

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 1 OF 1997

BETWEEN

KENNEDY NYAMBE. APPELLANT

AND

TANZANIA ZAMBIA RAILWAY AUTHORITY RESPONDENT

(Appeal from the decision of the High Court
of Tanzania at Dar es Salaam)

(Kyando, J.)

dated the 30th day of August, 1996

in

Civil Case No. 78 of 1994

JUDGEMENT OF THE COURT

SAMATTA, J.A.:

This is an appeal from a decision of the High Court (Kyando, J.) dismissing with costs a suit in which the appellant claimed against the respondent, the Tanzania Zambia Railway Authority (TAZARA), inter alia, (a) a declaration that the act of the respondent dismissing him from its service was wrongful; (b) damages for wrongful dismissal; and (c) costs of the suit.

The facts of the case were on the whole not in dispute. In the interests of brevity we propose to state them as follows: The appellant was employed in 1973 as a Field Assistant by the respondent, a corporate body carrying on business in Tanzania and Zambia. The respondent's head office is situated in Dar es Salaam. The appellant continued working for the respondent until May 31, 1993, when he was dismissed from employment. By that time he had reached the rank of locomotive driver and was stationed at the head office. On September 30, 1992, his application for 43 days annual leave was approved. He left for Zambia, his home country. On arrival there, he found out that a lot of serious problems

After the expiry of the annual leave extended to December 31, 1992, therefore, the management at the head office stopped payment of his salaries. After the disposal of one of the two cases he was involved in, the other case was adjourned to July 27, 1993. This development enabled him to visit the head office in Dar es Salaam on June 23, 1993. The purpose of the visit was to inform the head office that he would be in a position to resume duty earlier than he had anticipated, on September 1, 1993. On being informed by him of the various telex messages he had forwarded to the Area Office in Lusaka for transmission to the head office, the respondent's Human Resources Manager advised him to go back to Lusaka and there find out what had happened to the messages. Not unexpectedly, the appellant paid heed to the advice. When he returned to the head office he brought with him copies of the first two untransmitted messages, and a letter disclosing that the third message had been misplaced in the office of the Area Manager. The General Manager was not persuaded to treat those messages as constituting communications to his office. His view was that the appellant had absconded from his place of work. According to the defence case, the respondent's Personnel Department analysed the facts of the case and submitted "the case" to the organisation's Disciplinary Committee, which was chaired by a lawyer, which in turn made recommendations to the General Manager. The appellant's case was that at no time during that process was he given an opportunity to state his case. It is not disputed, however, that the General Manager reached the conclusion that the appellant was guilty of abscondment and that he had to be dismissed. On May 31, 1993, he wrote to the appellant in the following terms:

Dear Sir,

DISMISSAL FOR ABSCONDMENT

You applied for 43 days leave which commenced on 1st October 1992 which was to terminate on 1st December 1992. On 17th November 1992 you

sent a telex to request for an extension of your leave to 31st December 1992. You were therefore supposed to report for work on 1st January 1993, you have not reported for work to date without permission.

Clause 5.8 (xx) of the Disciplinary Code and Procedures states clearly that an employee who absents himself without permission for ten consecutive days is considered to have absconded and as such ceases to be an employee of TAZARA.

You have been away from your work place for six months without permission and therefore deemed to have absconded and dismissed yourself from the services of TAZARA with immediate effect.

By copy of this letter the Finance Manager is requested to pay all the monies due to you and recover whatever is due to the Authority.

Wishing you all the best in your future endeavours."

Clause 5.8 (xx) of the Disciplinary Code and Procedures (hereinafter referred to simply as "the Code"), cited by the General Manager in his above quoted letter, reads:

"ABSCONDMENT

An employee who absents himself from duty without permission for ten consecutive days shall be considered as having absconded ^{as} and ~~such~~ shall cease to be an employee of TAZARA. Such an employee will be regarded as having dismissed himself from the service of TAZARA. The penalty for this offence shall be a summary dismissal on the first breach."

The appellant unsuccessfully made a plea to the General Manager to reverse or alter his decision. He therefore summoned the law to his aid by instituting the suit the decision on which is being impugned in the instant appeal.

The learned trial Judge analysed the evidence laid in the scales at some length. Answering the issue whether the appellant's dismissal was wrongful, he said, inter alia:

"... I am of the firm view, and I hold, that it was not. To my understanding no employee can assume that he has been given leave without such leave being actually approved or authorised. In that the leave extensions he had applied for had been approved whereas they were not. It was wrong for him to assume. He should have continued to remain on leave upon receipt of a communication to approval of his leave applications. After seeing that no approval was forthcoming and the days for the approved leave were drawing to an end he should have returned to his work immediately. He blames the Lusaka Office for failure to transmit his applications for extensions. I think he has no one to blame in regard to this except himself. He assumed the risk of sending applications from his home. He cannot now be heard to say that these applications did not reach the headquarters. That is the risk he took and he is the one who was at fault - as it now turns."

Dealing with the question whether the rules of natural justice were complied with by the management, the learned Judge said:

"The procedures followed in dismissing the plaintiff were, according to the evidence of Kamukwamba DW.1, the proper procedures

governing disciplinary matter in TAZARA. He was formally charged and the disciplinary Committee considered the matter. It then recommended to the General Manager and it is the latter who made the decision to dismiss him. According to DW.1, the General Manager was the disciplinary authority for the plaintiff in view of his salary scale. So he was dismissed by a proper authority and I so find."

