

**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE NO. 51 OF 2021**

*(Arising from KCCA/NDC/LC/307/2020)*

**KAGWA MARIAM::::::::::::::::::::::::::::::::::::::::::::::::::::::CLAIMANT**

**VERSUS**

**V.G KESHWALA & SONS LTD:::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE:**

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,

**PANELISTS:**

1. MR. JIMMY MUSIMBI,

2. MS. ROBINAH KAGOYE &

3. MR. CAN AMOS LAPENGA.

 **AWARD**

**Introduction**

**[1]** The Respondent employed Ms. Mariam Kagwa (*the claimant*) as a Data Entrant in July 2014. She rose to the position of Territory Distribution Manager, earning a monthly salary of UGX 425,000/= in August 2020. She alleges that she was terminated without a hearing via WhatsApp on 1st November 2020 for absenteeism. By this reference, she sought declarations of wrongful termination and breach of Section 66 of the Employment Act. She asked for two months’ salary in lieu of notice, severance allowance, repatriation, unpaid NSSF contributions, general and punitive damages and costs.

**[2]** The Respondent opposed the claim. The Respondent’s case was that the Claimant went absent without leave in October 2020. She was asked to report for duty in response to her notice of intention to sue. In respect to the alleged termination, the Respondent contended that one Derrick Sekiziyivu was a consultant and not an agent of the Respondent Company. The Respondent maintained that the Claimant has continuously absconded from her duty station.

**Issues for determination by Court**

**[3]** At the scheduling conference, two issues were framed for determination viz:

1. Whether the Claimant was lawfully terminated from employment?
2. What remedies are available to the parties?

**The proceedings and evidence**

**[4]** The parties to this reference called one witness each who testified and were cross-examined on the 8th of November 2022. In her witness statement, the Claimant testified that she had been an employee of the Respondent since 2014 and rose through the ranks to become Territory Distribution Manager on 1st August 2020. On 1st November 2020, she received a message from Derrick Sekiziyuvu, whom she called an agent of the Respondent, to the effect that she had been terminated for absenteeism. The message was sent by email to other work-related WhatsApp groups. She testified that her supervisor, Mr. Sulaiman Kiwelabye, removed her from the groups and that the Respondent’s Managing Director ratified Mr. Sekiziyuvu’s message. She went to the Operations Manager, Mr. Bhima, and was asked to comply with Mr. Sekiziyuvu’s instructions. She stated that she was earning UGX 500,000 per month and her social security contributions for the period July 2014 to September 2016 had not been remitted. She testified that she was not afforded a hearing and sought various remedies.

**[5]** Mr. Kishor Madha, a manager of the Respondent Company, filed a witness statement in that capacity. He testified that in October 2020, the Claimant went absent without leave and that the Respondent had never terminated the Claimant. It was his evidence that Mr. Derrick Sekiziyivu was an independent consultant and was never sanctioned by the management of the Respondent and as such was not binding. The Respondent had continued to remit the social security contributions 6 months into the Claimant’s absence. The Claimant’s continued absence was construed as abscondment.

**[6]** At the conclusion of the hearing, the parties addressed Court by way of written submissions. The Court is grateful to the parties for the succinct arguments and the authorities cited and supplied in support of their respective cases.

**Analysis and Decision of the Court.**

**Issue 1. Whether the Claimant was lawfully terminated from employment?**

**[7]** Mr. Solomon Akenda, appearing for the Claimant, submitted that the Claimant was unlawfully terminated on a WhatsApp platform. She was not given a hearing. In respect of the Respondent’s assertion that the Claimant had never been terminated, Mr. Akenda argued that there was no evidence to demonstrate that the Respondent wrote to the Claimant inviting her to return to work.

**[8]** Counsel for the Respondent countered, that the WhatsApp messages were merely tendered for identification and not evidence. Relying on the case of **Okwanga Anthony vs Uganda [2001-2005] HCB 36 at 38**, Counsel submitted that the same could not be relied upon as documentary evidence. Counsel also submitted that it had not been proven that Mr. Sekiziyuvu was an agent of the Respondent or had power to terminate anyone. The Respondent maintained that the Claimant had absconded and refused to return to work. It was asked that the claim be dismissed.

