**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE NO. 137/2019**

**ARISING FROM LDC NO.078/12/2018.**

**LWETABE EMARINE ………………………….. CLAIMANT**

**VERSUS**

**SMART FM …………………. 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.MATOVU**

**AWARD**

**BRIEF FACTS:**

According to the memorandum of claim, on 30/10/2011 the Claimant was employed by the respondent under an oral contract as a radio presenter earning a salary of Ugx. 200,000/=. On 30/11/2018, while attending a general meeting she was verbally sent out of the meeting by the Micheal Muwnaguzi the station manager of the Respondent and asked not to return until she was recalled. She was not recalled. She was terminated instead. When she filed a complaint before the labour officer on the 19/12/2018, the Respondent was summoned and during the mediation the Respondent summarily dismissed her in writing. The Labour Officer referred the matter to this Court for adjudication hence this suit.

When the matter came up for hearing in Jinja Industrial Court of Uganda Jinja court Circuit 23/09/2019 to 4/10/2019

A partial consent was entered on the Court record for the Claimant in the following terms:

1. That the Claimant is entitled to accumulated annual leave calculated for the 7 years served at Ugx. 1,700,000/=
2. That the Claimant shall be paid 2 months in lieu of notice amounting to Ugx. 400,000/=
3. That the claimant is entitled to unremitted NSSF amounting to Ugx. 1,680,000/- less pay as you earn.
4. That the Respondent shall issue the Claimant with a certificate of service.

The ISSUEs that remained unresolved therefore were as follows:

1. **Whether the claimant was lawfully terminated and whether the termination during her last trimester of pregnancy was unlawful and it violated her personal rights ?**
2. Whether the claimant was entitled to the following reliefs?
3. Gratuity
4. Severance pay
5. Damages for breach of contract
6. Costs

**REPRESENTATIONS**

The Claimant was represented by Mr. Chris Munyamasoke of M/S Munyamasoko and Company and the Respondents by Assuman Nyonintono of Wagabaza & Company Advocates.

**EVIDENCE:**

The claimant adduced her own evidence and the Respondent adduce evidence through her Station Manager Micheal Muwangizi.

**CW1: LWETEBE EMARINE**

It was the Claimants evidence that she was verbally terminated and she was only given a termination letter on 25/01/2019, during a mediation meeting before the Labour officer. She stated that on appointment she was not requested to produce academic documents and she had no qualifications in journalism. However before she assumed duty, she received 1 months training from someone. She was recruited by the station Manager, Muwanguzi Micheal himself although he did give her a written appointment. According to her it was not the company’s policy to issue written appointments. She was not aware of the staff Audit so she did not participate in it. It was her testimony that she was terminated without being given a reason or a hearing because she was told to go away and wait until she was communicated to. According to her Muwanguzi accused her of having an altercation with a colleague whereas not. She said did not demand for a termination letter as alleged. According to her, she was entitled to gratuity because she worked diligently for 7 years, with a good track record.

**RW1 MICHEAL MUWANGUZI**

RW1 Micheal Muwanguzi on the other hand admitted that he recruited the Claimant and he did not give her an appointment letter. He admitted that she served the company for 7 years, although he did not know where she resided. He said the staff audit which she did not attend was intended to establish whether she was fit to formalize her employment. He admitted that he sent the claimant away because she had an altercation with another staff during a general meeting but he expected her to wait for him to finish the meeting but she did not. He said did not summon her for a disciplinary hearing because she reported the matter to a Labour officer. He admitted that he issued her with a termination letter on the 25/1/2019, during the, mediation before the Labour officer. He also admitted that by the time of her termination she was pregnant although that is not the reason she was terminated. According to him she was terminated arising out of a board’s decision to downsize the Respondent’s Labour force in their meeting held on 15/1/2019, however he did not produce the minutes of the board. He said the claimant missed the audit because she had absconded from duty. although he stated that each staff was summoned individually, he did not produce a copy of the memo that summoned later he retracted to state that a general memo was pinned on the notice board. He insisted that she was not terminated her because of the altercation she had with a colleague, but because the Company was downsizing.

