THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE No. 185 OF 2017

ARISING FROM LABOUR DISPUTE REF 16/03/2017

EMALU PATRICK :: CLAIMANT

VERSUS

ROOFINGS UGANDA LTD :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE:

THE HON. AG HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. MR. EBYAU FIDEL

2. MS. HARRIET MUGAMBWA NGANZI

3. MR. FX MUBUUKE

AWARD

REPRESENTATION

The Claimant was represented by Mr. Francis Ogwado of M/s FX Ogwado & Co. Advocates, Kampala and the Respondents by Mr. Alex Tusiime of M/s Lukwago & Co. Advocates, Kampala.

BRIEF FACTS

On 12/11/2002 the Respondent employed the Claimant as an Assistant on trial. On 27/12/2002 he was appointed to the position of Audit Assistant on 3 months' probation and confirmed on 03/03/2003. On 18/02/2010, he rose through the ranks and was promoted , from the position of Senior Executive Internal Audit to Assistant Manager. On 23/06/2016 he was terminated from the service of the Respondent on grounds that he was scheduled for an appointment at Roofing's Manufacturing (Rwanda) Ltd. He contends that he was not paid any terminal benefits, salary arrears for the months of September to October 2016, severance allowances for the time he initially worked in Rwanda While still at the Respondent, transport refund and accumulated leave days as particularized at pages 42 to 44 of his trial bundle.

His claim is for compensation for unfair dismissal, recovery of all terminal benefits, salary arrears , unpaid allowances, general damages and costs of the suit.

ISSUES

1. **Whether the Claimant's employment was terminated fairly/lawfully?**
2. **Whether the Claimant is entitled to Severance Allowance if so how much?**
3. **Whether the Claimant is entitled to remedies sought?**

SUBMISSIONS

OBJECTIONS ON POINT OF LAW

Counsel for the Respondent raised a Preliminary objection(PO) to the effect that, the claim as presented is barred by limitation of time and he believed that the disposal of this PO, would dispose of the entire claim. It was the submission of Counsel that the Claimant filed the claim outside the time prescribed under section 71(1) and(2) having filed his complaint before the Labour officer 8 months after his alleged unfair termination. He cited **Emmanual Lubandi vs Uganda Electricity Generation Company Ltd(LDC No. 104/2015,** in which this court struck out the claim on grounds that the Labour officer had not exercised his discretion to entertain the matter out of time. Counsel asserted that the Labour officer in the instant case did not exercise his discretion handle his case out of time, therefore it should be dismissed for being time barred..

In reply Counsel for the Claimant stated that, this Court in Lubandi(supra) noted that section 71 was not absolute and the holdings in **Kiwalabye vs Uganda Cr Appeal No. 143/2001** and **United Bank of Africa vs GMBH** on which this court relied in Lubandi(supra), were to the effect that, a Labour officer can only be understood to have exercised his discretion under section 71(2) of the Employment Act if he or she (a) addressed his or her mind to the circumstances under which the complaint was filed out of time and made a decision, (b) Entertains or handles the complaint and makes a decision even if he gives no reason why he entertained it out of time. According to Counsel, on 18/07/2017, the Labour officer in the instant case, made a decision to refer the matter to this court for resolution, therefore, he exercised his discretion under section 71(2) of the Employment Act, to entertain the matter, therefore this objection should fail.

Decision Of Court

The law on limitation, provides that for time-limits for different causes of action within which an aggrieved person can sue for redress. A case brought before a Court after the time-limit would be out of time and qualifies to be struck out. Limitation is an absolute defence to a claim. It bars an action from commencing after the expiry of the prescribed time. Under ***Section 3(1)(d) of the Limitation Act Cap. 80***, an action to recover any sum by virtue of any enactment (except penalty or forfeiture) shall not be brought after the expiration of six years from the date on which the cause of action arose and an action in contract, tort or certain other actions cannot commence six years after the cause of action arose.

Section 71(2) of the Employment Act, 2006, provides that:

"(2) A complaint made under this section shall be made to a Labour officer within three months of the date of dismissal, or such later date as the employee shall show to be just and equitable in the circumstances."

The Court of Appeal in John Eric Mugyenyi vs Uganda Electricity Generation Co. Ltd, CA No. 167 of 2018, held that:

"... section 71(2) is not a limitation period for the commencement of any action in a court of law or a court of Judicature... a limitation period is a bar to an action, but section 71(2) of the Employment Act just prescribes the period within which to lodge a complaint with the Labour officer with the rights of the Labour officer to allow the complaint outside a period of three months. It does not limit the Labour office as to when to allow the application. It only requires the complainant to justify the filing of the complaint outside the period of three months. In this case the Labour officer without making notes allowed the complaint to be filed. In any case, he had powers to abridge the time within which to allow the complaint to be filed..."

