THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT MBARARA
LABOUR DISPUTE REFERENCE NO. 03 OF 2023
(Arising from Labour Dispute Reference No. CR/MC/002/2022)

ROSE KYOBUTUNGI ::CLAIMANT

VERSUS

NIC GENERAL INSURANCE COMPANY LTD:::RESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana:

Panelists:
1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

Representation:

1. *Mr. Bright Bujara Arinaitwe of M/S Muhumuza-Kiiza Advocates & Legal Consultants for the Claimant.*
2. *Mr. Kenneth Mugira of M/S Kyagaba & Otatina Advocates for the Respondent.*

AWARD

Introduction

[1] The Claimant, Rose Kyobutungi, joined the Respondent in 1996 at its Mbarara Branch as Tea girl, Typist, Messenger and Cleaner. She eventually became Branch Secretary until the 7th of March 2022, when Mr. Moses Ouma, the Respondent's Coordinator of Branches *(from now BC)* asked her to stop working. She wrote to the Respondent's Human Resources Manager *(from now HRM)* seeking intervention. The HRM did not respond. She then lodged a complaint of illegal, unfair, and unjustified dismissal with the Labour Officer at Mbarara city. In response, the Respondent contended that the Claimant was not its employee but an independent contractor who had committed fraud and embezzled funds and her services were terminated. Following a failure to resolve the issues, the Labour Officer referred the matter to this Court.

[2] In her memorandum of claim, the Claim sought a declaration that she an employee of the Respondent who was unfairly and wrongfully terminated. She asked for UGX 50,000,000/= in aggravated damages, UGX 61,000,000/= in general damages, a declaration that she was unfairly and wrongly terminated, severance allowances, a certificate of service, interest, and costs of the dispute. In its reply, the Respondent maintained that the Claimant was an independent contractor and not its employee.

The issues

[3] On the 11th of December 2023, when the case file was called before us, the following issues were framed for determination, namely;

(i) *Whether the Claimant was an employee of the Respondent or an independent contractor?*

(ii) *Whether the Claimant's termination was unfair and wrongful? and*

(iii) *What remedies are available to the parties?*

The Claimant's evidence.

[4] The Claimant testified to having started out in 1996 as a tea girl, typist, messenger and cleaner and working through the ranks to become Branch Secretary at the Respondent's Mbarara Branch. She was paid UGX 37,500/= from 1996 to 2000, which was increased gradually to UGX 337,000/=. In 2020, when the Respondent's Manager, Mr. Edward Kakuyo, retired, he handed the caretaking to her until a new Manager was appointed. On 7th May 2022, she received a phone call from Mr. Ouma, informing her that she had been dismissed from employment on charges of embezzlement. That there was no investigation or notification of a hearing.

[5] Under cross-examination, she conceded to not having an appointment letter or any communication from the Respondent's Human Resource Department *(from now HRD)*. She did not familiarize herself with the recruitment procedure, did not have any pay slips and did not know if any taxes were deducted from her salary. She admitted that she did not make any NSSF contribution. She told us that she did not know that the payment of UGX 337,000/= was a motivation allowance. In re-examination, she confirmed that in 2002 she replaced the late Twinabo as Secretary.

[6] **Mr. Charles Byamukama** (CW2) testified that when he joined the Respondent in 2003, the Claimant was running the Respondent's Mbarara office as Secretary and continued to do so until he left three years later. The Claimant was paid a salary at the same time as other employees, and he was certain she did not cause any financial loss. He was shocked at her termination. Under cross-examination, he admitted that the Claimant did not show him an appointment letter, but her name was on the lists every time she signed for salary. He also told us that she contacted him in 2022 to tell him that she had been terminated. In re-examination, he told us that his salary was paid in cash, and he acknowledged receipt on a piece of paper.

[7] **Ms. Amumpaire Jenianah Battaka**(CW3) told us she worked in Mbarara from 2018 to 2020. She also told us that the informed her of the termination without a fair or disciplinary hearing on charges of embezzlement. In cross-examination, she confirmed that the basis of her information was as a Sales Representative between 2018 and 2020, and from mentorship by the Respondent and Mr. Kakuyo. She confirmed that she was not the Claimant's supervisor and did not have visibility of the Respondent's funds. She did not know the terms of the Claimant's employment. In re-examination, CW3 told us that the Claimant was responsible for issuing a receipt for policies and for payment of commissions to sales agents.

