**THE REPUBLIC OF UGANDA**

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

 **LABOUR DISPUTE REFERENCE No. 005 OF 2018**

**ARISING FROM KCCA/CEN/LC/50/2017**

 **NUWAGABA PATRICK ………………………….. CLAIMANT**

**VERSUS**

 **HOUSING FINANCE BANK ………..………. RESPONDENT**

**BEFORE:**

1. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1.MS. HARRIET MUGAMBWA NGANZI**

**2. MR. FX MUBUUKE**

**3.MR. EBYAU FIDEL**

**AWARD**

**BACKGROUND**

This claim was brought against the Respondent for an award of several remedies which are listed in the memorandum of Claim. These include; an award for salary arrears from the date of unlawful/unfair wrongful constructive and unjustified summary termination/dismissal to the date of the award with interest until payment in full, General damages, Aggravated damages, 4 weeks net pay for the breach of section 66 of the Employment Act, Exemplary damages, payment in lieu of untaken leave, severance pay, medical Insurance and a certificate of service.

**BRIEF FACTS**

The Claimant was employed by the Respondent Bank on a number of fixed term contracts from July 2011. He was stationed at the Bank’s Ndeeba Branch. By the time of his termination, he had completed his 4th 1 year contract with effect from 1/01/2013. According to him, before the expiry of this contract in December 2013, he applied for and was granted part of his accrued annual leave. However, when he returned to work in January 2014, he was issued an open-ended identity card, the previous one having expired on 31/12/2014 which according to him signified the beginning of a new contract period.

On 3/02/2014, he was invited for a meeting with other sales staff at the Main Branch at Kololo. He appeared before a committee which questioned him about his performance and decided that he should go. On 13/02/2014 he was issued with a termination letter on grounds of poor performance. He appealed but received no response.

The Respondent on the other hand contended that, the Claimant was aware that he served fixed term contracts whose renewal depended on satisfactory performance. Therefore when his contract expired on 31/12/2013, it was not renewed because of the claimant’s unsatisfactory performance. He was accordingly notified, therefore his termination was lawful.

**REPRESENTATION**

The Claimant represented himself and the Respondent was represented by Mr. James Zeere of Sebalu and Lule Advocates, Kampala.

**ISSUES FOR RESOLUTION**

The claimant raised several issues. However, when the matter was mentioned on 1/06/2021, both Parties agreed to adopt the issues which were framed by the Respondent as follows:

1. **Whether the Claimant had a contract of employment when the performance review was conducted. If so, whether the contract was conditional?**
2. **Whether the termination of the Claimant’s contract of employment was justified?**
3. **Whether the Claimant was entitled to the reliefs sought?**

**RESOLUTION OF ISSUES**

1. **Whether the Claimant had a contract of employment when the performance review was conducted. If so, whether the contract was conditional?**

In submission, the Claimant cited the definition of contract as defined undersection 2 of the Employment Act 2006 and refuted the Respondent’s assertion that, the period 2014 was conditional, because appraisals had not yet been carried out. According to him, it was the testimony of RW1 Emma Tayebwa that, at the time of his termination, he was still the Respondent’s employee. He contended that, all appraisals were always undertaken at the end of the year or within 1 week after the expiry of a fixed term contract. He stated that, his previous contracts marked exhibit Cex 5 and Cex 6 on the trial bundle, were renewed without appraisal. Therefore, to state that, the 2014 contract was conditional, would amount to constructive dismissal as provided under section 65(1)(c) of the Employment Act 2006, because it would be a contract with less favourable terms than the previous one of 2013 and therefore, it would amount to a demotion to a direct sale representative.

He cited REX 6 on the Respondent’s trial bundle and insisted that the Human Resources officer had not stated that his contract had expired. He further contended that, the Respondent’s acts of issuing him with a new identity card, assigning him work, renumerating him and paying him commissions and remitting his NSSF were done in recognition that, he had an existing contract. It was his submission that, the Respondent was therefore, estopped from denying its existence. He was of the view that, court should rather determine the question whether this contract was for a period of 1 year like the previous one or for 5 years as provided under clause 9.4 of the terms and conditions of service.

In reply, Counsel for the Respondent did not dispute the fact that the Claimant’s 2012 contract was renewed in 2013 for 1 year. The Claimant served the contract and it expired in December 2013. However, his appraisal was delayed and he served the month of January 2014, without being given a contract renewal.

It was his submission that in February 2014, the Claimant was subjected to a performance review meeting in which his performance was found unsatisfactory. According to Counsel, the meeting recommended that, his contract should not be renewed.

