**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE NO. 240/2014**

**ARISING FROM HCT-CS-165/2013**

**MULENGERA DENNIS DAMBA ………………………….. CLAIMANT**

**VERSUS**

**MUTESA ROYAL UNIVERSITY …………………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1. MR. EBYAU FIDEL**

**2. MR. F X MUBUUKE**

**3. MR. ANTHONY WANYAMA**

**AWARD**

**BRIEF FACTS**

The Claimant was employed as a part time lecturer under the Faculty of Business Administration and Management. On the 23/6/2012, a faculty meeting was held at the Kakeeka- Mengo Campus which resolved among others that the Claimant and some other lecturers be transferred to Kirumbe Masaka Campus. The said communication/transfer was placed on the notice board and the Respondents Faculty dean communicated the same to the Claimant , but the Claimant rejected the transfer. According to the Respondent he absconded ffrom duty and did not report for work to any of the campuses.

**ISSUES**

1. **whether there was an employment contract between the Claimant and the Respondent?**
2. **Whether there was a breach of contract if so by who?**
3. **Whether the Claimant is entitled to remedies sought?**

**REPRESENTATION**

The Claimant was represented by Mr. Steven Kiyaga of KOB Advocates & Solicitors and the respondent by Ms. Cylia Nagawa of Nagawa Associated Advocates.

**EVIDENCE**

The claimant Mr. Mulengera, adduced his own evidence and the respondent through Dr. Kyagulanyi, the dean of the Faculty of Business &Management at the respondent University.

It was MR. Mulengera’s testimony that he was orally employed by the Respondent and he commenced work on 8/08/2009 and he was terminated in July 2012. He was however issued with an identity card one of which he exhibited marked as “A” on page 20 of the joint trial bundle. He was asked to reapply in 2011. It was his testimony that he went to the Kakeeka branch and found that his name did not appear on the list of teaching staff. He was later informed by a one Kyagulanyi the dean, that his services were no longer required at the branch. He was removed from the timetable but he was not issued with a termination letter. The academic registrar promised to convene a meeting to address his complaint but none was held. He stated that he was not notified about a faculty meeting in which he was transferred to Kirumba, Masaka nor was the new timetable communicated to him. According to him although the Respondent knew he was resident in Kampala, he did not give him payment to enable him to shift to Masaka. He also stated that he never applied for leave because he was always engaged.

Dr. Kyagulanyi on the other hand testified that he joined the Respondent on the 3/09/2009 and the Claimant was presented to him on the same date. According to him the claimant commenced work on 1/08/2009 on short term informal contracts, teaching basic accounting, intermediated accounting and cost and management accounting. It was his testimony that at the time of the Claimants assumption of duty the Respondent did not issue written contracts and it engaged staff on short term oral contracts. He was a part time lecturer paid per semester taught and this was computed based on the attendance lists.

He said that the claimant had never been subjected to a disciplinary hearing. He confirmed that the notification about the faculty meeting was made via the notice board and full-time teaching staff had to read the notice board. He said the purpose of the meeting was to notify the staff about their teaching load, timetable and results.

He said the Claimant was not called on phone because the meeting was communicated through heads of department and he was informed that the Claimant’s head of department called. It was his testimony that those who attended the meeting signed an attendance book but not the minutes. He also said that the outcome of the meeting is placed on an open file and the staff would be informed if they asked, and when the claimant came to his office he informed about his transfer to Kirumba Masaka campus. However it was the duty of the lectures to read the minutes. According to him the claimant was not given prior notice about the transfer because it was resolved in a meeting which he did not attend and he could only see the time table marked “B” if he went to Kirumba Masaka and he was not given any allowance to enable hm to go and check or for him to shift from Kampala to Masaka but he was expected to travel to Masaka to teach. His salary was not increased. According to him the transfer from kakeeka to Masaka without any allowance did not imply termination. According to him the Respondent stopped paying him 31/7/2012 when he stopped working. He denied responsibility for assigning duties at the Kirumba campus. contracts. It was also his testimony that he had the responsibility to notify the staff about their teaching load and duty station

**SUBMISSIONS**

1. **Whether there was an employment contract between the Claimant and the Respondent?**

We took exception to the way counsel for the claimant referred to the Judges of this Court as their Worships! For his information the Industrial Court comprises of 2 Judges and 3 panelists. Be that as it may we considered his submissions in the interest of the justice of this case.

