THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT LIRA

LABOUR DISPUTE REFERENCE NO. 02 OF 2021

(Arising from Labour Dispute Complaint No. 2020/LDLG/11/004)

KEMBA MUSA::CLAIMANT

VERSUS

MOUNT MERU MILLERS (U) LTD::RESPONDENT

BEFORE:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA,

PANELISTS:

1. Mr. JIMMY MUSIMBI,
2. Ms. ROBINA KAGOYE &
3. Mr. CAN AMOS LAPENGA.

AWARD

Introduction:

[1] Mr. Kemba Musa (*the claimant*) was employed as a driver with the Respondent, earning a monthly salary of UGX 738,657/=.On the 15th day of October 2018, he was suspended without pay for one month to allow for investigations into unauthorized offloading of Crude Palm Oil from a tanker assigned to him. In a letter dated the 12th of February 2019, Mr. Kemba was informed that his contract had expired and would not be renewed. His outstanding dues were subjected to a deduction for loss of a truck tyre, and he was to be paid UGX 130,051/=. He filed Labour Dispute No. 2020/LDLG/11/004 at the Lira District Local Government. On 22nd September 2021, the Senior Labour Officer referred the matter to this Court.

[2] By a memorandum of claim dated 15th September 2021, the Claimant sought the sum of UGX 4,818,142 consisting of accumulated leave, unpaid wages, severance allowance, payment in lieu of notice, and compensation for failure to hold a fair hearing. He also asked for general damages, interest, and any other relief.

[3] The Respondent opposed the claim. The Respondent's case was that the Claimant's suspension and investigations established that he had been negligent on two occasions. As a result, his contract was not renewed. The Respondent contended that it paid the Claimant's entire salary for October to December 2018, subject to certain deductions. His final net pay was UGX 1,960,051 of which UGX 1,830,000 was deducted for the loss of a tyre, leaving a balance of UGX 130,051/=. The Respondent prayed that the claim be struck out with costs.

Issues for determination by Court:

[4] At the scheduling conference held on the 13th of February 2023, two issues were framed for determination viz:

(i) Whether the Respondent unlawfully and unfairly terminated the Claimant?
(ii) What remedies are available to the parties?

The Proceedings:

[5] The Claimant filed a witness statement, testified, and was cross-examined on the 20th of February, 2022. The Respondent called one witness. After the hearing, directions for written submissions were issued. The Claimant filed his written submissions on the 21st of February, 2023. Neither the Registry at Kampala nor the sub-registry at Lira had records of the Respondent's written submissions on the morning of the 24th of February 2023 when this Court held a quorum at the High Court of Uganda in Lira City. On the morning of the 27th of February 2023, we found that the Respondent had filed its submissions on the afternoon of the 24th of February 2023 after this Court had held its quorum. This is a significant omission because under Section 14(1) of the Labour Disputes (Arbitration and Settlement) (Amendment) Act 2020, decisions of the Industrial Court are reached, first, by consensus. Late filing of submissions, especially during a circuit session such as the present one, deprives the panel of an opportunity to consider the written submissions. It is not that the court derives

its decisions from oral or written submissions, but the parties may also use the submissions to articulate their respective cases neatly. The practice of late filing is to be discouraged.

Analysis and Decision of the Court.

Issue 1. Whether the Respondent unlawfully and unfairly terminated the Claimant?

[6] The Claimant testified that when he returned from Mombasa on the afternoon of the 14th of October 2018, he was instructed to park the vehicle at the weighbridge. He was informed that somebody else would be in charge of offloading. He left for the night. He received a suspension letter when he returned to work the following morning. The letter was admitted in evidence as CEXH2. The Claimant testified that when he returned to work, he was told that the person who had suspended him had traveled to India. After that, the Respondent was non-responsive until 12th February 2019, when he received a letter of non-renewal of the contract. He then filed a complaint with the Labour Office at Lira District Local Government.

