



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR REFERENCE NO. 110 OF 2019
(Arising from Labour Complaint No. KCCA/GEN/LC/137/2017)

PAUL KOKEYO.....**CLAIMANT**

VERSUS

PEACOCK PAINTS LTD.....**RESPONDENT**

Before:

The Hon. Mr. Justice Anthony Wabwire Musana

The Panelists:

1. Hon. Jimmy Musimbi,
2. Hon. Robina Kagoye &
3. Hon. Can Amos Lapenga.

REPRESENTATION:

1. Mr. Joshua Okanya of M/s. Alliance Advocates for the Claimant.
2. Mr. Shafir Yiga of M/s. Yiga Advocates for the Respondent.

AWARD

Introduction

- [1] Mr. Paul Kokeyo, a Kenyan National, secured employment with the Respondent as a Sales and Marketing Manager in December 2015. He expected the Respondent to obtain the relevant work permit for him. The Respondent felt this was the Claimant's responsibility. On the 24th of March 2017, the Claimant was asked to hand over office. He filed a complaint with the Kampala Capital City Directorate of Gender, Community Services, and Production, who referred the matter to this Court. By his memorandum of claim, Mr. Kokeyo sought a declaration of unfair termination.
- [2] The Respondent opposed the claim, arguing that Mr. Kokeyo did not have a cause of action against it. He had failed to produce a valid work permit, and

when pressed, he had absconded from work. The Respondent also contended that the reference was premature as there was no referral from the Labour Officer.

Issues for determination by Court

- [3] The parties filed a Joint Scheduling Memorandum (JSM), and at the scheduling conference held on 15th December 2022, two issues were framed for determination, namely:
- (i) *Whether the Claimant's employment was unlawfully terminated?*
 - (ii) *What remedies are available to the parties?*

The proceedings and summary of evidence

- [4] The parties called one witness each. Counsel were invited to address the Court by way of written submissions. In rendering this award, we have considered the submissions authorities cited together with the evidence and the law.

The Claimant's evidence.

- [5] The Claimant testified that he was offered employment on the 14th of December 2015 at a salary of UGX 3,170,000/= per month. He performed well and grew the market outreach by 45%. On 24 March 2017, the Respondent's General Manager informed him that he was required to hand over to Mr. Isaac Walusimbi immediately. When he inquired about the reason for this decision, he was advised to speak to Ms. Shifa Kaddu, a director of the Respondent. Ms. Kaddu told the Claimant that the Respondent could no longer afford his services. As a result of this abrupt and humiliating termination, he suffered and could not repatriate his family to Kenya.
- [6] Under cross-examination, he testified that he was not given a termination letter. He did not have a work permit and was now resident in Kenya. He possessed an entry permit while working for Bata Shoe Company between 2012 and 2014. He denied absconding from work. He also testified that the Respondent verbally promised to process a work permit and that he had presented his documents. He waited in vain and continued reminding the Respondent. He conceded that he did not have proof of the Respondent's promise to process the work permit. He also acknowledged that he had not complained about the said work permit.

The Respondent's evidence.

- [7] Mr. Allan Kibirige, General Manager of the Respondent, testified on its behalf. His evidence was that the Claimant was recommended as a potential hire and was in Uganda when he was recruited. During the interview, the Claimant informed Mr. Kibirige that he had the necessary documentation to work in Uganda. He was asked to provide proof of his eligibility during his employment, and he avoided doing so. His performance was also declining, and he attended work irregularly. It was also Mr. Kibirige's testimony that the Claimant's behavior affected his work. He continued to abscond from work and was replaced by Isaac Walusimbi.
- [8] Under cross-examination, he testified that there was no indication in the offer letter that the Respondent would process the work permit. He could not recall if the Claimant had been served with a termination letter, but there was a string of emails where the Respondent had expressed dissatisfaction with the Claimant's work. After the Claimant left the Respondent's employment, he continued assisting the Respondent informally. He did not recall if the Claimant's financial complaints were addressed. He also could not remember if the Respondent's Directors instructed him to communicate the decision to terminate the Claimant formally. He was also unsure of the Respondent's internal savings scheme but confirmed that the computations were similar to the National Social Security Fund. He could not recall whether the scheme was mandatory or voluntary. He did not deny that the Claimant was a member of the scheme.
- [9] In re-examination, he clarified that it was not his responsibility to process a work permit for a non-national. He confirmed that the Respondent issued termination letters before terminating employees.

