IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPEAL NO. 157 OF 2016

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

EMMANUEL MAIRA..... APPELLANT
VERSUS
THE DISTRICT EXECUTIVE
DIRECTOR OF BUNDA DISTRICT COUNCIL..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 24th day of February, 2015
in
Civil Case No. 9 of 2001

JUDGMENT OF THE COURT

23rd & 26th May, 2017

NDIKA, J.A.:

Mr. Emmanuel Maira, the appellant herein, was initially employed by the government as a Fisheries Assistant on 1st July 1983. He was posted to Bunda District Council where he served until June 1996 at the rank of Assistant Fisheries Officer, Grade III. By a letter dated 12th June 1996 referenced as HB/JB/940/52 (Exhibit P.2), the respondent dismissed him from his employment after he was suspended from service vide a letter with reference number HB/JB/940/51 dated 23rd January 1996 (Exhibit

P.1). After initially challenging the dismissal by enlisting the appellate intervention of the regional hierarchy who, then, urged the respondent to reinstate him in his office, the appellant lodged a suit against the respondent before the High Court at Mwanza, that is, Civil Case No. 9 of 2001 as reinstatement was not forthcoming. Claiming in that action that he had been dismissed wrongfully, he prayed for immediate reinstatement in his office, payment of all monthly salaries and other benefits he would have earned from June 1996, an award of general damages in the sum of TZS. 150,000,000.00, interests at the commercial rate and costs of the suit.

Although the respondent denied liability through its written statement of defence, it defaulted appearance when the trial was about to commence. At the request of the appellant, the hearing proceeded *ex parte*. In proving his claims, the appellant gave evidence as the sole witness and tendered four letters as exhibits.

In its judgment, the High Court (Mwangesi, J., as he then was) found no need to address the substance of the appellant's claims as it was satisfied that the appellant's grievance concerned summary dismissal, which, in terms of the provisions of section 28 (1) of the Security of Employment Act, Cap. 574 (now section 29 (1) of the Security of

Employment Act, Cap. 387 RE 2002), could not be litigated in a civil court. Accordingly, the Court struck out the suit for want of jurisdiction with no order as to costs.

Resenting the High Court's decision, the appellant has appealed to this Court upon three grounds of appeal as follows:

"1. *That the trial Judge erred both in law and fact in holding that the termination of the Appellant from employment was by way of summarily (sic) dismissal whilst the Appellant was not summary (sic) dismissed from employment.*

2. *That, since the Appellant was not summarily dismissed from employment, the trial Judge erred in law in invoking the provisions of section 28 (29) (sic) of the Security of Employment Act (Cap. 387 RE 2002) and holding that the trial High Court had no jurisdiction to entertain and try the Appellant's suit.*

3. *That, the trial Judge erred in law in holding that the Appellant ought to have disputed his termination from employment through the Labour Officer, Conciliation Board and later to the Minister for Labour whilst the*

Appellant, being an employee of the Local Government, with the rank of GS4 (sic), was not supposed to follow the said procedure."

At the hearing of the appeal, the appellant appeared in person and fended for himself. Without much argument, he urged us to allow his appeal upon the three grounds of appeal as argued in his written submissions. Mr. Michael Haule, learned Solicitor, represented the respondent. He too had little to say apart from praying that the appeal be dismissed with costs upon the written submissions in reply that the respondent lodged.

In determining the appeal, we will begin with the first ground of appeal that the trial Judge erred in law and in fact in holding that the appellant was summarily dismissed from his employment.

For a start, we wish to observe that both parties herein acknowledged in their respective written submissions that the term summary dismissal means "dismissal without notice" as was defined by the Court of Appeal for East Africa in **Kitundu Sisal Estates v Shingo and Others** [1970] E.A. 557. That definition was extended in **Mohamed and Others v Manager Kunduchi Sisal Estate**, [1971] HCD n.430, where Onyiuke, J., interpreted summary dismissal to mean termination of

the contract of service without notice or payment of salary in lieu of notice (see also **KLM Royal Dutch Airlines v Jose Xavier Ferreira** [1994] TLR 230; and **The General Manager, Williamson Diamonds Ltd. Mwadui v Edwin Yustas Magelegele**, Civil Appeal No. 8 of 1999 (unreported) where this Court cited the definition in **Mohamed and Others v Manager Kunduchi Sisal Estate** (supra) with approval).