**SUBMISSIONS**

1. **Whether the claimant was lawfully terminated and whether the termination during her last trimester of pregnancy violated her personal rights?**

It was submitted for the Claimant that Michael Muwanguzi well aware that the Claimant had no qualifications went ahead and recruited her as a radio presenter and she served the Respondent for 7 years. He refuted the assertion that she served as a volunteer for the 1st 4 years because she testified that she only volunteered for 1 month. Counsel insisted that the Claimant was terminated orally, because on 30/11/2018, she was asked to leave and not return until recalled and her termination was done without any reason. She was only issued a letter of termination in January 2019. She was never called back, or summoned for a hearing, she was denied access to the respondent’s premises and she had no knowledge about the audit of staff. He argued that the Respondent witness did not tell the truth when he said that the Claimant refused to attend the audit, yet she was retained in her employment. According to Counsel, her conduct should have been treated as insubordination on her part. Counsel contended that by issuing the claimant with a termination letter during mediation proceedings, and without subjecting her to a disciplinary hearing was a violation of her rights as enshrined in article 28 of the constitution, Sections 66,68 and 71 of the Employment Act, 2006. He further contended that the Respondent did not give the Claimant reason(s) for terminating the claimant as provided under Section 68 of the Employment Act, 2006. He refuted the reason that the Company was scaling down her Labour force. Citing **A.M Jabi vs Mbale Municipal Council(1975) HCB at page 192,** he argued that the termination was wrongful or unlawful, because the Respondent terminated without justifiable reasons, without reasonable notice, did not comply with staff regulations, did not follow the disciplinary procedur, it was done summarily and it violates the fundamental principles of natural justice. He also cited **Stanbic Bank Vs Kakooza Mutale SCCA No. 02/2010 and Barclays Bank of Uganda Vs Godfrey Mubiru SCCA No. 1 of 1998** cited in **Joseph Kibuuka & Others Vs Bank of Uganda LDC No. 184/2014,** for the legal proposition that an employer is required to provide a fair hearing to the employee before making a decision to dismiss him.

According to Counsel in the instant case the claimant’s contract was summarily ended when she was pregnant thus subjecting her to stress, psychological torture and anguish, therefore her employment was unlawfully terminated, therefore the 2 issues should be decided in the affirmative.

In reply Counsel for the Respondent asserted that she the claimant was lawfully terminated because the Company was restructuring/downsizing. He argued that it was trite law that section 65(1) empowers an employer to terminate an employee with reasonable notice and where reasonable notice is not given to pay I lieu of notice pursuant to section 65(5) of the Employment Act. Counsel cited **Benon H. Kanyangoga & others vs Bank of Uganda LDC No 080/2014** at length to distinguish dismissal and termination and stated that in the instant case the Respondent did not terminate the Claimant for nay disciplinary issues but because of restructuring/downsizing, which is a justifiable reason as stated in her termination letter. According to counsel it was the claimant’s testimony that she was not terminated in December and she did not possess the qualifications of a journalist and that she failed to participate in the audit despite being notified in a staff memo that was issued to all staff. It was his submission that she was not terminated on these grounds.

He contended further that whereas she testified that she did not demand for a termination letter the labour officers letter dated 21/12/2018 expressly requests for the letter of termination. According to him the claimant absconded from duty following her disciplinary issues hoping the Respondent would terminate her and it was her testimony that she was not issued with a termination letter until she asked for it. He argued that a hearing was not called because she had left and the respondent only heard from her when she was summoned by the Labour officer. He also attributed her absence in the audit to her absconding from duty and wondered why she did not report this matter to the Respondent’s directors yet she had previously reported trivial matters to them.

He insisted that the claimant’s termination was due to downsizing/restructuring and not for disciplinary issues, and the downsizing was not controverted by the claimant. He cited **Paul Muyimbwa vs Ndejje University LDC No. 222 of 2015,** whose holding is to the effect that unchallenged evidence is taken to be an admission by the opposite party. Citing **Komuhendo Jackline Vs DAJ Communications Ltd LD No. 7/2017,** in which this court stated that the reasons for termination should be stated in the letter of termination, he stated that the respondent complied with the labour laws and stated the reason for termination in her letter of termination as downsizing/restructuring and not misconduct or pregnancy, therefore the termination was lawful.

