**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE NO. 79/2018**

**ARISING FROM 048/2018**

**MIRIMO CHARLES ………………………….. CLAIMANT**

**VERSUS**

**MCLEOD RUSSEL U LTD …………………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. HARRIET NGANZI MUGAMBWA**

**2.MR. EBYAU FIDEL**

**3. MR. FX MUBUUKE**

**AWARD.**

**BRIEF FACTS**

In 1999, the Claimant was employed by the Respondent as an Accounts clerk. He rose through the ranks to the position of Accountant. According to him on 23/02/2018, Mr. Udupi Ramprasaad, the Respondents, Finance and Accounts Manager, summoned him to an abrupt meeting and gave him conditions to either resign or be demoted because of poor performance. He contended that the although the Respondent did not follow due process, he was left with no choice but to resign, which he did on 27/02/2018, therefore he was terminated and the termination was unlawful.

He prayed for compensation in form of general damages of Ugx.150,000,000/-, payment of an outstanding loan from Stanbic Bank of Ugx, 4,290,374/=, outstanding loan from Tembo Sacco of Ugx. 2,291,667/=, severance allowance, punitive damages, costs of the claim.

**ISSUES**

1. **Whether the termination of the Claimant’s contract of employment was unlawful?**
2. **Whether the Respondent company is responsible for paying the outstanding salary loan balance to Stanbic Bank and Tembo SACCO?**
3. **What are the available remedies to the parties?**

**REPRESENTATIONS**

The Claimant was represented by Ms. Angela Bahenzire of Bahenzire, Kwikiriza & Co Advocates, Fort portal and the Respondent was initially represented by Ms. Grace Nabakooza of Federation of Uganda Employers, Kampala later by and Mr. Richard Bwiruka, of Kahwa, Kafuuzi, Bwiruka& Co.Advocates.

**SUBMISSIONS**

**1.Whether the termination of the employment contract of the claimant was unlawful?**

It was submitted for the Claimant that he involuntarily resigned from employment, because he was directed to either resign, be demoted or be terminated. Counsel argued that he could not opt for demotion, because he had worked for Respondent with a good track record from 1999 to 2018. She asserted that, the Respondent took cognizance of this good performance, because he was promoted through the ranks from cashier to Accountant. According to her further testament of his good performance was shown by Respondent’s letter of recommendation for the Claimant. The letter stated that he left the Company by mutual consent, and not by resignation. It was her contention that any of the 3 options given to him would have terminated him from the position of Accountant, and yet the Respondent had no basis to subject him to either because there was no proof of incompetence. She insisted that he was merely informed that the was incompetent but the alleged incompetence was not proved. She further contended thar the Respondent merely relied on warning letters issued to the Claimant in 2012 and 2015. It was her submission that the meeting of the 23/02/2018 was unreasonable illegal and it amounted to the constructive termination of the claimant. She cited section 65(1)( c) which provides that termination shall be deemed to take place 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 and **Mbike Dennis Vs Centenary Bank LDC No. 023/2014** and **Nyakabwa Abwoli Vs Security 2000 Limited LDC No. 108/2014**, whose holdings were to the effect that the conduct of the employer must be illegal and injurious to the employee to make it impossible for the employee to continue working. She insisted that by requiring the Claimant to choose from the 3 options, without any opportunity for him to defend himself, rendered it impossible for him to continue working for the Respondent.

She further contended that the Claimant was not given a fair hearing, as provided for under section 66 of the Employment Act, which, makes it mandatory for an employer contemplating the dismissal of an employee on the grounds of poor performance or misconduct to hear the employee in issue, before the dismissal. She also cited the principles of the right to a fair hearing as enshrined in Article 44 of the Constitution of the Republic of Uganda 1995, as Amended and as elucidated in **Ebiju James vs Umeme Ltd HCCS 133/2012**, to the effect that:

1. *That the accused must be notified about the infractions against him. The notice of allegations must provide sufficient time to allow the accused to prepare a defence, an opportunity to respond to the infractions before an impartial tribunal and a right to call or cross examine witnesses if any.*

She contended that in the instant case, the Claimant was not notified or subjected to any hearing and instead he was summoned to an impromptu meeting, in which he was informed about his poor performance and given 3 options from which to choose that is; demotion, resignation or termination.