Analysis and decision of the Court.

Issue 1. Whether the Claimant's employment was unlawfully terminated?

Submissions of Counsel**For the Claimant**

- [10] Mr. Okanya, appearing for the Claimant, citing **Section 58(3) of the Employment Act, 2006** (from now "EA"), and the case of **Uganda Development Bank v Florence Mufumba Civil Appeal No. 241/2015**, submitted that the Claimant was entitled to one month's notice and that absent of notice, the

termination was unlawful. Learned Counsel faulted the Respondent for not processing the appropriate work permits for the Claimant.

For the Respondent

- [11] Mr. Shafir Yiga and Mr. Jamil Mugalula, appearing jointly for the Respondent, submitted that by absconding from work, the Claimant was in breach of the terms of employment. Learned Counsel cited the Namibian case of **Namibia Broadcasting Corporation v Lylie Ndeuya Haushona HC _MD-LAB-APP-AAA-2020-00072[2021]** in support of the proposition that the employee has a duty not to be absent from work without permission. Counsel submitted that there was no evidence of termination. In his view, the Claimant absconded and did not return to work.
- [12] It was also submitted for the Respondent that **Section 37EA** barred the Respondent from employing a migrant worker without valid authorization. Counsel relied on Section 59(1) of the Uganda Citizenship and Immigration Control Act Cap.69, which precludes a non-Ugandan from being employed in Uganda without a valid entry permit. Counsel submitted that the Claimant circumvented this legal requirement and could not take advantage of an illegality. He relied on **Makula International Ltd v Cardinal Nsubuga 1982(HCB) 11**. The Claimant absconded from work without justifiable reasons because he lacked valid documentation and was not terminated as alleged.

Submissions in Rejoinder

- [13] In rejoinder, it was submitted for the Claimant that the proposition of abscondment was not borne out of the evidence at the trial. The Respondent could also not prove that the Claimant was relieved from duty for abscondment. That the condition for a work permit was not included in the offer of employment and that it was the employer's responsibility to procure a work permit.

Resolution and Decision of the Court

This case raises a critical point regarding foreign nationals seeking gainful employment in Uganda. Mr. Yiga invited us to consider the absence of a work permit as an illegality for which the entire claim should collapse. It is trite that a court cannot sanction an illegality. Indeed, in the **Makula** case (supra), it is established that illegality, once brought to the attention of the Court, overrides all questions of pleadings, including any admissions made therein. Therefore, it follows that this Court must deal with the illegality as a matter of law and priority.

