

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 78 OF 2009

WILLIAM MUKASA:.....APPELLANT

5

VERSUS

UGANDA REVENUE AUTHORITY:.....RESPONDENT

CORAM: HON. LADY JUSTICE FAITH. MWONDHA, JA

HON. MR. JUSTICE KENNETH KAKURU,JA

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HON. MR. JUSTICE GEOFREY KIRYABWIRE, JA

JUDGMENT OF JUSTICE FAITH MWONDHA, JA

Introduction:

15 This appeal was brought to this Court by the appellant, having been dissatisfied with the judgment and orders of Her lordship Hon. Lady Justice M.S Arach Amoko J as she then was, in H.C.C.S No. 528 of 2005 delivered on the 21st day of August, 2007.

20 The agreed facts are that the Appellant was the plaintiff in Civil Suit No. 528 of 2005 wherein his claim against the Defendant now Respondent was for interest, unpaid National Social Security Fund contribution with interest,

Pension at Civil service rates and terms, interest for the unexpired loan period, general damages and costs of the suit.

The Appellant lost the suit, as the Court held that they were not public officers for the purposes of Pension under Article 254(1) of the Constitution of the Republic of Uganda, 1995, and therefore were not entitled to gratuity and that the suit had no merit.

The Appellant being dissatisfied with the Judgment filed this appeal.

Grounds of Appeal.

There are eight grounds of appeal as embodied in the Memorandum of Appeal as follows;-

- 1. The learned trial Judge erred in law and in fact when she held that the appellant was rightly paid long service award of 2.5% as per clause 14.7(a) of the manual.**
- 2. The learned trial Judge erred in law and in fact when she held that the financial provisions of the new manual did not apply to the appellant.**
- 3. The learned trial Judge erred in law and in fact when she held that the financial provisions of the new manual were suspended.**

4. The learned trial Judge erred in law and in fact when she failed to properly consider and evaluate the evidence and the submissions on record and held that the appellant was not entitled to gratuity.

5 5. The learned trial Judge erred in law when she held that the appellant could not sue the respondent directly in an ordinary suit to enforce compliance with statutory obligations.

10 6. The learned trial Judge erred in law and in fact and misdirected herself when she failed to properly consider and evaluate the evidence and submissions on record and held that the Appellant was not entitled to Pension.

7. The learned trial Judge misconceived and misapplied the law and facts relating to Pension for the Appellant.

15 8. The learned trial Judge erred in law and in fact when she held that the Appellant's claim as to remedies had no merit.

The Appellant prayed that:-

a. The Appeal be allowed and the Orders of the lower Court be set aside.

20 b. Costs be awarded to appellant with a Certificate for two Counsel.

Legal Representation.

Learned counsel Birungi Cephas and Diana Kasabiti represented the Appellant.

Learned counsel Habib Alike represented the Respondent.

5 Law applicable:

- Section 10 Judicature Act, cap 13. It provides;

“ An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.”

- 10
- Section 11 Judicature Act, cap 13. It provides;

“For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the power, authority and Jurisdiction vested under and any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated.”

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- Section 66 of the Civil Procedure Act, Cap 71

“ Unless otherwise expressly provided in this Act, an appeal shall lie from the decree or any part of the

decrees and from the Orders of the High Court to the Court of Appeal.”

- Section 80(1)(a) of the Civil Procedure Act, Cap 71.

“Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power to determine a case finally.”

- Rule.30 of the Judicature Act (Court of Appeal Rules) Directions SI 13-1

“On any appeal from decisions of the High Court acting in the exercise of its original Jurisdiction, the Court may-

(a) Reappraise the evidence and draw inferences of fact; and

(b) In its discretion for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial Court or by a commissioner.”

Leading cases:

Fredrick J.K Zaabwe V Orient Bank Ltd and 5 others (Civil Appeal NO. 4 of 2006)

Klfamunte Henry v. Uganda Criminal appeal No. 10/97

“ The duty of Court as the first appellate Court is well settled. It is to evaluate all the evidence which was adduced before the trial Court and to arrive at its own conclusions as to whether the finding of the trial Court can be supported ...”