He refuted the argument that, by issuing the Claimant with a new identity card and paying him for the month of January 2014, the Respondent renewed the Claimant’s contract for the year 2014. He argued that, the Claimant was always aware that, at all times his contract was only renewed at the beginning of the year following a performance meeting which would recommend whether the contract should be renewed or not. He insisted that, his contract was not renewed and the same was terminated by way of expiry of its term after he had failed to meet the required performance standard.

He insisted that, the Claimant’s contract was a fixed term contract which expired on 31/12/2013 and even if the Claimant served for the month of January and was issued with a new identity card for the year 2014, he was only serving on condition that, his performance appraisal would confirm whether to renew his contract or not. He refuted the misconception by the Claimant that, the conduct of issuing him with a new identity and payment for the month of January amounted to renewal of his contract because this was contrary to the conduct of the respondent regarding the renewal of contracts. He relied on **Mt. Elgon Hospital vs Nangosya LDA 17/2019,** which is to the effect that, a fixed term contract expires upon the expiry of the term of the contract, unless the conduct of the parties to the contract demonstrates that there was a provision for renewal.

Counsel insisted that conduct of the parties in regard to renewal of contracts was to conduct a performance appraisal meeting during which a decision to renew or not would be made. He made reference to the renewal of the Claimant’s 2012 contract which was based on a recommendation arising out of a performance appraisal meeting. He insisted that, according to RW2’s testimony, the Claimant’s 2013 appraisal was only delayed because the time in which it was supposed to have happened was a very busy period, for the Bank. Therefore, the issuance of the identity card and payment for the month of January 2014, should not be construed as a renewal of the contract. He insisted that, the Claimant did not have a contract between 2013 and December 2014 and at best he had a conditional contract which was dependent on the recommendation of performance.

**DECISION OF COURT**

Section 65 (1) (b)provides that:

*“(1) Termination shall be deemed to take place in the following circumstances-*

*a)…*

*b) Where the contract of service, being a contract for a fixed term or task, ends with the expiry of the specified term or the completion of the specified task and is not renewed within a period of one week from the date of expiry on the same terms or the terms not less favourably to the employee…”*

After carefully scrutinizing the Claimant’s 2013 contract and his terms and conditions of service at page 34 and 38 of his trial bundle, we established that, his contract was a fixed term contract for 1 year, from 1/01/2013, therefore its termination date was 31/12/2013. We did not find anything on the contract or in the term and conditions to indicate that, the contract’s renewal was conditional upon his satisfactory performance as Counsel for the Respondent argued. In fact, we did not find anything about renewal of contract.

We have no doubt in our minds that, the intention of the parties was that, once the Claimant’s contract would terminate on expiry. We are fortified by the fact that; the contract had no provision for its renewal or for appraisal as a condition for its renewal. Therefore, given the wording of section 65(1)(b), the Respondent was under no obligation to renew it or to give reasons for its termination, where its terms did not provide for renewal. The only reason for its termination therefore should be that it has come to an end and nothing more.

We therefore do not subscribe to the assertion by the Respondent in the instant case that, the renewal of the Claimant’s contract was conditional upon the Claimant’s satisfactory performance, when the contract did not state so. As already stated a careful perusal of the contract and the terms and conditions, makes no reference to any provision regarding renewal or performance appraisal as a condition for renewal. In **Akonye David vs Libya Oil LDC 082/2014,** this court heldthat;

*“…The burden of preparing a contract is placed on the employer because it is the employer who sets the terms and conditions of the employment. The burden of proving the provisions of any allegations regarding the terms of the employment contract therefore remain on the shoulder of the employer…”*

We strongly believe that, when drafting section 59 of the Employment Act, which requires the employer to provide written particulars of the Employment, the legislature’s intention was to ensure that, there should be no ambiguities in an employment contract, hence the requirement for the employer to explicitly set out the intentions of the parties in, the terms of the of contract. In any case, it is the employer who sets the terms and conditions of employment. Therefore, any omissions of any term or condition made by the employer cannot be visited on the employee and any anomaly arising out of an informal or verbal contract or failure to explicitly set terms and conditions in the contract cannot be blamed on the employee.