[7] During cross-examination, the Claimant testified that he did not know why he was suspended. Regarding the 14th of October 2018, the Claimant testified that he was called at about midnight and asked about the offloading of palm oil. When he reported to work the following day, he was suspended without pay and told that he would be informed of the status of his contract after two weeks. When he did not receive any information, he went to the workplace and was advised to wait for communication. He was called to the factory on 12th February 2019 and told that his contract would not be renewed. He was paid October Salary and one month's pay because he had not received a warning letter. About the tyre loss, the Claimant testified that the incident had occurred at Mbale when he parked the vehicle by the Islamic University in Uganda Campus and fell asleep. He reported the theft of the tyre to the Uganda Police and gave the reference number to his supervisors. He testified that he did not remember causing any unnecessary delays and had no recollection of causing mechanical defects since he started working for the Respondent.

[8] **Dan Lyadda (RW1)** testified that he was the Respondent's Human Resource Manager and that the Claimant's exit from the Respondent Company followed the law. The Claimant's employment contract was renewed on 1st January 2018 and was valid until 31st December 2018The contract expired while the Claimant

was on suspension. He testified that the Claimant had committed gross misconduct and acted negligently occasioning loss of a tyre valued at UGX 1,830,000/=. Further, that the Claimant was insubordinate and offloaded Crude Palm Oil at night contrary to Company policy. On 15th October 2018, the Claimant was suspended without pay and on 12th February 2019, he was given notice of non-renewal of the contract. His net pay of UGX 1,960,051/= was subjected to a deduction of UGX 1, 830,000/= for replacement of the lost tyre and the balance of UGX 130,051/= was payable to the Claimant.

[9] In cross-examination, RW1 testified that the sum of UGX 1, 830,000/= was for replacement of the lost tyre. He was referred to REXH4, a discharge voucher from Alliance Africa General Insurance Ltd where the Respondent's insurers compensated the loss of the tyre. In regard to the investigations surrounding the Claimant's suspension, RW1 testified that the Claimant was not subjected to any examination about the allegations and did not get a copy of the investigations report. He confirmed that the Claimant was suspended for 1 month on 15th October 2018 and the notice of non-renewal was issued 4 months later on 12th February 2019.

[10] In re-examination, he stated that the suspension was for one month and that the Claimant did not come back to work and had been paid his full dues.

Submissions of the Claimant:

[11] Ms. Bridge Kusemererwa, appearing for the Claimant, submitted that Respondent terminated the Claimant unfairly and unlawfully. That the Respondent imposed a disciplinary penalty of suspension without pay on 16th October 2018 and four months later issued a letter of non-renewal of the contract. There was no fair hearing and no record of a letter inviting the Clamant to any disciplinary hearing. In her view, this contravened Article 28 of the Constitution and Section 66(1) and (2) of the Employment Act, 2006. Learned Counsel contended that Section 66 of the Employment Act makes it mandatory for an employer to afford an employee a hearing in every form of dismissal. She cited the cases of **Twinomugisha Moses v Rift Valley Railways C.S No.212 of 2009** and **Kanyonga Sarah v Lively Minds Uganda LDR 16 of 2018** in support of this proposition.

[12] Dr. Adams Makmot Kibwanga, appearing for the Respondent, submitted that the claimant did not specifically pray to court to find that he was unlawfully and unfairly terminated. Counsel cited the case of **Peter Kitaka & 12 Others v Mohamood Thobani H.C.C.A No. 20 of 2021** in support of the proposition that

a court would be wary of stepping out of the pleadings of parties to grant orders not prayed for. Ms. Kusemererwa countered on the same authority, that where there is a departure from the pleadings and both parties submit on unpleaded points, then it is proper to deal with such an irregularity while dealing with one of the issues framed. We think that both Counsel are addressing a departure from pleadings while the question relates to framing of issues. The question of unfair and unlawful termination was framed as an issue at the scheduling conference. In the pleadings, the Claimant asserts that his suspension and eventual non-renewal of the contract was unlawful. On the other hand the Respondent counters that the contract ended lawfully, by effluxion of time. The question for determination is therefore the lawfulness of the termination whether starting with an unlawful suspension or ending by effluxion of time. This is the matter in controversy between the parties and was framed as an issue. Under Order 15 Rule 1(5) of the Civil Procedure Rules S.I 71-1, the court shall after reading the pleadings and after such examination of the parties or their advocates, ascertain what material propositions of law or fact the parties are at variance, and proceed to frame and record the issues on which the right decision of the case appears to depend. This is what transpired on the 14th day of February 2023 when 2 issues were framed for determination. At this point both Counsel agreed to the issues as framed. We think this not to be a matter of departure from the pleadings but a framing of the issue for determination.

[13] Returning to the main issue for determination, it was submitted for the Respondent that the Claimant did not have a case against the Respondent. That the Claimant was given a one year contract on 1st January 2018. That he was suspended on 15th October 2018 and *"absconded"* from work. His contract run out on the 31st of December 2018 and the contract ended by effluxion of time. The Respondent then deducted the sum of UGX 1,830,000/= for the lost truck tyre. The Respondent submits that the Claimant failed to bring evidence to prove that he was denied a fair hearing and he absconded from work.

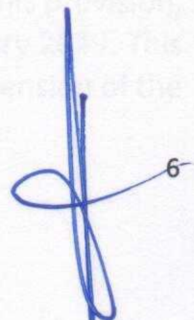
[14] The evidence before us demonstrates that the genesis of the Claimant's exit from the Respondent's employment are the events on the night of the 14th of October 2018. A reconstruction of these events is that the Claimant returned from Mombasa sometime in the late afternoon with a cargo of Crude Palm Oil (CPO). He was directed to park the truck and he left for the night. At about midnight he received a phone call regarding the unauthorized offloading of the truck. When he returned to work the following day, he was served with a one month's suspension with effect from 16th of October 2018. He was told that he would be informed about that status of his contract after a period of two weeks.

When he tried to follow-up he was advised to wait for the return of the person who suspended him. On 12th February 2019, he was served with a letter of non-renewal of his contract following his said suspension. His benefits were computed at UGX 1,960,051 and the amount of UGX 1,830,000 was deducted for the loss of the tyre. He was to be paid UGX 130,051/=.

[15] It is common to both parties that the Claimant was suspended for 1 month without pay to allow for investigations into allegations of unauthorized offloading of Crude Palm Oil. This is very clear from the suspension letter which was admitted in evidence as CEXH2 and REXH3. It is therefore a common exhibit and it is useful to reproduce the letter verbatim:

> *"15th/OCT/2018*
>
> *MR. KEMBA MUSA*
>
> *Mount Meru Millers (U) Ltd*
>
> *RE: SUSPENSION WITHOUT PAY*
>
> *This serves to inform you that you will be on suspension without pay for a period of One (1) month with effect from 16th Oct. 2018, this is to allow investigations into the unauthorized offloading of Crude Palm Oil (CPO) from the tanker assigned to you and suspicious behavior. You will be notified on the status of you contract after a period of two weeks.*
>
> *Wishing you all the best.*
>
> *Yours*
>
> *Human Resources Manager.*
>
> *CC. Transport and Logistics Officer"*

[16] Following this suspension, there was no communication for four months. On 12th February 2019, the Claimant was issued with a letter of non-renewal of contract. The letter was admitted in evidence as CEXH6 and REXH8. For effect, we think it is necessary to employ the full text of this letter:



"12th Feb 2019

Mr. Kemba Musa

(Driver)

RE: NON-RENEWAL OF YOUR CONTRACT

This serves to inform you that your contract with Mount Meru Millers (U) Limited which expired on 31st/Dec/2018 will not be renewed this is in regards to your earlier suspension. The would be your outstanding dues have been adjusted against the lost tyre which occurred due to your negligence. This amounted to 1,830,000UGX against your outstanding dues and balance due to you is 130,051 as per attachment. Therefore, you are to hand over all company that might be in your possession and stop conducting any business dealings on behalf of the company.

Thanks

Yours in service

Human Resource Manager

C.C Senior Labor Officer

C.C Finance Manager/Logistics Officer

CC. Accounts

C.C Personal Files"

[17] While both Counsel did not address us on whether the suspension was lawful, Section 63 of the Employment Act 2006 provides for the procedure of suspension. Under Section 63(1) an employer conducting an inquiry into the conduct of an employee may suspend that employee with **half pay**. In the case before us and as spelt out in CEXH2 and REXH3, the Claimant was suspended **without pay**. Under Section 63(2), a suspension shall not exceed four weeks or the duration of the inquiry, whichever is shorter. In the matter before us, the Claimant was suspended with effect from 16th October 2018. It follows that this suspension would lapse on the 16th November 2018. Contrary to this provision, the Respondent only gave a notice of non-renewal on 12th February 2019. This is after period of four months. We find that the Respondent's suspension of the

Claimant exceeded the statutory period. It was therefore unlawful. Secondly, it was unfair because the Respondent indicated that the Claimant would be advised within 2 weeks but did not write to the claimant until four months later. We find that the suspension was both unlawful and unfair.

[18] Our finding of an unlawful suspension has a corollary effect on the proceedings leading up to and the reason given for non-renewal of the contract. Section 2 of the Employment Act defines termination as follows: *"termination from employment "means the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc.*

[19] It is not in doubt that under Section 65(1) (b) of the Employment Act that termination shall be deemed to take place where the specified term of a fixed term of a contract ends and is not renewed within one week from the date of expiry of the contract. Indeed, Dr. Makmot Kibwanga made this point at the scheduling conference and during the cross-examination of the Claimant and re-examination of the RW1. The thrust of this argument was that the contract was renewed on 1st January 2018 for one year and lapsed on 31st January 2018 and was not renewed. However, the non-renewal of the contract was premised on the earlier suspension. It follows therefore, that having found that the suspension was unlawful, we are of the persuasion that any finding that the non-renewal of the contract of employment was lawful would be wholly inconsistent with the finding the suspension was unlawful. In the letter of non-renewal of the contract, the Respondent ascribes the non-renewal to the earlier suspension which suspension we have found to be unlawful. Further, the notice of non-renewal makes certain deductions on the Claimant's outstanding dues on account of loss of a tyre. In this regard, the reasons for termination of the contract are the suspension on allegations of unauthorized offloading of crude palm oil and loss of a tyre. While for the unlawful offloading of CPO, a disciplinary process by way of suspension was commenced, in the case of the loss of a tyre, no disciplinary proceedings were commenced. The inescapable conclusion is that the Respondent elected to pursue an end to the Claimant's employment on the grounds of misconduct, the allegations of unauthorized offloading of Crude Palm Oil and suspended him. After the suspension, the Respondent waited for four months until after the expiry of the contract to inform the Claimant that the contract would not be renewed. We think this was

an infringement of the Claimant's non-derogable constitutional right to a fair hearing. The Respondent allowed the contract to run out during what we have found to be an unlawful suspension and then ascribed the non-renewal to the Claimant's unlawful suspension. This was an attempt by the Respondent to fit an unlawful suspension within the ambit of Section 61(5) (b) of the Employment Act. We think that when the Respondent commenced disciplinary proceedings, Section 66 of the Act became applicable.

[20] Under Section 66 of the Employment Act, it is provided as follows:

> *"(i) Notwithstanding any provision of this part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.*
>
> *(ii) Notwithstanding any other provision of this part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representation which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (i) may make."*

[21] In the case before us, the facts are that the Claimant was suspended on a possible ground of misconduct. Four months after the suspension, the Respondent simply advised the Claimant that his contract would not be renewed. This notice of non-renewal infringed on the Claimant's right to defend himself on any of the reasons that Respondent felt might reveal a cause for dismissal at the commencement of the inquiry. The Claimant was not invited to a hearing where the reason or reasons for his termination would be explained to him. RW1 testified about an investigation report. The report was not given to the Claimant for him to give his view. He was not advised of his right to have a person of his choice attend anyhearing. In effect, the Respondent's actions is terminating were procedurally and substantially defective. And we are fortified in this view by a plethora of authorities by the Industrial Court on what constitutes a fair hearing. In the case of **Airtel Uganda Ltd vs Peter Katongole**[1]

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[1] LDA 13/2022(Unreported)

we cited the case of **Ebiju James vs Umeme Ltd**[2] where the Court held as follows:

"On the right to be heard, it is now trite that the defendant would have complied if the following was done.

1) *Notice of Allegations against the plaintiff was served on him and a sufficient time allowed for the plaintiff to prepare a defence.*
2) *The notice should set out clearly what the allegations against the plaintiff are and his rights at the hearing where such rights would include the right to respond to the allegations against him orally and or in writing, the right to be accompanied to the hearing and the right to cross examine the defendant's witness or call witnesses of his own.*
3) *The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of disciplinary issues of the defendant."*

[22] The unlawful imposition of disciplinary proceedings by way of suspension of the Claimant preceded the non-renewal of the employment contract on grounds that deprived the Claimant of an opportunity to make a defence. This was unlawful and contravened a very basic precept of employment law, enshrined in the constitutional enactment, the right to a fair hearing. It is a non-derogable right whose infringement would render any process that flouts it, a nullity. In the result and for the reasons above, we would answer Issue Number 1 in the affirmative. The Claimant was unfairly and unlawfully terminated.

Issue II. What remedies are available to the parties?

[23] The claimant sought various statutory and other remedies which we shall dispose of individually.

<u>Compensation for failure to hold a hearing:</u>

[24] The Claimant sought compensation for failure to give him a fair hearing. Under Section 66(4) of the Employment Act, an employer who fails to grant a hearing is liable to pay the employee a sum equivalent to four weeks' net pay. Having

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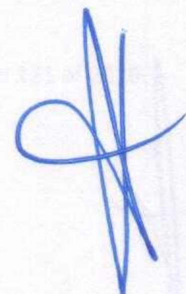
[2] H.C.C.S No. 0133 of 2012



found that the Claimant was not accorded a hearing, we award the sum of **UGX 578,127/=** being four weeks' net pay viz after statutory deductions.

Payment in lieu of Notice:

[25] Under Section 58(3)(b) of the Employment Act, where an employee has been in employment for a period of more than twelve months but less than five years, the employee would be entitled to not less than one month's notice. In the present case, the Claimant was on a one year contract that had been renewed on the 1st January 2018. CEXH No 1 demonstrates that the Claimant was appointed as Driver on 1st July 2016. We would find that that the Claimant had been in the employment of the Respondent for over 2 years at the time of his termination. In the circumstances, we award the sum of **UGX 738, 657/=** in lieu of notice.

Severance Allowance:

[26] Under Section 87(a) of the Employment Act, an employee who is unfairly dismissed is entitled to severance allowance. Having found that the claimant was unfairly terminated, we adopt this Court's reasoning in **Donna Kamuli Vs DFCU Bank Ltd**[3] the Claimant's calculation of severance shall be at the rate of his monthly pay for each year worked. Since he was employed from 1st July 2016 to 12 February 2019 being a period of 2 years, 7 months and 12 days, he is entitled to **UGX 1,908,197.2/=** as severance allowance.

Untaken Leave days:

[27] Counsel prayed for the sum of **UGX 738,657/=** for untaken leave. Section 54(1)(a) of the Employment Act provides for seven days of leave for every four calendar months. This means that the statutory minimum number of annual leave days is twenty-eight days. The Respondent unlawfully suspended the Claimant in October 2018 and only advised him of the non-renewal in February 2019. In these circumstances, the Claimant would be entitled to take paid annual leave for the year 2018 between October 2018 and December 2018. We therefore award the sum **UGX 738,657/=** as leave entitlement.

Unpaid Salary:

[28] It was the Claimant's evidence that he had not been paid a salary for the months of October, November and December of 2018. In cross-examination, he stated that he was paid October Salary and an extra 1 month's pay because he was not given a warning letter. The Claimant submitted CEXH 7 which was also admitted

[3] The Court of Appeal maintained this position in DFCU Bank Ltd vs Donna Kamuli C.A.C.A No 121 of 2016.