Appellant’s Legal arguments:

The Counsel for both parties submitted orally.

The Appellant’s counsel argued grounds 1,2 & 4 together.

Counsel argued that the appellant was entitled to gratuity calculated at 15% of gross salary as was communicated in the circular of the 4th of August, 2004.

He stated that the Old Human Resource Manual (HRMM) was replaced with the new Human Resource Manual which came into effect on the 1st of August, 2004.

He argued that the Old Manual which used the term “Long Service Award” for those whose contracts expired or voluntarily retired, the term does not

appear in the New Human Resource Manual, which substituted it with
Gratuity as per Sections 13.7.2 and 13.5.2.

He observed that the New Human Resource Manual (HRMM) came into
force and that is why the management staff received gratuity at 24% as
5 per the new manual and yet they had left URA employment after the
appellant.

Counsel submitted that since the Appellant was in employment after the
commencement date of the New HRMM, then it can not be said that the
New HRMM did not apply to the Appellant so as to be entitled to gratuity at
10 the rate of 15%.

On ground 3, it was submitted that before the Principal Revenue officer
(PRO) and the Senior Principal Revenue Officer (SPRO) could be
appointed on contract, their present employment would have to be
terminated requiring payment of terminal benefits and then reappoint them
15 on new terms.

Counsel argued that it was immaterial to argue that the financial provisions
of the new HRMM were suspended. That had it been as intended to be
presumed, the board would not have been mindful of the fact at that time of
the 168th Board meeting held between 11th and 17th April, 2005.

He submitted that the alleged suspension related to PRO and SPRO and the staff that were not retiring or being terminated.

On ground 5, Counsel asserted that the Civil Procedure Act and the Civil Procedure Rules provide for institution of a suit by any party with a cause of
5 action against any person liable by law according to the rules.

He argued that instituting a suit regard to statutory obligations is not limited to Judicial Review proceedings as held by the trial Judge and it was misdirection on the principles of law.

Counsel further submitted that it is the mandatory statutory duty of an
10 employer to make (NSSF) National Social Security Fund contributions, contravention of which calls for penalties under Section 44 of the Act.

It was in addition argued that where the funds are not remitted by the Respondent, the Appellant may enforce remittance through instituting legal action.

15 **Grounds 6 & 7** were argued together.

Counsel submitted that it was misdirection on the part of the trial Judge when she failed to evaluate the evidence and submissions on record, holding that the Respondent was not entitled to Pension.

It was submitted that the learned trial Judge could not hold that the Appellant is a public officer and later assert that they are not entitled to pension as under Articles 175 and 257 of the Constitution of the Republic of Uganda.

5 He argued that Article 257(2) of the Constitution does not limit the definition of a Public Officer to Health Service Commission, Education Service Commission and Public Service Commission.

The Appellant relied on the definition of a Public Officer as was in the case of: **Kwizera V Attorney General Const. Petition NO. 14 of 2005**. It was
10 held;

“A person employed by the government, in its public Service as defined by Article 175 and 257 of the Constitution and also extends to parastatal bodies, Government Companies, Legal Agencies, Projects.”

15 He emphasized that the respondent’s manual defines a **Public officer as “an employee of URA appointed to a post within the Organization and is therefore a Public Officer within the Constitution of Uganda”** and

estops the defendant from alleging that its employees are not entitled to pension benefits.

On ground 8, it was argued that the mere fact that the appellant was not accorded benefits by the respondent does not *per se* mean that his case
5 lacked merit.

Respondent's Legal arguments

The respondent argued the grounds in the same order as the Appellant.

On Grounds 1,2 and 4, it was the submission of the Respondent that the Appellant was only entitled to long service award of 2.5% as was paid to
10 him in accordance with clause 14.7(a) of the old HRMM. He stated that although it is true that the old HRMM was substituted with the new circular of the 4th day of August, 2004 did not indicate that the Appellant was entitled to gratuity calculated at the rate of 15% as provided for in the new HRM.

15 He argued that although the Respondent's Board had considered putting all of Respondent's staff on contract terms of service, the available funds could only cover those on voluntary retirement and termination and thus the staff below the rank of Assistant Commissioner would therefore continue working on permanent terms.