The Respondents did not file submissions due to the Covid19 lockdown, that notwithstanding, we shall rely on the evidence on the record and adduced at the hearing to resolve the matter.

Mr. Robert Balikenda, the Respondent’s Deputy Human Resources Manager-Administration, testified that the Claimant failed to satisfactorily accomplish specific tasks regarding VAT reconciliations and maintenance of the fixed assets register, even after several warning letters were issued to him. It was his testimony that on 23/02/2018, the Assistant General manager asked him to summon the Claimant together with one Nuwagira to his office, where he expressed his dissatisfaction with the Claimant’s performance, even after being guided. Mr. Balikenda admitted that, the Claimant was given 3 options, to resign, to be demoted or to be terminated for incompetence and he was given time to think about it. On 28/02/2018, the Claimant submitted his resignation.

The Assistant General Manager Mr. Udupi, Ramprasaad, testified that the Claimant resigned because he failed to accomplish specific tasks of VAT reconciliations and maintenance of the fixed assets register even after several warning letters were issued to him. He also stated that he Claimant on several occasions returned emails with incorrect workings, even after being guided, causing departmental delays in the submission of the Company’s returns. He admitted that he summoned the Claimant to a meeting on the 23/02/2018 and he expressed his dissatisfaction about his performance. He said he made reference to a warning letter he issued to him in 2015 and his failure to follow his guidance. He also admitted that he gave him 3 options from which to choose that is ; to resign , be demoted or be terminated and after giving him time to think about it, the Claimant opted to resign.

**DECISION OF COURT**

1. **Whether the termination of the employment contract of the claimant was unlawful?**

It is now settled that before terminating or dismissing an employee for poor performance or misconduct, an employer must notify the employee about the reason or reasons/infractions for which the dismissal or termination is contemplated, and be given reasonable time within which to respond to the reason or reasons/infractions, accompanied by a person of his or her choice, if any. (see Section 66 of the Employment Act, 2006). The reason must be a justifiable reason. Therefore, an employee must be given a fair hearing before his or her termination or dismissal can take place.

The evidence in the instant case shows that the Claimant was summoned to an impromptu meeting and informed about his alleged incompetence. He was not given any opportunity to respond to the allegations. Instead he was immediately given 3 options to either resign, be demoted or be terminated. It was further the Manager’s testimony that if the Claimant opted for demotion it would reduce him to an Assistant Accountant, therefore his contract of employment as Accountant would be terminated.

It our considered opinion that the evidence adduced by the Assistant manager to in court should have been put to the claimant in a disciplinary hearing, where the Claimant would have made a response to the allegations. This Court in **Akeny Robert Vs Uganda Communications Commission LDC 23/2015**, held that:

*“… It is not the role of Court to supervise the disciplinary/grievance process between the employer and employee … The role of the Court is to ensure that the disciplinary process is undertaken before the termination or dismissal occurs and that it is done in accordance with the law.*

Section 66 of the Employment Act (supra) makes it mandatory for the employee in issue, to be given a reason/s why his or her termination/ dismissal is contemplated and an opportunity to respond to the reason “**before”** the employer makes the decision to dismiss or terminate his or her employment.

Therefore, the Respondent in the instant case had an obligation to substantiate the allegations made against the Claimant, before giving him options to resign, be demoted or terminated. The Respondent was obliged to give the Claimant reasonable time within which to respond to the allegations against him , at least 7 days, before imposing any penalty against him.

It is our considered opinion that by handing him the 3 options; to resign, be demoted or to be terminated, the Respondent intended to terminate the Claimant’s employment without giving him any opportunity to the infractions leveled against him, which was contrary to the principles of natural Justice and Section 66 of the Employment Act(supra). We are therefore inclined to agree with Counsel Bahenzire, that any of the options would lead to the termination of the Claimant’s position as Accountant. Therefore, as contended by Counsel Bahenzire, his resignation with no opportunity to defend himself was involuntary and coerced by the Respondent. The 3 options; to resign, be demoted or be terminated rendered it impossible for the Claimant to continue working for the Respondent as an Accountant.

We therefore find that his resignation amounted to constructive termination within the meaning of Section 65(1) (c)(supra). The termination was therefore unlawful.

**2.Whether the Respondent Company is responsible for paying the outstanding salary loan balance to Stanbic Bank and Tembo SACCO?**

The Claimant prayed for the payment of his outstanding loans. It was submitted for the him that, this Court in **Florence Mufumbu vs UDB LDC 138/2014** which relied on **Okello Nymlord Vs Rift valley railways (U) Ltd**, held that where a salary loan is by agreement of both employee and employer, recoverable only by guarantee of deductions from the employee’s salary and the employee is unlawfully terminated , the employer is liable to pay the outstanding loan. She argued that the Claimant had proved that he acquired the 2 loans to be serviced by his salary as shown under exhibit C5, on the recommendation of the Respondent.

A careful perusal of record showed that whereas the application for the loan from Tembo SACCO was acquired on the recommendation of the Respondent, to be recovered from his salary as seen under exhibit C5, it was not clear how the loan from Stanbic Bank was acquired, because there was no documentation on the record relating to this loan.

In light of this court’s holding in Mufumbu (supra), given that the Claimant acquired the Salary loan from Tembo SACCO on the Respondent’s recommendation, and having established the Respondent unlawfully terminated him, it is obligated to pay the outstanding balance on the loan, amounting to Ugx. 2,291,667/= plus interest accrued thereon.

The Claimant having not proved how the loan from Stanbic Bank was acquired and whether it was actually a salary loan, we have no basis upon which to order the Respondent to pay it. In the circumstances is denied.

**3.What are the available remedies to the parties?**

We have already established that the Claimant’s termination was unlawful, therefore he is entitled to some remedies.

According to the memorandum of claim, the Claimant prayed for compensation of General damages of Ugx. 150,000.000/=. Ms.Bahenzire Counsel for the Claimant, citing **Dr. Dennis Rwamafa Vs Attorney General HCCS No. 79/1983 1 KALR 21** and **Ouma vs Nairobi City council**, argued that the primary measure of General damages was restitution. She argued that the allegations of poor performance against the Claimant were baseless and he had a long service of 20 years with the Respondent.

It is a settled matter that in addition to remedies provided under the Employment Act, any person who is terminated or dismissed unlawfully shall be entitled to General Damages whose quantum shall be determined at the discretion of court based on the merits of each case.

According to the memorandum issued on 22/07/2013, by the General Manager a Billy Singh, attached to the claim as Annex “A”, at the time of his termination, the Claimant was earning Ugx.1,520,000/- per month. It was not disputed that he had worked for the Respondent for about 20 years, with a good track record save for some lapses in 2015, where he was given warnings about his work. In the circumstances we think an award of Ugx, 20,000,000/- is sufficient as General Damages.

**AGGRAVATED DAMAGES**

He prayed for aggravated damages. Aggravated damages are intended to punish the acts of the Respondent if they are found to be not only unlawful, but callous and degrading to the Claimant. We found no aggravating circumstances in the instant case, to warrant the award of aggravated damages. They are therefore denied.

**SEVERANCE ALLOWANCE**

Citing section 87 (1) (a) of the Employment Act, Counsel asserted that the an employee who has worked for more than 6 months and he or she was unfairly terminated is entitled to an award of Severance pay. She also cited **Donna Kamuli vs DFCU Bank LDC No. 002/2015,** in which this Court held that where there was no agreement between the employee and employer as to the formula for payment for severance pay as provided under section 89 of the Act, the employee in issue will be entitled to severance pay of 1 months’ salary for every year worked.

She prayed that the Claimant is paid 1 month’s salary for each year she served the respondent for 20 years.

We have already established that the Claimant was unfairly terminated, therefore he is entitled to severance pay of 1 month for each of the 20 years served, amounting to 30,400,000.

**INTEREST**

An interest of 15%per annum is awarded on all the pecuniary awards above from the date of this Judgement until payment in full.

**CONCLUSION**

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

1. A declaration that he was unlawfully terminated.
2. An award of Ugx. 20,000,000/= as general damages
3. An award of severance payment of Ugx. 30,400,000/-
4. An order that the loan from Tembo SACCO of Ugx, 2,291,667/- plus interest is paid.
5. 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. HARRIET NGANZI MUGAMBWA ………..**

**2.MR. EBYAU FIDEL ………..**

**3. MR. FX MUBUUKE ……….**

**DATE: 5TH JUNE 2020**