**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE APPEAL NO. 21/2019**

**ARISING FROM KCCA/CEN/LC/NO 115/2018**

 **YOUR CHOICE LTD ………………………….. CLAIMANT**

**VERSUS**

**OMUNTU DAN ………..………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS. ADRINE NAMARA**

**2.MS. SUSAN NABIRYE**

**3. MR. MICHEAL MATOVU**

**AWARD**

**BACKGROUND**

 Respondent claimed that he was employed by the Appellant Company and he was unlawfully terminated. He filed a complaint before the Labour Officer Kampala City Council Authority for unpaid salary, NSSF, Accrued Annual Leave and costs. The Appellant denied ever employing him. The Labour officer however found for the Respondent. The Appellant being dissatisfied with the Labour Officer’s decision filed this Appeal on the following grounds.

**GROUNDS OF APPEAL**

1. **The Labour Officer erred in law when he held that the Respondent was an employee of the Appellant.**
2. **The Labour Officer erred in law and in fact when he proceeded to make an award without properly evaluating the evidence on the record thereby arriving at a wrong decision.**

**SUBMISSIONS**

In order to pre-empt a preliminary objection regarding ground 2 which is a mixture of law and fact, Counsel for the Appellant submitted that he was alive to the requirement under section 94(2) of the Employment Act, for appeals to be on questions of law only and with leave of this Court on questions of fact forming part of the Labour Officer’s decision. It was his submission that it was the inherent obligation of the Appellate court to re-evaluate evidence. He relied on the decision of the Court of Appeal in **Bainagana JohnPaul Vs Uganda. Criminal Appeal No. 068/2010,** in which the Court of Appeal struck out the grounds of mixed law and fact save for the ground on evaluation of evidence, which the Court held to be a matter of law which had to be resolved. He also cited **Mubiru Martin vs Red cross Society LD Appeal No. 28/2018,** in which this Court was of the same view, therefore it was a settled matter. It was his submission that this court was therefore under obligation to re- evaluate the evidence on the record before coming to its own conclusion.

Indeed, this Court like the Court of Appeal has taken the position that it is under the obligation to reevaluate evidence as a matter of law on the record in order to resolve an appeal as a point of law. We shall delve into the ground as a matter of law and draw our own conclusion, being cognisant of the fact that we either heard nor saw the witnesses as was stated in **Father Nanesio Begumisa & 3 Others Vs Eric Tiberaga SCCA 17/2000[2004],** which was also cited by counsel.

**1.The Labour Officer erred in law when he held that the Respondent was an employee of the Appellant.**

It was the submission of Counsel that, according to section 2 of the Employment Act, the basis employment is a contract which can either be written or oral and the Respondent had the onus to prove that he had a contract of employment with the Appellant. According to Counsel the Respondent did not adduce any evidence of an original letter of appointment or a contract and only provided copies on pages 5 of the record. He was also unable to provide a copy of the appointment letter purported to have been issued to him on 24/08/1999 and signed by Mwathi Bette as Executive Director of the Company as seen at pages 35-39 of the record. He argued that the letter was disputed by the Appellant’s because the said Mwathi was not its employee at the time the appointment was allegedly signed in 1999. According to him the Appellant led evidence to show that there was fraud and forgery on the part of the Respondent because at the time Mathis was alleged to have signed the letter, she was not yet staff of the Appellant having joined in 2014. He also disputed the documents dated 25/10/2016, which the Respondent produced as evidence of the list of Directors and staff handling customs work for the Appellant because the name of the commissioner who commissioned then was not given. He further disputed the authenticity of the contract on the grounds that the Appellant’s witness one Kateregga testified that Patel who was supposed to have signed it in October 2016, died on 20th January of the same year.

He insisted that the Appellant led evidence to indicate that the Respondent was a clearing Agent who was paid on a consignment basis as shown by the Vouchers on the record and the Respondent did not deny that he was an Agent.

 It was further his submission that the documents from URA which the Respondent relied on to prove his employment relationship with the Appellant referred to him as a declaration Officer whose duties involved receiving declarations and instructions from Clients among others, which duties fell in line with the Appellant’s evidence that the Respondent was a clearing Agent.

He further submitted that the documents relating to PAYE and NSSF which the Respondent relied on to support its dispute against the Appellant claim for NSSF did not bear his name and he did not adduce any evidence to the contrary which was proof that he was never employed by the Appellant.

He contended that, the Appellant was a self- clearing Company and the Respondent was its clearing Agent on a consignment basis at the rate of Ugx. 160,000/- per consignment. According to him the money was paid to him through the Bank or in cash and on certain occasions it was a requirement by URA for the Company to submit to it papers indicating the Company’s Directors and declaration agents hence the documents on the Record.