The Respondent's counsel reiterated the earlier submission that the appellant was never employed on contractual terms and therefore did not qualify for gratuity under the new HRMM but rather the long service award under the old HRM since he was on permanent basis.

5 It was submitted that whereas the Management staff had earlier on been employed on contract and continued as such in the new HRMM, it was not the case for non-management staff. He stated that only the management staff that left respondent had to be paid gratuity as per the new HRMM since the financial implications related to their employment had not been
10 suspended like that of the non-management staff on contract.

On the date of commencement of the new HRMM, the respondent's counsel submitted that although it was in force at the time the appellant retired, he was not entitled to gratuity at the rate of 15% as the policy of the new manual to that effect with respect to his rank was suspended.

15 It was respondent's submission that Ground 1,2 and 4 fail.

On Ground 3, the respondent stated that its gist was discussed in ground 2 above.

It was in addition argued that even if it were to be held that the Board did not suspend the 15% gratuity, clause 3.2.4 of the new HRMM provides that

gratuity is payable to the employees after completion of a minimum of one year in service to the respondent which the appellant had not yet served. He concluded that ground 3 fails.

On ground 5 of the Memorandum of Appeal, it was submitted that the only way in which the appellant could enforce compliance with the provisions of the NSSF Act is through Judicial Review.

The Respondent's counsel relied on **Kenya National Examination Council V Geoffrey Gathenji Njoroge (CAK) Appl. NO. 266 of 1996** where Court stated that the only remedy available was to apply to the High Court to seek an order of mandamus to compel the respondent to perform its statutory obligations.

On Ground 6 and 7, the Respondent's counsel affirmed that the definition of Public Officer under Article 175 of the Constitution of the Republic of Uganda, 1995 is limited to Public Service Commission, Education Service Commission and Health Service Commission. The Respondent's Counsel cited **URA V. Boniface Ojok SCCA NO. 35 of 1995** where **Justice Oder** held that the definition of Public Officer does not apply to public bodies or corporations such as URA(Uganda Revenue Authority).

He pointed out that under Article 257(2) (b) of the Constitution, reference to an office in the Public Service does not include a member of any Authority and the respondent being an Authority, is excluded from being an office in the Public Service.

5 He further submitted that the Appellant's claim that he is entitled to pension and NSSF contribution contravenes both the NSSF and Pensions Act by virtue of the 6th paragraph of the First Schedule to the Pensions Act and the fact that the Appellant made NSSF contribution claims.

10 It was further submitted that by the fact that Section 21 of the Pensions Act does not make mention of or include officers in Public bodies like the Respondent implies that the Respondent's officers are not entitled to Pension.

On ground 8, it was submitted that the trial Judge rightly held that the Appellant's claim to remedies had no merit.

15 It was argued for the Respondent that the Appellant already received all his benefits and had no other claims against the Respondent, not even 15% gratuity claimed.

The Respondent prayed to this Honourable Court to uphold the decision of the trial Court and dismiss the Appeal with costs.

This Court had the opportunity to read the lower Court record and the Judgment. I also heard and considered the submissions from both counsel for the appellant and Respondent and I find as follows;

(i) On grounds 1, 2 & 4 the Appellant submitted that he was entitled to gratuity at the rate of 15% of the gross annual salary for non management staff as communicated in the new HRMM. This had effect from 1st August 2004. He said that 15% substituted the Long Service Award in the old HRMM.

According to Annexure C dated 4/8/2004 titled Uganda Revenue Authority Internal Memo, the subject was "Changes in the New HRMM". It provided in No. 2(a) with sub heading contracts (3:2.2) that :

"The Board proposed the policy of appointing all staff on contract. This shall be spread out starting with PROs & SPROs. However the Board suspended the implementation and financial implications of this policy to a later date. Therefore all staff remains on the current terms until further notice.

(ii) Gratuity payable to management staff whose contracts expire after 1st August, 2004 is provided for at 24% of consolidated pay.

For the other staff i.e. below (AC) gratuity will be paid at 15% of consolidated pay.”

It was the evidence of the appellant at the High Court (or at the trial) that when he was employed by the respondent there were terms and conditions of employment. There was a Circular specifying his benefits on retirement. 5 The new HRMM was introduced in 2004-2005 which provided that gratuity was to be calculated at 15% of the consolidated pay. The appellant said he was paid part of it i.e. 2.5% and so was demanding for the balance of 12.5%. He testified that there was a circular from the Commissioner 10 General's Office dated 7th of March, 2005 and the title was phase 2 of the Restructuring exercise (See Page 50 of the lower Court proceedings.) He said that this was the circular which advised them either to retire voluntarily or apply for new jobs. That there were other circulars that had been issued before , showing how they were going to be paid and how it would be 15 calculated. That this was confirmed by his voucher when he went to collect his cheque. That he got to know that he was going to be paid less after he had already taken the decision to retire. That Uganda Revenue Authority by press release from I.K. Kabanda Chairman Uganda Revenue Authority dated 23rd of March,2005, it was stated that the package consisted of 20 gratuity, severance payment in lieu of Notice long service award and

transport. The total package was to range from 10,000,000/- to over 40,000,000/- That all this came after he had retired. The appellant admitted having received the 7 months pay long service award, outstanding leave and transport. He testified that when he retired voluntarily on 4th of April, 2005 under the restructuring program he knew what he was due to get i.e. as per the Internal Memo EX.D1, P.8. He said he was not on contract and was not on management staff.

Counsel for the Respondent based his submission on the comparisons of the Old Human Resource Manual which he said that provided for gratuity for management staff on contract and Long service Award for non management staff who were on permanent terms. He also went further to argue that the policy of appointing non-management staff on contract and the financial obligations thereof were suspended and the appellant could not claim gratuity basing on the new HRMM. *According to the BOD 160th ordinary meeting which was held on 28th July,2004 (page 366 & at page 374 min. URA/58/2004 (3)(a)* the board decided that the new Human Resource Management Manual would be implemented with effect from 1st August, 2004 subject to incorporation of the comments made by the chairman under relevant sections.

That all staff were to be informed of the effective date of the new manual and copies of the manual should be circulated to all staff for their information ... The minute quoted above continued as hereunder:

(iii) **“That the appointment on contract/ would be implemented after the process had been completed and the relevant provisions of HRMM would be suspended until that time .**

(iv) **That at the time of implementation the result of the ongoing appraisal process as well as interviews would be used to identify staff to be appointed on contract.”**

10 From the above extract of the minute and the internal Memo of 4/08/204, it was clear that the appellant was employed on the Old Terms Human Resource Management Manual, but with the coming into force of the new HRMM by virtue of that minute quoted above in (iii) it was the appointment on contract which was not implemented for the reasons
15 already given in that minute, and it's the relevant provisions of the HRMM which related to contracts appointment which were suspended until the process which lead to appointment on contract was completed. See (iv) above.

That is why the circular of 4th August, 2004 was issued and since the appellant had voluntarily retired after the commencement of the New HRMM he was entitled to 15% of the consolidated pay. This in my understanding meant the pay he was being paid on the basis of the old
5 HRMM.

The press release which the chairman of the Board published on 23rd March, 2005 with the benefits was belated as it was issued just 14 days before he registered his decision of voluntary retirement. In that press release there was no cancellation of what had been communicated earlier
10 in the circular of 4th August, 2004. I could not find any minute from the Board which included the contents of the Press Release.

The argument by counsel for the respondent that gratuity payable to the management staff at 24% according to the new HRMM policy was because they were already on contract does not hold. Constituting the
15 issue of gratuity as it is in the Circular, what applies to the management staff whose contracts expired after 1st April 2004 has to apply to other staff who were on permanent terms and retired voluntarily after 1st April 2004.

Apparently when he appellant testified in the examination in chief, that there was the internal Memo from the Commissioner General's office,

advising them on the restructuring phase 2 where they were informed of the opportunity of retiring voluntarily, that fact was not challenged at all in cross examination by the respondent. It therefore implied that it was true.

Definitely, the appellant could not have been appointed on contract as was explained by the board in the minute above quoted.

This meant that the respondent was treating the appellant differently when the circumstances were the same. The most important fact to be considered were:

- (a) Contracts expiring after 1st August, 2004
- (b) Voluntary retirement for other staff after 1st August, 2004.

Management cannot change a Board decision in corporate governance. This would amount to discrimination and therefore infringed on Article 21 of the Constitution. It provides :-

“All persons are equal before and under the law and in all spheres of political, economic. Social and cultural life and in every other respect and shall enjoy equal protection of the law.”

I therefore find that the New HRMM was applicable in as far as Voluntary retirement after 1st August, 2004 was concerned as it applied to the management staff for staff whose contracts expired after, 1st August, 2004 under the Board minute The Min. URA/58/2004 3(i) (iii) & (iv) at Page 375 of the record of proceedings, the Board noted that it was important to have a complete URA structure presented by management and approved by the board in order to establish the staff levels and available positions (iii) that the appointment on contract would therefore be implemented after that process (also that the New Commissioner General be involved in proposing the URA structure to be considered and approved by the board) had been completed.

(v) “That at the time of implementation the results of the on going appraisal process as well as interviews would be used to identify staff to be appointed on contract. “

Again it's clear to me that it was not automatic that everybody who was on contract would be retained on contract or that everybody on permanent terms would be automatically appointed on contract. It was clear to me that, that circular on the 4/08/2004 was purely for transition purposes. The long service award of 2.5% was part of the 15% provided in that circular and the appellant was entitled to demand the balance of 12.5%.

Accordingly grounds 1,2,3 & 4 succeed.

(2) On ground 5, the Civil procedure Act is very clear. It defines Suit in S. 2(x) to mean all Civil proceedings commenced in any manner prescribed.

This means that there is no first and hard Rule that even if a person is not seeking for reliefs of prerogative orders has for the sake of it commence the proceedings by way of judicial review. Counsel for the Appellant relied on a Kenyan case of **Kenya National Examination Council V. Republic CCA (B) No. 266 of 1996.** That was an appeal arising from Judicial Review Application of the High Court of Kenya.

10 The appellant was the Kenya National Examination Council which was a creature of S.3 (1) and 3(2) of the Kenya National Examination Council Act.

The Court observed that the appellant Kenya National Examination Council having been a creature of a statute, it had only to do what that creator Act permitted it to do.. If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by parliament it would become amendable to the supervisory. Jurisdiction of the High Court which for simplicity is now called Judicial Review.

I had the opportunity to read that case but could not find anywhere, where the issue of commencing an action only by judicial review was discussed or mentioned. Citing it as an authority persuasive at that in the instant appeal was divisionary to say the least.

5 According to the facts of this case the appellant had various issues which could only be resolved negatively or affirmatively by way of filing an ordinary plaint to avoid multiplicity of proceedings. Failure to remit funds to National Social Security Fund (NSSF) which was deducted from the appellant's pay was one of them. Needless to say that Judicial review is limited to only
10 prerogative orders under the Judicature Act. From the foregoing ground 5 succeeds.

(3) On grounds 6 & 7, the submissions of both counsel on these grounds have been re-stated on record. Public Service is defined in the Constitution in article 257 as an office in the Public service,. The appellant relied on
15 the case of **Kwizera V. Attorney General Constitutional Petition No. 14/2005.**

I had an opportunity to read that case. I found the facts highly distinguishable, but even if they were not, the Court had been requested to interpret article 80(4) where the Petitioner alleged that the amendment to
20 that article was inconsistent with an contravened articles 1(4), 21(1) & 38(1)

of the Constitution. That it was discriminatory. The Court was particularly requested to interpret the phrase

“a person employed in any Government Department or agency of Government or anybody in which government has controlling interest.”

The Court held that in the contest of the amendment article 80(4) the term refers to a person employed by the Government in its Public Service as defined in article 175 & 257 of the Constitution. It extends to parastatal bodies, Government Companies, local Government agencies, projects.

As far as the word “Department” is concerned the Court relied on Blacks Law Dictionary which defined department as:-

“One of the major administration divisions of the executive branch of Government usually headed by an officer of cabinet for example department of State . Generally a branch or Division of Government Administration.”

It was noted by court that here was no first and hard rule on definitions of employee or employer and department. According to Halsbury’s laws of

England 4th Edition 1987-2000 re-issue volume 16 the term employee at common law is defined among others;

Employee means:- **“an individual who has entered into or works, worked under, a contract of employment. Employment in relation to worker, means contract of service or apprenticeship whether express or implied whether in writing or oral...”**

In the instant case there was an old HRMM which provided the terms & conditions the appellant was employed on. There was the new HRMM.

It was submitted by counsel for the appellant that in the URA HRMM defined a public officer as an employee of URA appointed to a post within the organization. He added that the appellant was therefore a Public officer within the meaning of the Constitution of Uganda. He submitted that the respondent is estopped from denying that the appellant was not entitled to Pension

The fact that the URA HRMM defined a Public officer as a person employed to a post within URA could not make the appellant be entitled to pension as per Article 175 & 257. If the appellant had any pension claim this ought to have been pegged to the HRMM of URA if he was entitled to it any way. That definition of Public Officer in the context of URA could not

be extended to Public officer under articles 175 & 257 of the Constitution of the Republic of Uganda.

Counsel for the respondent cited the case of Uganda Revenue Authority V. Boniface Quinto Ojok Civil Appeal No. 33/95 where Oder JSC held:-

5 *“In my view this is a contextual definition of Public Officer. The definition applies to chapter 10 of the Constitution and it appears to be limited to the provisions of that chapter only. Chapter 10 establishes and concerns the Public Service Commission, the Education Service Commission and the Health Service Commission. In the circumstances I am unable to agree*
10 *that the employees of URA are public officers...”*

Unfortunately Counsel for the Appellant failed to appreciate the context of the Kwizera Eddie Case (Supra) because, it arrived at the same conclusion as the Quinto Ojok case. I respectively concur with it and in any case this Court is bound by it. The Kwizera Eddie case was concerned with the
15 context in article 80(4) of the Constitution in the context of qualifications & disqualifications of a member of parliament in a Multiparty Political System Under chapter 5 of the Constitution.

Grounds 6&7 fail therefore .

(4) Ground 8: The submissions of both counsel in respect of this ground have already been set out in this Judgment. Since the appellant has succeeded on grounds 1,2,3,4, 5, I also find that the trial Judge erred in holding that the appellant's claim had no merit, accordingly ground 8 also succeeds.

5 Accordingly, judgment is entered in favour of the appellant as hereunder;

(1) Appeal allowed in respect of grounds 1,2,3,4 , 5 & 8.

(2) The Judgment and decree of the High Court are hereby set aside and substituted with the Judgment of this Court in the following terms:

10 (i) The balance of gratuity of 12.5% of the consolidated pay be calculated and be paid to the appellant by the Respondent, so it is ordered.

(ii) The above sum shall attract interest at 17% per annum from date of Judgment until payment in full.

(iii) Costs of this Court and in the Court below be provided for.

15 Since my learned brother Justices Hon. Kakuru,JA and Hon. Kiryabwire, JA concur, it is so ordered.

Dated at Kampala this 21st day of November, 2013.

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20 **HON. LADY JUSTICE FAITH MWONDHA, JA**

JUDGMENT OF HON JUSTICE KENNETH KAKURU, JA

I have had the opportunity of reading the judgment of my sister Hon Lady Justice Faith E.K.Mwondha, JA in draft.

5 I entirely agree with her that this appeal be allowed. I also agree with the orders she has proposed and I have nothing useful to add.

Dated at Kampala this ...**21st** ...day of ...**November**,... 2013

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HON KENNETH KAKURU

10 JUSTICE OF APPEAL

JUDGMENT OF HON JUSTICE GEOFFREY KIRYABWIRE, JA

I have read in draft the judgment of Hon Faith E.K.Mwondha, JA and I agree with it and have nothing more useful to add.

15 Dated at Kampala this ...**21st** ...day of ...**November**,... 2013

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HON GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL