**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE No. 110 of2017**

**ARISING FROM LD.NO.110 OF 2017**

**OBONYO BOSCO MAKONDO ………………………….. CLAIMANT**

**VERSUS**

**MERRYLAND HIGH SCHOOL ………..………. 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. BEATRICE ACIRO**

**3. MR. JACK RWOMUSHANA**

**AWARD**

**BRIEF FACTS**

According to the Claimant, in February 2001, he was orally employed by the Respondent as an Agriculture teacher until he was summarily dismissed on 9/10/2015. The Joint scheduling Memorandum on the record indicates that, he was earning Ugx. 800,000/- per month. Prior to his dismissal he was involved in a motor Accident which occurred on 14/05/2015, during the 1st term school holidays. He claims that, he notified the Respondent about the accident and he was advised to first recover before reporting back to work. The Accident incapacitated him for 4 months, but upon full recovery, he reported back to work in September 2015 and started conducting lessons. On 9/10/2015 he was informed that, he had been terminated. He was not given a hearing before the termination. It is also his claim that, he was forced out of his quarters and his property was taken by the Respondent and he was not paid 4 months’ salary, 420 days of untaken leave and his NSSF was not remitted to the Fund, hence this suit.

The Respondent on the other hand alleges that, it was not aware that the Claimant was involved in any accident. According to it, the Claimant did not return to work after the first term holidays in May 2015, and having absconded from work he was replaced because he was teaching Senior Six.

**ISSUES**

1. **Whether the Claimant was unlawfully terminated?**
2. **What remedies are available to the parties?**

When the matter came up for hearing the Respondent was not in Court and no explanation was rendered for her absence. On several occasions in 2019 and 2020, the matter failed to proceed because the Respondent had not filed pre-trial documents, or because she was absent. We were satisfied that she was effectively served, although service was received in protest and granted the Claimant leave to proceed exparte because on the ground that the Respondent’s firm had a number of lawyers who could have appeared in the absence of counsel in personal conduct.

**EVIDENCE**

The Claimant adduced his own evidence and that of Engwedu Peter. He restated the facts of the case and added that, he notified the head teacher about his accident. It was also his testimony that, he did not take any leave during his employment with the Respondent, despite requesting for leave. He said he was unlawfully terminated. He claimed salary arrears for 4 months amounting to Ugx. 3,200,000/-, 420 days of untaken leave amounting to Ugx.11,200,000/- and NSSF contribution of 15% of gross salary for 7 years amounting to Ugx. 10,080,000/-. He also claimed repatriation allowance to enable him transport his property to his home in Amolator District. It was also his testimony that having worked for 14 years, he was entitled to 3 months’ notice or 3 months’ pay in lieu of notice.

Engwedu testified that, during the staff meeting in May, the Director of studies, a one Mbeyi Jimmy informed the meeting that, the Claimant was involved in an accident, so another teacher was going to be appointed to replace him temporarily until he recovered. He said he was actually replaced by a one Okello who was doing his teaching practice. It was his testimony that, together with other staff members at the meeting, he contributed some money towards meeting the Claimant’s medical expenses. It was his evidence that, the Claimant returned to work in September and he started conducting classes in early October 2015.

**REPRESENTAION**

The claimant was represented by Mr. Augustine Ochieng of Nexus Solicitors and Advocates Kampala. The Respondents were represented by M/S Sendege, Senyondo & Co. Advocates, but they did not enter appearance.

**SUBMISSIONS**

It was submitted for the Claimant, that, the Claimant was notified that, his contract was terminated only 2 weeks after he returned in September 2015. Counsel contended that, the Claimant notified the Director of Studies and Mukiibi Drake, the Head teacher about his accident on 12/05/2015, 3 days after it happened, therefore, the Respondent cannot claim it was ignorant about the accident to justify the Claimant’s termination. He cited **Dr. Omona Kizito vs Maries Stoppes Uganda,LDC No. 033 of 2015,** in which this court stated that, the Employment Act under sections 55 and 75(i) are to the effect that an employee cannot be terminated on the grounds that, he or she was unable to work due to sickness and in this case, the Claimant was terminated due to sickness. He argued that in any case, he should have been paid salary in lieu of notice and he should have been given a reason for the termination. He contended that, the Respondent did not give the claimant justifiable reason for his termination nor was he accorded a disciplinary hearing to ascertain the reasons for his absence, yet his absence was justified. He cited **Florence Mufumbo Vs UDB LDC No. 138/2014,** for the legal proposition that before terminating an employee the employer must give him or her justifiable reasons for the termination, therefore not doing so was prima facie evidence that the termination was unlawful, unless the employee was guilty of aggravating conduct. He stated that, in this case there was no justifiable ground for terminating the Claimantwithout notice or payment in lieu of notice and without a disciplinary hearing. He insisted that the Claimant was terminated because of sickness therefore he was unlawfully terminated.