He insisted that the Appellant’s witness Katerega testified that, the Respondent had never been salaried employee. Therefore, in the absence of a binding agreement and an authentic appointment letter and in the absence of any terms and conditions of employment, the labour officer erred to hold that, the Respondent was an employee of the Appellant within the meaning of section 2 of the Employment Act.

Therefore, the appeal should be allowed and the labour officer’s orders be set aside with costs.

In reply Counsel for the Respondent, contended that the labour officer properly evaluated the evidence and arrived at the correct decision. According to him, Section 2 of the Employment Act, 2006 provides that a contract of employment, otherwise known as a contract of service, means any contract, whether oral or in writing, whether express or implied, where a person agrees in return for renumeration, to work for an employer and includes a contract of apprenticeship.

He relied on Ready **Mixed Concrete Southeast Ltd v. Minister of Pensions and National Insurance (1968) 2 QB497, (1968) 1 All ER 433 (1968) 2WLR 775,** to describe circumstances under which an employment relationship is deemed to exist. The holding was to the effect that the servant agrees that, in consideration of a wage or other renumeration, he or she will provide his or her own work and skill in performance of some service for his or her master and will be subject to the master’s control.

He also cited the **Halisbury’s Laws of England Vol 1 26,4th edition** for the proposition that factors such as control and integration in the business, method of payment, obligation to work for stipulated hours, overtime available, holidays, tax arrangements, insurance contributions, mode of termination of the contract among others need to be considered when determining the classification of employment. He also cited **Everret Aviation Limited vs Kenya Revenue Authority [2013] KLR,** which was to the same effect.

He argued that the Respondent had a duty to prove that, he entered into a contract of service with the Appellant and the labour officer rightly evaluated the evidence and found that the Respondent was paid a monthly salary of Ugx. 550,000/=, in 2 equal instalments during the middle and at the end of the month and the money was deposited on his Account at Crane Bank/DFCU Bank Account. He also stated that the Respondent was given a staff identity card and his name was on the list of staff which was presented to URA, the regulatory body. Counsel insisted that the Appellant did not adduce any evidence to prove that it had no control over the Respondent.

It was his submission that the Appellant’s had control over the Respondent to impute a master- servant relationship. He refuted the assertion that the Respondent paid the Respondent on a consignment basis because no evidence was adduced to that effect, instead there was evidence on the record that the Respondent was paid on a monthly basis as inputs/declarations officer.

It was his submission was that, the labour Officer having properly evaluated the evidence on record he was correct to find that, the Respondent was an employee of the Appellant within the meaning of section 2 of the Employment Act.

**DECISION OF COURT**

**1.The Labour Officer erred in law when he held that the Respondent was an employee of the Appellant.**

It is trite that the relationship between an employer and an employee is governed primarily by a contract of employment and in case of employment in Uganda, the contract of employment must be in compliance with the Employment Act, 2006 and other related laws.

**Section 2 of the Employment Act,** defines, ***“employee” to mean; any person who has entered into a contract of service or an apprenticeship contract, including without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Public Service, a local authority or parastatal organisation but excludes a member of the Uganda Peoples’ Defence Forces”***

The same Section, 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.”***

Although the burden of preparing an employment contract is placed on the employer, any person claiming employment rights must prove the existence of the employment relationship. After carefully perusing the record of proceedings and evaluating the evidence on the record, we established that, the Labour Officer in the instant Appeal, found that the contract which the Respondent relied on as evidence of his employment with the Appellant was not authentic and as a result, he relied on other evidence to decide the matter. The basis of his finding was a Bank statement and schedule of payment which were submitted by the Respondent. The Appellant however contends that the Respondent was never employed but rather worked on a consignment basis. The issue whether a contract of service or a contract for services exists is a substantive issue of law which we have to resolve. This Court in **Godfrey Kyamukama vs Makerere University Business School LDR No. 147/2019,** observed that, *“Courts have over time applied various tests to determine the status of a person’s employment and the employer’s responsibility towards their employees. Tests such as the* ***control test****, where a person is subject to the command of the master as to the manner in which he or she shall do the work … The* ***integration test****; which was propounded by Lord Denning in Stevenson* ***Jordan and Harrison vs MacDonald & Evans (1952),*** *in which he held that:*

***“… under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.” …****The* ***economic or business reality test****; which takes into account whether the worker is in the business or is an independent entrepreneur or works for another person who takes the ultimate risk of loss or chance for profit…”*

