**THE REPUBLIC OF UGANDA**

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

 **LABOUR DISPUTE REFERENCE No. 80 of 2018**

**ARISING FROM KCCA/MAK/LC NO.138/2017**

 **KISEMBO EMMANUEL ……………….. CLAIMANT**

**VERSUS**

 **INTERCAR (U) LTD ………..………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. ADRINE NAMARA**

**2.MS. SUSAN NABIRYE**

**3. MR. MICHEAL MATOVU**

**AWARD**

**BACKGROUND**

When the matter came up for hearing on 27/01/2021. The parties informed Court that the dispute had been partially settled and what remained outstanding was the issue of unpaid annual leave.

The parties were directed to file written submissions on the outstanding issue, which they did and for which Court is grateful.

**BRIEF FACTS**

On 10/05/2010, the Claimant was employed by the Respondent Company as a Mechanic, earning Ugx. 1,460,000/- per month. On 23/05/2017, his employment was terminated. He claimed that for the entire period he was in the Respondent’s employ, he was never accorded any leave, although he severally sought for it. It was his case that he was entitled to leave pay as part of his terminal benefits.

**ISSUES**

**Whether the Claimant is entitled to payment in lieu of leave?**

Citing Section 54 of the Employment Act which entitles an employee to a paid holiday every Calendar year, Counsel for the Claimant submitted that the Claimant who had served the Respondent as her sole Chief Mechanic with limited assistance of 1 panel boy for over 7 years was never awarded leave.

According to him, the Claimant would therefore travel all over the country to service and repair the Vehicles which the Respondent’s would hire out to various Companies and places. As a result, he was always on the move repairing the Respondent’s vehicles in different parts of the country.

It was his submission that the Claimant’s contract provided for the procedure for taking leave, which included filling leave forms provided by the Respondent. The Claimant was entitled to 28 days per annum.

He relied on **Mbiika Dennis vs Centenary Bank Labour Dispute Claim No. 23/2014,** in which this Court’s holding is to the effect that, it was mandatory for employers to grant their employees rest days during every Calendar year, for purposes of making the employee rejuvenate and work better. Leave was an entitlement and not a privilege, therefore, the employer must put a system that ensures that every Calendar year, the employee is granted leave and the absence or weakness of such a system would not affect the employee’s entitlement to take leave.

He argued that the Respondent’s system for applying for leave had weaknesses because once the prescribed leave forms were submitted by the employee, they would not be returned to him or her when the leave was denied. He contended that the Claimant in the instant case, severally applied for and was denied leave. He prayed that in light of section 18 of the Labour Disputes (Arbitration and Settlement) Act 2006, which provides that this Court is not bound by strict rules of evidence the claimant’s oral evidence in the circumstances should be considered in determining this matter.

It was his submission that the Claimant ‘s claim for leave pay was Ugx. 10,220,000 for 7 years at Ugx. 1,460,000/- per year and it should be awarded.

In reply Counsel for the Respondent in his submission did not dispute that section 54 of the Employment Act makes it mandatory for an employer to grant an employee leave days with full pay, every calendar year, at such time as may be agreed between the parties.

He also cited **Mbiika** (supra), which cited **Edace Micheal vs Watoto children’s Miniistries** in which this court held that:

*“ The question when in a calendar year an employee is to take leave is determined by the employer upon the request of the employee and that once the employee does not request for such rest days it is assumed that he/she forfeited such rest days.”*

According to him the Court in **Mbiika** (supra), stated that, upon the employee requesting for his rest days the employer is required under section 54 (supra) to fix the dates for the rest days in every calendar year and if in the employers view the employee cannot be released due to pressure of work, or otherwise, the employer is obliged to pay the employee a certain sum of money in lieu of leave and it is upon the employee to accept or refuse and take his/her leave days. he said that, in **Mwaka Mosese vs Road Master Cycles (U) Ltd , LDC No. 155 of 2014,** whose holding is to the effect that, the employee is expected to apply for leave and or choose to be paid in lieu of leave. Where neither is done, when the employee is aware of the right to take leave, it is presumed that the employee has voluntarily forfeited to take leave.

He contended that the Claimant in the instant case, was aware of his entitlement to 28 days of paid annual leave. He was also aware of the procedure for taking leave was specified at page 2 of his contract. He was required to submit a written leave request form at the beginning of the year.

Counsel refuted the assertion that, the Claimant requested for and was denied leave, during the 7 years he served the Respondent and that the Respondent retained the leave forms the claimant purported to have submitted because, he did not make any application for their production by the Respondent as provided under section 18(1) of the **Labour Disputes (Arbitration and Settlement) Act, 2006.** Therefore, there was no evidence that he filed the leave forms.

He invited Court to find that the Claimant did not discharge the burden of proving that he applied for leave in accordance with his contract of employment and the same was denied, for him to claim payment in lieu of leave amounting to Ugx.10,220,000/-. He prayed that the suit is dismissed with costs.

**DECISION OF COURT**

It is trite law that the entitlement to leave is a fundamental part of an employment contract. Section 54(1) (a) of the Employment Act provides that:

***“…***

1. ***Subject to the provisions of this section-***
2. ***“An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months’ service to be taken at such time during such calendar year as may be agreed between the parties. (0ur emphasis).***

***….”***

As rightly submitted by Counsel for the Respondent, this Court in **Mbiika Dennis vs Centenary Bank Labour Dispute Claim No. 23/2014,** held that section 54 (1) (a)(supra) makes it mandatory for an employer to grant paid annual leave days to his or her employee, every calendar year. However, the dates on which the leave days are taken is determined by the employer upon the request of the employee. Once the employee has not requested his or her employee for leave, it is assumed that he or she has forfeited the leave.

Therefore, the employer must have a mechanism through which the employee can make requests for leave days and the absence of such a mechanism does not affect the entitlement of the employee to his or her leave.

It was in dispute that, the Respondent in the instant case had a mechanism for applying for leave and it was stipulated under clause 2 of the Claimant’s contract of employment, as follows:

*“Annual and Other Leave*

*You shall be entitled to paid annual leave of 28 days per annum. This entitlement only accrues to employees who have served for a period of not less than twelve (12) months. All leave should be taken and will not be carried forward unless express approval in writing has been received from the General manager. All leave should be taken within the year it is due. Written leave request forms should be submitted at the beginning of the year.*

*….*

*Please fill in the leave form if you have any accrued leave and have it approved to enable you proceed on leave…*

It was the Claimant’s case that, he applied for leave but the leave forms which he submitted, were not returned to him when the leave was denied, therefore, he could not adduce them as evidence. He considered this a weakness in the system therefore his oral testimony should be allowed on the basis of section 18(1) of the Labour Disputes (Arbitration and Settlement) Act, 2006, which states that the court is not bound by strict rules of evidence. We respectfully do not agree with the submission of the Respondent that, the evidence of the existence of the forms did not exist merely because, the Claimant did not apply to this court to compel the Respondent to produce the forms.

It is our considered opinion that, given that the Respondent did not expressly deny that the Claimant did not submit any leave form as provided under his contract, leaves no doubt in our minds that this was not the case. And given that, the Respondent did not adduce to contradict the assertion that once the employees submitted the leave application forms they were not returned whether the leave was granted or not, we have no reason not to believe the Claimant when he submitted that when he submitted the leave application forms, the leave was denied and the forms were not returned to him.

 In the circumstances the weaknesses in the respondent’s leave application system cannot be visited on the Claimant. We do not think that, given the nature of his work, which required him to travel all over the country servicing and repairing the Respondent’s vehicles, he would forfeit an opportunity to take some rest days for 7 consecutive years.

Convention 132 – **Holiday’s with pay Convention (Revised), 1970,** recognizes the importance for granting paid annual leave to employees as a means of ensuring that employees remain healthy and also as a means to promote their wellbeing in general. This Court in **Mbiika** (supra) in line with the Convention, stated that the purpose of leave was to enable employees rejuvenate and work better. The Respondent in our view was also cognisant of the need for the Claimant to take rest days and that is the reason she made it a requirement under his contract of employment, for him to take to take leave every calendar year. We believe that, the Respondent appreciated that he needed to rest in order for him to be able to work better.

We are convinced that, the Respondent having not expressly denied that the claimant applied for leave in accordance with the procedure for applying for leave, we believe that the claimant applied for leave, but it was denied.

We are convinced that he was entitled to paid annual leave, therefore his claim for payment in lieu of leave, amounting to Ugx. 10,220,000/- at Ugx. 1,460,000/- per year, is granted.

An interest rate of 15% per annum shall accrue on this award from the date of judgement,until payment in full. No order as to costs is made.

Delivered and signed by:

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

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

**PANELISTS**

**1.MS. ADRINE NAMARA …………………**

**2.MS. SUSAN NABIRYE …………………**

**3. MR. MICHEAL MATOVU ………………….**

**DATE: 1/4/2021**