[8] The Claimant's final witness, **Ms. Annet Kyogabirwe** (CW4), testified that the Claimant had asked her to be her guarantor for the position of Secretary, and she signed a guarantor form. The Claimant informed her that the Respondent had terminated her without a fair or disciplinary hearing. In cross-examination, she said that the Claimant was her sister who had never stolen anything. In re-examination she told us she had seen the Claimant working with the Respondent as a Secretary for a long time.

The Respondent's evidence.

[9] The Respondent called two witnesses. Ms. Susan Nampiima (RW1) testified as Acting Head of Human Resources and told us that the Respondent's Branches were headed by a Branch Manager, an employee of the Respondent, recruited through a process involving internal recruitment or advertising, shortlisting and interviews. She told us that a Branch Manager is supervised by the Branch Coordinator and is authorized to hire commissioned brokers and other independent service providers such as a Tea girl, Cleaner and Branch Secretary. That the Branch Secretary was not in the Respondent's employee databases as Human Resources did not play a role in their firing or termination. It was her evidence that the claim did not have merit.

[10] In cross-examination, RW1 confirmed that she had not seen the Claimant's name in the Respondent's HR records and that secretaries were not classified as employees. She told us that the HR policy defines an employee as a person who has agreed to work for some form of payment under a contract of employment. She was shown the Terms of Reference (TORs) in JEX1 and maintained that the Mbarara Branch had only one employee, the Branch Manager. She confirmed that when Mr. Kakuyo retired in 2020, his successor, Christine Birungi, reported on 12th April 2021, and during the interim period, the Branch Coordinator *(from now BC)* was in charge. She told us that there were no records of the Claimant as an employee in the Respondent's archived records and that the Claimant was a freelancer.

[11] In re-examination, she confirmed that the Claimant was working daily, but she wasn't required to do so and was free to come in and leave at any time.

[12] **Mr. Moses Ouma** (RW2) testified that as BC, he oversaw all seventeen of the Respondent country-wide Branches and supervised Branch Managers *(from now BM)*. He confirmed that BMs were authorised to hire a Branch Secretary in consultation with the BC purely on an independent basis and not as an employee of the Respondent. He told us that the

TORS may differ from Branch to Branch and would be set by the BM. He said that the Branch Secretary was entitled to a motivation allowance of UGX 337,000 which was not subject to NSSF and PAYE deductions. He also said that an audit in 2022 showed that the Claimant had received more premium than she was recording, and her services were terminated on the 7th of March 2022.

[13] In cross-examination, he said that as a BM in Busia, he had sales agents and did not have a Secretary. He also said that secretaries were independent contractors and not employees. His Secretary in Busia did not carry out receipts or banking. He confirmed receiving Mr. Kakuyo's handover report on 2nd December 2020 and indicated that the typewriter at the Mbarara Branch belonged to the Claimant. He insisted that she did not have a definite term of employment but was paid a monthly amount. She was also given money to cover the cleaner's salary, detergent, office tea, sanitizer, and envelopes to maintain the Branch. He confirmed that he told the Claimant not to return to work, and at this time, the Branch was under his control. He also confirmed that the Claimant was terminated because of embezzlement of UGX 18,000,000/=. He also told Court that he did not follow up on the case that was reported to the Uganda Police.

[14] In re-examination, RW1 said that the Claimant was maintaining the Branch under his instructions and the TORS were in respect of independent contractors. He also told us that the handover to Christine Birungi was gradual because of the nature of the insurance business.

Analysis and Decision of the Court

Issue I: Whether the Claimant was an employee of the Respondent or an independent contractor?