- [14] But just before delving into the illegality, the Respondent suggested no valid reference before this Court. A brief comment clarifies this point. It is not the practice of the Industrial Court to admit disputes before a copy of the lower record has been submitted to the Registrar of this Court. To this end, the record reflects that by letter dated 12th September 2019, the Registrar of this Court requested a copy of the record on KCCA/CEN/LC/137/2017. By letter dated 3rd October 2019, the lower record was provided. The same contains a reference to this Court by Mr. Mukiza Emmanuel Rubasha, Labour Officer, dated 5th February 2018. It is our finding that there is a valid reference before this Court. We will, therefore, return to the matter of illegality.
- [15] Under Section 53(3) of the Uganda Citizenship and Immigration Control Act Cap.66(*from now "UCICA"*), a person intending to take on employment under entry permit class G specified in the Fourth Schedule to the UCICA may only enter Uganda after his or her application for an entry permit has been granted. Under S.59 UCICA, it is an offence for a non-Ugandan to be employed in Uganda without a valid entry permit. Mr. Yiga contended that obtaining the work permit was the Claimant's responsibility. At the same time, Mr. Okanya argued that it was the Respondent's duty, and this was not a condition within the contract.
- [16] It was not in dispute that the parties executed a contract of employment. The contract was admitted as the Claimant's Exhibit and marked "EXH C1". A review of this contract does not specify the requirement for and duty to obtain a work permit. The contract's validity has been challenged because of the absence of a work permit. We note that S.59 UCICA requires a non-Ugandan to obtain a work permit if he or she wishes to be gainfully employed within the Republic of Uganda. We think that Mr. Okanya's argument that this was not a condition in the employment contract is not well grounded in law. The absence of a need to fulfill a statutory requirement in a contract of employment is not to be wished away. **Section 4 EA** establishes the Employment Act, 2006, provisions as irreducible minimums of employment law and relations in Uganda. In other words, the provisions of the EA are the statutory minimums below which standards in an employment relationship are not expected to fall. We shall return to examine this effect later in this award.
- [17] The question this court must examine on illegality is whether the absence of a work permit vitiates a contract of employment.

- [18] The history of immigration controls in the Ugandan workplace is important. In the case of **Ahmed Bholim v Car and General Ltd**¹ the Supreme Court of Uganda considered a similar question. It was found that it was the responsibility of the Respondent to obtain a work permit. For this reason, the Supreme Court found that the learned Justices of Appeal had erred when they held that the appellant never had a valid work permit and that his employment contract was illegal. The **Bholim** case suggests that the employment contract would not be illegal without a valid work permit. We are mindful that in the **Bholim** case, the Supreme Court considered sections 10 and 13 of the Employment Decree, 1975. These provisions, together with the relevant provisions of the Immigration Act 1969, made it an offence if the employer did not obtain a work permit. Under that legal regime, the onus lay with the Employer to process the work permit.
- [19] The observation from the **Bholim** case is important because the Uganda Citizenship and Immigration Control Act Cap.66 (UCICA), now the law in force, modified the responsibility of obtaining a work permit. The law now provides as follows:

"59. Employment without entry permit

1. *A person who is not a citizen of Uganda shall not, unless that person is in possession of a valid entry permit, certificate of permanent residence or special pass issued under this Act—*
 - (a) *be employed in a parastatal or private body;*
 - (b) *be employed in the public service;*
 - (c) *be employed by a private person;*
 - (d) *engage in private business in Uganda.*
2. *A person who—*
 - (a) *not being a citizen of Uganda, engages in any employment or profession, whether or not for gain, contrary to subsection (1); or*
 - (b) *employs any alien, whether or not for gain, whom he or she knows or has reasonable cause to believe is contravening subsection (1),*
 - (c) *commits an offence and is liable on conviction to a fine not exceeding one hundred and fifty currency points or imprisonment not exceeding two years or both.*
3. *Any person convicted of an offence under subsection (1)(a) is liable, in addition to any penalty imposed under that section, to a*

¹ Civil Appeal No.12 of 2002 [2004] UGSC 8 (15 January 2004)

fine not exceeding two currency points in respect of each day on which he or she has acted contrary to subsection (1)(a); and the board may suspend or cancel the employer's permit, if any."

Under the provision cited above, particularly subsection 1, an employee is barred from employment without a valid entry permit. Under **Section 59(2) EA**, the employer would be guilty of an offence if the employee does not have a valid entry or work permit. The offence is, therefore, now contemporaneous. Both the employer and employee commit an offence. In the Claimant's case, it was common that he did not have a valid entry permit or work permit during the pendency of his employment with the Respondent. As a non-citizen, he was required to have a valid work permit. If he did not, that would be an offence under UCICA. Similarly, it would be an offence for the Respondent to employ the Claimant without a valid work permit.