The learned trial Judge's decision is impugned on the following grounds:

1. The learned trial judge erred in failing to take into account the fact that the Lusaka Area Office was an establishment of the Respondent and as such any message or request sent through it is taken to have been received by the Respondent immediately after it has been received by the said Lusaka Area Office.
2. The learned trial judge erred in law and in fact in holding that a charge had been preferred against the Appellant before the Appellant was dismissed by the Respondent in the absence of any evidence to that effect.
3. The learned trial judge erred in law and in fact in not considering whether the principles of natural justice had been adhered to by the Respondent before deciding to dismiss the Appellant.
4. The learned trial judge erred in law and in fact in failing to address his mind to the disciplinary procedures laid down in the Collective Agreement and the Respondent's Disciplinary Code and Procedures."

Mr. Maira, Counsel for the appellant, who argued, with much energy, the first and third grounds of appeal together and the remaining two grounds also together, essentially made the following arguments. First, the learned trial Judge misdirected himself in that he failed to take into account that the Lusaka Area Office was part of the respondent. According to the learned advocate's submission, receipt of the telex messages by that office had to be deemed receipt of the same by the respondent's head office. Secondly, bearing in mind the head office's silence, the appellant acted reasonably when he took the silence as demonstrating that the General Manager had no objections to his applications. Thirdly, since no running away secretly was involved in the appellant's alleged misconduct, no abscondment was proved in this case. The learned advocate went on to submit that Clause 5 (8) (xx) of the Code could not rightly be invoked by the General Manager in this case. In any case, the learned advocate went on to contend, if the appellant had absconded from duty, he should have been formally charged with that misconduct so that he could be heard in his defence. Fourthly, and finally, Mr. Maira submitted that the provisions of the TAZARA Collective Agreement, especially the one dealing with leave without pay, were not complied with and that omission was a serious irregularity. The learned advocate pressed on us to allow the appeal, with costs, and reverse Kyando, J.'s decision. In his attractive submission Mr. Killindu, counsel for the respondent, submitted that the appeal is devoid of merit. He contended that the appellant was not entitled to assume that, since his first application for extension had been granted, the subsequent applications would also be granted. Mr. Killindu submitted that chaos would reign at places of work if employees were entitled to make such assumptions. Even if it is accepted, the learned advocate further submitted, that the Area Manager in Lusaka was wrong in not transmitting the appellant's messages to the General Manager, the appellant was not right to assume that he had been granted the unpaid leave he had applied for. Citing Konig v Kanjee Naranjee Properties Ltd. [1968] E.A. 233 in support of the

proposition, Mr. Killindu submitted that once an employee absents himself from his place of work he is liable to be dismissed. The learned advocate urged us to dismiss the appeal, with costs.

We have carefully considered the rival arguments in this appeal, but in the end we are of the opinion that the outcome of the appeal hinges on the answer to the question whether the respondent's General Manager exercised his power of dismissal in accordance with the Code. We did not understand Mr. Maira to contend, and we think he could not rightly do so, that the General Manager had no power of dismissal. Plainly, he had that power. In our view, however, notwithstanding what is laid down in the inelegantly worded Clause 5 (8) (xx) of the Code, which we have already quoted in this judgment, where the alleged offence is abscondment, the power of dismissal in TAZARA must be exercised in accordance with the provisions of Clause 6.0 of the Code. That Clause reads as follows:

"6.0 DISCIPLINARY PROCEDURE

At District level, Regional Office and the Head Office disciplinary action must be taken within seven days from the date of the occurrence of the offence:-

- (i) All cases that are referred to the Regional Manager from the districts, which are within his jurisdiction, must be disposed of /and/ disciplinary action taken within 21 days from the date of the occurrence of the offence.
- (ii) Cases that are referred to the Regional Office, which are within his jurisdiction, must be disposed of /and/ disciplinary action taken within thirty (30) days from the

date of the occurrence of the
offence.

- (iii) All appeals by employees arising
from dismissals, terminations
and other related grievances
should be made within a period
of 30 days." (the emphasis
is supplied)

It is, in our opinion, patently clear from the evidence on record that, although the letter informing the appellant of his dismissal had already been prepared by June, 1993, when he reported at the respondent's head office on June 23, 1993, he was not served with that letter. Instead the appellant was advised by the respondent's Human Resources Manager to visit the Lusaka Area Manager's office to find out what had happened to his telex messages submitted to that office for transmission to the head office. It would appear that until that time the management was treating the appellant as still being in the respondent's employment. The dismissal letter was served on him about a month later - on July 21 to be more precise. It is as plain as a pikestaff, in our opinion, that the General Manager did not act in accordance with the provisions of Clause 6.0 of the Code in that he did not take the disciplinary measure of dismissing the appellant within seven days "from the date of the occurrence of the offence". In this country, whatever disciplinary measure a master decides to take against his servant the measure must be taken not only in accordance with the law of the land but also in accordance with the rules of procedure in force at the place of work. In this connection, we desire to draw the attention of employers to the following celebrated observation which Mr. Justice Frankfurter made in a somewhat different context in Vitarelli v Seaton (1959) 359 US 535, 546-547, cited with approval by Mathew, J., in Sukhdeo Singh v Bhagatram, A.I.R. 1975 S.C. 1331 at p. 1360:

"He that takes the procedural sword shall
perish with that sword."

In our settled opinion, since the disciplinary authority in the instant case did not exercise its power of dismissal in accordance with the and mandatory provisions of the Code, the learned trial Judge should have held that the purported dismissal of the appellant was wrongful and should have proceeded to enter judgment for the appellant.

For the reasons we have given, we allow the appeal with costs and enter judgment for the appellant. The case is remitted to the High Court for assessment of damages for the wrongful dismissal.

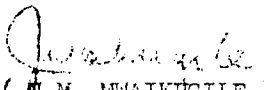
DATED AT DAR ES SALAAM this 24th day of March, 1999.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M.M. MWAIKUGILE)
SENIOR DEPUTY REGISTRAR