In dealing with the question whether the appellant's termination of employment was summary dismissal or not, the learned Trial Judge examined the letter of termination (Exhibit P.2) and found as follows:

> *"In the same it has been indicated that, he was being dismissed from employment in terms of the provision of the Local Government Disciplinary Code of 1983 Part A (f), which was embodied in the provisions of sections 19 and 20 of the then Security of Employment Act, 1964, Cap. 574 (Now sections 20 and 21 of Cap. 387). Section 19 was about 'Restriction in summary dismissal and fine' while section 20 was about disciplinary penalties."*

In the circumstances, the learned Judge concluded:

"It is evident from the wording of the provisions which were used by the defendant to terminate the employment of the plaintiff that, it was by way of summary dismissal."

We find it pertinent to interpose and remark on the gist of the provisions cited in the above passages. We note that section 19 of Cap. 574 (supra) restricts the right of an employer to dismiss an employee summarily. It provides that:

"Subject to the provisions of section 3 but notwithstanding the provisions of any other law no employer:

(a) shall summarily dismiss any employee; or

(b) shall, by way of punishment, make any deduction from the wages due from him to any employee, save for the breaches of the Disciplinary Code, in the cases and subject to the conditions, prescribed in this part and the Second Schedule to this Act."

Section 20 of the same Act gives the right to an employer to dismiss an employee summarily for breaches of the Disciplinary Code in the cases in which such penalty is allowed under the Code.

In his written submissions, the appellant faults the learned Trial Judge's portrayal of his termination as a summary dismissal on two main

reasons: first, he argued that the learned Trial Judge did not consider the letter of suspension from employment (Exhibit P.1), which, in his opinion, constituted notice prior to dismissal, as it served upon him on 23rd January 1996, a little over five months prior to his dismissal. Secondly, he contended that as his suspension was made at half monthly salary that was paid until the day he was served with the letter of termination (Exhibit P.2), his dismissal ought not to be termed summary dismissal. On this point, he placed reliance upon **The General Manager, Williamson Diamonds Ltd. Mwadui v Edwin Yustas Magelegele** (supra).

Mr. Haule, learned Solicitor for the respondent, disagrees with the appellant, contending that the letter of suspension was not a notice of termination but an instrument that paved the way for setting into motion appropriate disciplinary proceedings against the appellant.

On our part, we do not find any fault in the learned Trial Judge's finding that the appellant's termination of employment was essentially a summary dismissal. First and foremost, we examined the letter of suspension (Exhibit P.1) and came to the conclusion that it simply notified the appellant that he had been suspended from his employment with effect from 1st January 1996 at a half monthly salary pending a disciplinary inquiry instituted against him. That letter certainly did not

constitute a "prior notice of termination", as we define "notice of termination" to mean a written advance communication by an employer to an employee of his intention to terminate that employee's employment with him on a particular future date.

In addition, we think that the evidence that the appellant was paid a half monthly salary throughout the period of suspension does not mean that the half salaries so paid by the respondent constituted "salaries in lieu of notice". In this regard, the appellant's reliance upon our decision in **The General Manager, Williamson Diamonds Ltd. Mwadui v Edwin Yustas Magelegele** (supra) is completely misplaced. The factual basis in that decision was that although the employee (i.e., the respondent) was dismissed without notice, there was evidence that the employer (i.e., the appellant) paid the employee his terminal benefits including a one-month salary in lieu of notice. We insist that in the instant appeal, there is no evidence on the record that the appellant was paid any monies in lieu of prior notice.

The foregoing apart, we also agree with the learned Trial Judge that since the provisions of the law cited (i.e., sections 19 and 20 of Cap. 574 (supra)) in the letter of dismissal (Exhibit P.2) concerned summary

dismissal there was no doubt that the respondent terminated the appellant's employment by way of summary dismissal.

