirement for the claimants to carry out the particular work for which they had been employed or an expectation of such cessation/diminution in the future.

According to RW2s testimony the structure of the sales department had changed to require that the employees who would undertake the work would go beyond “push” to “push and pull” ….*to target end users more, from passive selling to going beyond distribution to end product…”*  she did not say the sales job had diminished or ceased to exist she said it required more of the employees in terms of technical and behavioral skills. According to her the business had changed and they wanted to make it more competitive to enable them achieve its ***“performance ambition”*** hence the need for a “whole round person.” She went further to stated that the termination had been done in accordance with section 9.3.3 of the Human Resources Manual at page 43 of the claimant’s trial bundle which provides that

*“An employee whose job is declared superfluous by abolition of office or responsibility (our emphasis) shall be declared redundant and shall be served with appropriate notice to cease employment….”*

From her testimony it was clear to us that in restructuring the respondent company, focus was placed on enhancing the function of the sales department and not the other way around. The roles in the sales department were not abolished they were simply enhanced to enable the achievement of the respondents ***“performance ambition.”*** The jobs were renamed but substantially they remained the same although it seems to us that emphasis was placed possession pf behavioral skills. RW1’s testified that; “***what we did was assess the people for the roles required under the restructuring…yes we expected the people to perform without fresh skills, yes the claimants had the same skills as the people that applied…”***

The court appreciates that the jobs substantially remained the same but the assessment undertaken empahsised the identification of behavioral skills.

The redundancy letter whose content was the same for all the claimants was worded as follows:

29TH April 2014

ADAM KAFUMBE MUKASA

C/o. Uganda Breweries

By hand Delivery

Dear ADAM KAFUMBE MUKASA

**RE: REDUNDANCY**

***Reference is made to the Town Hall meeting of 19th March 2014, where it was communicated that there was need to review the way we are organized as a business in order to secure the future of Uganda Breweries Ltd.***

***Consequently, the Company’s business and organization structure have been reviewed and the sales structure has changed. Positions within the Sales function have been reviewed and re-aligned to deliver the Company’s performance ambition. These new positons within the new Sales structure require a new set of skills, accountabilities and behaviors in the new Sales structure.***

***Unfortunately, your position is one of those affected by the review and re-alignment of the structure and following a comprehensive review of your skills, we have not been able to find you a role that best fits your skills and behaviors in the new Sales structure.***

***Accordingly, the company has no alternative but to terminate your services with effect from 1 May 2014 on the terms of this letter.***

***The following pay package shall be applicable to you:***

***(cxxvii) Three (3) months’ pay in lieu of notice.***

***(cxxviii) Severance pay – one (1) month salary for each completed year of service.***

 ***(cxxx) Outstanding leave shall be paid in cash at the existing rate.***

***(cxxxi) Retirement Benefits Scheme entitlements to be paid where applicable, as per existing terms and conditions. The company will instruct AON to pay full entitlements under this scheme to you.***

***(cxxxii) Medical Package – for employee, spouse and five (5) dependents***

***( registered with the company) for a period of three (3) months starting from the effective date of the exercise.(Coverage to be in line with existing UBL Rules and Regulations for Medical benefits).***

***(cxxxiii) Shared Save Option contributions to be paid where applicable.***

***The amounts tabulated below are subject to the usual statutory deductions (PAYE & NSSF) and will also be paid less any monies owed to the company.***

***You will be required to clear with the company and settle any outstanding debts before your final dues are released to you. Should you have a bank loan, you will be required to liaise with your bank and present clearance letter(s) to HR before your payment can be released to you.***

***Please contact the HR department to submit all Company equipment and property in your possession, in any case not later than Friday 7th May 2014.***

***Finally, you will be given a Certificate of service in recognition of Service in recognition of your contribution to UBL.***

***I take this opportunity to thank you for the service you have rendered to the company over the past 3 years and to wish you prosperity and the very best in your future endeavors.***

***Please sign this letter in duplicate, retain one original and return the other copy together with your duly completed clearance form to the undersigned.***

***Yours sincerely,***

***UGANDA BREWERIES LTD.***

***Florence Bamwine***

***HUMAN RSOURCES DIRECTOR***

***ACCEPTANCE***

***I, ADAM KAFUMBE MUKASA, have read and understood the contents of this letter and agree to be hound by the terms hereof and herby confirm that save for the dues enumerated above I have no other or further claims of any nature whatsoever against (the Company), its affiliates, directors, shareholders or officers.***

***Signed by ADAM KAFUMBE MUKASA …………………………..this 5th May 2014***

***Witnesses at my request by:***

**Name:……………………**

**Address: ………………………..**

**Occupation: …………………..**

**Signature: …………………**

When we scrutinized this letter we found that the claimants had signed the acceptance undertaking included at the bottom of the letter, confirming that; save for the dues enumerated in the letter they had no further claims against the respondent. This in effect meant that they were satisfied with the content of the letter and signed to be bound by the terms therein and by implication they were satisfied with the procedure applied to terminate their services.

This court is of the view that having signed to be bound by the terms of the letter, the claimants cannot at this time bring a claim to retract the same. It is trite that a person is bound by his or her signature unless fraud or duress is proved and this was not the case in the instant case.

We are therefore inclined to hold that in light of the acceptance which the claimants signed, this claim cannot be sustained. It is therefore dismissed.

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. ROSE GIDONGO ………………………**

**2. MR. MAVUNWA EDISON HAN ………………………**

**3. MR. EBYAU FIDEL ………………………**

**DATE…………………………**