**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE 307/2017**

**(ARISING FROM LD NO. GR. 1054/1/2017)**

**u**

**BETWEEN**

**AMULLEN ESTHER & OTHERS ………………………………CLAIMANT**

**VERSUS**

**APOLLO NA ANGOR…………………………………………RESPONDENT**

**BEFORE**

THE HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE

HON. LADY JUSTICE LINDA LILLIAN MUGISHA

**PANELISTS**

1. Mr. Ebyau Fidel
2. Ms. Harriet Mugambwa Nganzi
3. Mr. F. X. Mubuuke

**AWARD**

This is a labour claim originally filed by the claimants claiming for:-

1. Unlawful termination of service
2. Payment of salary in lieu of notice of 7,270,050/=
3. Permission of outstanding NSSF contribution
4. General damages
5. Exemplary damages
6. Costs

Subsequently on 5th November 2019 Mr. Erimu Elijar while appearing with Mr. Okirol Moses for the claimants **informed** court that much of the claim had been settled and that the only issues left for the court to decide were on payment in lieu of notice and costs.

**REPRESENTATIONS;**

The claimant was represented by Mr. Erimu Elijar from M/S E.Wamimbi & CO Advocates while the respondent was represented by Ms Rita Achen Ogwang of Oars & Bt. Advocates.

**Section 58 of the Employment Act** provides

“**58 Notice periods**

1. **A contract of service shall not be terminated by an employee unless he/she gives notice to the employee except –**
	1. **Where the contract of employment is terminated summarily in accordance with Section 69 or**
	2. **Where the reason for termination is attainment of retirement age**

From the above section we infer the position that one is only entitled to notice in the event that he or she is to be terminated from his/her employment by his/her employer. It was the respondent’s sub mission that the claimants were not terminated but left on their own volition and that therefore the need of notice periods under **Section 58** above did not arise.

The claimants contended that the respondent terminated their employment by locking them out of the premises when they protested nonpayment of salaries, no remission of NSSF deductions and abusive behavior of the respondent. It was argued that this conduct of the respondent was such unreasonable conduct that made it impossible for the claimants to continue to work as employees. They relied on the authority **of Nyakabwa Vs Security 2000 Ltd. LDC 108/2014** and **Section 65(c) of the Employment Act.**

There is no doubt on perusal of the pleadings of both parties, and on perusal of the submissions of both counsel, that the claimants were not paid salary and NSSF contributions for sometime and as a result there was discontent among the workers who included the claimants. According to the respondent there were numerous undertakings by the respondent that the salaries would be paid once the donor funds were released but the claimants instead continued with what the respondent referred to as an illegal strike.

 On perusal of the contract of service of the claimants, their remuneration for services rendered were to be paid monthly. According to **paragraph 4(d) of the memorandum** **of claim,** the respondent grossly defaulted on the legal obligation to pay the claimants salaries and remit NSSF payments for the year 2014, 2015 and 2016.

**Section 30 of the Labour Disputes (Arbitration & Settlement Act) (LADASA)** provides:

 **“30 employee’s right to participate in industrial action**

1. **Subject only to any limitation provided in this Act or any other law, it shall be lawful for an employee –**
	1. **To participate in an Industrial action;**
	2. **To act in contemplation or furtherance of an industrial action in connection with a labour dispute.**
	3. **Civil action shall not be taken against an employee who participates or acts in contemplation or furtherance of an industrial action in connection with a labour dispute, under this section.”**

**Section 3 of the Labour unions Act** provides for the right of employees to organize themselves in any labour union and for their right to withdraw their labour and take industrial action.

In the case of **Tumusiime Richard & 5 others Vs Mukwano personal Care Products Labour Dispute Reference 022/2014** the claimants were alleged to have participated in what management called an illegal strike.

The court while emphasizing the fact that the claimant has a right to withdraw their labour, stated that such withdraw has to be done in an orderly manner without causing destruction of property or any unnecessary inconveniences which may be illegal. The claimants refused to go to work in the instant case because as they pleaded under paragraph 4(d) of the memorandum of claim, the respondent had over time defaulted in payment of their salary and NSSF contributions. Nothing on the record suggests that there was any destruction or intention to destroy any property.

In our considered view this was an industrial action within the meaning of Section **30 of LADASA (supra).**

Although in his submission, counsel for the respondent contended that this was an unlawful strike, no law was cited to us making the industrial action by the claimants unlawful. Counsel for the respondents relied on the labour union Act 2006 and the LADASA Act 2006, but avoided pointing out the **Section of the law** that required **at least 14 days’ notice** to the employer and other prerequisites as he prescribed in his submissions before employees effect a strike.

We consider the respondent’s payment of the outstanding arrears and NSSF contributions **after** the claimants lodged the claim and the respondent’s pegging payments of salaries and NSSF contributions to release of donor funds as an admission that for a long time such payments were not effected despite the claimants’ continued service to the respondent.

Consequently, in the absence of any law shown to us by the respondent making the industrial action illegal, we find the submission by the respondent that it was illegal without any merit.

It was the submission of counsel for the respondent that the claimants were advised by the police officer and the labour officer to return to work but they refused and therefore they absconded from duty and were no longer interested in their jobs thus they were not entitled to be given any notice. The claimants contended that they were unceremoniously terminated by the respondent’s Director in deliberately locking them out of the premises as per respondent’s witness statement.