In the circumstances the argument by Counsel for the Respondent that, the renewal of the Claimant’s contract was conditional cannot stand because his contract and terms and conditions of employment did not explicitly provide for such an obligation. Having not provided for renewal or appraisal as a condition for renewal, in the terms of the contract or the terms and conditions of service, we strongly believe that it was not the intention of the parties to this contract to renew it after it expired. Even if it is not in dispute that the Respondent carried out performance appraisals before the renewal of the Claimant’s previous contracts, prior to 2013, it would not be correct to impute that these appraisals automatically became a precondition for renewal of subsequent contracts, without being explicitly provided for in the terms of the contract

We reiterate that, the contract being a fixed term contract is terminable by effluxion of the agreed time stated therein, unless the contrary is clearly stated. In this regard, we associate ourselves with the holding in the Kenyan case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied workers Vs Egerton Univerisity, Industrial Couse No. 208 of 2013,** in which it was held that;

*“…* *Employers are under no obligation to give employees reasons for non- renewal of fixed term contracts unless there is such an obligation created in the expiring contract; the said contract is automatically terminable by effluxion of the agreed time defining the tenure of the contract.”*

Therefore, the Claimant’s 2013 contract, having been a fixed term contract for 1 year, with effect from 1/01/2013, it terminated by effluxion of time on 31/12/2013 and given that there was no provision for renewal or for a performance appraisal as a precondition for its renewal in it terms, the argument that it was renewable upon satisfactory performance cannot stand.

However, as already established, the Claimant returned to work after the expiry of the contract, he was given work and was even paid for the month of January. He was also issued with an open-ended Identity card for the year 2014, without being given a contract renewal. In fact, Counsel for the Respondent submitted that, *“…the appraisal for 2013 was delayed and he served the month of January 2014 without being given a contract renewal.*

 This court in **Ochuru Henry vs ACE Global Ltd LDR No. 164/2017,** held that;

*“Where the contract has expired and it is not renewed within 7 days as provided under Section 65(1)(b)( supra) but the employee continues in the service of the employer, the contract is presumed to have been automatically renewed.*

We have already established that, performance appraisal is not a precondition for the renewal of a fixed term contract unless the contract explicitly provides otherwise. Therefore, the Claimant’s 2013 contract having expired, and it was not renewed after 7 days, but the Claimant continued working, he was issued with an open ended identity card for 2014 and he was paid for the work done in January 2014, his contract, is deemed to have been automatically renewed.

In the circumstances, by the time the meeting which was purported to be a performance meeting took place on 3/2/2014, the claimant was serving under a new contract of 2014, under the same terms and conditions as the expired 2013 contract. This issue is therefore decided in the affirmative.

**2.Whether the termination of the Claimant’s contract of employment was justified?**

It was the submission of the Claimant that he was abruptly called to appear before a panel of 3 persons who did not constitute the Departmental Appraisal committee because the committee did not include a representative of the Human Resources department and the Head of Department. According to him this was confirmed by both RW1 Tayebwa Emma and RW2 Andrew Musitwa during cross examination. He contended that in addition to having exercised powers not vested in them, it was wrong for the Respondent to refer to them as the contract performance review committee whereas they were not. He argued that whereas RW 1 stated that, the performance review meeting occurred weekly, he later retracted this testimony when he was shown paragraph 6.4.5 of the Respondent’s memorandum of reply and stated instead that, the meeting of 3/02/2014 was a special appraisal for the Claimant. According to the Claimant, in re-examination RW1 referred to the meeting as a Branch management Committee. He argued that in addition to the irregular constitution of the committee, the fact that that his superviser sat on the Committee as the chairperson, rendered it illegal and a violation of the principles of natural justice and a breach of section 66 of the Employment Act. He further contended that, his being thrown out of his office by this meeting, amounted to constructive termination of employment. He relied on **Nyakabwa Abwooli V Security 2000, Labour Dispute No. 108 of 2014**, to support of this argument. It was further his submission that, the termination was wrongful for being done without notice and without justifiable reason. He contested the expectation that he had to work during leave contrary section to 75(b) of the Employment Act. He also stated that it was also a breach of clause 9.4 of his terms and conditions of service.

He argued that, the termination offended section 68 because it was incorrect for the Respondent to state that the reason for his termination was that he poorly performed. Yet on the contrary, during the period of appraisal, he filled staffing gaps at the branch and during that period he earned a lot of commission meaning he exceeded his targets as was stated by RW2, during re-examination. Therefore, his termination was not justified.