It was submitted for the claimant that there was a valid employment contract between the claimant and Respondent. Counsel Kiyaga cited section 2 of the contract Act to the effect that a contract is an agreement made with the free consent of the parties with capacity to contract, for lawful consideration and with lawful object with the intention to be legally bound. Therefore, it gives rise to obligations which are enforces or recognized by law. He also cited Section 25 of the Employment Act which is to the effect that a contract of service, other than a contract which is required by to be in writing may be made orally and the Act would apply equally to oral and written contracts.

He cited the His Lordship Yorokamu Bamwine’s holding in **Green Boat Entertainment Ltd vs City Counsel of kampala HCT- 00-CC-0580/2008** that: *“For a contract to be valid and legally enforceable there must be capacity to contract, consensus ad idem; valuable consideration, legality of purpose and sufficient certainty of terms. If any given transaction any of them is missing, it could well be called something else other than a contract.”*

He invited Court to consider the Claimant testified that he was recruited as teaching staff on 8/08/2009 based on a oral contract between him and the Respondent and according to the letter dated December 2009 he was earning Ugx.620,000/= per month paid to him via his bank Account in Centenary Bank, therefore there was a valid contract. He also submitted that the staff identity card that was issued to the claimant by the Respondent on 5/09/2010 and valid until 30/09/2011 was evidence that he was considered staff of the Respondent.

In reply Ms. Nagawa submitted that there was no valid contract between the Claimant and the Respondent. She cited section 2 of the Employment Act which defines “a Contract of service *“to mean any contract whether oral or in writing whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.”*

She also cited sections 2 and 10 of the Contract Act which define a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

A contract the subject matter of which exceeds twenty-five currency points shall be in writing. She submitted that although he said he commenced employment on 8/08/2009, he did not have an appointment letter save for bank statements with payments therein as proof that the Respondent paid him a salary. According to her the Claimant failed to prove that he agreed in writing in return for remuneration of Ugx. 620,000/= and subject to other written the terms of engagement he would work for his employer because he did not have a written contract as provided under section 10(5) of the Contract Act or an appointment letter for such a position in 2009.

**DECISION OF COURT**

An employment relationship is created by a contract of service which as submitted by both Counsel can be either oral or written. Whereas section 2 and 10 of the Contract Act 2010 defines a contract in general terms to mean *An agreement made with the free consent of parties with capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound…”,*  Section 2 of the Employment Act defines a contract of service to mean, “*any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.”*

It was not disputed that the claimant was engaged on short term informal contracts on the 1/08/2009 and at the time the Respondent did not issue written contracts. It was RW1’s testimony that the Claimant was teaching “*basic accounting, inter mediate accounting, and cost accounting and management.”* Annexure “B” dated 1/12/2009, on page 21 of the trial bundle filed in this court on the 21/05/2018, further attests to the fact that the Respondent engaged him to teach in return for remuneration. It read as follows:

 ***RE: TEACHING ALLOWANCE***

***“This is to inform you that the University will continue to engage you as part time lecturer for the second semester commencing 1/2/2010. You will be paid as a full-time lecture at a rate if Ugx. 620,000/- (six hundred thousand twenty thousand shillings only) per month…”***

Although Ms. Nagawa argued that the claimant failed to prove that there was an employment relationship because he did not have a written contract and other terms of reference, the Employment Act provides under Section 59 that an employee is entitled to receive the particulars of his or her employment from her employer.