- [20] Under **Section 2EA**, an employee means any person who has entered into a contract of service or an apprenticeship contract. Under **Section 6(2) EA**, the Industrial Court has a duty to guarantee equality of opportunity for persons who, as migrant workers or as members of their families, are lawfully within the territory of Uganda. Under, a "migrant worker" means a person who migrates or has migrated from one country to another with a view to being employed by another person and includes any person regularly admitted as a migrant worker. According to Black's Law Dictionary,² a migrant is a person who moves from place to place, especially to find work. The Claimant is not a national of the Republic of Uganda. In this context, the Claimant, a non-national, would be considered a migrant worker under the EA. The evidence from the Claimant and Respondent was that the Claimant was required to possess an entry permit. Their disagreement was about whose responsibility it was to process the same.
- [21] The Claimant testified that he had a valid certificate of residence at the time the Respondent employed him. The same had been obtained for him by his previous employer. He did not produce this permit in Court. He also testified that the Respondent would assist him in getting a work permit. The Respondent believed it was the Claimant's sole responsibility to process a work permit. The provisions of Section 59 UCICA make it an offence for both the employer and employee if a work permit is not obtained. It is a shared duty and responsibility to ensure that a non-national or migrant worker is legally employed.
- [22] This shared responsibility is elaborated under the Uganda Citizenship and Immigration Control Regulations, S.I 16-2004. Regulation 9 requires an employer to furnish a return of non-citizen employees employed by him or her,

² 11th Edn by Bryan A. Garner, Thomson Reuters page 1188

to the Commissioner every six months, stating the name, nationality, immigration status, place of work, and any other particulars as the Commissioner may require. Failure to furnish a return is an offence. On the part of the employee, Regulation 14 provides for the form of application for an entry permit and requires the prospective employee to fill out and sign the application form. The responsibilities are, undoubtedly, dual. From the evidence adduced before us, it was not shown what steps either the Claimant or the Respondent took to ensure compliance with the UCICA and the Immigration Control Regulations. A visit to the official website of the Directorate of Immigration and Citizenship Control³ (DCIC) demonstrates that Kenyan nationals are exempt from work permit fees but are required to apply for and obtain a work permit. According to the DCIC website, the work permit is described as a permit that allows the applicant to live and work in Uganda and is always sponsored by an organization or company that must have a mandatory organization code. In our view, this requirement for an organization code coupled with sponsorship makes for a shared responsibility between the employer and employee in applying for a work permit. Similarly, the default in applying is an offence for which the employer and employee are culpable for offences under UCICA. We find that both parties were at fault. Would this culpability render the employment contract illegal?

- [23] There has been jurisprudence that articulates the defence of illegality in the employment context, with a foremost expression being in the case of **Ivy Odekina v Judith Chikale**⁴ where the Civil Division of the Court of Appeal of England and Wales discussed in detail the distinction between the common law defence of illegality and statutory illegality. In that case, Judith Chikale took Ivy Odekina to the United Kingdom as a domestic worker. Ms. Odekina obtained a six-month visa. Upon its expiry and unknown to Ms. Odekina, Ms. Chikwale forged an application for visa extension, submitting that Ms. Odekina was her relative, whereas she was not. The visa extension was denied. At some point, Ms. Odekina, having worked for a pittance, sought more money. She was summarily dismissed and ejected from the Chikwale residence. She brought an action for unfair dismissal and relief, to which Ms. Chikwale raised a defence of illegality arising from Ms. Odekina's illegal immigration status. Lord Justice Underhill observed that;

“Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided that the

³ <https://immigration.go.ug/permit/entry-permit> last accessed 5/31/2023 4.47pm

⁴ [2019] EWCA Civ 1393

contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute. Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct."

What emerges from this authority is that statutory illegality is where the statute expressly prohibits a contract. The significant distinction is that common law illegality relates to the formation of the contract, its purpose, and public policy considerations⁵. In this context, the illegality may not necessarily be expressly prohibited by statute but is illegal for public policy considerations.