**[9]** From the evidence adduced, it was a common position that the Claimant was employed by the Respondent and was at the position of Territory Development Manager in October 2020. It was also common to both parties that Mr. Derrick Sekiziyuvu whom the Respondent referred to as a consultant without authority to bind the Respondent, wrote to the Claimant advising her not to return to work. Counsel for the Respondent submitted and quite correctly, that documents marked for identification do not dispense with formal proof. However, under cross examination, Mr. Kishor Madar, the Respondent’s Operations Manager, testified that he was the Claimant’s immediate supervisor and that the WhatsApp platform was the commonest form of communication for the Respondent. He stated that the Respondent’s Managing Director was a member of these WhatsApp groups. He also testified that he remembered a message from Mr. Derrick Sekiziyuvu around 1st November 2020. He did not recall whether it was for termination but he confirmed that the Claimant had stopped working. He also testified that the Respondent did not write to the Claimant after Mr. Sekiziyuvu’s message. The Claimant’s account of Mr. Sekiziyuvu’s participation in the affairs of the Respondent was that he was the one who terminated her and when she contacted her immediate supervisor, Mr. Bhima, he referred her to Mr. Sekiziyuvu. During her re-examination, she testified that she did not get any written communication to return to work.

**[10]** It was the Claimant’s case that she was dismissed via WhatsApp. The Respondent objected to the admission of the WhatsApp messages. Counsel contended that having been admitted for identification, the evidence was inadmissible. WhatsApp message is categorized as a data message or an electronic record under section 2 of the Electronic Transactions Act 2011(*from now ETA*) which provides that a data message means data generated, sent, received or stored by computer means and includes a stored message while electronic record means data which is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar devices and includes a display, print out or other output of that data. Electronic evidence is admissible under the ETA. The Learned Author Cornelius H. Mukiibi[[1]](#footnote-1) posits that there are three concerns; the authenticity of the electronic evidence, the reliability of the data and its source and the manner in which the data was generated, stored. We propose a brief overview of the process of admitting electronic evidence;

(a) Under section 8 (2) of the ETA, a person seeking to introduce a data message or an electronic record in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. This rule may be satisfied by proving the authenticity of the electronic records system by which the data was recorded or stored. In the case before us, there was no foundation laid for the photocopies of the print outs of the WhatsApp messages. The Claimant did not lead any evidence to authenticate the storage of the data messages. In our view, this would not satisfy the requirement under Section 8(3) of the ETA which requires proof of authenticity of the electronic records in which the data was stored or recorded. This would be the device.

(b) Section 8 (6) of the Act provides that, for the purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of set standards, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the [electronic record](https://ulii.org/akn/ug/act/2011/8/eng%402011-03-18#defn-term-electronic_record) and the nature and purpose of the electronic record. The WhatsApp messages presented before us were attached to the Claimant’s witness statements without authentication. This would not pass the reliability test under the ETA and renders the WhatsApp messages inadmissible. The Claimant premised her termination on an inadmissible WhatsApp message without proving the authenticity and reliability of the electronic evidence[[2]](#footnote-2). While this Court is not bound by the rules of evidence in any civil proceedings[[3]](#footnote-3), jurisprudence posits that it is important to consider questions of authenticity and reliability of electronic evidence.

 **[11]** Further, it is evident that when Mr. Derrick Sekiziyuzu wrote to the Claimant, terminating her on the 1st of November 2020, the Claimant appears to have instructed M/S Madira & Co Advocates to act on her behalf. The said Advocates wrote a demand letter to the Respondent on the 3rd of November 2020. The Respondent’s Advocates M/S Nambale & Nerima Advocates by letter dated 9th November 2020, denied the Claimant’s termination and asked the Claimant to return to work. This letter was admitted as “REX1”. By a further letter dated the 30th of November 2020, in reply to a letter from the Supervisor Labour KCCA, the Respondent’s lawyers maintained that the Claimant had been asked to report to the Human Resource department of the Respondent but she had not taken heed. The letter was admitted as “REX2”. Counsel for the Claimant submitted that there was no single evidence adduced by the Respondent to confirm that it ever wrote to the Claimant to resume work. The chronology of events as we have laid them out, do not support this proposition. In our view, the Respondent’s account has been consistent and timely. REX1 and REX2 were written in short succession within less than one month after the Claimant had received the message from Mr. Sekizyuvu. While the Respondent’s witness, Mr. Kishor Madha, admitted to having seen a communication by Mr. Derrick Sekiziyuvu, he was not certain that the message related to the Claimant’s termination. In the letter (REX2) it was emphasized in very clear and plain language that Mr. Derrick Sekiziyuvu, was not an employee of the Respondent and did not have a right to terminate the Claimant. The Claimant did not produce a power of attorney or such other document proving that Mr. Sekiziyuvu was authorized to act on behalf of the Respondent. The Respondent’s lawyers advised the Claimant’s lawyers and the Labour Officer of this fact. During her cross-examination, the Claimant confirmed that she did not report to the Human Resource Department of the Respondent as indicated in REX1. She also testified that she made a verbal plea for reinstatement and was advised by the Labour Officer to report to the Respondent. Clearly, the Respondent considered the Claimant their employee at the time the matter was reported to the Labour Officer. Further, the Claimant testified that she was not officially terminated. From the evidence on record, it is our determination that the Claimant has not established that the Respondent terminated her employment. Accordingly, we do not accept the contention that the Claimant was unlawfully terminated and would answer Issue No. 1 in the negative.