**DECISION OF COURT.**

Section 55 (1) of the Employment Act, 2006 provides that;

1. *An employee who has completed not less than one month’s continuous service with an employer and who is incapable of work because of sickness or injury is entitled to sick pay as follows-*
2. *For the first month’s absence from work he or she is entitled to full wages and any other benefit whether for his or her family or himself or herself stipulated in the contract of service; and*
3. *If at the expiry of the second month the sickness of the employee continues, the employer is entitled to terminate the contract of service on complying with all the terms of the contract of service up to the time of termination of employment.*

In **Kabuusu Henry vs** **Uganda Revenue Authority LDR No.149 of 2015,** this court held that Section 55(1) of the Employment Act(supra) provides specifically for circumstances where an employee is temporarily incapacitated due to sickness. However the employer in this case, is at liberty to terminate the employee in accordance with the terms of the contract and if the period of sickness exceeds 2 months, provided in the law. Section 55 therefore, entitles a sick employee to receive full pay and all entitlements for the 1st and 2nd month of absence due to sickness and as already stated if the sickness persists after the expiry of the 2nd month, the Employer is at liberty to terminate the contract of service in accordance with the terms of the contract of employment. Section 55(1) therefore, entitles an employee who is absent from work due to sickness to full pay of wages or salary for a maximum period of 2 months. This is an exception to section 40 and 41 of the Act, which require that an employee are can only be paid salary or wages in return for work done.

In the circumstances, this section cannot be construed together with section 58 which provides for various notice periods which must be given to an employee before termination, depending on the length of service organisation. The only requirement under section 55, is for the employer to be made aware that the employee’s absence is due to sickness and once the period exceeds 2 months, the Employer is at liberty to terminate the employment without further notice. It is our considered opinion that it would be unfair to require the employer to issue the employee with further notice or to pay in lieu of further notice in such circumstances because the employee already received full pay without rendering any services to the employer. It is also our considered opinion that, in such a case there is no requirement for the employee to be subjected to a a disciplinary hearing before termination. This is because the reason for termination is long absence due to sickness and not for poor conduct or poor performance as provided for under section 66 of the Employment Act. In this case, the reason for the termination is his or her inability to perform the duties because of being absent for more than 2 months due to sickness.

It was the Claimant’s evidence that, in May 2015, he was involved in an accident in May 2015, which incapacitated him and according to him the accident occurred during the first term holidays. His witness Engwedu Peter also, testified that, the staff were informed about the his accident, in a staff meeting in May 2015 and in the same meeting the staff were notified that he was going to be replaced by another teacher temporarily. Mr. Engwedu, also testified that the Claimant returned to work in late September 2015, which meant that he was absent from duty for a period of 4 months, given that the accident occurred in May 2015.

In light of the provisions of Section 55(supra), he was absent for more than 2 months, therefore, the Respondent was entitled to terminate him after the expiry of 2 months. It was his testimony that he was terminated on 9/10/2015, having returned in September. He however did not state the date on which he actually returned to work nor did he adduce any evidence to show that he actually worked in September. He also claimed that he did not receive salary for the four months he was absent and he wanted the same paid. It seems to us that the Respondent ceased to pay him when it learnt about his accident because according to his witness Engwedu, he was replaced by another teacher. It is clear that the Claimant continued to be sick beyond the 2 months, prescribed under section 55(2) (supra) therefore, the Respondent was at liberty to terminate him. He was however terminated after 4 months. In the circumstances it would not be farfetched to believe that the Respondent ceased to consider him an employee when it stopped paying him a salary and as already discussed above, this was after it heard about his accident. In light of the provisions of section 55, the Respondent was obliged to pay him for the first 2 months. Having continued to be sick beyond the 2 months, however, the Respondent cannot be faulted for terminating the Claimant without further notice or payment in lieu of notice. It can only be faulted for not paying him for the first 2 months of his absence as provided under section 55 of the Employment Act(supra). In the circumstances, the termination was lawful.