as REXH 9. This was a common document and an account of the Claimants pay. It listed the Claimants pay for October UGX 225,670/= after statutory deductions and advance taken and UGX 578,127 after statutory deductions for each of the months of November and December 2018. It also listed the sum of UGX 578,127 being one month's pay in lieu of notice. This may be quite possible why the Respondent held the view that the Claimant had been fully paid but for the deduction of UGX 1,830,000/= for the lost tyre. We have already found that no disciplinary proceedings were held in respect of the tyre incident in order to impose a penalty by deduction of the Claimant's pay. Additionally, REXH4 was a discharge voucher by the Respondent's insurers M/S Alliance Africa General Insurance Ltd who compensated the Respondent in the sum of UGX 1,163,650/= for a lost tyre and rim. The Respondent discharged all its claims against the insurer for the loss and assigned its subrogation (the right to recover the tyre) rights to the Insurer. Under the provisions of Sections 45 and 46 of the Employment Act, deductions to remuneration earned by employees are restricted except as permitted by law. Specifically, Section 46(1) (a) permits deductions in respect of tax, rates, subscription or contribution imposed by law. Section 46(1) (b) (c) and (d) permit deductions by written consent of the employee for purposes of a provident fund, reasonable rent or union dues. The deduction of UGX 1,830,000/= for the lost tyre does not in our view fall within the permitted deductions under Section 46 of the Act. And the Employment Act provides a specific remedy in the event of an unlawful deduction. Under Section 47 of the Act, an employer who acts in contravention of the Act is liable to repay any remuneration wrongfully withheld or deducted from the employee. Accordingly, we find that the deduction of **UGX 1,830,000/=** from the Claimant's remuneration was unlawful and we order that the Respondent to repay the said sum to the Claimant. We are mindful that the Court ordered the production of bank statements of the Claimant at the Respondent's cost. The same were not produced to aid the Respondent's case that it had paid the Claimant in full.

General Damages

[29] The principles on the award of general damages are those damages such as the law will presume to be the direct natural consequence of the action complained of[4]. In the case of **Dr. Omona Kizito vs Marie Stopes Uganda**[5] this Court observed that damages are assessed depending on the circumstances of a given

[4] Stroms v Hutchinson[1950]A.C 515

[5] LDC NO.33 of 2015

case and in the discretion of the court. Considering the circumstances of the present case, we think that the Respondent should pay general damages because we have found that he was unfairly terminated. Counsel asked this Court to award the sum of UGX 10,000,000/= in general damages. Counsel cited the case of Gillabhai Ushillingi v Kampala Pharmaceutical Ltd S.C.C.A No. 6 of 1999 in support of the proposition that the award of damages will help restore the Claimant to the position he would have been in but for the termination of his employment. Counsel did not lay a factual basis for this assertion. In assessing an appropriate quantum of damages in an employment dispute, the case of Donna Kamuli (supra) is instructive. In that case the Court considered the earnings of the Claimant, the age, position of responsibility and the duration of the contract. In the case before us, the Claimant was earning UGX 738,657 per month and was about 40 years of age at the time of his termination. He had worked for the respondent for 2 years and 7 months at the time of his termination. It is our determination that on the basis of his monthly salary the sum of **UGX 2,215,971/=** as general damages, will suffice.

Orders of the Court

[30] The orders of this Court are:

(i) It is declared that the Claimant was unfairly and unlawfully terminated from employment with the Respondent.

(ii) The Respondent is ordered to pay to the Claimant the following sums:

(a) **UGX 1,908,197.2/=** as severance allowance.

(b) **UGX 738,657/=** being one month's salary in lieu of notice.

(c) **UGX 738,657/=** as leave entitlement.

(d) **UGX 1,830,000/=** unlawfully deducted from the Claimant's remuneration,

(e) **UGX 2,215,971/=** in general damages and;

(f) **UGX 578,127/=** being four weeks' net for failure to grant a fair hearing.

(iii) In respect of costs of the claim, we have ruled in the case of **Joseph Kalule v GIZ**[6] that whereas costs follow the event, in labour disputes the award of costs is unlikely to follow the event on account of the nature of the employment relationship. There has to be some form of misconduct (including filing a frivolous and vexatious claim) on the part of a party for costs to be awarded against such offending party. We find no such misconduct on the part of the Respondent. As such, there shall be no order as to costs. It is so ordered.

Delivered at Lira this 28th day of February 2023

DELIVERED AND SIGNED BY:

THE HON. JUSTICE ANTHONY WABWIRE MUSANA, ________________

THE PANELISTS AGREE

1. **Mr. CAN AMOS LAPENGA,** ________________
2. **Ms. ROBINA KAGOYE &** ________________
3. **Mr. JIMMY MUSIMBI.** ________________

Delivered in open Court in the presence of:

Dr. Adam Makmot Kibwanga for the Respondent

Ms. Bridge Kusemererwa for the Claimant.

Claimant in Court.

Respondents Human Resource Manager, Mr. Dan Lyadda in Court.

Court Clerk. Mr. Samuel Mukiza.

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[6] LDR 109/2020(Unreported)