The import of this holding is that Section 71(2) grants the Labour office discretion to entertain a matter which is filed outside the time prescribed thereunder and the Labour officer need not give any reason why he or she exercised discretion to entertain a complaint filed outside the time prescribed under the section. Therefore, the Labour Officer in the instant case having entertained the complaint even if it was filed outside the time prescribed under section 71(2) and having made a decision to refer it to this court for further management, the matter is properly before this court. We therefore find no merit in the PO, it is overruled.

RESOLUTION OF ISSUES

ISSUE 1

Whether the Claimant's employment was terminated fairly/lawfully.

It is trite that, the employers right to terminate an employee he or she no longer wants cannot be fettered by Courts so long as the employer follows the correct procedure for termination/dismissal in as laid down under **Articles 28 and 44 of the Constitution** and Section 58 and 70(6) of the Employment Act 2006. (Also see **Hilda Musinguzi vs Stanbic Bank SCCA No. ....**) Where an employee intends to dismiss the employee on grounds of poor performance or misconduct, however, Section 66 of the employment Act makes it mandatory for him or her to notify the employee in a language the employee understands, about the nature of the offence the employee is accused of, to give the employee sufficient time to prepare and appear before a disciplinary committee, which after considering the response/defence to the accusation, without any bias gives issues a verdict. Sections **58 and 68** further provide that the employer must give the employee notice before dismissal and must prove that the reason for dismissal genuinely existed and it was justifiable respectively.

The High Court in **Ebiju James Vs Umeme HCCS 0133/2012,** summed up the procedure to be complied with as follows:

i. Notify the employee of the nature of the offence.

ii. Give the employee sufficient time to prepare a reply.

iii. Constitute an impartial tribunal.

iv. Give the employee sufficient time to defend the accusation which includes calling evidence.

v. Give the employee chance to appear with a person of his choice who should be allowed to make representations.

vi. Give the employee chance to cross examine the witnesses against him or her.

vii. Prove the commission of the offense by the employee.

viii. Make a decision.

The Claimant's contention as we understand it is that he was unlawfully terminated for misconduct and not because of an impending appointment to Roofings Rwanda.

After carefully analyzing the evidence on the record, we established that, on 23/06/2016, the Respondent's Director Technical Sheikh Arif, issued the Claimant with a termination letter which stated in part as follows:

> *"...following your impending appointment at roofing manufacturing Ltd Rwanda, management wishes to inform you that you are released of your service with roofing's limited effective 23rd October 2016.*

Please note that you are hereby required to serve 4 months' notice before handing over Company properties in your possession by the 23rd October 2016 and settling your final Account with accounts as per the Human Resource Policy/ Employment agreement..."

The Claimant received this letter and appended his signature on it on 1/7/2016. He also signed a 1-year contract of employment with Roofing's Manufacturing Ltd Rwanda, on the same date. The contract was to take effect on 23/10/2016. It is not in dispute that the Respondent initiated the termination on the understanding that the Claimant was commencing another contract in Rwanda, therefore it would not be farfetched that to believe that the Claimant accepted the termination in anticipation of his impending employment with Roofing's Manufacturing Ltd(Rwanda).

The letter of appointment seems to suggest that this was a mutual termination, therefore, the assertion by Counsel for the Respondent that an employee must necessarily be accorded a hearing before he or she is terminated, would not be applicable in this case. The Claimant in the instant case signed a termination letter in return for the new employment with Roofing's Manufacturing Rwanda and as stated in the letter he undertook to serve the notice period of 4 months. A further scrutiny of the contract did not indicate that the contract was a decoy intended to hoodwink the Claimant into believing that the reason for his termination reasonably existed.

The Labour case in **Mtati vs Kpmg (Pty) Ltd BLL 315(LC),** cited in the Kenyan Case of **Kennedy Obala Oaga vs Kenya Ports Uthority ELR cause No. 339 0f 2016,** held that the authority to discipline the employee is based on the existence of a contract of employment. Without a contract, there is no authority. Therefore where

an employee has given notice of resignation and is serving a notice period, the employer retains jurisdiction to discipline the employee until the notice expires.

It is not in dispute that while the Claimant served his 4 months termination notice, the Respondent assigned him work in Rwanda. Which clearly indicated that he was still the Respondent's employee. In light of the **Mtati vs Kmpg**(supra),the Respondent had jurisdiction over him as an employee including power to discipline him, until the expiry of the notice period. The evidence on the record did not show that the Respondent initiated any disciplinary proceedings against the Claimant, regarding allegations that he had not accounted for an advance, but rather that it initiated his termination at the Respondent in return for new employment in Rwanda. and the Claimant accepted to terminate the employment after serving the notice period of 4 months. Therefore, in addition to mutually agreeing to the termination of his contract, with the Respondent, the Claimant remained an employee of the Respondent until the expiry of his contract.

