**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERNCE NO.181 OF 2019**

**ARISING FROM LDA NO.021 OF 2018**

 **KAYINGO MOSES & 5 ORS …………….. CLAIMANT**

**VERSUS**

 **BOARD OF GOVERNORS OF**

**ST. MARY’S COLLEGE ……………RESPONDENT BEFORE:**

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

**PANELISTS**

**1. MR. BWIRE ABRAHAM**

**2. MS. JULIAN NYACHWO**

**3. MR. EDSON HAN MAVUNWA**

**AWARD**

**BRIEF FACTS**

The Claimants were verbally employed by the Respondent as head teacher and teachers in 2017 and 2018, respectively. In February 2019, when they went to the Respondent’s premises, they found that the Respondent had replaced them with new teachers, without giving them any reason or notice. When they asked the Director why they were replaced, he promised to get back to them, but he did not. As a result, they reported the matter to the labour officer, who referred it to this court for disposal. According to them, they were earning the following monthly salaries: the 1st claimant was earning a monthly salary of Ugx. 400,000/-, the 2nd Claimant, Ugx, 250,000/= the 3rd Claimant Ugx. 180,000/- per month, the 3rd Claimant Ugx. 160,000/- per month, the 4th Ugx. 180,000/- per month, the 5th Ugx 160,000 per month and the 6th Ugx. 160,000/- per month. They claim they were not paid their salary arrears as follows: 1st claimant Kayingo Moses, Ugx. 2,160,000/- for 5 months and 12 days, 2nd Claimant, Tenywa Richard, 1,100,000/- for 4 months and 12 days , 3rd claimant, Musambira Moses, Ugx,1,184,000/- for 7 months and 12 days, the 4th claimant, Naika Henry, Ugx. 792,000/- for 4 months and 12 days, the 5th claimant, Kasadha Ezekiel, Ugx 1,184,000/- for 7 months and the 6th claimant, Tewali Esther, Ugx. 864,000/=

**ISSUES**

**1.Whether the Claimants were terminated by the Respondent: and if so, whether the termination was lawful?**

**2. Whether the Claimants are entitled to remedies sought?**

When the matter came up for hearing on 14/12/2020, Counsel Erina Kawalya for the Claimants applied to proceed exparte, on the grounds that, when she served Counsel for the Respondent, they informed her that, they had ceased to represent the Respondent. When we perused the hearing notices and Affidavit in support, we were satisfied with her submission and granted her leave to proceed.

**Issue 1. Whether the Claimants were terminated by the Respondent: and if so, whether the termination was lawful?**

It was submitted for the Claimants that, the circumstances under which an employment contract could be terminated were provided for under section 65 of the Employment Act, 2006. According to her the Claimants were terminated in accordance with section 65(1)(c ) which provides that:

*“…c) 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…”*

She argued that once the provisions of this sub section are satisfied, the employee is said to have been constructively dismissed. She also relied on **Nyakabwa Abwooli vs Security 2000 Limited LC No. 108/2014,** for the legal proposition that the unreasonable conduct of an employer within the meaning of section65(1) (c ) of the Employment Act, must be illegal, injurious to the employee and must make it impossible for the employee to continue working. It was her submission that, when the Claimants reported for duty in February 2019, and found that the Respondent had replaced them with new teachers without any reason and or any notice and the fact that the list of teachers which was placed on the notice Board not only excluded them, but it also denied them access to their classes, were circumstances which clearly fell within the ambit of Section 65(1)( c).

She further contended that although the Respondent in reply to the Claim, denied ever terminating the Claimants and instead alleged that they had misconducted themselves, there was no evidence to show that they were subjected to any disciplinary procedure as provided under Section 66 of the Employment Act. Section 66, requires an employer who is contemplating the termination of an employee, to give the employee reasons for termination and an opportunity to respond to the reasons before effecting the termination. she also relied on **QueensVelle Athieno vs Centre for Corporate Governance** (Industrial Court of Kenya, Cause 81/2012), for the same legal proposition. She insisted that the infractions leveled against the Claimants, were not brought to their attention nor were they given an opportunity to respond to them before they were terminated. She argued that, there is no evidence to show that the Respondent invited them for a hearing nor is there any evidence that any penalty was imposed on them within 15 days of the alleged infractions, as provided under section 62(5) of the Employment Act. According to her, the evidence on the record, shows that the Director instructed a one Ibrahim Opedum, to carry out an investigation and nothing else. She contended that the Respondent only remembered to resurrect the allegations after the Claimants lodged their complaint before the labour officer.