In reply, Counsel for the Respondent submitted that the Claimant was lawfully terminated by the expiration of his contract after he failed to meet his performance targets and he was given an opportunity to explain himself regarding the allegations of poor performance before the decision not to renew his contract was made. Counsel submitted that during cross examination, the Claimant admitted that, he failed to meet his targets for 2013 although he alleged, he was “star performer.” He also related this to the high commissions he was paid. Counsel refuted this assertion because RW2 testified that, there was a difference between targets for paying out and performance targets and in this case, it was possible that the Claimant could continue to receive commission without necessarily meeting his targets. In any case RW2 testified that, the Claimant only received commission for 5 months out of the 12 months which meant that he only met his targets for 5 months. He contended further that, the Claimant did not adduce any evidence to prove that he met all his annual targets. He relied on **Stanbic Bank (U) Limited vs Apollo Twinomuhangi Tayebwa LDA 21 of 2020,** for the proposition that, targets agreed by the Respondent are sufficient to gauge the performance of the Claimant. He insisted that the claimant in this case failed to meet his targets for 2013.

He reiterated that the Claimant’s contract of employment expired in 2013 and therefore it terminated by way of expiry. He insisted that, it’s renewal was conditional on the satisfactory performance.

It was his submission that, at the meeting held on 3/2/2014 which was meant to discuss his performance, the Claimant’s performance was appropriately reviewed with the objective of deciding whether to renew his contract or not. He insisted that, the Claimant testified that, he was questioned about his performance and according to him, the Claimant’s contention that, the meeting was not sufficient for purposes of reviewing his performance and recommending the renewal of his contract simply because it was not the Department Appraisal committee was a misconception. This was because the committee’s recommendation was upheld by the Head of human Resources and subsequently by management.

He cited **Stanbic Bank vs Twinomuhangi(supra)**, for the holding that an appraisal which is conducted with the participation of an employee against agreed targets was sufficient even where some aspects of the performance appraisal process had not been complied with and concluded that, the Claimant’s contract was terminated by expiry after he failed to achieve the performance targets required.

**DECISION OF COURT**

We have already established that, the Claimant’s contract was a fixed term contract which expired by effluxion of time and it did not provide for appraisal as a precondition for its renewal. We have also found that, the contract having expired and the claimant having been allowed to continue working without renewal after the expiry of the contract, his contract was automatically renewed under the same terms and conditions under the expired 2013 contract. He was therefore, serving under a new contract, therefore the appraisal for 2013 contract did not apply to the new contract.

It is not disputed that, the Claimant had performance targets and he was entitled to commissions whenever he exceeded his targets. Although RW2 testified that, it was standard practice that once one fails to meet targets the contract would not be renewed, we found nothing in the contract which provided for this. Even if it were the standard practice, the Claimant was serving a new contract therefore, the appraisal should have been based on the 2014 targets and not the 2013 targets.

 It is trite that, before terminating an employee for poor performance, the employer is required to notify the employee about the allegations of poor performance. The employer is also required to give the employee in issue reasonable time within which to respond to the allegations of poor performance. (see section 66 of the Employment Act). The employer is also expected to prove the allegations of poor performance. (See section 68).

It is not disputed that, the Claimant in this case was invited to a meeting and questioned about his performance. The Respondent however, did not adduce any evidence to indicate that the Claimant was notified about the allegations of poor performance or that he was actually given an opportunity to respond to them. In any case the Respondent submitted that, the appraisal was based on the 2013 contract which ceased to exist when it expired and not on the 2014 contract which commenced when he was allowed to continue working without renewal after the expiry of the 2013 contract.

It is therefore, our finding that, by terminating the Claimant’s new fixed contract, without following the right procedure as provided under section 66 and 68 of the Employment Act, rendered the termination unlawful. We are persuaded by the Kenyan case in **Alphonce M. Mwachanya v Operation 680 limited Industrial Cause Number 146 of 2012,** that premature termination of a fixed contract is no different from the termination of an indefinite contract of employment or even what is normally referred to as permanent employment without following the procedure for termination is unlawful.

In conclusion, the termination of the Claimant’s new contract was unlawful.

**3.Whether the Claimant was entitled to the reliefs sought?**

Having established that the Claimant was unlawfully terminated, he is entitled to some of the remedies prayed for. The claimant prayed for

1. **Salary arrears from the date of unlawful termination to the date of this award.**

Salary arrears refer to payment overdue for work completed from previous pay period. It is trite that once an Employment contract has been terminated, unlike an ordinary contract, Courts cannot make an order for specific performance of an employment contract and the only remedy to an employee in issue is the award of General damages in addition to other remedies prayed for under the Employment Act. We are fortified by the Supreme Court’s holding in **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** which stated thus:

“… *it is trite law that normally an employer cannot be forced to keep an employee against his will. There can be no order for specific performance in contracts of employment.(emphasis ours) However, the employer must be prepared to pay damages for wrongful dismissal….”*

In **Richard Kigozi vs Equity Bank Uganda Limited, LDC No. 115 of 2014,** this court stated in line with **Kiyimba Mutale**(supra), that: *“…Even then it is not a guarantee that an employee will serve the term of employment to the end. There is a possibility that the contract could be terminated by unforeseen reasons other than termination, such as death, lawful termination, resignation etc. For the same reasons therefore, there was no guarantee that the Claimant would have served the Respondent until retirement…”*  The claim for earning after termination of employment is speculative therefore it cannot stand. In the circumstances this claim is denied.