Accordingly, we find no merit in the first ground of appeal, which stands dismissed.

Next for consideration is the second ground of appeal, which is a complaint that since the appellant was not summarily dismissed from employment, the learned Trial Judge erred in law in finding that the jurisdiction of the court had been ousted by the provisions of section 28 (1) of the Security of Employment Act, Cap. 574 (now section 29 (1) of the Security of Employment Act, Cap. 387 RE 2002).

As is evident in the above ground, it was made upon the assumption that the Court would find the appellant's termination of employment was anything but not a summary dismissal. As we have found against the appellant that his dismissal constituted summary dismissal, we are constrained to endorse the learned Trial Judge's finding that the High Court had no jurisdiction to try and determine the suit. Indeed, that is the effect of section 28 (1) of the Security of Employment Act, Cap. 574 (now section 29 (1) of the Security of Employment Act, Cap. 387 RE 2002), which stipulates thus:

"No suit or other civil proceedings (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part) shall be entertained in any civil court with regard to the summary dismissal or proposed summary dismissal of an employee."

The position that the above provisions constitute an ouster of jurisdiction of civil courts over grievances arising from summary dismissal was restated in, for example, **Kitundu Sisal Estates v Shingo and Others** (supra), **Mohamed and Others v Manager Kunduchi Sisal Estate** (supra), **KLM Royal Dutch Airlines v Jose Xavier Ferreira** (supra), and **The General Manager, Williamson Diamonds Ltd. Mwadui v Edwin Yustas Magelegele** (supra). We thus find the second ground too lacking in merit.

The final ground of complaint faults the learned Trial Judge for holding that the appellant ought to have disputed his termination from employment through a structure that involved levels from the Labour Officer, the Conciliation Board to the Minister responsible for labour matter whilst the appellant, being an employee of the Local Government, with the rank of LGGS4, was not supposed to follow the said procedure.

Submitting on above ground, the appellant argued that at his rank of LGGS4 he was in terms of section 14C of the Local Government Service Act, 1982, as amended by the Local Government Laws Amendment Act, Act No. 23 of 1991, under the disciplinary authority of his Council, the Regional Commissioner being the final appellate authority. It was, therefore, his view that he was not supposed to follow any other structure for resolving the matter. In this regard, he lodged his complaint with the Regional Commissioner vide a letter dated 22nd October 1996 against the dismissal. According to him, the Regional Commissioner responded in writing (Exhibit P.3) by setting aside his dismissal and ordering his reinstatement.

Replying, Mr. Haule argued, in effect, that the procedure under the Local Government Service Act did not exempt the appellant in any way. Citing the case of **Omari v East African Airways** [1970] EA 610, he argued that since the appellant had been dismissed summarily, he ought to have challenged the dismissal before the High Court by way of judicial review.

On our part, having read section 14C cited by the appellant as the basis of his exemption from the dictates of Cap. 574 (now Cap. 387), we

do not think that it provides any such exemption. To appreciate that point, we reproduce the aforesaid provisions as follows:

"14C. The Council shall: -

(a) have the power to employ all such other officers to certain offices in the service of local government other than those employed by the President, Commission or the Minister;

(b) be the ***disciplinary authority in respect of officers it employs and the Regional Commissioner shall be the final appellate authority.***" [Emphasis supplied.]

In our considered view, the above provisions delineate the powers of the Council in recruitment and discipline of its staff. Section 14C (b), to which the appellant appears to make specific reference, sets up the disciplinary authority for Council's staff, stating that while the Council will serve as the initial disciplinary authority, the Regional Commissioner shall be the final appellate authority. This structure, we think, is an internal disciplinary structure. It does not indicate or suggest any exemption from the application of Cap. 574 (supra), now Cap. 387 (supra). Had there been any exemption from that law of certain staff of local government

authority, the Minister responsible for labour matters ought to have made a publication in the gazette to that effect under section 2 of Cap. 574 (supra). On this basis, we find no merit in the third ground of appeal.

In the premises, we dismiss the appeal in its entirety. Given that this matter was in essence a labour dispute, we order each party to bear its own costs.

DATED at **MWANZA** this 25th day of May, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL