

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT JINJA
LABOUR DISPUTE REFERENCE NO. 146 OF 2019
[ARISING FROM LABOUR COMPLAINT JJA/025/APRIL/2019]

BETWEEN

TIBENKANA EDITH.....CLAIMANT

VERSUS

LONDON DISTILLERS (U) LTD.....RESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Mr. Ebyau Fidel
2. Mr. F. X. Mubuuke
3. Ms. Mugambwa Harriet Nganzi

AWARD

Brief facts

The claimant filed a memorandum of claim in this court alleging that having been employed by the respondent in September 2011 as Lady Supervisor at a Jinja Office, in March 2019 she got transfer instruction to Kampala whereupon she attempted to discuss the transfer with a view of stopping it since she had certain challenges. The attempts were frustrated by the refusal of the agents of the respondent to allow her access the officials concerned. When she lodged a complaint to the labour officer the respondent admitted she was still her employee but mediation failed hence this claim.

By a memorandum in reply, the respondent contended that the claimant on being promoted and transferred to Kampala as sales representative, she abandoned duty at her new work station without any reason amounting to refusal to comply with lawful orders of the respondent company.

The matter came up in a Jinja Industrial Court session on 2/10/2019 and in the presence of both counsel it was adjourned to 4/10/2019 at 2.00pm.

On this date, although one Mr. Ndimuli appeared as a representative of the respondent, counsel was reported to be a main speaker at a law society symposium. This court reluctantly adjourned the matter till next convenient session at Jinja as it granted costs payable personally by counsel for the respondent.

On 14/12/2020 one Mukwadanga was in court as a representative of the respondent but once again counsel was absent.

Hearing was fixed for 1/2/2021 at 2.30pm.

On this date, neither a representative of the respondent, nor counsel was present in court. Considering that the date had been fixed in the presence of a representative of the respondent company, we allowed the claimant to proceed *ex parte*. The issues for determination are:

- 1) **Whether the claimant was constructively dismissed by the respondent.**
- 2) **What remedies are available to the claimant.**

Evidence adduced

The claimant testified in a written witness statement that after her negotiation to keep in Jinja were thwarted by the respondent she on 8/5/2019 after getting the location of the Kampala offices, from one Klaus David and one Juma, proceeded to Kampala where she found the office closed. She made a call to one Sandipu on the advice of Klaus but Sandipu informed her that the office needed no extra labour because of slow business. According to her evidence, she called the Production Manager to inform them about the situation at the Kampala office but none of them responded.

Submissions

Relying on the authorities of **Nyakabwa J. Abwooli Vs Security 200 Ltd., LDC 108/2014.** Counsel for the claimant submitted that her client was constructively dismissed from employment.

Counsel also submitted that the transfer from Jinja to Kampala was illegal since it changed the title of the claimant and reduced her salary culminating into a demotion. She relied on the Supreme Court of Philippines cases of **Albert Tinto Vs Smart communication Inc (G.R. No. 171764)** which according to her this court relied on, in **Muyimbwa Paul Vs Ndejje University, LDR 222/2015** and **Blue Dairy Corporation Vs National Labour Relations Commission (G.R No. 129843, September 14 1999).** Counsel also relied on **Kiwalabye Joseph Kayondo and Others Vs Posta Uganda, LDC 018/2015** for the proposition that where a transfer constitutes a redesignation of an employee from the job originally deployed to, and such redesignation does not show any advantage or favour to the employee, there is need for the employer to consult the employee before such a transfer otherwise it constitutes a violation of the contract.

Decision of Court

There is no doubt that an employer has a right to transfer an employee from one branch of the same organization. The effect of the decisions in **Albert O. Tinto Vs Smart Communication** (supra) and **Muyimbwa Paul Vs Ndejje University** (supra) is that such a transfer must be at the same rank and salary pay scale.

The case of **Albert O. Tinto** defined a transfer as compared to a demotion as:

“a movement from one position to another which is of equivalent rank, level or salary without a break in service. Promotion on the other hand is the advancement from one position to another with increase in duties and responsibilities as authorized by law and usually accompanied by increase in salary.”

In the instant case, according to paragraph 5 and 6 of the reply of the memorandum of claim, the claimant was promoted from “**lady supervision**” to “**Sales Representative**” and transferred to Kampala but absconded her duties on her new work station without a valid reason.