Citing the holdings in **Florence Mufumbo Vs UDB LDC No. 138/2014** and **Moses ObonyoVs Mtn LDC No. 45/2015,** she prayed that Court finds that having replaced the 1st Claimant who was head teacher and the 2nd, 3rd, 4th ,5th, and 6th as teachers by excluding them from the teachers’ roaster, without any justifiable cause , Court should find that the Claimants were unlawfully terminated.

**DECISION OF COURT**

It is well settled that; an employer can no longer terminate or dismiss an employee for no reason and without according him or her an opportunity to respond to the reasons for which he or she is being considered for termination or dismissal. It is also trite that such an employee must be given reasonable time within which to prepare to respond to the reasons and to make representations before a disciplinary tribunal or committee accompanied by a person of his or her choice. Section 66(1,2,) of the Employment Act provide that:

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

***(1) Notwithstanding any other provision of this part, an employer shall before (***our emphasis) ***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 (****emphasis ours****) 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.***

Section 68 of the same Act, also provides that the employer must prove the reasons as follows:

***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 time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee….”***

It is not disputed that the Claimants in the instant case, were orally employed by the Respondent as follows: the 1st Claimant as head teacher and the other Claimants as teachers on various dates in 2017 and 2018 respectively. The evidence on the record indicates that indeed, in February 2019, the 1st Claimant was replaced as head teacher and the others were excluded from the teachers roaster by a notice placed on the Respondent’s notice board.

The Record also indicates that when the Labour officer brought the Claimants complaint to the Respondent’s attention in his letter dated 18/02/2019, the Respondent in its letter dated 28/02/2019, stated that, although the Claimants were still their employees, they had committed some misconduct, which they listed in the letter. The letter was however, silent on what measures which the Respondent had taken against the Claimants. It only stated in part that; *“As provided under Section 64(2) of the Employment Act, 2006, we beg your office to act accordingly. Therefore, we wait for your positive response on the above.”*

Section 64(2) provides that:

*“where a complaint under this section has been made to a labour officer the officer shall-*

1. *Investigate the circumstances leading to the imposition of the disciplinary penalty and in the course of these investigations he or she shall consult any labour union, if any, established in the business in which the employee is employed; and*
2. *Seek to settle the matter in the first instance by mediation*

It seems to us that, by referring the list of infractions to the labour officer for his action in accordance with section 64(2), the Respondent was admitting that it excluded that the Claimants from the list of teachers as disciplinary penalty and the labour officer was expected to take action against them in accordance with section 64(2) and report the action to them.

In our considered opinion, the Respondent by this letter admitted that it withheld the Claimant’s tools of employment, thus rendering it impossible for them to continue working. In the circumstances, the Respondent constructively terminated the Claimant’s employment, as provided under section 65(1) (c) and the holding in **Nyakabwa Abwooli** (supra). In addition given that, the Respondent imposed such a penalty for infractions which it did not notify them about, and without according them an opportunity to respond to the infractions, as provided under section 66(1) and (2)(supra), rendered the termination both substantively and procedurally unlawful.

In the absence of any evidence to the contrary, it is our finding that, the Claimants were constructively terminated and the termination was unlawful. The issue is resolved in the negative.

**2.whether the Claimants were entitled to the remedies sought?**

Having found that the Claimants were unlawfully terminated, they are entitled to some remedies. They prayed for the following remedies:

1. **Payment in lieu of notice.**

It was Counsel’s submission that the claimants were entitled to notice before termination and given that 1st claimant was employed between 2017 -2019 and the others between 2018 -2019, they were entitled to 1 months’ salary in lieu of notice as provided under Section 58(3)(b) of the Employment Act, 2006.

Indeed, the Claimants were entitled to notice before termination as provided under Section 58 of the Employment Act. We have no reason not to award it. It is ordered that the Claimants having worked for more than 1 year and less than 5 years, should be paid 1 months’ salary in lieu of notice each, as provided under section 58(3) (b).

1. **Compensation of the Claimants for failure to conduct a hearing.**

Counsel prayed that given that the Respondent fundamentally breached the Claimants right to a fair hearing, court should make this award in accordance with section 66(4) of the Employment Act, which provides that;

*“(4) Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks’ net pay…*

It has long been settled that the only remedy for an employee who has been unlawfully terminated is damages and other remedies pleaded for under the Employment Act 2006.( see **STANBIC BANK VS KAKOOZA MUTALE C.A No. 2 OF 2010).** We have already established that the Claimants were unlawfully terminated therefore, they are entitled to damages. We believe that the remedy under section 66(4) applies to circumstances where the termination of an employee is justified but the employer breaches procedure as provided under section 66(1) and (2).

