IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., BWANA, J.A. AND MASSATI, J.A.)

CIVIL APPEAL NO. 46 OF 2007

DIRECTOR, RUKOHE ENTERPRISES ..... APPELLANT

VERSUS

JANUARY LICHINGA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Lukelelwa, J.)

Dated the 5th day of April, 2005
in
Misc. Civil Appeal No. 6 of 2004

JUDGMENT OF THE COURT

27 & 30 SEPTEMBER. 2010

BWANA, J.A.:

This is a second appeal. Initially the parties appeared before the Mtwara Resident Magistrate's Court whereby January Lichinga, now the respondent, sued the Director of Rukohe Enterprises, the appellant herein, for the sum of Tshs.1,320,000/= as wage arrears. The respondent claimed to have been underpaid by the appellant throughout the period of his employment. He is said to have been

employed by the appellant from the 7th day of April, 2000 up to the 20th day of October, 2003 when his services were terminated. During that period of service, it was avered by the respondent that, he was paid shs.5,000/= only per month as his wage.

The appellant denied any liability, avering that there was no contract of employment between the two parties. The appellant claimed that during that period, the respondent was employe another person who used to park his motor vehicles next to the appellant's premises. The latter asked the former to work on a temporary basis as a watchman between 5.00 pm and 6.00pm daily.

After considering the evidence before it, the trial court entered judgment in favour of the respondent and ordered the appellant to pay him the sum of shs.1,320,000/= being wage arrears as claimed. Aggrieved by that finding of the court, the appellant lodged an appeal before the High Court of Tanzania at Mtwara. Again, he was unsuccessful, hence this second appeal.

Both parties were unrepresented before the Court. In his Memorandum of Appeal before this Court, the appellant had raised three grounds of appeal. However, he abandoned the third ground and proceeded with the first two. The said two grounds are couched in the following words:-

(1) That, the appellate learned judge erred both in fact and in law when he failed to define the term employee regarding (sic) with circumstances and kinds of employment in Tanzanian situation.

(2) That, the learned judge erred both in fact and in law when he dismissed the appeal and awarded the respondent terminal benefits while the respondent had abandoned his employment at his own initiative.

Before us, the appellant had nothing more to add to the above stated two grounds. On his part, the respondent amplified on what he had stated already in the courts below.

The appellant's first ground of appeal seems to be that the respondent was not a full time employee of Rukohe Enterprises. He

was rather, a casual employee. He therefore invited us to reconsider the law pertaining to employee, employer and casual employee.

We must state at the outset that labour relations at the material time was governed by the Employment Act, Cap. 366 (R.E. 2002). Section 13 of the said Act states:

> *"No person shall employ any person and no person shall be employed under any contract of service* ***except in accordance with the provisions of this Act.****"*[Emphasis provided].

Therefore when the appellant employed the respondent, be it an casual employee or on full time basis, the law governing their labour relations was Cap. 366 (the Act).

Under that Act, the terms **employee, employer** and **contract of service** are clearly defined as hereunder.

Employee –

> *"a person who has entered into or works under a contract of service with an employer*

whether by way of manual labour *... or otherwise and whether* ***the contract is expressed or implied or is oral or in writing.***" [Emphasis added].

Employer –

"a person or any firm ... who or which has entered into a contract of service to employ any person ... and ***who is placed in authority over such person employed.***" [Emphasis added].

Contract of Service –

"*any contract whether in writing or oral, whether expressed or implied, to employ or to service as an employee* ***for any period of time or number of days*** *to be worked ...*" [Emphasis added].

It is apparent from the above definitions that the respondent was legally an employee of the appellant, be it as a casual employee or not, **or** whether or not there existed a written contract between the

two parties. It is on record that the appellant had given to the respondent, a written document concerning the nature of duties he was to do. In our respected opinion, that constituted a written contract (Exh P1).

The respondent was paid on a monthly basis. That did not make him a casual employee as defined under the Act. Section 2 of the Act defines a casual employee as –

> *"any employee the terms of whose engagement* ***provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time*** *but* ***does not include an employee*** *who is deemed by section 38* ***to be employed on a monthly contract.*** "[Emphasis added].

Therefore, having considered the above quoted provisions of the Act and taking into consideration the evidence on record, we are in total agreement with the decisions of the two courts below that under the

law, the respondent was an employee of the appellant. The latter had authority over the former by having power to "*hire and fire*" as is sometimes said and as was the situation in the instant case.

The second ground of appeal seems to evolve around the view that the first appellate court erred in awarding terminal benefits to this respondent who, as it is claimed by the appellant, had abandoned his employment.

First, it should be noted that the respondent controverts that claim that he abandoned his employment. He avers that it is the appellant who terminated his services forcefully, with threats. The evidence on record suggests that what the respondent states is what transpired. Both the courts **a quo** held so. We see no reason to differ with them on this factual issue. The role of a second appellate court, when it comes to deciding factual issues, is well settled. In **Felix Kichele and Emmanuel Tienyi @ Marwa v. The Republic** Crim. Appeal No. 159 of 2005 (unreported)), this Court stated:

> *"It is an accepted practice that a second appellate court should very sparingly depart*

from concurrent findings of fact by the trial court and the first appellate court. Indeed there is a presumption that disputes on fact are supposed to have been resolved and settled by the time a case leaves the High Court ..."

The second point worth noting is the absence of records in support of the appellant's averments when it comes to employment terms and dues in respect of the respondent. It is imperative, under section 40(1) of the Act, that every employer keeps a record of contract for every employee. Subsection (2) of section 40 lists what should be itemized in that record of contract. Failure to comply with the foregoing has serious consequences when it comes to disputed interpretation of such terms and conditions. Section 40(5) provides thus –

"*where any dispute arises as to the terms and conditions of an oral contract other than a contract for the employment of casual employee, and* ***the employer fails to produce a record*** *of such contract made in*

accordance with the provisions of this section, ***the statement of the employee as to the nature of the terms and conditions, shall be receivable as evidence*** *of such terms and conditions* ***unless*** *the employer satisfies the court to the contrary."* [Emphasis added].

We agree with the two courts below, that the appellant has failed to prove to the satisfaction of the Court that what the respondent claimed was not justified and not provided for in the contract. It was held by the trial court that indeed the respondent worked for the appellant during the material period. Further, that during the said period he was paid a monthly wage of shs.5,000/=, hence below the prescribed minimum wage. He is therefore entitled to be reimbursed the difference.

Both courts below found that the appellant should pay the sum of shs.1,320,000/= being wage arrears. **We uphold that decision.**

We would like to remark on one last point. It is on record that the respondent paid shs.30,000/= as filing fees while the appellant

paid shs.3,500/= as fees for filing his written statement of defence. No doubt that contravened the clear provisions of the Act which states categorically, under section 153 thus:

> "No fees or costs shall be payable in respect of any *proceedings, under the provisions of this Act before any court or magistrate ..*"

Under such circumstances **we order that the said fees be refunded to the parties.**

In conclusion, this appeal fails in its entirety. It is dismissed. No order as to costs.

DATED at MTWARA, this 29th September, 2010.

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL