**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE No.310 OF 2017**

**ARISING FROM KCCA/NDC/LC/278/2016**

**MEEME LYNDA ………………………….. CLAIMANT**

**VERSUS**

**GEO LODGES UGANDA ………..………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MR. EBYAU FIDEL**

**2.MS. HARRIET MUGAMBWA NGANZI**

**3. MR. FX MUBUUKE**

**AWARD**

**BACKGROUND**

The Claimant was cross examined by the Respondent on 21/08/2020 but the matter was adjourned for her reexamination on 10/09/2020 and for opening the Respondents case. On 10/09/2020, Counsel for the Respondent, did not enter appearance and no reason was advanced for his absence. The matter was adjourned again to 17/09/2020. On 17/09/2020, Mr. Lule Kennedy Ben, Counsel for the Claimant informed Court on the 17/09/2020, that when the Respondent was served, he received service in protest yet he was aware that the matter had been scheduled for hearing, on 10/09/2020 and prayed that Court allows the matter to proceed exparte.

We interpreted Counsel for the Respondent’s conduct as disrespectful, because courtesy demanded that a law firm with many lawyers such as Muwema & Co Advocates, would at least send one of them to hold his brief or seek an adjournment for justifiable reasons. We were satisfied that the respondent was effectively served and given that the we had set it down for the reexamination of the Claimant and opening the Respondent’s case, we granted the Claimant leave to proceed with reexamination and closure of her case. The defence case was set down for hearing on 1/10/2020 and Mr. Lule undertook to serve Mr Nsubuga. On 1/10/2020, Counsel Nsubuga for the Respondent appeared with Mr. Lule Kennedy Ben for the Claimant and apologized for failing to enter appearance on 17/09/2020. He sought an adjournment, the grounds that , but he was not able to proceed because one of his witnesses Ochiba the Human Resources Officer had since left the Respondent’s employ and the alternative witness a one Zahid Alam was out of Jurisdiction. The matter came for hearing again on 23/02/2021, but Counsel Nsubuga for the Respondent did not appear. Mr. Lule, Counsel for the Claimant prayed to proceed exparte under Order 9 rule 20, so that he can file submissions. Court was satisfied that the Respondent was effectively served and the matter having been adjourned on several occasions on account of the Respondent’s inability to proceed, Court allowed the Claimant to proceed and file his submissions hence this award.

**BRIEF FACTS**

The Claimant was employed by the Respondent Company from 3/10/2007 to 30/10/2016, when she was terminated. She rose through the ranks and by the time of her termination, she was holding the position of Lodge Manager earning Ugx. 1,800,000/- per month, but it was later reduced to gross of 1,620,000/- per month. She claims that her summarily termination on 30/10/2016, was unlawful because she was not given a reason and she was not given notice.

She prayed for special damages amounting to **Ugx. Shs.40,392,000/-** for **3 months in lieu of notice, 120 days, 172 off days, 9 months’ pay for severance** allowance and **96 unpaid public holidays**, respectively and general damages of Ugx. 50,000,000/- for mental anguish, inconvenience and psychological torture after her summary dismissal and cost of the claim.

The Respondent on the other hand contended that the Claimant was not summarily terminated but she was given notice and terminated because of the prevalent economic constraints, therefore she was not entitled to any reliefs.

**ISSUES**

1. **Whether the termination was fair and lawful?**
2. **What remedies are available to the parties?**

**REPRESENTATION**

The claimant was represented by Mr. Lule Kennedy Ben of M/S Sekaana Associated Advocates and the Respondent by Mr. Nsubuga Charles Kevin of M/S Muwema &Co Advocates & Solicitors.

**RESOLUTION**

1. **Whether the termination was fair and lawful?**

Counsel Lule, for the Claimant submitted that, it was an agreed fact that she was the Respondent’s employee for 9 years from 3/10/2007 to 30/10/2016, as evidenced by her contract of employment dated 3/10/2007, marked “C1”, confirmation of employment Marked “C2”, Promotion and salary change dated 8/05/2013, marked “C4” salary change dated 3/10/2014 marked “C5” and the termination letter dated 30/10/2016 marked “C6”.

He refuted the insinuation made by Counsel for the Respondent during cross examination that the Claimant did not have a valid contract, because the Respondent issued her with a termination letter dated 30/10/2016 which she received on 7/11/2016.

He argued that the Claimant was summarily terminated without justification contrary to Section 69 of the Employment Act, which justifies summary dismissal where an employee has committed misconduct or where the employee had by his or her conduct shown that he or she fundamentally breached the obligations under his or her contract of employment. However, the section does not give an employer leverage to dismiss the employee without according him or her a hearing. He argued that the Claimant in the instant case, was not summoned for a disciplinary hearing for any misconduct on her part but she was summoned to head office to receive a new posting but was terminated by Zahid Alam, instead.

He contended that her dismissal without notice, was contrary to section 58(3) of the Employment Act, which entitled her to 2 months’ notice before termination, because she served the Respondent for 9 years. He also submitted that, the dismissal was contrary to sections 71, 73,and 75 of the same Act. He relied on **Muyama Juliet vs Nsereko Charles T/a Kisoso Parents Day and Boarding Primary School LDC No. 034.2016(Industrial Court at Masaka)** in support of the legal proposition that dismissal without a hearing was unfair and unlawful and **Hilda Musinguzi vs Stanbic Bank (U) Ltd Civil Appeal No.005 of 2016,** for the same legal proposition. He contended that, that the Claimant’s termination on the grounds that the Respondent was restructuring because of the economic climate at the time, was not a justifiable reason as envisaged under section 68 of the Employment Act. He insisted that the Claimant was hoodwinked by an offer of a new position of marketing, only to be told that her services had been terminated. There was no indication that her position at the Rain Forest Lodge Mabira, had been rendered redundant after she served in it for 9 years and in any case, it was not the lodge which was sold off, to cause her dismissal.

He argued that the Respondent failed to challenge the Claimant’s evidence by way of documentary evidence or otherwise, therefore court should find that the Claimant’s summary dismissal was unlawful, having been done without a valid reason and without a hearing.

The Respondent did not file any submissions in reply.

**DECISION OF COURT**

The holding in **Hilda Musinguzi vs Stanbic Bank (U) Ltd SCCA No. 005/2016,** is to the effect that, the right of an employer to terminate a contract of employment, cannot be fettered by the courts so long as the procedure for termination, provided under Sections 66, 68 and 70(6) of the Employment Act, 2006, is followed. The law provides that, before dismissing or terminating an employee the employer must explain to the employee the reason for the dismissal/termination and give him or her an opportunity to respond to the reason/s in the presence of a person of the employee’s choice, before the dismissal/termination takes place. The employer is also required to prove that, the reason for the dismissal/termination, existed at the time of the dismissal or termination and it was a justifiable reason. However, proof of the reason need not be beyond reasonable doubt. The employer is therefore, expected to rely on evidence from a reasonable investigation into the alleged infractions and decide on a balance of probabilities.

According to the Joint scheduling memorandum, in the instant case, it was an agreed fact that the Claimant was employed by the Respondent from 3/10/2007 to 30/10/2016 when she was terminated. By the time of her termination, she was holding the position of Guest Relations officer, earning a gross monthly salary of Ugx.1,620,000/-. Her termination letter indicated that the termination was *“due to the current economic climate Geo lodges has had to restructure its organisation as a result we are hereby terminating your contract* ***with immediate effect…****”*

The requirements of the business of an organization are exclusively defined by the employer, therefore he or she has a right to restructure or reorganize his or her organisation or business to fit purpose. However, the restructuring or reorganization, could lead to job losses, therefore an employer contemplating restructuring, must ensure that all his or her employees are notified about the restructuring process and the employees who may be affected should be specifically notified about their contemplated termination. The employer must also ensure that the termination of such employees is procedurally fair and substantively justifiable. Section 81 of the Employment Act 2006, provides the procedure for termination of employment by redundancy. It states as follows:

*“Collective Terminations*

*Where an employer contemplates termination of not less than 10 employees over a period of not more than 3 months for reasons of an economic, technological, structural or similar nature, he or she shall;*

1. *Provide the representatives of the labour union, if any , that represent the employees in the undertaking with relevant information and in good time which shall be a period of at least 4 weeks before the first terminations shall take effect , except where the employer can show that it was not reasonably practicable to comply with such a time limit having regard to reasons for the terminations contemplated ,(emphasis ours) the number and categories of workers likely to be affected and the period over which the terminations shall be carried out, and the information in paragraph (a)shall include the names of the representatives of the labour unions if any that represent the employees in the undertaking;*
2. *Notify the commissioner in writing of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out*

*(2) An employer who acts in breach of this section commits an offence.”*

This court in**Programme for Accessible Health Communication and Education (PACE) vs Graham Nagasha LDA No. 035/2018,** held that:

*“… The section makes it mandatory for the employees contemplated for termination to be informed through their representatives (unions) and in our view where they are not unionized or represented, to be informed individually, at least 1 month before the terminations takes effect…”*

