**THE REPUBLIC OF UGANDA**

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

 **LABOUR DISPUTE REFERENCE No.319 OF 2017**

**ARISING FROM LD. No. 132/2017**

 **NYAKATO DOCUS MATISKO ………………….. CLAIMANT**

**VERSUS**

 **GRAND VICTORIA LIMITED ………..………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. ROSE GIDONGO**

**2.MS. HARRIET MUGAMBWA NGANZI**

**3. MR. JACK RWOMUSHANA**

**AWARD**

**BRIEF FACTS**

In June 2014, the Claimant was orally employed by the Respondent Company, as an operator. On 1/07/ 2016 she was issued with a written contract promoting her to Regional Manager (west Nile region) and her salary was a gross Ugx. 987, 692/- per month.

She applied for and was granted Maternity leave of 3 months from 1/01/2017. However, she was terminated on 27/03/2017, on grounds of poor performance, absenteeism and insubordination and according to her, this was done, during her Maternity leave. She contends that, the termination was illegal, unfair and unlawful.

As regional Manager, one of her duties was to find locations for the Respondent to operate, for which she would be entitled to earn Ugx. 500,000/- Commission which she contends was not paid to her.

She claims for payment of aggravated damages for unlawful termination, general damages and severance allowance of 3 months’ salary in accordance with section 87(a).

**ISSUES**

1. **Whether the termination of the Claimant by the Respondent was lawful?**
2. **Whether the action by the Respondent of terminating the Claimant while on maternity leave violated her rights as a working mother?**
3. **Whether the Claimant is entitled to the remedies pleaded?**

**REPRESENTATION**

The Claimant was represented by Mr.Niwandinda Rwambuka of Rwambuka and Co. Advocates and the Respondent by Mr.Samuel Kakande of Silicon Advocates, Kampala.

**SUBMISSIONS**

**1.Whether the termination of the Claimant by the Respondent was lawful?**

It was submitted for the Claimant that, Section 68 of the Employment Act requires the Respondent to prove the reasons for termination and failure to do so makes the termination unfair within the meaning of Section 71 of the Employment Act. He relied on **Florence Mufumbo Vs Uganda Development Bank LDC No. 138 of 2014** and **Moses Obonyo vs MTN (U) Ltd LDR 045 of 2015**, for the legal proposition that, whether an employer chooses to terminate or dismiss an employee, such an employee is entitled to notice and justifiable reasons for the dismissal or termination. He refuted the reasons given to the Claimant, because Section 66 of the Employment Act requires the employer to give the employee a hearing before deciding to terminate or dismiss him or her. He contended that the Claimant was employed on a fixed term contract and her contract under clause 8.2 entitled her to 12 weeks maternity leave. He submitted that, she applied for leave starting from 1/01/2017 to 31/03/2017 and was expected to report on 1/4/2017. According to him, it was her testimony that, on 20/03/2017, she contacted the HR officer to let her know that, she would resume her duty on 1/4/2017, instead the HR summoned her to appear at the office in person, to resolve pending issues whose details she did not divulge to her. On 27/03/2017, she went to the office with her baby where the Assistant HR handed her a termination letter. She forced to sign for the said letter or else she would not be allowed to receive any payment for the Months of March and April 2017. According to Counsel, the Claimant testified that, she was told that the owners of the Respondent no longer wanted her to work for them and this evidence was not controverted by the Respondent. It was his submission further that, the Respondent’s witness Elizabeth Sabano failed to prove the allegations which were leveled against the Claimant that; she was frequently absent at work, she regularly did not submit to her superiors, she was disrespectful to her colleagues and that she was subjected to a disciplinary hearing on 20/03/2017 as alleged, because she did not provide court with evidence to show that, Claimant received any invitation for a hearing nor did she provide any evidence to show that a hearing took place. Therefore, Court should find that, no hearing took place and the allegations of insubordination and poor performance which were stated in the termination letter were false because they were not proved.

Counsel contended that the Claimant’s right to a hearing was violated and so was her right to maternity leave because the termination occurred while she was still on maternity leave, therefore she was deprived of her right to return to work after maternity leave contrary to the Constitution and the Employment Act.