[24] In the Odekina case (ibid), the Court laid down the rules for determining whether the statute expressly prohibits the contract and makes it unenforceable. These rules are:

- (i) The Court needs to look at the statute's wording. There is either an express prohibition or there is not.
- (ii) Absent of the express prohibition, the Court reverts to the ordinary rules of statutory interpretation, taking into account the legislature's intention and public policy considerations.

Applying these principles to the case before us, the relevant provisions of the UCICA, which we cited in paragraph 20 above, is titled "Employment without entry permit". Under Section 59 (1) UCICA, a person who is not a citizen of Uganda **shall** not, unless that person is in possession of a valid entry permit, certificate of permanent residence or special pass issued under the Act, be employed in a parastatal or private body, be employed in the public service, be employed by a private person and engage in private business in Uganda. Under **Section 59(2) EA**, persons in breach of Subsection 1 commit an offence and are liable on conviction to a fine, sentence, or license revocation. In our view, the wording S59 UCICA expressly bars or prohibits an employment contract between an employer and a non-national employee without a valid work permit. Additionally, such a contract invites criminal sanctions. The use of the

⁵ Underhill LJ referred to Patel v Mirza [2016] UKSC 42, [2017] AC 467. The Court adopted an approach based on an assessment of what the public interest requires in a particular case, having regard to a range of factors. Underhill LJ referred to an extract of Lord Toulson decision in Patel v Mirza who said: "One cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."

expression "shall" has been held to be mandatory in the case of **Komakech Geoffrey & Another v Rose Akol Okullo**⁶. Further, Mr. Yiga pleaded illegality, citing the **Makula** case. The case concerned the Supreme Court dealing with a taxation award which contravened Schedule VI of the Advocates (Remuneration and Taxation) of Costs Rules S.I 258-6. Relying on **Belvoir Finance Co. Ltd v Harold G. Cole Ltd [1967] 2 All E.R 904 at 908**, the Supreme Court held that an illegality, once brought to the attention of the Court, overrides all questions of pleading, including any admission made thereon. In the **Belvoir** case, the Court was dealing with the question of whether "actual payment" of the statutory amount was in contravention of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1964 (S.I. 1964, No. 942) on an agreement relating to motor-car where the initial payment was less than 20 percent of cash price paid by the hirer. Both these cases relate to statutory illegality. It would follow that the provisions of Section 59(1) UCICA are couched in mandatory terms. In other words, Section 59 UCICA makes it plainly illegal for a non-national to employ or be employed in Uganda without a valid work permit. By expressly prohibiting employment of foreign workers without work permits, the Claimant would be precluded from taking any benefits under the contract because, unlike in the **Odekina** case, he had full knowledge of his obligation to obtain the same.

[25] Accordingly, and after objectively considering the evidence and the provisions of the UCICA, we determine that both the Claimant and Respondent were at fault for entering a contract of employment without a valid entry permit. The contract dated 14th December 2015 did not meet the statutory requirements under UCICA. The Claimant did not adduce evidence showing he applied for a work permit. The Respondent could not prove that it supported the Claimant's application for a work permit, nor did it prove that it filed returns of foreign nationals as required under the immigration regulations. The Claimant, having previously worked for Bata Shoe Company Ltd., was aware of the obligation to obtain a work permit. Similarly, Mr. Kibirige was also aware of the Claimant's nationality. Mr. Okanya's argument that possession of a work permit was not a condition in the contract does not aid the Claimant's case. Therefore, it is impossible to say that the Claimant was lawfully within Uganda during his employment with the Respondent to benefit from the protection under the law. The first and primary condition is for a migrant worker to be lawfully within Uganda before the Industrial Court promotes and guarantees equality of opportunity and access to labour justice.