In the circumstances we respectfully do not agree with Counsel for the Claimant that the new contract with Roofing's Rwanda was intended to oust the Jurisdiction of this court, because we found no nexus between the terms of the impending contract with Roofing's Manufacturing Rwanda Ltd and his contract with the Respondent. In any case the issue for resolution is the termination of the contract between him and the Respondent and not the impending new contract, had not commenced by the time of the termination moreover which was clearly under a foreign jurisdiction (Rwanda).

We found nothing on the record to indicate that he was coerced to accept the new contract to warrant this court to conclude that it was intended to oust the Jurisdiction of this court. We are further fortified by the fact that he signed the contract on

1/07/2016, and it was scheduled to commence on 23/10/2016. We further found the contention by Counsel for the Claimant that, the Respondent had occasioned an illegality untenable and Section 27 which provides for the variation or exclusion of the provision of the Employment Act 2006 in any contract of employment would not apply to the new contract, because it was governed by the laws of Rwanda and not the Employment Act. The section provides that:

> *"(1)Except where expressly permitted by this Act, an agreement between an employer and an employee which excludes any provision of the Act shall be void and of no effect.*
>
> *(2)Nothing in this section shall prevent the application by agreement between the parties of terms and conditions, which are more favourable to the employee than those contained in this Act.*

We reiterate that, the new contract being governed by a foreign legislation, this section is at not applicable to it. The claimant testified that he occasionally worked in the same entity in Rwanda, albeit on temporary terms and particularly that, in November 2015, he was involved in setting up the Rwanda office. He said *"... I accepted the offer of Rwanda because the terms and conditions in Rwanda were different from what director had directed..."*.

As already discussed the Respondent assigned the Claimant the responsibility of setting up an office in Rwanda and training of staff. We also established that, while undertaking this assignment he was accused of advancing himself money and failing to account for it. His testimony seemed to suggest that did he took some advances in addition to receiving his salary and allowances, but he accounted for all the money, as evidenced under exhibit CEX15 at page 51 of his trial bundle. We had an opportunity to scrutinize CEX15, which showed that he did apply for an advance,

he testified that:*"... I was answering to Roofings Manufacturing at the end of my notice period of 23/10/2016... some advances were taken before and after ..."* RW1, Dibyendu Banerjee, the group commercial manager, testified that the Claimant committed this infraction towards the end of his termination notice period during which ,*"... he was given temporary transfer to Rwanda..."* According to him this infraction resulted in the cancellation of the impending contract with Roofing's Manufacturing Rwanda Ltd, after the Claimant admitted liability when he wrote to the ED apologizing for not accounting for money.

Having established that the Respondent had jurisdiction over him as his employer because he was still serving his termination notice, it is our considered opinion that he was entitled to be subjected to the proper disciplinary procedures as prescribed by laws of Uganda, before termination.

In the circumstances the argument that, he should have been subjected to laws of Rwanda and its manual cannot hold. Even if he submitted his apology to Executive Director of Roofings Manufacturing, he was on assignment by the Respondent, before the commencement of the contract with Rwanda and this was confirmed by RW1, when he said that: *"...yes the claimant worked in Rwanda , in July 2015-0ctober 2016, ... yes he was on temporary transfer... he was entitled to only salary and allowances...he was under the payroll of Roofings (Uganda) ltd...after the temporary assignment he was supposed to get new contract with Rwanda in October 2016...."* . This testimony clearly demonstrates that, even if he submitted his apology to ED Roofings (Rwanda), he was answerable to the Respondent who assigned him the role, while he was still serving the 4 months' termination notice. He was still under the jurisdiction of Roofings (Uganda) Ltd, the Respondent and not Roofing's Manufacturing (Rwanda).

We respectfully do not associate ourselves with the submission by Counsel for the Claimant that, the Rwandan contract was a decoy to hood wink the Claimant because as already discussed, he did not adduce any evidence to indicate that he was coerced to sign it and by appending his signature to the contract he demonstrated that, he understood and accepted the terms of the contract, therefore he cannot approbate and reprobate. Although it was his testimony that he protested internally, he did not adduce any evidence to prove it. We are not convinced that he did. We are also not convinced that the assignment he was given by the Respondent in Rwanda was covered under the new contract, or that it was construed in accordance with the laws of Rwanda. In addition, we found nothing on the record to indicate that the forum for dispute resolution regarding the assignment was the laws of Rwanda or that the parties agreed that the assignment would be considered under the exclusive jurisdiction of the Rwandan Courts as provided under paragraph 8 of the new contract. Most importantly, we strongly believe that the Claimant was at liberty not to subject himself to the terms of the contract if he was not in agreement with the terms therein.