Counsel further argued that the Claimant who was entitled to take 60 days maternity leave as provided under Section 56 of the Employment Act had a right to return to the job which she held immediately before her maternity leave. He argued that, the Claimant requested for leave from 1/7/2017 to 31/3/2017. He contended therefore that, the Respondent’s actions violated the law as contained in the Constitution and the Employment Act, 2006. He insisted that, Section 56(2) guaranteed the Claimant, a right to return to work in the same job or in an alternative job with the same or better terms. She had a right to return to work as a regional manager or to return to her managerial position. Therefore, her termination was illegal and unlawful.

In reply, it was submitted for the Respondent that, the Claimant’s termination was lawful, because the she was accorded a hearing which she did not utilize and subsequently she was terminated. According to Counsel her termination letter clearly spelt out the reasons for her termination and the reasons were not contested by the Claimant. He argued that, the Ms. Sabano the Respondent’s witness testified that, the Claimant was invited for a hearing but she chose not to attend, therefore the hearing proceeded in her absence. He further argued that the exparte proceedings are lawful if a person was summoned and chose not to appear. He contended that the fact that she chose not to appear did not mean that she was not given a hearing. she cannot be seen to approbate and reprobate.

Counsel further submitted that, the Claimant’s rights to maternity leave were not violated because the Respondent followed due process. He refuted Counsel’s assertion that, Section 56(1) and (2) entitles the Claimant to return to the job she held immediately before her maternity leave, because the provisions don’t make it mandatory for an employer to continue employing a person he or she did not want on grounds of the employee’s poor performance or bad conduct. He cited **Sitenda Sebalu Vs Sam Njuba and the Electrol Commission (Election Appeal No 26 of 2007** and the observations of Lord **Steyner in Regina Vs Sovejiand other[2005] HKHL49,** for the legal proposition that, although the use of the word “shall” in a statutory provision gives a provision a mandatory character, in some circumstances it is used in directory sense and it would only have any impact if a failure to comply invalidates the act in question. He contended that there was no provision of the law that fetters the employer’s right, to terminate the services of an employer. According to him, the wording of Section 56 (2) of the Employment Act grants a right to an employee who may also choose not to exercise it(supra) and in this case the Claimant did not prove that she called anyone to notify them about her intention to return to work. In his opinion, the legislature would not have intended to deny the employer its right to terminate an employee simply because such an employee was on maternity leave and in the instant case due process was followed prior to the disengagement of the Claimant therefore, there was no breach of her maternity rights.

**DECISION OF COURT**

It is well settled that an employer’s right to dismiss/terminate an employee cannot be fettered by the courts, provided that he or she follows the procedure for termination/dismissal as provided under Sections 66, 68 and 70(6) of the Employment Act, 2006. The law makes it mandatory for the employer to explain to an employee the reason why he or she is considering the employee’s dismissal or termination, before the termination occurs and to give the employee in issue, an opportunity to respond to the reason/s in the presence of a person of the employee’s choice and the explanation can be made in writing or orally before an independent and impartial disciplinary tribunal or committee and to prove the reasons. (see sections 66 and 68 of the Employment Act, 2006).

Therefore, where the termination or dismissal must be based on grounds of poor performance or misconduct which have been properly investigated by the employer. The results of the investigation or appraisal must be put to the employee and he or she must be given an opportunity to respond to the findings before he or she can be terminated.

After carefully perusing the Evidence adduced in court and on the record, we established that, it was not in dispute that, the Claimant was employed by the Respondent as an Operator and as Regional Manager in the West Nile region from 1/07/2016. It is also not in dispute that, she was terminated from employment while she was still on maternity leave on allegations of poor performance, frequent absenteeism, and inconsiderate behavior towards her supervisors and colleagues. Her termination letter specifically stated in part as follows:

*“We regret to inform you that your employment has been terminated forthwith. the decision was reached after a thorough analysis of reports from your superviser regarding;*

* *your work output which was below average*
* *your frequent absentia from duty*
* *and your insubordinate behaviour towards your superviser*

*…”*

As already discussed before, the employers right to terminate an employee cannot be fettered by courts provided he or she follows the proper procedure for termination under Section 66, 68 and 70(6) of the Employment Act, to give the employee the reason for termination, an opportunity to respond to the reason and proof of the reason/s before the termination.