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

Section 55(2) (supra) is to the effect that, termination under section 55, must be done in accordance with the contract of service. It was the Claimant’s evidence under paragraph 4 of his memorandum of claim, that he was orally employed by the Respondent from February 2001 and he was he was earning a monthly salary of Ugx.800,000/- after deductions of NSSF, he was also entitled to 30 days annual leave, NSSF of 15% gross salary and he was entitled to a certificate of service on request upon termination.

Our analysis of the pleadings and the evidence on the record indicate that, the Respondent under paragraph 5 of its memorandum in reply admitted the contents of paragraph 4 of the Claimant memorandum of Claim. In any case, an employee is entitled to written particulars of employment and it is the responsibility of the employer to provide the written particulars (see section 59 of the Employment Act) and where the employer does not provide the written particulars of the employment relationship, the burden of disproving verbal allegations of the terms of the contract of service by the employee shifts to the employer.

In the absence of a written contract and given the Respondent’s admission of the contents of the paragraph 4 of the Claimant’s memorandum of Claim, we have no reason to doubt the Claimant and take it that those were the terms of his employment.

1. **Payment in lieu of Notice**

The Claimant prayed for payment in lieu of notice of 3 months’ salary amounting to Ugx. 2.4 million. We have already found that section 55 is to the effect that, the employee in this case would not be entitled to further notice or payment in lieu of notice, having been paid for 2 months without rendering any services to his or her employer because of sickness. We however established that, the Respondent did not pay him the 2 month’s salary. The Respondent is therefore ordered to pay the Claimant 2 months’ salary in lieu of notice amounting to Ugx.1,600,000/- with interest of 15% per annum from 2015 until payment in full.

**2.NSSF Remittances**

Although the Claimant claimed that, the Respondent did not make any NSSF remittances on his behalf for 7 years, amounting to Ugx. 10,080,000/-, the NSSF statement he attached as evidence fell short of indicating the date when he became eligible to receive NSSF. There was further no evidence to show the non -remittance for the 7 years claimed. We also found it strange that he had kept quite about the non-remittance of his NSSF contributions for that long and he did not report the same to the Fund. This court has held in many cases that NSSF remittances, are personal property, which the employee has a right to claim, however the onus lies on the employee to prove that, these remittances were not made. In the absence of evidence showing when he became eligible for NSSF and in the absence of evidence to show that the same was not remitted, we have no basis to cause the Respondent to remit the same to the Fund. The Claimant in the instant case has not proved this claim, it is therefore denied.

**3.Leave days**

This court has held in many cases that, even if Section 54 of the Employment Act entitles an employee to leave days, the employee is obliged to apply for and be granted the period within which to take his or her leave. Therefore, a claim for untaken leave will only succeed when an employee can demonstrate that he or she applied for leave but it was denied.

This Court has however taken judicial notice of the fact that employees in the teaching profession take leave every school holiday therefore a claim under section 54 would only succeed if their contracts of service specifically state that they are entitled to leave outside the school holidays.

Although the Claimant stated that he was entitled to annal leave as part of his terms of employment, he did not adduce any evidence to show that the leave he was claiming was outside the school holidays and he had applied for it and it was denied. In the absence of such evidence, we have no basis to grant the claim for payment in lieu of 420days of untaken leave, amounting to Ugx. 11,200,000/-

**General Damages**

Having established that the Claimant’s termination was lawful, he is not entitled to general damages.

In conclusion this claim fails, save for the order for the Respondent to pay the Claimant 2 months’ salary amounting to Ugx.1,600,000/- in accordance with section 55(1) supra, with interest of 15% per annum from August 2015 until payment in full. No order as to costs is made.

Delivered and signed by:

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

**PANELISTS**

**1.MS. ROSE GIDONGO**

**2.MS. BEATRICE ACIRO**

**3. MR. JACK RWOMUSHANA**

**DATE: 25/10/2021**