[15] Relying on **Charles Lubowa & Anor v Victoria Seeds**[1] it was submitted for the Claimant that an independent contractor works under a contract and controls the means and the way work is performed while an employee is subjected to the organization's procedures and performs part of the regular business of an employer and he or she must follow specific instructions on how to perform the work. It was argued that CW1, CW2, CW3, and CW4 had confirmed that the Claimant was an employee of the Respondent as a Secretary at the Mbarara Branch and the TORs were written terms of employment. It was also submitted that she was paid a monthly salary, reported to the BM, provided day-to-day management of client needs and had key result areas. RW2 confirmed that stickers sold were manufactured by the Uganda Insurance Association and picked up by the Respondent. It was argued that there was no room for the Claimant to exercise any form of independence, she did not have control over the work to be done, how, when and with whom it was to be done. She was required to render a personal service solely on the Respondent's terms. As such she was an employee and not an independent contractor.

[1] LDR 185 of 2016

[16] For the Respondent, it was submitted that the control, integration, and economic and business reality tests were not applicable as the BM at Mbarara did not have the authority to hire another employee. That the Claimant had walked into the Branch in 1996 and asked to do any work. That she was not named in any databases and was not supervised by Human Resources. Under the principle of freedom of contract, the Claimant was barred from seeking to be excused from the terms accepted as her contract and on the authority of **Printing and Numerical Registering Co. v Sampson**[2] public policy demanded that the Court enforce the contract between the parties. It was suggested that the Court was not invited to consider freedom of contract in **Geofrey Kamukama v Makerere University Business School**[3] and had it done so, it would have found that the Claimant therein was bound by his contract as an independent contractor. It was also submitted that any finding that the Claimant was an employee would have far-reaching ramifications for the Respondent that had found a very good bargain and would open a floodgate of claims by ex-Branch Managers. We were asked to determine issue 1 in the negative.

[17] In rejoinder, it was suggested that the Respondent was exploiting its other staff by categorizing them as independent contractors when the Respondent controls the scope of their employment. Counsel cited **Ready Mixed Concrete(Southeast) Ltd v Minister of Pensions and National Insurance[1968] 2 Q B 497** [4], for the master and servant proposition of an employment relationship and asked this Court to qualify the Claimant by virtue of her role as Branch Secretary. In respect of actual, implied, or ostensible authority, Counsel cited **Freeman & Lockyer v Buckhurst Park Properties(Mangal) Ltd**[5] for the proposition that if a person allows another to believe that a state of affairs exists with the result that there is reliance upon such belief, that person cannot afterwards be allowed to say that the state of affairs was different. Counsel suggested that this was the essence of CEX1. This Court was also asked to stem the exploitation of workers miscategorized as independent contractors.

Determination

[18] The determination of whether the Claimant was an employee or independent contractor has a bearing on the jurisdiction of this Court. This Court has under **Section 94 Employment Act 2006** *(from now EA)* and Section 5 of the Labour Disputes (Arbitration and Settlement) Act 2006*(from now LADASA)* jurisdiction to consider labour disputes and appeals from decisions of labour officers. Therefore, for a matter to be properly before the Industrial Court, a person must be an employee as under **Section 2EA**, where employee means any person who has entered a contract of service or an apprenticeship contract, with a labour dispute against an employer which includes a company.

[19] We wish to point out at the start of this determination that the Respondent's submission to the effect that the traditional tests of control, integration, and economic reality in establishing if a contract is of or for services is not applicable is misplaced in the employment sphere. Under **Section 2EA**, the terms employee and employer are defined.

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[2] (1875) 19 Eq 462,
[3] LDR No.147 of 2019
[4] Also reported in (1967)QBD 433
[5] [1964] 2 QB 480

This Court, in a dispute where the issue of employment is brought into question, is entitled to determine whether an employment relationship subsists or subsisted. For this reason, the threshold in **Ready Mixed Concrete**(supra) and other authorities of decided cases stand. It is supported by the doctrines of precedent and stare decisis. Authorities of decided cases have furnished a basis for deciding the question of whether an employer-employee relationship exists. In other words, there is judicial precedent on the point and when the question arises, this Court is bound to follow precedent. The decisions **Charles Lubowa**(supra), **Godfrey Kamukama**(supra) and **Edison Kamukama v Summit Projects Ltd**[6] which shall be discussed in detail below, are examples of the exercise of jurisdiction to attend to the question. Therefore, this Court is well within its jurisdiction to apply the threshold in **Ready Mixed Concrete**.