It was the Respondent’s submission that, the Claimant was accorded a hearing, but she failed to avail herself for it. However, no evidence was adduced to indicate that the infractions leveled against the Claimant were put to her or and she was given an opportunity to respond to the infractions either in writing or through a hearing nor was there any evidence to indicate that a hearing actually took place. This Court in **Oola Bonny vs Chemonics International Inc LD No. 289/2016,** stated that:

*“Although it is not a requirement for the Employer to prove the reasons for terminating an employee beyond reasonable doubt, he or she still has the responsibility to demonstrate …, that the reasons as provided under Section 68 (supra) existed at the time the dismissal or termination was being considered. The Employer must therefore adduce evidence to prove that the reason existed before the dismissal was considered and it was a justifiable reason.”*

We are not satisfied that, the Respondent in the instant case, demonstrated that, before terminating the Claimant, it brought the infractions leveled against her to her attention or that she was actually given an opportunity to respond to them, either in writing or at a hearing as provided for under sections 66 and 68 (supra). For emphasis we shall restate that, an employee is entitled to a hearing whatever the grounds or allegations leveled against him or her are and the Employer is obliged to demonstrate that the allegations/ reasons for the contemplated termination or dismissal existed before the termination/dismissal. The employer must demonstrate that, the allegations were put to the employee in issue and he or she was given an opportunity to respond to them, before the termination/dismissal took place.

Whereas, we agree with assertion by the Respondent that, once an employer summons an employee to attend disciplinary proceedings, the employee must comply, failure of which the employee cannot turn around to complain that he or she was not heard, the employer must prove that the employee was actually summoned and he or she failed to avail him or herself for the disciplinary proceedings. This was not done in the instant case. It was RW1’s testimony that, on 17/03/2017, she called the claimant on phone and informed her about a hearing scheduled for 23/03/2017, but she refused to come. However she did not adduce any evidence to prove that the Claimant was actually invited or of the call which she purports to have made.

We also do not associate ourselves with the assertion by Counsel for the Respondent that, Section 56(2) was intended to fetter the Employer’s right of to terminate an employee he or she no longer wanted for whatever reasons because Maternity protection is a fundamental labour right enshrined in key Universal Human Rights Treaties. The International Labour Organisation adopted 3 Maternity Conventions in 1919, 1952 and recently in 2000, The **Maternity Protection Convention No. 183 of 2000.** Uganda **ratified** Convention **103** on 25/03/1963 and domesticated it under Section 56 of the Employment Act 2006. The Convention is primarily intended to protect the health of a Pregnant woman and nursing mother from continuing to work without rest. It is also intended to create assurance to such a woman that she would be able to return to work after the delivery of her child /children or while nursing the child/children, hence the requirement for them to receive full wages during maternity leave. Once on maternity leave, the female employee’s Contract of employment continues and all terms and conditions of employment apply as if the female employee was not absent.

Article 6 of the Convention 103 provides that:

*“… while a woman is absent from work on maternity leave in accordance with provisions of Article 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or give her notice of dismissal at such a time that the notice would expire during such absence …”*

Article 8 of the **Maternity Protection Convention No. 183 of 2000**, provides that:

*“… it shall be unlawful to terminate the employment of a woman during her pregnancy or absence on leave 4 and 5(maternity leave), or during a period following her return to work to be persevered by national laws or regional except on grounds unrelated to pregnancy or birth of child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or child birth and its consequences or nursing shall rest on the employer.”*

1. *A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.”*

Section 56 on the other hand provides that:

 *“56. Maternity leave*

1. *A female employee shall, as a consequence of pregnancy, have the right to a period of sixty days leave from work on full wages hereafter referred to as “maternity leave” of which at least four weeks shall follow the childbirth or miscarriage.*
2. *A female employee who becomes pregnant shall have a right to return to work, to the job which she held immediately before her maternity leave or to a reasonably suitable alternative job on return and conditions not less favourable than those which would have applied had she not been absent on maternity leave.*
3. *In the event of sickness arising out of pregnancy or confinement, affecting either the mother or the baby, and making the mother’s return to work inadvisable, the right to return mentioned in subsection (2) shall be available within eight weeks after the date of child birth or miscarriage.*
4. *A female employee is entitled to the rights mentioned in subsection (1), (2) and (3) if she gives not less than 7 days’ notice in advance or shorter period as maybe reasonable in the circumstances of her intention to return to work.*
5. *The notices referred to in subsection (4) shall be in writing if the employer requests*
6. *A female employee who seeks to exercise any rights mentioned in this section shall if requested by the employer, produce a certificate as to her medical condition from a qualified medical practitioner or mid wife.”*