The Court has further held that even if the restructuring of an organisation involved the termination of less than 10 people, even if it involved 1 employee, the affected employee had a right to be given notice about the termination of not less than 1 month.(see **Norah Nabuuma Kaweesa vs CBS Ltd LDC No. 64/2014).** The Employer is required to notify the entire staff about the downsizing or restructuring process, consult with them about the process and then notify those that are contemplated for termination, as a result of the restructuring, at least 1 month before the termination occurs. (also see **Dr. Kiwalaby Elizabeth vs Mutesa 1 Royal university, LDC No. 005/2017)**. Therefore, a termination by redundancy can never be a summary termination and it cannot be done without a justifiable reason. Even if we were to believe that, the Respondent’s assertion that, she was restructuring, the Claimant’s termination letter stated that the termination took **immediate effect,** there is no evidence on the record to indicate that the Respondent notified her or any other staff about a restructuring process nor is there any evidence to show that she was notified about her contemplated termination. It is clear that, the Respondent did not follow the redundancy procedure as laid down in section 81(1) before she terminated the claimant. Secondly the Respondent did not demonstrate that the organisation was experiencing any economic challenges at the time to warrant its restructuring. We are persuaded by the Kenyan case in **Irene Naserian Karbolo vs Kenya Aids NGOs , Consortium (Industrial Cause number 1937 of 2011) in which Ongaya J’s** held that:

*“… A crucial element in redundancy is the act of abolishing the office that the affected employee is holding or acting in. The employer must show that the office has been manifestly and effectively abolished. Redundancy does not occur where there is mere desire to change the office holder by removing the affected employee. Redundancy does not also exist merely by redefining the workload or duties attached to a given office. The employer must, justify redundancy, show that the office held by the employee has been abolished, that is ceased to exist because of lack of work load attached to that office arising out of better economy or diminished demand of the functions of the office. Once the employer has proved abolition of office, it is vital to comply with the prescribed procedure for redundancy…”*

The Respondent in the instant case did not prove the reason for termination, there is no evidence on the record to show that she complied with the procedure laid down under section 81 to warrant the termination of the Claimant by redundancy. In the circumstances we are not convinced that, she was terminated due to restructuring.

As already established her termination took ***immediate effect*** , therefore the assertion that she was terminated by redundancy fails given that the Respondent did not comply with the procedure for termination by redundancy, as provided under the employment Act, its reliance on restructuring cannot stand. she was not given any notice, or a hearing and as already established that she was not notified about any restructuring process in the Respondent. It is our finding therefore, that her termination was not due to restructuring and in absence of evidence that she was given a justifiable reason for the termination, notice of termination and a hearing before the termination, we find that her termination was unlawful.

The second issue for determination is **What remedies are available to the parties?**

 She prayed for the following remedies:

1. **Payment of 2 months’ salary in lieu of notice.**

Counsel submitted that Section 58(3)(c) entitled the Claimant to 2 months’ notice, or payment in lieu thereof, because she had served the Respondent for 9 years. He also relied on **Mbiika Dennis Vs Centenary bank LDC No. 023/2014,** to the same effect.

We have already established that she was terminated without a justifiable reason and it is not disputed that she worked for 9 years she is indeed entitled to 2 months’ notice of termination or payment in lieu thereof as provided under section 58(3)(c ) as follows:

 *“58. Notice periods*

1. *A contract of service shall not be terminated by an employer unless he or she gives notice to the employee, except-*

*…*

*(3) The notice required to be given by an employer or employee under this section shall be-*

*…*

*(c) not less than two months, where the employee has been employed for period of five, but less than ten years; and…”*

She is therefore awarded payment in lieu of notice at the rate of Ugx. 1,620,000/- per month amounting to **Ugx. 3,240,000/-.**

1. **Severance Allowance equivalent to 9 months’ pay**

Citing **Dr. peter Wasswa Kityaba vs African Field Epidemiology Network (AFNET) LDC No 084 of 2016,** Mr. Lule submitted that it is trite that where there is no formula agreed between the employee and employer, pursuant to sections 88 and 89, it shall be calculated at 1 month’s salary for every year served. He prayed that the Claimant is awarded severance pay equivalent to 9 months’ salary for the 9 years she served the Respondent, amounting to **Ugx. 14,580,000/-**. Having already established that she was unlawfully terminated, she is awarded severance pay at the rate of 1 month each at Ugx 1, 620,000/-, for the 9 years she served.

iii.**General Damages.**

She prayed for an order for General Damages for inconvenience, mental Anguish, psychological torture and humiliation she suffered as a result of her summary termination by the Respondent whom she served for 9 years. He prayed that following **Dr. Peter Kityaba(**supra) in which this court awarded Ugx. 150,000,000/- as general damages, the Claimant should be awarded Ugx. 50,000,000/- as General Damages.