**Issue II. What remedies are available to the parties?**

**[12]** The claimant sought various statutory and other remedies. Having found that the Claimant was not terminated by the Respondent, the remedies sought, except the prayer for written particulars of employment to which we shall return, are denied.

**[13]** In its final submissions, the Respondent asked that the Claimant be advised to report back to her employer and ask for redeployment. In our view, this would akin to the remedy of reinstatement had there been a termination. Under **Section 71(6) of Employment Act 2006**, there are conditions related to reinstatement. It is provided that:

“*The court shall require the employer to reinstate or re-employ the employee unless;*

1. *The employer does not wish to be reinstated or re-*

*employed.*

1. *The circumstances surrounding the dismissal are such*

*that a continued employment relationship would be intolerable*

1. *It is not reasonably practical for the employer to re-*

*instate or re-employ the employee or*

1. *The dismissal is unfair only because the employer did*

*not follow a proper procedure”*

**[14]** In the case of **Busuula Samuel V Attorney General**[[4]](#footnote-4) the Industrial Court found reinstatement to be applicable where therespondent has the ability and capacity to re-employ the claimant. In that case, the respondent having not shown any unnecessary hardship that could be encountered by re-employment of the Claimant, the prayer of reinstatement was allowed.

**[15]** We note that in the Busuula case (ibid), the employer was the Government of Uganda, in the present case, the employer is a private entity. However, the Respondent has made it clear that it would have no difficulty admitting the Claimant to redeployment. Under Article 126(2) (d) of the Constitution of the Republic of Uganda, 1995, in the adjudication of disputes, reconciliation of the parties is to be encouraged. The Respondent suggests a reconciliation. We therefore find that because the Respondent has expressed a willingness to redeploy the Claimant, the Claimant would be entitled to redeployment or reinstatement.

**[16]** Before taking leave of this matter, we wish to return to the prayer for written particulars. It was submitted that the Claimant was in employment under an oral contract of employment and only given a company identity card. **Under Section 59 of the Employment Act,** an employee is entitled to receive from his or her employer notice in writing of particulars of employment including the full names and addresses of the parties, the date of commencement of the contract specifying the date from which the employees period of continuous service commences, the job title, the place of work, the wages and intervals of payment, rate of overtime, work hours, number of days of annual leave, terms and conditions of incapacity or sick pay and length of notice required for lawful termination. In the present case, the Respondent did not issue any such written particulars of employment to the Claimant. Pursuant to **Section 59(3) of the Employment Act,** the Respondent is ordered to provide the Claimant with written particulars of employment now and within 12 weeks of her redeployment.

**[17]** Finally, the Respondent asked that the matter be dismissed with costs. This Court has ruled that given the nature of the employment relationship, the grant of costs to the successful party is an exception rather than the rule. In the present case, we do not find that the Claimant be condemned in costs. Therefore, there shall be no order as to costs.

**Orders of the Court**

**[18]** The orders of this Court are:

1. It is declared that the Claimant was not terminated from her employment.
2. The Claimant is at liberty to report to the Human Resource Department of the Respondent for redeployment.
3. The Respondent is ordered to give the Claimant written particulars of employment in accordance with Sections 59(1) and (3) of the Employment Act.
4. There shall be no order as to costs.

**It is so ordered and declared.**

**Delivered at Kampala this \_\_\_\_day of March 2023**

**SIGNED BY:**

**THE HON. JUSTICE ANTHONY WABWIRE MUSANA, \_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**THE PANELISTS AGREE**

1. **MR. JIMMY MUSIMBI, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**
2. **MS. ROBINA KAGOYE & \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**
3. **MR. CAN AMOS LAPENGA. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Delivered in open Court in the presence of:

1. Mr. Solomon Akenda for the Claimant.

Court Clerk. Mr. Samuel Mukiza.

1. Cornelius Henry Mukiibi Sentamu Esq. “The Law of Evidence in Uganda” C.H Mukiibi Kampala Pp 82 and 83 [↑](#footnote-ref-1)
2. Per Madrama J(As he then was) in **Hesse Brian v Senyonga Patrick and 12 Others High Court Civil Suit No. 612 of 2014** [↑](#footnote-ref-2)
3. Section 18 of the Labour Disputes(Arbitration and Settlement) Act 2006 [↑](#footnote-ref-3)
4. Labour Dispute Claim No. 029 Of 2014 [↑](#footnote-ref-4)