**DECISION OF COURT**

1. **Whether the claimant was lawfully terminated and whether the termination during her last trimester of pregnancy, violated her personal rights?**

It is trite that an employer who intends to dismiss an employee must explain to the employee the reason or reasons why he or she intends to dismiss the employee and give the employee in issue opportunity to respond to the reason or reasons. Section 66 (1) and (2) provide 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.”***

The law also provides that before an employer dismisses or terminates an employee, he or she must prove the reason or reasons for the dismissal or termination.

***“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….”***

Section 70(6) is to the effect that the burden of proving that the reason for dismissal existed before the dismissal actually takes place is on the employer.

After carefully perusing the evidence adduced and the submissions of both Counsel, it is not disputed that the Claimant worked for the Respondent as a radio presenter for 7 years earning Ugx. 200,000/- per month. It is not disputed that she was not issued a written contract of service and that she worked in this position without any qualifications in journalism. It is also not disputed that she was asked to leave the Respondent’s meeting on the 30/11/2018 and she left.

**What needs to be resolved is whether this amounted to termination?**

It was the Claimant’s case that she was asked to leave and not return until she was recalled. The Station Manager RW1, Micheal Muwanguzi, on the other hand testified that the Claimant was only asked to get out of the meeting and wait for him, however when he came out of the meeting, she had left. The record does not show any further action taken by the Mr. Muwanguzi after that. It was his testimony that he only heard about the claimant again, on the 21/12/2018, when he was summoned to the Labour office, almost one and a half months later. It was also his testimony that he did not summon her for a hearing because she went to the Labour officer. He admitted that he sent her out of the meeting because she had an altercation with a fellow employee which is a disciplinary matter.

It is our considered view that having sent her out for such disciplinary issue, he had the duty to ensure she was subjected to a fair grievance management procedure. Whereas he asserted that he was unable to subject her to disciplinary proceedings because she left, yet the other employee with whom it was alleged she had an altercation with waited, he did not bring the other employee as a witness, nor did he adduce any other evidence to prove his assertion. We are inclined to believe the claimant, that Muwanguzi sent her away and asked her not to return until she was called back. He only issued her with a letter termination after the labour officer commenced mediation proceedings and purported it was under the directive of the Respondent’s Board. In out considered view, the Muwnaguzi’s silence about instituting a disciplinary process and the fact that he only issued a termination letter 21 days after he sent her away amounted to her termination.

We do not agree with Counsel for the Respondent that the Claimant demanded for a termination letter, given her complaint to the Labour officer dated 19/12/2018 and the Labour officer’s letter to the Manager, dated 21/12/2018 regarding the Claimant. We have scrutinized both letters and particularly, the Labour Officer’s letter dated 21/12/2018 and find nothing in it to suggest that the claimant was demanding for a termination. The letter which states in part as follows:

***“The Manager***

***Smart FM***

***…***

***RE: LWETABE EMARINE***

***This is to notify you of a labour complaint filed against you by the above named subject.***

***She says that whereas you employed her as senior Radio presenter in 2011, you went ahead to terminate her on 30/11/2018 without fulfilling the following;***

1. ***You never provided her with a contract of service for 7 years as she worked for the Station as provided for under section 59 of the Employment Act, 2006.***
2. ***You did not provide her with a termination letter indicating the reasons for her termination.***

***…”***

The letter simply brings to the attention of the Manager the fact that, he terminated the Claimant without issuing her with a termination letter stating the reasons why she was terminated. As already stated above, before an employer can terminate an employee, he or she must explain to the employee the reason or reasons why the employee is being considered for termination or dismissal. The employer must also give the employee an opportunity to be respond to the reason or reasons in a hearing. It is also a requirement for the employer to prove the reason or reasons for dismissal or termination. The claimant in the instant case was not accorded any of these rights. Although the respondent’s thought her claim was trivial, Section 12 of the Employment Act empowers an employee to seek redress before a Labour officer where he or she has any grievances relating to an employment contract. It provides that