Indeed, general damages are intended to compensate the aggrieved party and to return him or her to the position he or she was in before the injury occasioned by the Respondent. The quantum of damages is however decided at the discretion of Court and on the merits of each case. The Claimant in the instant case was summarily terminated without any justification and she lost her source of income as a result of her unlawful termination therefore, she is entitled to an award of general damages. We believe an award of **Ugx.30,000,000/-** is sufficient as general damages.

1. **Unpaid Annual leave**

She also prayed for an order for unpaid Annual Leave totaling to 150 days. counsel cited section 54(1) of the Employment Act, which provides that annual leave with full pay is mandatory and **Mbiika Dennis Vs Centenary Bank (supra)** in which this court held that:

*It is the duty of the employer to put a system in place that each employee takes leave in a given calendar year and the absence or weakness of such a system does not at all affect the entitlement of the employee to his leave…”*

According to Counsel, the claimant applied for but could not take leave for the years 2009 to 2010 and 2010 to 2011 because there was no replacement. The application forms were attached and marked as C6 and emails to that effect at page 123 of the trial bundle. The Respondent did not adduce any evidence to the contrary. She also relied on a muster roll containing all the staff attendance information, which he said she retrieved from the Nakawa labour office.

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).***

***….”***

In **Mbiika,** (supra), 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.”*

Therefore it is incumbent on the employee get his or her employee to authorize the leave dates by applying for leave in accordance with the Organization’s leave application mechanism. As stated by Counsel, citing **Mbiika**(supra), it is the responsibility of the employer to put in place such a mechanism and its none existence cannot be visited on the employee.

A perusal of the record indicated that According to her evidence in chief under para graph 6, the claimant stated that she did not take annual leave for the year 2009 to 2010 and 2010 to 2011, but in paragraph 8 she stated that she took leave for the year 2009-2010 in 2012 from January 2012 to 21st February 2012 and leave for 2012 was cancelled because there was no book keeper /receptionist in Mabira and she was directed to continue working until a replacement was found. She did not take leave in 2013. And under paragraph 13. She took annual leave from 1st to 30th October 2016 for the year 2010 to 2011.

Based on the evidence on the record it was clear to us that, she took the leave for 2009-2010 in 2012 and 2010-2011 in 2013 and leave for 2012 in 2016. Therefore, the only period which was unaccounted for is 2013-2014, 2014-2015 and 2015-2016 which is 3 years. The leave forms attached to the record as evidence that she did not take leave were not controverted by the Respondent. Therefore, in the absence of evidence to the contrary, we have no reason not to believe that the Claimant applied for and she was denied her annual leave for this period, 2013-2014,2014-2015 and 2015-2016, at 28 days per month as provided under section 54(1) (supra).

She is therefore entitled to payment in lieu of this untaken leave. We hereby award her payment in lieu of untaken leave for 3 years at 28 days per year at Ugx. 54,000/- per day amounting to **Ugx. 6,048,000/-.**

1. **Unpaid public holidays Days**

She also prayed for an order for payment of a sum of Ugx. 5,184,000/- for 95 days of public holidays at a rate of Ug.54,000/- per day based on her monthly salary of Ugx.1,620,000/-. She argued that she was entitled to take 11 public holidays per year and in the 9 years of service she only took 3 public holidays leaving 95 days untaken.

Section 54(1 (b) provides that:

1. *An employee shall be entitled to a day’s holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day’s holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work…”*

However, her contract of service provided that; *“… Due to the nature of the hospitality industry, your work week/day may rotate over 7 days and may include shift work.* The assumption therefore is that where a person works a shift, the shift this may include public holidays. Therefore, her claim for untaken public holidays has no basis. In the circumstances her claim for untaken public holidays cannot stand, it is denied.

1. **Unpaid off days**

She claimed for 172days of off days untaken at a rate of Ugx. 54,000/- per day at the rate of her monthly salary of Ugx. 1,620,000/-. According to the Claimant it was Company policy for each worker to take a day off. She however did not attach the policy which entitled staff to 1 day off.

We perused the muster roll she attached as evidence of the day off not taken, but we were unable to discern how she had computed the 172 days she was claiming because Some of the pages on the roll were not legible. It was not clear how the 172 days were computed therefore we had no basis to make any award for off days. This claim therefore fails it is not awarded.

In conclusion this claim succeeds with no order as to costs made, an interest of 15 % per annum shall accrue on all the pecuniary awards, from the date of this award until payment in full.

Delivered and signed by:

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

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

**PANELISTS**

**1.MR. EBYAU FIDEL ……………**

**2.MS. HARRIET MUGAMBWA NGANZI …………….**

**3. MR. FX MUBUUKE ……………**

**DATE: 28TH APRIL 2021**