IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And RAMADHANI, J.A.)

CIVIL APPEAL NO. 62 OF 2000

BETWEEN

NICHOLAUS HAMISI And 1013 OTHERS .... APPELLANTS

AND

TANZANIA SHOE CO. LTD. And
TANZANIA LEATHER ASSOCIATION INDUSTRIES ..... RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam) (by Madame Kimaro, P.R.M., Extended Jurisdiction) dated the 4th day of February, 1999 in Civil Appeal No. 77 of 1998)

JUDGEMENT OF THE COURT

MAKAME, J.A.:

The appellants, advocated for in this appeal by Mr. Bashaka, learned advocate, went to the High Court (Kimaro, Principal Resident Magistrate, Extended Jurisdiction, as she then was), dissatisfied with the judgement delivered in the Resident Magistrate's Court of Dar es Salaam where they had sued for Subsistence Allowance for the period between their undenied termination of employment by the first respondent, a subsidiary of the second respondent, and their eventually being paid for their travelling costs to their alleged places of domicile. There was also a smaller group of one hundred and seven people who were claiming Severance Allowance.

Before this Court the first respondent was represented by Mr. Kilindu, learned advocate, while learned counsel, Mr. Fauzi Taib, appeared for the second respondent.

The learned Principal Resident Magistrate, E. J., accepted the learned trial magistrate's view that only four appellants, the ones who gave evidence, had established that they had indeed been the first respondent's employees. The learned trial magistrate went on to say "As regard the rest the issue of employment will have a meaning if this Court gives them any relief and a need arises for the respondent to give such a relief ..." We must confess that we find this piece of reasoning rather unusual. One would have thought it is the other way round: the question of relief would arise only if the fact of employment was established.

Be it as it may, after making that remark the learned trial magistrate nevertheless jumped on to the question of subsistence allowance and, agreeing with Mr. Kilindu, and adopting Mackanja, J.'s exposition of the law in **MATHEW LEONARD KATO versus NATIONAL POULTRY CO. LTD.** H.C. CIVIL APPEAL No. 122 of 1990, which exposition may be correct but in our view not relevant in the context of the matter before the trial magistrate, he concluded that subsistence allowance was not payable.

The learned Principal Resident Magistrate, E.J., noted that the trial magistrate rather skirted the issue of employment and on her part went on to remark that the people who gave evidence testified only on their own behalf and gave no evidence regarding the rest. A remark this Court made in **MARCKY MHANGO on Behalf of 684 Others vs. TANZANIA SHOE COMPANY AND TANZANIA LEATHER ASSOCIATION INDUSTRIES** Civil Appeal No. 36 of 1996, was called in aid to reach the conclusion that the evidence adduced at the trial was too 'generalized' to lead to a finding that all the appellants had been employees of the first respondent. On this we wish to distinguish the present issue from that in **Marcky Mhango**. In **Marcky Mhango** the issue was that in order to establish how much accumulated leave one was entitled to, each one had to show when the days were earned and whether the days were earned before or after a circular stopping the workers from going on leave was issued. That aspect of particularity cannot be imported and used here where, if the fact of employment is established, and the employees were terminated on the same day, the issue would only be how long an employee was detained in Dar es Salaam, if he was, and whether that was relevant.

We have had to consider the first appellate court's examination of the trial court evidence in its totality and bear in mind that this was a civil matter, not criminal, so the measure must be a preponderance of probabilities.

The matter was instituted by a Labour Officer as a report to a Magistrate in terms of Section 132 Cap. 366. Annexed to it were documents, A and B, detailing the names of alleged employees. The report and the documents, read together, clearly allege that the people named were employed by the first respondent and were all terminated on the same day, and for Severance Allowance it was shown when each person was engaged. The Annexures were part and parcel of the appellants' case.

The appellants were paid terminal benefits, less transport costs, and in the case of Severance Allowance only one hundred and seven people were involved. The four people who testified each referred to "we", i.e. "I and the others" in the context. Nicholaus Hamisi said "I was employed along with others ... we were retrenched ..." and Mr. Kilindu did not bother to cross-examine to find out who the witness was referring to if Mr. Kilindu was really seriously in doubt.

We are satisfied that on the evidence, the two courts below should have found that the appellants had indeed been employed by the first respondent until their services were terminated. One does not pay people salaries and terminal benefits if one was not implying that those people were his employees.

What has bothered us considerably is the question of subsistence allowance. Subsistence allowance is payable upon

repatriation, following termination of employment, to the former employee's place of engagement or his place of domicile. There should have been credible evidence that the appellants were taken on at places other than Dar es Salaam or that there was a contract obliging the employer to transport the employees to their places of domicile for the first respondent to be responsible for their repatriation and, with that, subsistence allowance during the journey; in terms of Section 53 of the Employment Ordinance Cap. 366 or any other relevant law. From that one could conceivably argue that some form of allowance would be payable for detention for the number of days the appellants say they were forced to remain in Dar es Salaam awaiting their being paid their transport charges. The same argument would apply even if one applied the Parastatal Service Regulations, in our view.

The evidence on record would not support the appellants' claim for subsistence allowance. Between them the four appellants who testified said nothing that would support the claim. Indeed the 'star' appellant Nicholaus Hamisi conceded, when being cross-examined by Mr. Kilindu, "I was employed when here in Dar es Salaam". It is true that the appellants were paid for transport costs to various places upcountry and from this one may be tempted to infer that the first respondent was admitting responsibility to transport the appellants and so the first respondent would be responsible for facilitating their travel out of Dar es Salaam to the various places. But the correct

position is that it cannot be argued that the first respondent would be estopped from denying liability for Subsistence Allowance because he paid their transport costs. The law is that the first respondent would be liable to pay subsistence allowance only if he was legally liable to repatriate the appellants. Legal liability to repatriate has not been established as we have endeavoured to explain, and there can be no question of estopped regarding the payment of subsistence allowance. In other words the payment of transport charges could have been *gratis;* or even as a result of a bungle, seeing that the matter was being handled by a number of different Government ministries. In which case the appellants may be said to have been lucky and, as Mnzavas, J.K. as he then was, said in **AMOS KASHUKU versus THE GENERAL MANAGER, TANGANYIKA DYEING AND WEAVING MILLS LTD.** H.C. Misc. CIVIL APPEAL NO. 6 of 1988, in a situation rather similar to the present one, making the proposed payment would be a second 'wrong', the first 'wrong', being the payment of transport charges, and the two would not make a right: The first respondent's payment of transport charges did not impose a legal obligation to pay subsistence allowance. As Mr. Taib suggested, perhaps the appellants could have sued for Damages for detention and specifically proved such damages.

With respect to Mr. Bashaka, in our opinion our decision does not in any way contradict what this Court said in **TRANSCAN**

TIMBER COMPANY LIMITED versus ARTHUR KIBONA (Civil Appeal No. 50 of 2000) where the nearest relevant issue to the present one concerned the alleged responsibility of the employer, otherwise liable to repatriate an ex-employee, to pay subsistence expenses for the period the ex-employee resisted repatriation. In that appeal this Court decided in favour of the employer.

We accordingly dismiss the appeal but make no order as to costs.

DATED at DAR ES SALAAM this 21st day of November, 2003.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

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

(S. A. N. WAMBURA)
SENIOR DEPUTY REGISTRAR