[20] In **Edison Kamukama***(ibid)* we reiterated the long-held dictum that the distinction between an employee and an independent contractor rests on whether there is a contract of service or a contract for services. **Section 2EA** defines a "contract of service" to include any contract, whether oral or in writing, whether express or implied, where a person agrees to work for an employer in return for remuneration and includes a contract of apprenticeship but EA does not define a contract for services. There is judicial consensus that an independent contractor performs a contract for services while an employee carries out a contract of service.

[21] We were not provided with a formal contract of employment or letter of appointment to immediately subject the question to the initial definitive test based on a contract of employment as defined under **Section 2EA**. However, in **Edison Kamukama***(op cit)*, we cited **Ready Mixed Concrete***(supra)* which was also cited in **Godfrey Kamukama***(supra)*. In that case, Mackenna J. held that there were three conditions for a contract of service:

(i) first that the employee undertakes to provide his or her own work or skill to the employer in return for a wage or other payment,

(ii) secondly the employee agrees to be subject to the employer's control to a sufficient degree to make that other master and

(iii) thirdly that the other provisions of the contract are consistent with it being a contract of service in the end.

[22] The **Ready Mixed Concrete***(ibid)* test has been applied in this jurisdiction. In **Charles Lubowa***(supra)* this Court held that the control test primarily governs the distinction between an employee and an independent contractor. That an independent contractor is a person who works under a contract but is not in the same state of dependence on the employer as an employee is. Whereas the independent contractor controls the means, and the way work is performed, the employee, on the other hand, is subjected to the organization's procedures, is expected to perform part of the regular business of an employer, and he or she must follow specific instructions on how to perform work. An independent contractor usually has a fixed task and is paid on completion of the said

[6] LDR 78 of 2017 Per Wabwire Musana J. Panelists Musimbi, Kagoye, Lapenga

task and is free to delegate work to other workers of his choice without the knowledge and consent of the employer.

[23] Added to the control tests are the integration and economic and business reality tests. In the integration test, the Court would be concerned with whether the employee is subjected to the rules and procedures of the employer rather than personal command. Here, the employees work is primarily part of the business while the independent contractor may perform entries.

[24] Precedent also suggests that modern workplace conditions now require an expanded approach to the test of employee versus independent contractor. In **Edison Kamukama** *(op cit)*, we were considering the question of whether a site agent was an employee or an independent contractor. We observed that English Courts had moved beyond the integration test and applied mixed or multiple tests. We said that in this regard, the courts will balance the factors for a contract of service against those for a contract for services, considering as they do so a range of factors, including the employer's powers of selection and dismissal, the measure of control is exercised by the employer, agreements about the method and amount of remuneration, arrangements for the payment of tax, supplies of tools and equipment, who bears the economic risk in the enterprise, hiring of helpers, responsibility for investment and management, whether the employee can profit from sound management in the performance of a task, how do the parties themselves view their relationship and how are the employees usually engaged in the trade or industry.

[25] The Supreme Court of Canada considered this holistic approach to determining the nature and extent of the employee vs independent contractor relationship in **Ontario v Sagaz Industries Canada Inc**[7]. In that case, the Court observed that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, the worker's opportunity for profit in the performance of his or her tasks. The Court also observed that although the contract designated an employee as an "independent contractor", this classification is not always determinative.

[26] And closer to home, in **Stanley Mungai Muchai v National Oil Corporation of Kenya**[8] Ongaya J. observed that none of the tests on control, integration or economic and business reality can resolve the issue decisively on their own. In his Lordship's view, the issue would be determined by examining the whole of various elements which constitute

[7] [2001] 2 SCR 938; 2001 SCC 59 https://scc-csc.lexum.com/scc-csc/scc-csc/en/1898/1/document.do last accessed 4.9.2024 12.26 am
[8] [2009] LLR 250

the relationship between the parties. In his Lordship's words, this has been called the multiple test.