We have no doubt in our mind that after the respondent was made aware of the intended strike, the respondent informed the police about this intended strike and indeed the next day 03/08/2017 none of the employees showed up, although the respondent had locked the premises not to allow the striking workers to enter.

Amullen Esther on behalf of others wrote a complaint to the labour officer, and on the same date the labour officer informed the respondent about the complaint, at least according to the witness statement of one Moses Aisia, the Executive Director of the respondent. It follows from this narrative of events that by the time the District Police Commander came to the premises and advised the respondent to allow the employees resume their duties at 11.30am (according to Aisia) the claimants were not at the premises, having laid down their tools. It is therefore not possible for us to believe the same Aisia when in his paragraph 7, 8 and 11 he states that the claimants were advised to return to work but they refused.

Even if we were to believe the respondent that in fact the claimants were advised to return to work and they refused, we would not be prepared to hold that their refusal to return to work amounted to absconding duty. This is because the respondents executive Director in paragraph 11 states “**that the labour officer advised that the employees resumes work since I on behalf of the company had undertaken to pay their salaries once funds were obtained.”**

We do not appreciate the insinuation of the respondent that the claimants having not been paid salaries in 2014, 2015 and 2016 would comfortably return to work without any salaries **“until when funds were obtained”** contrary to their terms of engagements, and that by refusing to return to work for failure of the respondent to pay their salaries, they would be abandoning or absconding from their duties.

We consider failure of an employer to pay wages/salaries to an employee a breach of **Section 41 and 43 of the Employment Act** both of which entitle an employee to such wages /salaries. This being the case **unless the employer is insolvent through the legal process or unless both employee and employer agree as to postponement of payment of such wages/salaries, the failure to pay the same entitles the employee** **to terminate the employment under** **Section 65 (1)(c) of the Employment Act** which states:

 **“65 Termination**

1. **Termination shall be deemed to take place in the following instances**
	1. **………..**
	2. **………**
	3. **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.**

Consequently it is our finding that although the claimants were locked out of the premises of the respondent, the reason for their failure to report to work was not the lock out or their absconding from duty but the failure of the respondent to paytheir wages/salaries and therefore breaching the contracts of service and entitling the claimants to terminate the contracts under **section 65(1)(c)** above mentioned. **Were they entitled to Notice of periods or payment in lieu thereof??**

The answer is No.This is because **Section 58 of the Employment** **Act (supra**) expressly provides for notice periods in cases where the **employer terminates the employee**. There is no provision in the law known to us that provides for notice to be given to the employee once such employee exercises his**/**her rights to terminate the contract. Interestingly, there is no provision in the law (except as provided specifically in a contracts of service) that provides for notice to be given to the Employer in the same terms that it is provided for to be given to the employee under **Section 58 of the** **Employment Act**. In the circumstances we hold that the claimants were not entitled to notice or payment in lieu of notice.

The last issue relates to costs.

As a general rule this court does not grant costs to the successful party because of the nature of the relationship between Employer and Employee which is funder mentally based on the principal of TRUST AND CONFIDENCE and which in our view gives the Employer an upper hand although in rare circumstances the court may consider to grant costs.

It was argued strongly by the claimant while relying on the authority of Cecilia **Kakuru Ngayu Vs Barclays Bank of Kenya & Another, Njeri High court Civil case** **17/2014,** that in the circumstances of this cases where the claim was precipitated by the respondent’s engagement in illegal conduct that was injurious to the claimants making it impossible for them to continue working, the claimants should be awarded costs.

In reply the respondent contended that it was not the respondent’s failure to pay salaries of the claimants that led them to file the claim in court but rather their own decision even when they were aware of financial constraints of the respondent.

According to the respondent the claimants’ failure to exercise patience since the respondent had good will should disentitle the claimants to costs of the claim.

There is no doubt that the claimants were not paid their salaries during the period 2014, 2015, 2016 and when they lodged a complaint to the labour officer, they were not paid either.

Payment of their dues was only effected after 2 years when the matter was in this court. As already pointed out this was in breach of the law despite difficulties encountered by the respondent related to securing funds for the purpose. We do not accept the submission that the respondent’s failure to pay the salaries of the claimant was not the cause of filing the claim in this court but rather their impatience. They were patient during the periods of 2014, 2015 and 2016 until 4/8/2017 when they filed the complaint before the labour officer.

We agree with the claimants’ submission that the subject of the claim having been unpaid salaries and unremitted NSSF, the same was injurious to the claimants making it impossible to continue working. The fact that payment of the salaries and remittances of NSSF were effected long after the claim was lodged in this court in our considered view suggests laxity on the part of the respondent. It would be more injurious to the claimants if this court was to order each of the parties to pay costs in the circumstances.

Accordingly we allow the prayer for the claimants that the respondent be responsible for costs in this claim. Order accordingly.

**BEFORE**

THE HON. CHIEF JUDGE RUHINDA ASAPH NTENGYE ……………….

HON. LADY JUSTICE LINDA LILLIAN MUGISHA ……………….

**PANELISTS**

1. Mr. Ebyau Fidel ……………….
2. Ms. Harriet Mugambwa Nganzi ……………….
3. Mr. F. X. Mubuuke ……………….

Dated: 02|06|2020