Section 59 of the Act provides that:

***“An employee is entitled to receive from his or her employer notice in writing of the following particulars of employment-***

1. ***the full names and addresses of the parties to the contract of service***
2. ***The date on which employment under the contract begun, specifying the date from which the employees’ period of continuous service for the purposes of this Act shall commence;***
3. ***The title of the job that the employee is employed to do;***
4. ***The place where the employees duties are to be performed;***
5. ***The wages which the employee is entitled to receive or the means by which they can be calculated, and in either case, the intervals at which they can be paid, and the deductions or other conditions to which they shall be subject;***
6. ***The rate of any overtime pay applicable to the employee;***
7. ***The employee’s normal hours of work and the shifts or days of the week on which such work is to be performed;***
8. ***the number of days’ annual leave to which the employee is entitled and his or her entitlement to wages during such leave;***
9. ***The terms or conditions relating to the incapacity for work due to sickness or injury, including any provision of sick pay ;***
10. ***The length of notice in excess of that provided by this Act required for the lawful termination of the contract by the employer and the employee; and***
11. ***The terms and conditions relating to the incapacity for work due to sickness or injury, including any provisions for sick pay***

In light of this provision therefore it was the responsibility of the Employer to provide particulars of employment and where the employer fails to do so he or she must prove or disprove any alleged term of an employment relationship. That claimant’s particulars of employment in the Instant were oral in nature and an oral contract is a valid contract within the meaning of sections 2(supra) and 25 of the Employment Act , which provides that:

*“A contract of service, other than a contract which is required by this or any other Act to be in writing, may be made orally, and except as otherwise provided by this Act, shall apply equally to oral and written contracts.”*

Given that there was no other contract on the record we shall take the letter marked annexure “B” dated 1/12/2009, as the basis of employment relationship between the Claimant and the Respondent. This court’s holding in **Okonye Vs Libya Oil LDC 082/2014** is to the effect that in an employment relationship, the employee and the employer are never on the same footing, because it is the employer who sets the terms of employment, which include the rules and policies and it is the employer who is the primary custodian of all documents relating to the employment therefore the burden shifts to employer to produce documents to clarify disputed facts and not the employee( See the **Samuel Ndungi Mburu Midview Hotel Mombasa, Industrial Cause No. 176/2012, [2012] LLR 244** **(ICK).**

We have no doubt that the Respondent gave the claimant work and actually paid him for the work and the Bank statements and work time table that he adduced as evidence were not rebutted by the Respondent. In the circumstances even if there was no written contract setting down the terms of employment, evidence of assigned work and payment for the said work is sufficient to create an employment relationship.

In Annexture “B” the Respondent set basic terms of the engagement as part time lecturer to be paid at the rate of a full time lecturer, therefore she cannot turn around to deny that there was indeed an employment relationship between her and the Claimant. Besides an employment contract can be oral and the Employment Act unlike the contract Act Section 10(5)(Supra) does not make it mandatory for an oral employment contract worth over 25 currency point to be reduced in writing. Section 25 (supra) provides that:

***“A contract of service, other than a contract which is required by this or any other Act to be in writing may be made orally and except otherwise provided for by this Act, shall apply equally to oral and written contract.”***

Therefore Ms. Nagawa’s argument that the claimant should have produced a written contract as proof given section 10(5) of the Contract Act 2010 because he was earning more than 25 currency points, fails.

We therefore find that there was an employment contract between the Claimant and the Respondent. This issue is resolved in the affirmative.

**Issue 2 . Whether there was breach of the contract and if so by who?**

Mr. Kiyaga, submitted that breach of contract as defined by Black’s law dictionary 9th edition to mean where a party to a contract fails to carry out a term. He also cited **Nakana Trading co. Ltd vs Coffee Marketing Board CS No 137/1991** in which court defined breach of contract to mean where one or both parties fail to fulfill the obligations imposed by the terms of the contract. He also defined Constructive termination as defined in the Blacks law dictionary 9th edition as termination brought about by the employer making the employee’s working conditions so intolerable, that the employee feels compelled to leave and **Nyakabwa Abwooli Vs Security 2000 Ltd LDC No. 108/2014**, in which this court held inter alia that once an employer removes the instruments of an office for which the employee is employed to occupy and instructs another employee to take up such instruments without providing alternatives to the employee, such acts constitutes termination of employment by reason of the employers conduct and such termination is referred to as constructive dismissal…”

He contended that the Claimant’s transfer to Masaka without communicating to him, or giving him prior notice, under harsh conditions such as not providing housing, transport and allowance, and without consideration that he was pursuing his Master’s degree, at the Uganda Martyrs University, Rubaga campus, compelled him to leave. He argued that the claimants removal from the teaching time table in Kakeeka-Campus in Kampala, on the grounds that he was purportedly transferred to Kirumba Campus in Masaka under harsh and unfavorable conditions was a breach of the employment relationship since it amounted to unlawful dismissal which he referred to as constructive termination.