[27] Following the dicta of the above cases, what is to be discerned is that the traditional tests of control, integration and the economic reality test are not stand-alone tests and the mixed or multiple test is effective in holistically establishing whether an employment relationship exists or not. It goes beyond form and considers the substance of the relationship. To this end, we must therefore ask what the totality of the substantive relationship between the Claimant and the Respondent is. The undisputed evidence is that the Claimant joined in the Respondent in 1996. On her appointment by the BM as Branch Secretary, the BM Mr. Kakuyo, issued her with TORs, JEX1. The TORs indicated that the Claimant reported to the BM and was responsible for providing day to day excellent management of client needs and maintaining complete and correct records. She was responsible for receipting and banking duties for all premiums, updating the cashbook daily and banking premiums. She was also in charge of record keeping, issuing insurance stickers, submitting monthly returns in liaison with BM, maintaining and updating all registers, assisting the BM in monitoring outlet officers, managing office imprest, and providing accountability. In her front desk services, she was responsible for handling and recording all inquiries, advising customers of the Respondent's policies, and routing all customer complaints. She was also responsible for assisting the BM in training new sales agents and outlets officers and any other duties assigned to her by the BM, BC, or the Respondent's Head of Marketing. On the first test is on control, it is impossible to say that the Claimant was not under the control and supervision of the Respondent. She reported to the BM and did not set out how, when and where her tasks were to be carried out. These were very clearly detailed in the TORs, and this was not contested. While she was not listed in the Respondent's employee database, the Respondent's witnesses conceded that Branch Managers were at liberty to contract a Tea girl, Cleaner and Branch Secretary but as independent contractors. For their work, a Branch Secretary was paid a motivation allowance and the Claimant's uncontested evidence is that she was entitled to UGX 337,000/= per month at the time of her termination. The work element which included issuance of stickers, receipting and day to day management of the Branch was not work which the Claimant had full control to determine. The guidelines on how tasks were to be executed was handed down by the Branch Manager. The work that the Claimant did was integral to the business of the Respondent.

[28] On the material before us we are inclined to find on the control and integration tests that the Claimant was not an independent contractor. She was not in complete control of the work but was dependent on the TORS and instructions of the Respondent's BM, BC, or Head of Marketing. It would follow that the detailed TORS dated the 7th day of June 2019 and signed by both the Claimant and the Respondent's employee Branch Manager duly authorized, rendered the Claimant an employee of the Respondent.

[29] Regarding the economic or business reality test, the evidence does not support a proposition that the Claimant was in business for herself or on her own account. She was paid a motivation allowance determined by the Respondent. She was not engaged as an entrepreneur running a business of her own for which she invoiced the Respondent at the end of any period. In her provision of accountability for office imprest for instance,

we were not shown that the Claimant would bear any risk for loss or retain any profit. In essence, she had not set up shop within the Respondent's business premises in Mbarara. The evidence is contained first in a memorandum by BM, Mbarara to Manager (Human Resources) and Chief Manager (Marketing). By this memo, BM asked the Management team to consider the Claimant for formal appointment and he indicated that she had demonstrated commitment from the start in 1996 as a Tea girl. Mr. Edward Nambafu Wakuma BM requested her confirmation in 2006. No evidence was produced to show that there was confirmation.

[30] However, in a memo dated 21st July 2014, the BM requested an upward review of the Claimant's salary from UGX 150,000/= to UGX 300,000/= to match her revised duties as Branch Secretary. This appears to have followed her request for an increment on 24th May 2013 which the BM endorsed with the telling remarks

> *"the staff is very committed to her duties and she has got some third party clients around her and i am of the opinion that an adjustment can be put on her salary in order to boost her morale".*

As BM, Mr. Kakuyo was steadfast in the view that the Claimant was an employee, and we will return to this point shortly. RW1 testified and this was also not disputed that he Claimant earned a motivation allowance of UGX 337,000/= at the time her *'contract for services'* was terminated. It follows that there was an upward revision of the motivation allowance as the RW1 and RW2 called it. What is not in dispute is that the Claimant became the Respondent's Branch Secretary, appointed by the BM.

[31] Therefore, we must ask, as with the dicta in **Edison Kamukama** *(supra)*, what the insurance industry standard is for engagement of a Branch Secretary. In its evidence and submissions before us, the Respondent adverted to an independent contractor approach for all its seventeen Branches. Counsel for the Claimant suggested that this was exploitation. There is some persuasive jurisprudence on the point. In **Jackline Wanjiku Munyua & Another v AAR Health Services Ltd**[9] the High Court of Kenya was considering the question whether an insurance agent was an employee. Applying the common law test of control, Odunga J. found that an agent required to strictly adhere to operate under the guidance of his Manager or any authorized officer of the company and expected to work consistently and according to programme and attend all training organized by the company was an employee. The Federal Court of Australia also took a similar view in **ACE Insurance Ltd v Trifunovski**[10]**.** In that case, the court was considering whether insurance agents were employees and not independent contractors. At paragraph 121 of the judgment, it was found that the agents were carrying on only one business of renewing policies of existing customers and chasing up lapsed and cancelled policies in accordance with the defendant's very active instructions and pursuant to a training schedule. The agent did not generate any goodwill that could be sold.

[32] Similarly, in the matter before us and considering the TORs, the Claimant as Branch Secretary, was not carrying on any business of her own which could generate any good

[9] [2012] eKLR Civil Suit No. 602 of 2009
[10] [2011] FCA 1204

will for her. It was the sole business of the Respondent in the Respondent's business premises in Mbarara under the supervision of the Respondent's employee. In view of and applying the combined persuasive dicta of **Munyua**(supra) and **ACE** (*ibid*) and the principles relating to independent contracting vis a vis contract of services, to the case before us, it is impossible to find that the Claimant was an independent contractor. She was not and, as Branch Secretary of the Respondent, the Claimant was an employee of the Respondent, and we so find. We are fortified in this determination by the best explanation of the notion of an independent contractor by the Employment and Labour relations Court of Kenya in **Jones N. Aunga v Master Quick Services Ltd**[11]**.** In that case, the Court was considering a claim by a debt recovery agent who had verbally agreed to payment of KSHS 20,000 in wages and a commission of 35% on debts recovered. He was dismissed orally without a hearing or payment of terminal dues. Mbaru J. held that the hall marks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as deduction of PAYE(tax in income), will not get annual leave, sick leave, 13th cheque and so on. The Claimant in that case admitted that he earned a commission, and the Court held him to be an independent contractor.

[33] Applying the very persuasive dicta in **Aunga**(ibid) and the other authorities cited in this award to the facts of the matter before us, we do not find evidence of hallmarks of an independent contractor present in Ms. Kyobutungi's case. We must arrive at the inescapable conclusion, on the material before us, that the Claimant was an employee and not an independent contractor. Issue one will be answered in the affirmative. We declare that the Claimant as Branch Secretary with specific Terms of Reference (TORs) was an employee of Respondent.

[34] The Respondent made two other defensive arguments.

[35] First, we were invited to consider the principle that courts should not interfere with settled contracts as per Sir Jessel Goerge in **Printing and Numerical Registering Co.** *(supra).* In that case Sir George, Master of the Rolls, was considering the doctrines of illegality and immorality in an assignment agreement. His Lordship held the view that he could not extend public policy considerations in interfering with freedom of contract after the contract had been made. We think Sir George's dicta not to be particularly applicable in employment disputes because the object of employment legislation is to balance the employment relationship where the employee does not have the same bargaining power as the employer. In the present case, the Court's inquiry is in classifying the contract either as contract of services or a contract for services. With the greatest of respect to learned Counsel for the Respondent, this is very much within the Court's ambit. It is not interfering with the party's freedom to contract and thereby upsetting 'a very good bargain' for the Respondent as put forth by Counsel. It is the role of the Court to ensure a balance. We are fortified in taking this view by the decision of Rika J. in **Kenya Shoe and Leather Workers Union v Falcon Tanners Ltd**[12] where the Court observes that

[11] [2021] eKLR Cause No. 451 of 2016

[12] [2012] LLR 219

contractual principles such as freedom of contract, privity of contract and capacity to contract do not have the same influence on labour contracts, as they do upon other forms of contract.

[36] The other proposition by Counsel for the Respondent was that a finding that the Claimant is an employee would open a floodgate for perceived unlawful termination claims by ex-Managers. Counsel for the Respondent suggested to us that the BM was authorized to hire commissioned brokers and independent service providers including a Branch Secretary. This point was resolved by the Industrial Court of Kenya in **Kenya Plantation and Agricultural Workers Union v Rift Valley Bottlers/Rive Flora Limited**[13] where Ongaya J. observes that employers organize their business around multiple layers of insulating personalities, corporate and individuals in an attempt to avoid regulatory burdens. In the courts view, the law aims to assist the lesser of the parties in the bargaining equation by making it possible for a weaker party to proceed and apportion liability to any decision-making component of the economic enterprise. We find this persuasive decision applicable to the instant case because the Respondent concedes that it got a very good bargain by distancing itself and its human resource function from its Branch secretaries who were performing, as we have found, an integral function under the control of its Branch Managers. The import of the decision in **Kenya Plantation and Agricultural Workers Union** *(ibid)* is to distance from employment disputes, age old and accepted dicta like corporate personality defences. And there is ample proof of this proposition in **Section 2EA** which includes, in the definition of an employer, a person or group of persons, a governing body of an unincorporated association or other institution or organization whatsoever. In the employment sphere, therefore, there is to be an approach that supports unveiling of ordinarily acceptable legal shields. For this reason, we are unpersuaded that the perceived threat of a floodgate of actions by ex-Branch secretaries should be a compelling reason for this Court not to find that the Claimant was an employee of the Respondent. We respectfully decline to accept the argument.

[37] In the result, issue one will still be answered in the affirmative.

Issue II: Whether the Claimant was terminated and if whether that termination was lawful?

[38] The accepted standard and fair labour practice on any dismissal or termination of a contract of employment is that **an employer has an unfettered right to terminate its employee provided it follows procedure.**[14] We have established that the Claimant was an employee of the Respondent. It is also undisputable she was dismissed by RW2, Mr. Charles Ouma. The only other question is whether the Respondent followed procedure?

[39] The Respondent concedes, through RW2, that there was an audit in the beginning of 2022 which revealed that the Claimant was receiving much more premiums than she recorded in the receipt book, and which was higher than the value of the insurance stickers. At paragraph 11 of his witness statement RW2 said upon the strength of the

[13] Industrial Cause No. 691 of 2009

[14] Per Mwangushya J.S.C *(as he then was)* in S.C.C.A No. 28 of 2012 Hilda Musinguzi vs Stanbic Bank (U) Limited SCCA 28/2012, See also Bank of Uganda v Geoffrey Mubiru S.C.C.A. No. 1 of 1998.

report from the Respondent's Internal Auditor, on the 7th of March 2022, he terminated the Claimant's services. The Claimant in her witness statement says she received a telephone call from RW2 on the same day directing that she had been dismissed from her employment. This dismissal is a summary dismissal consistent with **Section 69(1)EA** which provides that summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which an employee is entitled by any statutory provision or contractual term. There was no notice and as such this was a summary dismissal.

[40] Under **Section 66(1) EA**, it is provided that before reaching a decision to dismiss an employee on grounds of misconduct or poor performance, the employer shall explain to the employee the reason for which the employer is considering dismissal. The employee is entitled to have another person of his or her choice present during the explanation. There was no such hearing and for this reason we find that the Respondent unfairly dismissed the Claimant. The Respondent did not also prove the reason for termination as required under **Section 68(1)EA**. Therefore, and for the reasons laid out above, we find that the Claimant was unlawfully dismissed from her employment, and she would be entitled to a declaration to that effect.

Issue III: What remedies are available to the parties?

Damages

[41] The Claimant sought general damages in the sum of UGX 61,000,000/= and aggravated damages in the sum of UGX 50,000,000/= on the ground that she had served for over a decade at the time of her termination, was earning UGX 337,000/= per month and was subjected to falsified criminal charges to terminate her employment.