**General damages**

He prayed for General damages for embarrassment suffered, mental anguish, stress and inconvenience occasioned to the Claimant and interest thereon from the date of award until payment in full.

Chief Justice Katureebe,(Emeritus)on the award of General Damages, held in **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** that:

*“… Having found that the appellant was wrongfully terminated, the Court should have proceeded to make an award of general damages which are always in the discretion of the court to determine.*

*…*

*In my view, that adequate compensation would have been a payment in lieu of notice, a measure of general damages for wrongful dismissal(emphasis ours) and payment of accrued pension rights. The High Court could have awarded substantial general damages but in its discretion, it chose to award only shs. 2,000,000/. … I think that the respondent could have been awarded substantial general damages for wrongful termination of his employment, taking into account his status, the manner of termination ”* (*Emphasis ours).*

In light of **Kiyimba Mutale(supra)**, this court has held in many cases that the remedy for an employee who is unlawfully terminated is an award of general Damages.

Having established that, the Claimant was unlawfully terminated, he is entitled to an award of damages. He had only served 1 month and 13 days of out of his 1-year fixed contract of 2014, therefore an award of Ugx.6,000,000/- as general damages is sufficient.

1. **Aggravated damages**

We found no aggravating circumstances to warrant an award of aggravated damages.

1. **Four weeks net pay**

He prayed for 4 weeks net pay for breach of section 66 of the Employment Act. We believe that the general damages already awarded to him are sufficient.

1. **Exemplary damages**

We found no basis to award these damages. They are denied.

1. **Payment in lieu of notice**

*“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-*

*(a) where the contract of employment is terminated summarily in accordance with section 69; or (b) where the reason for termination, is attainment of retirement age.*

*(2) The notice referred to in this section shall be in writing, and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.*

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

*(a) not less than 2 weeks, where the employee has been employed for a period of more than six months but less than one year;*

The claimant in the instant case was employed for 1 month and 13 days which was less than 6 months, in light of section 58(supra) he is awarded payment in lieu of 1 weeks notice.

**(e) Severance Pay**

section 87(a) and 89 of the Employment Act, respectively entitle an employee who has been in the employ of the employer for more than 6 months to severance pay which is calculated by mutual agreement between the parties. This Court in **Donna Kamuli vs DFCU LDC 002/2015,** held that where there was no agreed formula for the calculation of severance pay an aggrieved employee would be entitled to 1 month’s pay for every year worked. The claimant in the instant case served for only served 1 month and 13 days of his new fixed term contract, therefore he does not qualify for an award of severance pay within the meaning of section 87(a)of the Employment Act.

1. **Cerificate of service**

***“Certificate of Service***

1. ***On the termination of a contract of service an employer, if so requested by the employee,****(emphasis ours)* ***shall provide the employee with a certificate…”***

The Claimant did not adduce any evidence to show that he requested for a certificate of employment and it was denied. However,since he has prayed for it, there is nothing to preclude its issuance. The respondent is therefore directed to issue the Claimant a certificate of service.

1. Award of redemption out of the awarded salary arrears of the Claimant’s mortgaged interest comprised in block 127 plot 302 Buwagga Wakiso.

No evidence was led in support of this claim; therefore, we had no basis for granting it. It is denied.

The Claimant did not adduce evidence to substantiate claims he made under part 3b of his memorandum of claim. We therefore had no basis to make any award on the same. They are therefore denied.

In conclusion, the claim succeeds in the following terms.

1. A declaration that, by the time the Claimant was terminated he had subsisting 1year fixed contract which commenced on 01/01/2014.
2. His contract was unlawfully terminated.
3. An award of Ugx. 6,000,000/= as general damages, at an interest of 15% per annum until from the date of this award until payment in full.
4. No order as to costs is made.

Heard and delivered by

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

**PANELISTS**

**1.MS. HARRIET MUGAMBWA NGANZI `.….…………**

**2. MR. FX MUBUUKE ………………**

**3.MR. EBYAU FIDEL ……………….**

**DATE: 28/01/2022**