A perusal of Bank statement covering the period 12/10/2015 to 31/12/2016, (unfortunately the record of Appeal has no page numbers), which the labour officer relied on to determine the matter indicates that; in November 2015, the Claimant received payment (in ward EFT) from Your Choice Ltd (the Appellant) on 3 dates, 3/11/2015 of Ugx. 275,000/-, 16/11/2015 RTGs credit transfer of Ugx. 275,000/- and 30/11/2015 RTGs Credit transfer of Ugx.275,000/- in December 2015, on 17/12/2015 he received an RTGs credit Transfer from Your Choice Ltd of Ugx. 275,000/-, there was no other credit from the Appellant after December 17th. It was the Labour officers finding that the Respondent that, “… *In the absence of an authentic contract, evidence from the claimant bank account indicates that he was a salaried employee earning 550,000/- per month…”*  It is not clear to us how the labour officer came to such a conclusion because in the month of November 2015, the Claimant received Ugx.275,000/-, 3 times amounting to Ugx. 825,000/- and in December, he only received Ugx. 275,000/-. Even if he stated that the Appellant stopped paying him through the Bank, there is no other evidence on the record to indicate that the Respondent continued to receive any money from the Appellant as salary amounting to Ugx. 550,000/- as stated by the labour officer. The only other evidence of receipts for money by the Respondent, were various receipts for money for clearing goods on various dates and not receipts for salary. We also find it peculiar that he was not included on the list the other staff of the Appellant as at the year 2010. Besides the staff were serialized based on their TIN numbers and the Respondent did not adduce his own TIN number neither did he refute this evidence.

In the circumstances it would not be farfetched to conclude that the Respondent was indeed employed on consignment basis and not a monthly salary as claimed. In any case he did not deny that he received the 160,000/- which the Appellant said was paid to him for each consignment, although he considered it as an allowance.

In the absence of a contract of employment with clear terms and conditions of service and in the absence of any other evidence to indicate that he received a monthly salary of Ugx. 550,000/- paid in 2 instalments and in the absence of evidence of an NSSF Account in his names or remittances by the Appellant to the said Account, mere reliance on a personal account on which the salary was purportedly deposited, was not sufficient evidence that he was a salaried employee.

The Labour Officer also relied on identity cards which were purportedly issued to the Respondent by the Appellant and an approval by the General manager of medical treatment for the Respondent on 13/11/2015. It was the Appellant’s evidence before the labour Office that, the Respondent was the Appellant’s clearing agent who was paid on a consignment basis. Therefore, he required identification to enable him carry out his roles as a clearing Agent. That being the case, it was the responsibility of the Appellant to issue him with identification, which was done. However, the issuance of an identity card in our view is not conclusive evidence that, he was necessarily a salaried employee. A scrutiny of the 2 identity cards showed that 1 was issued on 16/07/2008 and it was open ended and another issued on 17/12/2012 and it was also open ended. Whereas the staff number stated on the Identity card issued of 16/07/2008 started with ID.NO/051/…, the number on the ID issued on 17/12/2012 started with ID.NO.056/…This in our considered view is a major discrepancy which makes the authenticity of the 2 cards questionable and therefore unreliable as evidence of employment. We further found nothing on the record to explain the issuance of 2 open-ended identity cards. Therefore, the Labour officer’s reliance on these cards as prove of the Respondent’s employment was an error.

The labour officer in his award referred the claim for NSSF to the Fund. however, we have not found evidence on the record to show that, the Respondent had an NSSF Account and the Appellant made any NSSF remittances therein. The only record of a schedule of monthly NSSF staff remittances does not include his name. As already stated, in the absence of evidence of an NSSF Account or a statement of NSSF remittances by the Appellant in favour of the Respondent, the Labour officer had no basis upon which to refer this claim of NSSF to this Court .

From our re-evaluation of the evidence as discussed before, we have established that the Respondent did not adduce sufficient evidence to proof that he was a salaried employee and not an employee on consignment basis. In the absence of a contract of employment, clear evidence of payment of salary, absence of an NSSF Account in his names and a statement of NSSF remittances by the Appellant to the said account, we have no doubt in our minds that the Respondent was not entitled to NSSF therefore it would not be farfetched to believe that he worked on a consignment basis. We are fortified by the mode of payment for his services as shown on the Account he adduced as evidence and attached receipts of facilitation for the field work he undertook on behalf of the Respondent.

We are satisfied that he was not an employee on contract terms, as defined under section 2 of the Employment Act 2006. Therefore, the labour Officer erred when he held that, he was an employee. This ground succeeds. The Labour Officer’s decision is set aside.

**2.The Labour Officer erred in law and in fact when he proceeded to make an award without properly evaluating the evidence on the record thereby arriving at a wrong decision.**

The Record shows that the Labour officer after making a finding of that the Respondent was an employee of the Appellant, he warded him payment in lieu of leave and unpaid salary for the Month of March 2017.

We have already established that in fact, the Respondent was not an employee of the Appellant, therefore he was not entitled to payment of salary of March 2017 and Payment in lieu of leave for 17 years, these being a preserve of employees.

In conclusion, this Appeal succeeds with no order as to costs.

delivered and signed by:

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

**PANELISTS**

**1.MS.ADRINENAMARA ………………**

**2.MS. SUSAN NABIRYE ………………**

**3. MR. MICHEAL MATOVU ………………**

**DATE:17/09/2021**