[42] It is trite that an unfairly dismissed employee is entitled to damages. General damages are those damages such as the law will presume to be the direct natural consequence of the action complained of[15]. In **Stanbic Bank (U) Ltd v Constant Okou**[16] it was held that general damages are based on the common law principle of *restituto in integrum*. In the case before us, the Claimant was unfairly and unlawfully dismissed. Counsel for the Respondent argues that the sum of UGX 61,000,000/= was extortionate implying from the ordinary meaning of extortion, an attempt to obtain damages by some action of illegal means, force, or coercion. We think, from a broad range of authorities that any claim for general damages before the Courts of law cannot be an exercise of extortion because there are principles that guide a grant of the remedy. In this Industrial Court the guidelines include the prospects of the employee getting alternative employment or employability, how the services were terminated, and the inconvenience and uncertainty of future employment prospects. In **Donna Kamuli v DFCU** [17] the Industrial Court considered the earnings of the Claimant, age, position of responsibility, and contract duration to determine the damages awardable. In the present case, the Claimant joined the Respondent in 1996 and served until March 2022. She was earning

[15] Stroms v Hutchinson [1950]A.C 515
[16] Civil Appeal No. 60 of 2020
[17] LDC No. 002 of 2015

UGX 337,000/= per month and was unfairly summarily dismissed. The Respondent proposed, if this Court was inclined to grant general damages, a sum of UGX 3,000,000/=. We think that the proposition is reasonable in principle, but we do not agree that the quantum proposed is adequate. Considering these and all circumstances, including the Claimant's monthly pay and service period, we would grant the Claimant the sum of **UGX 8,088,000/=** in general damages.

[43] In respect of aggravated damages, the Respondent submitted that there was no malice or arrogance on its part, and it only believed the Claimant to be an independent contractor. That her arrest and detention by the Uganda Police was at the discretion of the Police. In **Aporo George Goldie v Mercycorps**[18] we cited the principle considerations for an award of aggravated damages enunciated in **Bank of Uganda v Betty Tinkamanyire** [19] where Kanyeihamba J.S.C found illegalities and wrongs of the Appellant in terminating the Respondent were compounded further by its lack of compassion, callousness, and indifference to the good and devoted services the appellant had rendered to the bank. In the case before us, we are not persuaded that the Claimant has laid forth any particularly aggravating circumstances to warrant an award of aggravated damages.

[44] **Section 87(a)EA** provides for severance pay where an employee is unfairly dismissed and has been in continuous service for six months or more. The Industrial Court, in **Donna Kamuli v DFCU Bank Ltd,**[20] held that the calculation of severance shall be at the rate of monthly pay for each year worked.[21] In the circumstances of the Claimant's 26-year service and taking her last salary of **UGX 337,000/=,** we would grant the Claimant the sum of **UGX 8,762,000/=** as severance pay, which we award.

[45] Under Section 8(2a)(d) of the Labour Disputes(Arbitration and Settlement) Amendment Act 2021, this Court may make orders as to costs as it deems fit. We have held that 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 culpable of some form of misconduct.[22] We do not think in the present case that the Respondent has misconducted itself to warrant an award of costs against it and we decline to grant costs.

Final Orders

[32] In the final analysis, we make the following declarations and orders:

(i) We declare that the Claimant was an employee of the Respondent.

(ii) We declare that the Claimant was unlawfully dismissed from employment by the Respondent.

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[18] LDR.14 of 2021

[19] S.C.C.A No. 12 of 2007 [2008] UGSC 21 (16 December 2008)

[20] See DFCU Bank Ltd vs Donna Kamuli C.A.C.A No 121 of 2016 where the Court of Appeal of Uganda upheld the Industrial Courts' computation of severance pay.

[21] See also Mirimo Charles v Mcleod Russel(U)Ltd LDR No. 79 of 2018.

[22] Joseph Kalule Vs Giz LDR 109/2020(Unreported)

(iii) We order the Respondent to pay the Claimant the following sums:

(a) **UGX 8,762,000/=** as severance pay and;

(b) **UGX 8,088,000/=** in general damages.

(iv) Each party shall bear its costs.

Signed in Chambers at Kampala this 12th day of April 2024.

Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

12.04.2024
11.05 a.m.

Appearances:

1. **For the Claimant:** Mr. Dan Busingye
   Claimant in Court.
2. **For the Respondent:** Mr. Fabian Omara for the Respondent.
   No representative of Respondent in Court.

Court Clerk: **Ms. Matilda Nakibinge**

Mr. Busingye: Matter for award, and I am ready to receive it.

Court: Award delivered in open Court.

Anthony Wabwire Musana,
Judge, Industrial Court.