Section 56 which is drafted in line with the Maternity Conventions recognizes the health implications resulting from the birth of a child or complications relating to childbirth or pregnancy or nursing. In line with the principles established under ILO Convention 103 and 183(supra), Section 56, is intended to protect the health of a pregnant or nursing employee and to give the employee assurance that, she would be able to return to work after the delivery of her child/children or while nursing the child, hence the requirement for the employee to receive full wages during maternity leave. Most importantly, it is a bar against discrimination against women based on their reproductive role. We must emphasis that, maternity leave is intended to preserve the health of a mother and her new born baby given their delicate state after child birth and particularly for the preservation of the new born baby whose survival in the first couple of months after depends solely on its mother. The maternity leave is a period in which the mother is expected to rest and recuperate after child birth or any complications relating to child birth.

Therefore, an employer is not expected to interfere with an employee’s maternity leave. The employee is not expected to be subjected to any work-related matters including any form of disciplinary proceedings.

This however does not fetter an employer’s right to commence such proceedings, after the maternity leave, provided they are commenced after the expiry of the maternity leave and for justifiable reasons, as provided under the law. The employer is only precluded from interfering with the employee’s maternity leave.

It is not in dispute that, the Claimant in the instant case applied for and was granted maternity leave from 1/01/2017 to 31/03/2017. It was the testimony of RW1 Elizabeth Sabano, that, she went on maternity leave on the said dates, and the leave it was approved by Philda Rwandarugali, the HR officer at the time. It was also her testimony that, the Claimant was terminated while she was still on maternity leave. She testified that;

*“… yes she was terminated while on maternity leave…. yes I gave her the termination letter on 27/03/2017, … yes female employees have a right to report after giving birth…”*

There is no doubt that, the Claimant was dismissed during her maternity leave. and there was no evidence to indicate that she was actually invited for a hearing or that she was asked to respond to the infractions in writing. No evidence was adduced to show that, a hearing took place even in the absence of the Claimant as purported by the Respondent. However, even if the Respondent had proved that an invitation for a hearing had been extended to the Claimant, and due process was followed before the termination occurred, this would stand as proof that the process contravened Section 56(supra). There was no evidence adduced to prove the existence any allegation either.

It is our finding therefore that, the termination of the Claimant without prove of the allegations against her and without a hearing moreover during maternity leave was unlawful.

The assertion that the claimant did not prove that she called to notify the Respondent about her intentions to return to work cannot stand because it seems to us that the Respondent already had intentions of terminating her given RW1’s testimony that she called her on phone on 17/03/2017 to notify her of a disciplinary meeting scheduled for 20/03/2017 and the subsequent issuance of the termination letter on 27/03/2017. Section 56(4) provides that:

1. *A female employee is entitled to the rights mentioned in subsection (1), (2) and (3) if she gives not less than 7 days’ notice in advance or shorter period as maybe reasonable in the circumstances of her intention to return to work.”*

The Respondent commenced disciplinary proceedings on the 17/03/2017 which 14 days before the expiry of the maternity leave which was expiring on the 31/03/2017.

In the absence of evidence that the Claimant was made aware of the disciplinary proceedings that had been commenced against her by the 17/03/2017, we have no reason not to believe that she only got to know about them when she called the HR to inform her about her intention to return to work and she was summoned to head office instead. The Respondent cannot now shift the burden to the Claimant who physically went to the office in response to the HR’s summons. In fact, RW1 testified that she personal handed her the termination letter when she said that, *“… yes I gave her the termination letter on 27/03/2017.”*

In conclusion, having terminated the Claimant based on unsubstantiated allegations, without a hearing moreover during her maternity leave was contrary to sections, 56, 66 and 68 of the Employment and therefore, it was unlawful.

**2.Whether the Claimant was entitled to remedies?**

Having established that, the claimant was unlawfully terminated she is entitled to some remedies as follows:

**1.Payment of worked but unpaid overtime in the sum of Ugx. 12, 247,381/-**

We have considered the submissions on overtime. However, we did find the basis of the overtime. Clause 5 of the contract of Employment provides that:

*“The Employee shall be required to work (6) six days a week Mondays to Saturday. Because of the nature of business in this company, the employee may be required to work on Sundays and Public holidays. The Employer shall give the Employee a rest day during the week to compensate for such working conditions and remuneration benefits to this will be a mutual understanding between the two parties.”*

Section53(8) provides that:

***“(8) where in excess of hours of eight hours per day or forty-eight hours per week are worked, they shall, in the absence of a written agreement to the contrary, be remunerated at the minimum of one and a half times of the normal hourly rate if the overtime is on normal working days and two times of the normal hourly rate if the overtime is worked on gazetted public holidays.”***

We found nothing to indicate that, she was entitled to overtime pay. In any case she was receiving a regular monthly salary which was subject to statutory deductions and PAYE. Nothing in her contract provided for the calculation of overtime pay. She agreed to the terms of this agreement and she did not adduce any evidence to show how the overtime she is claiming accrued. In the circumstances, we have no basis for granting her prayer for overtime pay, it is denied.

**2.General Damages of 100,000,000/=**

Counsel relied on Article 126(2)(e), to claim for adequate compensation for the Claimant and **Kampala District Land Board &George Mitala vs Venansio Babweyaka CA No. 2 of 2007,** in support of the award of damages to the Claimant for her being terminated on unsubstantiated grounds, without a hearing and while she was still on maternity leave.

We have already established that the Claimant was terminated, without a hearing and while she was still on maternity leave, which rendered her termination unlawful. She is therefore entitled to an award of General damages. According to the evidence on the record she commenced her employment with the Respondent as an operator I June 2014 and by the time of her termination on 27/3/2017 she had worked for 2 years and 9 months earning Ugx. 740,000/-. In the Circumstances we think her prayer for Ugx. 100,000,000/-as general damages is overstated and an award of **Ugx. 30,000,000** is sufficient as damages for unlawful termination.

**3.Aggravated Damages**

Counsel submitted that claimant was entitled to aggravated damage because pf the aggravating conduct of the Respondent. He argued that aggravated damages are compensatory in nature and they reflect the exceptional harm done to the Claimant because of the Respondents actions/omissions against the Claimant that cause injury that should be compensated.

Indeed, aggravated damages are extra compensation to a plaintiff for injury to his or her feelings and dignity, caused by the manner in which the defendant acted. As already discussed above, the conduct of the Respondent was not only unfair and detrimental to the Claimant but also to her new born Baby) we are convinced that the injury of the Claimant was aggravated by commencing disciplinary proceedings against her while she was still on maternity leave moreover over baseless allegations. In the circumstances we think an award of **Ugx. 5,000,000/=** is sufficient as aggravated damages.

**4.Severance pay**

Section 87(a) of the Employment Act, entitles an employee who has been in an employer’s continuous service for a period of 6 months and is unlawfully dismissed to severance pay. Section 89 of the same Act provides that, severance allowance should be negotiable between the employer and employee. Counsel for the claimant prayed that the Claimant is paid severance allowance at the rate of 1 months’ salary per year served in accordance with the holding in **DONNA KAMULI VS DFCU BANK LDC 002 OF 2015,** that where there was no agreed calculation of severance between the employer and the employee, the employee would be entitled to 1 months’ salary for every year served.

We have already established that the Claimant served the Respondent for 2 years and 9 months and she was earning a net pay of Ugx. 740,000/- per month. We therefore award her to net pay of **Ugx, 1, 850,000/=** as severance pay.

She prayed for salary arrears at 740,000/- from date of termination. It is settled that claims for prospective payment is speculative therefore it cannot succeed because unlike an ordinary contract, Court cannot make an order for specific performance of an employment contract. Therefore, 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. In **Stanbic Bank Vs Kiyimba Mutale SCCA No. 2/2010,** it was 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….”*

This Court in **Richard Kigozi vs Equity Bank Uganda Limited, LDC No. 115 of 2014,** in line with **Kiyimba Mutale**(supra), stated 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…”* In the circumstances the claim for earnings after termination as salary arrears cannot stand. It is denied.

**5.Claim for Commission**

Claim for Ugx. 500,000/- commission for securing premises for the Branch in Arua. It was not disputed that she secured premises for the Respondent in the circumstances the claim is granted.

**6.Interest**

She prayed for interest of 25% from the date of the award until payment.

Given the inflationary nature of the currency today, we hereby award interest of 15% percent per annum on all pecuniary awards above, from the date of award until payment in full.

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. ROSE GIDONGO …………….**

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

**3. MR. JACK RWOMUSHANA ……………..**

**DATE: 28/JANUARY/2022**