Having established that, the assignment he undertook during the notice period was given to him by the Respondent, and he carried it out while serving his termination notice, we reiterate that he was under the jurisdiction of the Respondent and not that of Roofing's Manufacturing in Rwanda. His contract with the Respondent was still subsisting until the expiry of the notice period.

The Claimant admitted under REX 3, that, he took advances and did not account for some of them and as a result, the Respondent canceled his impending contract with Roofing's manufacturing Rwanda, on 12/10/2016, before its commencement.

Therefore, having admitted to committing the infractions, leveled against him, while serving his termination notice, the Respondent which had jurisdiction to discipline him during the notice period, had no obligations to subject him to disciplinary proceedings since he had admitted. (see **Kabojja International School vs Godfrey Owesigyire LDA No. 003 of 2015).**

In the circumstances, given that the Claimant mutually agreed to terminate his contract on 1/7/2016, effective, 23/10/2016, even if the agreement to terminate was initiated by the Respondent, and in the absence of any other termination letter, it is our finding that the issues regarding accountability of advances arising from the assignment in Rwanda, which occurred after the mutual agreement to separate, did not affect the new contract in Rwanda which was to take effect on 23/10/2016.

We are satisfied that the Claimant agreed to relinquish his employment contract with the Respondent in anticipation of his new employment with the Rwandan entity and even if the issues regarding his taking of advances arose after he had mutually agreed to separate from the Respondent, he was still the Respondent's employee. However, even if the Respondent had Jurisdiction to discipline him, his admission of the infractions exonerated the Respondent from subjecting him to disciplinary procedures(Kabojja(Supra) and by cancelling his impending contract with Roofings manufacturing Rwanda instead, had no effect on the termination of his contract with the Respondent, which he mutually agreed to terminat.

Therefore, this issue is decided in the negative.

Issue 2

Whether the Claimant is entitled to Severance Allowance.

It was the evidence of RW1 that the Respondent was still willing to pay Claimant his terminal benefits as calculated by the Respondent after he cleared with it, in accordance with the Respondent's Human Resources Manual, he is therefore entitled to these benefits.

Having undertaken to pay him his terminal benefits as provided in the Human Resources Manual, the Respondents argument that he was not entitled to severance pay cannot hold. This is because Clause 24.1 of the Human Resources Manual provides that on cessation of employment (under restructuring,/redundancy, retirement, expiration of contract, resignation with appropriate notice) the employee shall be entitled to receive severance pay/terminal benefits plus any accrued leave and outstanding wages for the period worked. Although Counsel submitted that he should be paid in accordance with **Donna Kamuli vs DFCU Bank LDC No. 002 /2015** in which this court awarded a severance pay at the rate of 1 month per year served, where there was no formula for calculating severance as is required under section 89 of the Employment Act. The Respondent's HRM laid down the formula as follows:

i) On Probation – o days gross
ii) 3months -1 year – 14 days gross pay
iii) 1-2 years 30 days gross pay
iv) 2-3years 45 days gross pay
v) 3-5 years 2 months gross pay
vi) 5-7 years 2 ½ months gross pay
vii) 7-10 years- 31/2 months gross pay
viii) Over 10 years -15 days per completed year of service

The Claimant served the Respondent for 14 years , therefore he is entitled to15 days per completed year of service as provided under clause 24.1(Viii)(Supra) amounting to Ugx.5,161,000/= monthly salary divided by 2 amounting to Ugx. 2,580,500- for each of the 14 years served totaling to Ugx 2,580,500 x 14 years = **Ugx. 36,127,000/ as severance Pay.**

What other remedies are available to the parties?

a) Special Damages

He claimed for special damages as particularized under CEX 42 and as rightly stated special damages must be strictly proved. We respectfully are not persuaded by **Kalemara Godfrey& Others vs Unlever & Another ULR 2008,** relied on by Counsel for the Claimant, for the proposition that, although it was a requirement to strictly prove special damages, one need not rely on documentary evidence to do so. The Claimant in this case omitted to provide any form of evidence to prove the special damages claimed, therefore we had no basis to grant them. They are therefore denied.

b)General damages

Having established that the Claimant's termination was mutually agreed and he admitted to the commission of the infractions leveled against him, he is not entitled to an award of General damages. They are denied.

c)Aggravated Damages

We found no basis to award Aggravated damages. They are denied.

The Claimant having been lawfully dismissed; he is not entitled to any other remedies arising from this claim.

In conclusion, save for the terminal benefits which the Respondent conceded to pay and is ordered to pay and the award of **Ugx.36,127,000/-** as severance pay, the rest of the claim fails. No orders as to costs is made.

Delivered and signed by:

THE HON. AG HEAD JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. MR. EBYAU FIDEL

2. MS. HARRIET MUGAMBWA NGANZI

3. MR. FX MUBUUKE

DATE: 23/8/2023