In reply Ms. Nagawa agreed in principal with the definition of breach of contract as stated by Mr. Kiyaga and also cited **Ronald Kasibante vs Shell Uganda Ltd HCCS No. 542/2006** which defined it similarly**.** She argued that having submitted that there was no written contract between the employee and employer, the parties should be guided by the Employment Act 2006, which imposes rights and duties on both employers and employees , including duty to provide work, pay wages , render services among others and in addition where the employer was desirous of terminating the employment of an employee, it should be done in accordance with the terms of the agreement or the Employment Act.

Citing the definition of constructive dismissal as provided under Black’s law dictionary (supra)she asserted that the transfer of a worker to another duty station to perform the very same tasks cannot amount to the working conditions being intolerable. According to her there was no agreement between the parties that the claimant would only work at kakeeka campus and nowhere else. She argued that given that the Respondent had different branches she reserved the right to make transfers as and when it deemed fit.

She insisted that the Claimant was not unlawfully terminated because at all times he was aware of the fact that the Respondent had 2 campuses, kakeeka – Mengo and Kirumba -Masaka and his superviser was at liberty to rotate him to either of the Campuses. She contended that when the claimant did not find his name on the list at kakeeka, he was informed about his transfer to teach in Kirumba, where his services were most required. She insisted that the respondent did not commit any act that was illegal, injurious and she did not make it impossible for the claimant to continue working. She submitted that on the contrary the Claimant’s refusal to obey the lawful orders of his supervisor to go to Masaka amounted to insubordination, negligence and showed lack of interest in his work and therefore the termination did not fall within the ambit of section 65(1)(d), that is due to unreasonable conduct on the part of the employer towards the employee.

She concluded that, given that he was not issued with a termination letter, the claimant’s refusal to teach in Kirumba-Masaka amounted to him terminating his own services with the university.

According to Counsel his failure to attend the meeting that was called on 23/7/2012, to discuss the teaching load, duty station and the timetable was an indication that he lacked interest in his work. It was her submission that he failed to exercise due diligence when he missed the meeting yet the notifications for meetings were displayed on the notice board and minutes of the same were placed in an open file for all to peruse, but he did not read the said minutes. She argued that his absence without permission amounted to absconding from duty. Therefore, he could not turn around to state that the respondent had violated his constitutional rights.

She insisted that by refusing to execute his duty of a lecturer, he fundamentally breached his employment relationship.

**DECISION OF COURT**

It was the Claimant’s case that he was forced to terminate his contract of service because Respondent’s conduct, when she transferred him to the Kirumba- Masaka camp without giving him notice or facilitation for him to report to the new campus. Therefore, he was constructively dismissed within the meaning of Section 65(1) (c).

According to the Black’s Law dictionary 9th edition “a termination brought about by the employer making the employee’s working conditions so intolerable, that the employee feels compelled to leave.

Section 65(1) ( c) stipulates that:

1. *Termination shall be deemed to take place in the following circumstances-*

*(a)…*

*(b) …*

*( 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…”*

From the evidence led in court the decision to transfer the Claimant to Kirumba Masaka was taken in a meeting which he did not attend. According to him being a part time employee, he was not aware about the meeting and no one notified him about it. He did not dispute RW 1’s testimony that he was later informed about the transfer, when he went to inquire about not being included on the list of teaches on the Kakeeka teaching timetable.

As already discussed already, it is the preserve of the employer to assign duties to his or her employees, and in our considered opinion the duties must be given in accordance with the terms of the contract of employment.

We already established that the Claimant was engaged as a part time lecturer serving on an oral contract from 8//2009 until 23/07/2012. Evidence on the record also indicates that there was a meeting on 23/7/2012, in which the decision to transfer him to Kirumba Campus in Masaka was made. However he di not attend the meeting. The Respondent’s letter to him dated 1/08/2009, marked “B” on the Joint trial bundle filed in court on the 21/05/2018, stated that the University would continue to engage him as a part time lecturer for the second semester commencing 1/02/2010, to be paid as a full-time lecturer at Ugx. 620,000/-. The letter did not state any other terms, nor did it indicate where he would be deployed.

Although we believe that given his status as apart time lecturer therefore it was possible that he may not have been seen the notice about the meeting of the 23/7/2012, he was later informed about the outcomes of the meeting in which his terms and conditions of service were discussed. He confirmed that he was told about it when he contacted the dean of the faculty and who confirmed that he was transferred to the Kirumba Campus on the same terms, of employment and on the same pay. The the subjects he was teaching at the Kakeeka Campus were also maintained.

In our considered view it is at this point that he should have discussed his inability to take up the part time teaching position in Kirumba. We do not think that by requiring him to move to Masaka even though it was geographically further than Kakeeka, the Respondent had acted unreasonably. RW1 stated that he was transferred to the campus where his services were needed the most. His terms and conditions of employment remained the same because he still considered a part time lecturer. The transfer to Masaka therefore was not a variance in his terms and conditions of service as a part time lecturer. What changed was the geographical, location of the job. We do not consider the transfer a fundamental breach of the employment relationship/contract on the part of the Respondent because the Claimant had the option to decline the position if he felt he would not be able to handle it. The Respondent required his services in Masaka and as already seen it was the employer who assigned work to the employee and the employee reserved the right to decline. An employee is expected to perform the assignment given to him or her and where he or she felt unable to do so , he or she was at liberty to resign from the position. However we do not agree with Counsel the Respondent that such circumstances where an employee expressed inability to take up an assignment due to lack of transport facilitation and Housing allowance and or geographical location, this should be considered to be disobedience to lawful orders.

It is our considered opinion that an employee had freedom enter into a contract of service to do the work assigned to him or her under stated terms without duress and equally the Employer reserves the right to give the assignment to be performed that is the terms and conditions without duress.

W e do not think that by transferring the Claimant to Masaka notwithstanding it’s geographical location, that the Respondent had acted so unreasonably to warrant the claimant to claim he was constructively dismissed by the Respondent.

Constructive dismissal/termination arises where the employer’s conduct was likely to have the effect of destroying or seriously damaging the employment relationship. The House of Lords in **Malik vs BCC(1997 cited in Employment Law by Gwyneth Pitt)** it was held that a breach of a duty to maintain mutual trust and confidence would constitute constructive dismissal. It is highly unreasonable conduct of the employer that has the effect of destroying the employment relationship that would amount to constructive dismissal/termination. In Nyakabwa **Abwoli vs Security 200 Ltd LDC No. 108/2014,** this court held that *“In order for the conduct of the employer to be deemed unreasonable within the meaning of Section 65(c). … Such conduct must be illegal, injurious to the employee and make it impossible for the employee to continue working. The conduct of the employer must amount to a serious breach and not a minor or trivial incident and the employee must act in response to such breach not for any other unconnected reason and act in reasonable time...”*

We think that the circumstances in this case, do not in any way fit the criteria of the unreasonable conduct to warrant the Claimant to consider himself constructively terminated.

 We are convinced that his employment as a part time lecturer was not varied save for the inconvenience to do the job in another geographical area which in our view did not amount to unreasonable conduct that was so intolerable because he had room to negotiate for facilitation to enable him undertake the assignment or to stay on at Kakeeka but he did not consider negotiating for the same. He simply didn’t take up the job.

We are inclined to agree with counsel that his conduct amounted to absconding from duty and therefore it would not be farfetched to conclude that indeed he terminated his own employment. In the premises he was not constructively dismissed.

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

Having found that the Claimant was not constructively dismissed, he is not entitled to any remedies.

In conclusion this claim fails. No order as to costs is made.

Delivered and signed

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

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

**PANELISTS**

**1. MR. EBYAU FIDEL …………**

**2. MR. F X MUBUUKE …………**

**3. MR. ANTHONY WANYAMA …………..**

**DATE:6TH DECEMBER 2019**