[26] We do not find that the employment contract was lawful and agree with Counsel for the Respondent that this was illegal. This brings the matter to an instant end. The Latin maxim "*Ex turpi causa non oritur actio*" would have full

⁶ S.C.C.A No. 21 of 2010

effect. The maxim means that no one can benefit from an illegal action. Accordingly, the Labour Dispute Reference No. 110 of 2019 stands dismissed. Given this finding and conclusion, it is unnecessary to consider whether the termination was lawful.

- [27] The Respondent sought costs of the claim. We make no order as to cost because, in employment disputes, the grant of costs to the successful party is an exception on account of the nature of the employment relationship except where it is established that the unsuccessful party has filed a frivolous action or is guilty of some form of misconduct.⁷ The illegality resulting from failure to obtain a valid work permit was a shared responsibility, and both parties were culpable. For this reason, we decline to award the Respondent's costs.

Final orders of the Court.

- [28] In the final analysis, the claim is tainted with illegality. This Court cannot sanction an illegality and has no obligation under **Section 6(2) EA** to extend an invitation to parties who have knowledge of a statutory illegality to take benefit of that illegality. The claim is dismissed with no order as to costs.
- [29] Before taking leave of this matter, we observe the dire consequences for migrant workers who are not lawfully within Uganda and would be encouraged to regularize their immigration status to be afforded protection in the workplace. Under Article 104 of the East African Community Treaty, the East African Community Partner States agreed to adopt measures to achieve the free movement of persons, labour, and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community. To this end, the Partner States concluded the Protocol for the Establishment of the East African Community Common Market. Article 10 of the Protocol guarantees the free Movement of Workers who are citizens of the other Partner States within their territories. Paragraph 2 of Article 10 encourages the Partner States to ensure non-discrimination of the workers of the other Partner States, based on their nationalities, in relation to employment, remuneration, and other conditions of work and employment. Paragraph 7 enjoins the office responsible for employment in a Partner State to facilitate a citizen of another Partner State who seeks employment in the territory of that Partner State to receive the same assistance as would be accorded to a citizen of that Partner State who seeks employment.
- [30] Additionally, under Regulation 13(1) (h) of the East African Community Common Market (Free Movement of Workers) Regulations, Annex II to the Protocol, the same treatment is accorded to the workers from other Partner

⁷ Joseph Kalule Vs Giz LDR 109.2020(Unreported)

States as is accorded to the nationals of the Partner State with regard to access to dispute resolution mechanism and any other right accruing to a worker under the provisions of the national laws of the Partner State. These provisions have been cascaded into **S6 (1) EA**, under which the Industrial Court has a bounden duty to promote equality of opportunity to eliminate discrimination in employment. Further, under **S6 (2) EA**, the Industrial Court has a duty to "promote and guarantee equality of opportunity for persons who, as migrant workers, or as members of their families, are lawfully within the territory of Uganda. As the law stands, the protection would be open only to lawful migrant workers, thus the need to regularize immigration status.

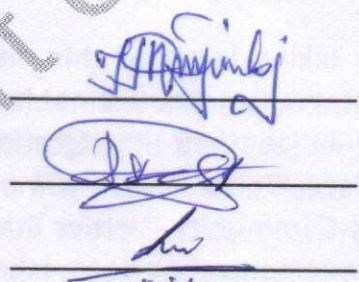
Dated and signed in chambers at Kampala this 6th day of Sept 2023.



Anthony Wabwire Musana,
Judge, Industrial Court

THE PANELISTS AGREE:

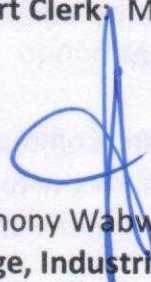
1. Hon. Jimmy Musimbi,
2. Hon. Robina Kagoye &
3. Hon. Can Amos Lapenga.



Award delivered in open Court this 6th day of September 2023 at 9.59 a.m. in the presence of:

1. **For the Claimant:** Mr. Joshua Okanya
Claimant in Court.
2. **For the Respondent:** None.

Court Clerk: Mr. Samuel Mukiza.



Anthony Wabwire Musana,
Judge, Industrial Court