***“(1) where an employer neglects or refuses to fulfil the terms of a contract of employment, or where a complaint or Labour dispute arises as to the rights or liabilities of either party under a contract of employment or under the Act.”***

We also do not subscribe to Counsel for the respondent’s submission that the Claimant was actually terminated under the Directive of the Respondent’s Board of Directors in their meeting of 15/12/2018, on grounds that the company was downsizing/restructuring and not because of disciplinary issues. It was not disputed that the claimant left the Respondent Company on the 30/11/2019. The Respondent did not adduce any evidence to show that at the time the Company was undergoing a restructuring process. It was Muwanguzi’s testimony that every employee was notified individually about a staff Audit although he later retracted and stated that the notice was pinned on the notice board. When he was asked whether he knew where the claimant resided, he said he did not know. Section 59 of the Employment Act, 2006, imposes a duty on the employer to provide the employee with written particulars which include, the full names and addresses of the parties to the contract. The employer who engages persons under oral contracts in our view, ought to have at least as a basic minimum the full names of the employees and their addresses. This was not the case.

In any case restructuring or downsizing envisages termination of not less than 10 employees over a period of 3 months and it must be for reasons of an economic, technological, structural or similar nature. (see, Section 81 of the Employment Act). The Section further requires the employer to provide the employees or Representatives of the Labour union if any, at least 4 weeks’ notice prior to the first terminations during the restructuring process. The employer must also give notice to the commissioner Labour in writing about the reasons for the termination and the categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

The Respondent in the instant case did not adduce any evidence to show that she complied with Section 81 nor did she adduce the minutes of the Board that directed the Claimant’s termination on grounds of downsizing/restructuring. According to RW1 it was only the claimant and another employee who were terminated. Within the meaning of Section 81 therefore, her Claimant did not qualify to be considered as a termination arising out of downsizing or restructuring. Besides the purported termination letter was only issued to the Claimant on the 25/1/2019, during the mediation proceedings before the labour officer, yet she was sent away from the Respondent Company on the 30/11/2018, that is 25 days later.

It is our considered opinion that the termination letter was an afterthought intended to rectify the Respondent’s omission not to comply with section 66 and 68 of the Employment Act(supra).

We are convinced that the Claimant was sent away because of the altercation she had with her fellow employee which is a disciplinary issue and not because of restructuring/downsizing of the Company, as Counsel for the Respondent would want us to believe.

In **Oola Bonny vs Chemonics International Inc LD No. 289/2016,** this court held that:

***“ …Although it is not a requirement for the Employer to prove the reasons for terminating an employee beyond reasonable doubt, he or she still has the responsibility to demonstrate as Counsel for the Respondent put it, that the reasons as provided under Section 68 (supra) existed at the time the dismissal or termination was being considered. The Employer must therefore adduce evidence to prove that the reason existed before the dismissal was considered and it was a justifiable reason. The standard of reasonableness as we understand it, is the standard of care that a reasonable prudent person would observe given certain circumstances. The employer is therefore expected to demonstrate that he or she had a justifiable reason to warrant the termination of the employee and not to merely impute a reason or ground of misconduct on an employee. The reason is ordinarily put to the employee during a disciplinary hearing where the employee is expected to make a response.”***

Given that the Manager, Muwangizi sent the claimant away, kept silent about instituting disciplinary proceedings against her regarding the allegations that she had an altercation with a fellow employee, and having issued her with a termination letter only after the matter was reported to the labour officer, she was denied an opportunity to know the reason for which she was sent away and an opportunity to respond to the reason in a disciplinary hearing, as provided under the law. In the circumstances we find that indeed she was terminated when she was sent away 30/11/2018 and her termination was unlawful.

**What was the effect of her pregnancy?**

The Claimant did not adduce evidence that she was actually in the 3rd trimester of pregnancy. Her notice for maternity leave was made on the 17/1/2019 after she had been terminated. She had therefore ceased to be staff of the Respondent. Although her entitlement to maternity leave in light of Section 56 of Employment 2006, would arise in the last trimester of her pregnancy, given that she had ceased to be an employee of the respondent. Therefore, this issue cannot stand.

1. **Whether the Claimant is entitled to following reliefs?**
2. **GRATUITY**

It was the claimant’s submission that she deserved gratuity because she served the Respondent diligently for 7 years.

Counsel for the Respondent on the other had argued that for gratuity to accrue it should be agreed upon between the employer and employee in the contract of employment. He cited **Emomeri Vs Shell (U) CA No. 47/97 which confirmed this principal.**

According to counsel for the Respondent the claimant did not prove that gratuity was provided for in her oral contract, therefore it should be denied.

Indeed gratuity must be negotiated and agreed between the employer and employee. Although the burden of proving any allegations relating to a dispute relating to the terms of a contract shift to the employer where there is no written contract(see, **the Kenyan case in Josephine M Akinyi vs Farhiyo Mohammed Industrial Cause number 148 of 2012)**, it was the claimants testimony that there was not provision for gratuity but she deserved to be awarded gratuity for her diligent 7 year service to the Respondent. In the absence of any evidence that the there was an agreement between the parties, we have no basis to make this award, it is therefore denied.

1. **SEVERENCE ALLOWANCE**

Section 87 of the Employment Act provides that an employee who has been in continuous service of the employer for over 6 months is entitled to Severance pay if unlawfully dismissed. Counsel for the claimant argued that in light of the circumstances in which the claimant’s contract was summarily terminated , she was entitled to severance allowance.

We have already established that the claiant was unlawfully dismissed therefore in accordance with section 87, she is entitled to severance. Section 89 of the Employment Act provides that the calculation of severance pay shall be negotiable between the employer, the workers or the labour union that represents them. Given that it was an oral contract no formula was provided by either party. We shall therefore invoke the formulain in **Donna Kamuli Vs DFCU Bank LDC 002/2015,** where this Court decided that where there was no provision for the calculation of severance pay, the employee in issue will be entitled to payment of 1 months per year served. The claimant in the instant case served for 7 years therefore she is entitled to severance pay at the rate of 1 months salary for each of the 7 years served, amounting to Ugx. 1,400,000/=.

1. **GENERAL DAMAGES**

It is settled that in addition to the statutory remedies provided in the Employment Act 2006, a person who was unlawfully dismissed, is entitled to an award of General damages. General Damages are intended to return the Claimant to as near as possible in monetary terms to the position he or she was before the wrong occasioned to him or her by the Respondent. General Damages are awarded at the discretion of Court and based on the circumstances of each case. See **VIRES VS NATIONAL DOCK LABOUR BOARD (1958) 1 QB 658** cited with approval in **STANBIC BANK VS KAKOOZA MUTALE C.A No. 2 OF 2010.**

We have already established that the claimant was unlawfully terminated therefore she is entitled to damages. It is trite that determination of the quantum of damages to be awarded is at the discretion of Court. Given that the Claimant had served the respondent for 7 years earning Ugx.200,000/-, with a clean track record and she was unlawfully dismissed moreover when she was pregnant, we think Ugx.2,400,000/- is sufficient.

1. **INTEREST**

Interest of 20% per annum shall accrue on all the pecuniary awards mentioned above from the date of this award, until settlement in full.

1. **COSTS**

Although the Civil Procedure Act provides that cost follow the event, this court has decided that given the inequality in employment contracts, the employee being subordinate to the Employer the award of costs is discretionary and it shall be made in exceptional circumstances. In the instant case no order is made as to costs.

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

1. A declaration that the Claimant was unlawfully terminated.
2. An award of Ugx.1,400,000/- as severance pay.
3. An award of Ug. 2,400,000/=as general damages
4. Interest of 20% on (b) and (c) above.
5. 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. MS. ADRINE NAMARA ……………….**

**2. MS. SUSAN NABIRYE ……………….**

**3. MR. MICHEAL MATOVU ………………..**

**DATE: 4/OCTOBER/2019**