However in her evidence paragraph 10 and 11, the claimant asserted that this was not a promotion since her net earnings from employment would be lesser on promotion. We are persuaded by the

Philippine decision in Blue Dairy Corporation Vs National Labour Relations Commission
(supra which observed that

“Indeed, it is the prerogative of management to transfer an employee from one office to another within the business establishment based on its assessment and perception of the employees qualifications, aptitudes and competence, and in order to ascertain where he can function with maximum benefit to the company. This is a privilege inherent in the employer’s right to control and manage his enterprise effectively.

The freedom of management to conduct its business operations to achieve its purpose cannot be denied. But, like other rights, there are limits thereto. The managerial prerogative to transfer personnel must be exercised without grave abuse of discretion, bearing in mind the basic elements of justice and fair play.

Having the right should not be confused with the manner in which that right is exercised. Thus, it cannot be used as subterfuge by the employer to rid himself of an undesirable worker. In particular, the employer must be able to show that the transfer is not unreasonable, inconvenient or prejudicial to the employee; nor does it involve a demotion in rank or a diminution of his salaries, privileges and other benefits.

Should the employer fail to overcome this burden of proof, the employee’s transfer shall be tantamount to constructive dismissal, which has been defined as a quitting because continued employment is rendered impossible, unreasonable or unlikely.”

Section 65 of the Employment Act provides

“65. Termination

(1) Termination shall be deemed to take place in the following instances

a.

- b.
- c. **Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee;**

The case of **Nyakabwa J. Abwooli Vs Security 2000 Limited, LDC 108/2014** is authority for the legal proposition that in order for the conduct of the employer to be deemed unreasonable within the meaning of **Section 65, (c) of the Employment Act**, such conduct must be illegal, injurious to the employee and make it impossible for the employee to continue working. The conduct of the employer according to the **Nyakabwa case** must amount to a serious breach and not a minor or trivial incident.

We are persuaded that in the instant case the claimant's transfer was as a result of a demotion since she would be earning less than from the previous designation and since there was no evidence of her job routine description as opposed to the previous routine including the reporting mechanism in order to determine whether her new assignment constituted a promotion. In **Muyimbwa Paul Vs Ndejje University** (supra) this court held

“Although demotion is not necessarily a termination of employment, the requirement of an employee to give a reason for termination under Section 68 of the Employment Act equally applied when the same employer contemplates demotion of an employee.”

Applying this authority to the instant case, it is clear that as the claimant sought explanation or justification of the transfer, the respondent ought to have explained the re-designation of her job especially when it had undertones of a demotion. The fact that subsequently she reported to her new station and found the station under lock and key gives an impression that the transfer was **“used as subterfuge by the employer to rid himself of an undesirable worker”** as observed in the Philipian case of **Blue Dairy Corporation** (supra). This together with the fact that the officials of the respondent failed to respond to her inquiry about her finding no work to do at her new posting, amounted to a serious breach of the responsibility of the employer to provide work for the employee as provided under **Section 40 of the Employment Act** making it not only illegal but impossible for the employee to continue working as held in the **Nyakabwa J. Abwooli case** (supra).

Accordingly, and for the above reasons, it is our finding that the claimant was constructively dismissed and the 1st issue is answered in the affirmative.

The 2nd issue is: **what remedies are available to the claimant?**

In the submission of counsel of the claimant, and as prayed for in the memorandum of claim, the claimant was entitled to the following:

(a) Payment in lieu of notice

We agree with the submission of counsel, that the claimant having worked from 2011 to 2019 which is over six years, she was entitled to 2 months under **Section 58(3)(c) of the Employment Act**, amounting to Ugx. 940,000/=.

(b) Severance Allowance

We are satisfied that constructive dismissal is an unfair dismissal that entitles an employee to severance allowance under **Section 87(a) of the Employment Act**.

We agree with counsel that under **Section 89** as interpreted by this court in **Donna Kamuli Vs DFCU Bank LDC 002/2015**, the claimant would be entitled to a months pay per year worked.

From September 2011-March 2019 is 7 years of work and therefore she shall be paid Ugx. 3,290,000/=.

(c) General Damages

Having been unfairly dismissed, we take cognizance of the fact that she lost her monthly earnings necessary for sustenance of her and her immediate family. Given what she earned on her job and circumstances of her termination together with the period she had worked, we consider Ugx. 5,000,000/= sufficient for General Damages and so it is ordered.

In conclusion the claim succeeds in the above terms.

BEFORE

- 1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

- 1. Mr. Ebyau Fidel
- 2. Mr. F. X. Mubuuke
- 3. Ms. Mugambwa Harriet Nganzi

Dated: 5/FEB/2021