**c)General Damages**

As already stated, an employee who is unlawfully terminated is entitled to damages. The Claimant prayed that Court awards damages as held in **Mufumbo**(supra) and **Gullabhai Ushillini Vs Kamapala pharmaceutical Ltd CA No. 6 of 1999,** to the effect that damages are intended to restore the wrongful party to the position they were in before the breach against them occurred.

 It is trite that General Damages are intended to bring an aggrieved party to as near as possible in monetary terms to a position a Claimant was in before the injury occasioned to him or her by the respondent occurred. The quantum of damages to be awarded is decided at the discretion of Court .The claimants in the instant case prayed for an award of General damages for the humiliation , mental anguish and distress they suffered. According to the memorandum they claimed Ugx.5,000,000/= as General damages.

We take cognizance of the pain and suffering caused by the loss of a person’s job especially when it is terminated unlawfully. We shall therefore award the claimants damages as follows:

The 1st Claimant having worked as head teacher from 2018-2019 earning Ugx. 400,000/- is awarded Ugx. 1,200,000/- as general damages, the 2nd Claimant having worked between 2018-2019 earning Ugx 250,000 per month is awarded Ugx. 800,000/= as general damages, the 4th claimant having worked between 2018-2019 earning Ugx. 180,000/- per month, 720,000 as general damages and the 3rd  claimant worked from 2017-2019, earning Ugx. 160,000/- is warded Ugx. 800,000/=, 5th Claimant having worked from 2017-2019 earning Ugx. 160,000/- is also awarded Ugx. 800,000/- and 6th claimants having worked for the Respondent between 2018- 2019 earning Ugx. 160.000 per month is awarded Ugx. 640,000 each as general damages.

**d)Severance pay**

Citing section 87(a) of the Employment Act which provides for the payment of severance allowance to an employee who has been in the employ of an employer for six a period of 6 months or more and is unlawfully terminated among other circumstances. Counsel prayed that the Claimants are paid Severance allowance in accordance with **Donna Kamuli vs DFCU LDC 002/2015,** it was held that 1 months’ salary for every year served, is paid in cases where there is no agreed formula for the calculation of severance pay. The Claimants should therefore be awarded Severance pay as follows; the 1st , 2nd , 4th and the 6tth claimant who worked for 1 year should be awarded 1 month salary as severance pay and the 3rd and 5th who worked for 1 year and 9 months I .5 months’ salary as severance pay .

We have no reason not to award the Claimants severance pay, having established that they were unlawfully terminated. We therefore award the 1st, 2nd , 4th and 6th Claimants 1 months’ salary each as severance pay as follows 1st Claimant- 400,000/-, 2nd Claimant- 250,000/-, 4th Claimant- 180,000/-, 6th Claimant 160,000/= and the 3rd Claimant-240,000/- 5th Claimant- 240,000/-.

**e) Unpaid salary arrears**

Counsel submitted that the claimants were entitled to wages as provided under Section 42 of the Employment Act and section 43(6) which provides that

*“…on termination of his or her employment in whatever manner, an employee shall within seven days from the date on which the employment is terminated be paid his wages and any other remuneration and accrued benefits to which he is entitled.”*

She contended that no evidence was adduced to controvert the Claimants claims for salary arrears, therefore they should be paid.

Indeed, no evidence was adduced to that effect, and even though the Respondent filed witness statements, this was not sufficient because the veracity of the evidence therein was not tested in court therefore, they were disregarded.

In the absence of evidence to the contrary, we are inclined to order that the salary arrears as claimed are paid to them by the Respondent as follows:

1st Claimant- ugx. 2,160,000/-, 2nd Claimant- Ugx.1,100,000/-, 3rd Claimant- ugx.1,184,000/=, 4th Claimant, Ugx. 762,000/-, 5th Claimant- Ugx. 1,184,000/=. 6th Claimant-864,000/-.

In conclusion this claim succeeds with no order as to costs.

Delivered and signed by

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

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

**PANELISTS**

**1. MR. BWIRE ABRAHAM …………….**

**2. MS. JULIAN NYACHWO ……………**

**3. MR. EDSON HAN MAVUNWA ……………**

**DATE: 23/12/2020**