

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 47 OF 2018

JUMA ISSA RAMADHAN ----- APPELLANT

VERSUS

MKURUGENZI MKUU SHIRIKA

LA BANDARI ZANZIBAR -----RESPONDENT

**(Appeal from the judgment and decree of the High Court of Zanzibar
(Industrial Division) at Vuga)**

(Sepetu, J.)

dated the 04th day of May, 2016

in

Civil Case No. 03 of 2012

JUDGMENT OF THE COURT

8th & 16th December, 2020

MWANGESI, J.A.:

The appellant in this appeal is challenging the decision of the Industrial Court of Zanzibar sitting at Vuga (Sepetu, J.) which dismissed his claims for reinstatement and payment of other statutory entitlements after allegedly being unlawfully terminated from his employment by the respondent. According to the memorandum of appeal which was lodged in Court on the 15th March, 2018 his appeal is premised on four grounds two out of them being in the alternative, namely: -

1. *"That, the Honourable High Court Judge erred in law by allowing the redundancy which was made*

to the appellant by the respondent without complying with the procedure of redundancy in accordance to the law;

2. That, the Honourable Justice of the High Court erred in law and fact for basing his decision on section 11 (5) of the Public Investment Act No. 04 of 2002 which was wrongly interpreted in the absence of regulations.

IN THE ALTERNATIVE

3. That, the Honourable High Court Justice erred in law in entertaining the suit without framing issues;

4. That, the Honourable High Court Justice erred in law in entertaining the claim and pronounced the decision without recording the opinion of the assessors."

The brief facts of the suit leading to the impugned decision as discerned from the pleadings were that: Up to 04th February, 2010 Mr. JUMA ISSA RAMADHAN was in permanent employment of ZANZIBAR HARBOURS CORPORATION (Shirika la Bandari Zanzibar). On 11th August, 2009 he was supposed to start his work in the shift that started at around 18:00 hours and had to last up to 06: 00 hours on the following morning. He however failed to do so due to sickness and never informed his boss. On the following day, it was discovered that theft had

occurred at his work place. Because he was the one on duty, he was implicated with the loss and required to give his statement. After having failed to give his statement within the stipulated period, on the 05th day of February, 2010 he was served with a letter by the respondent, informing him that the Board of Directors of the Corporation (the Board), had resolved to terminate his employment effective from 04th February, 2010.

Dissatisfied by the termination made against him, the appellant lodged his complaint in the Industrial Court of Zanzibar, arguing that the reasons which had been advanced by the respondent in terminating him from employment, were legally improper and unjustifiable. In resisting the alleged termination, the appellant relied on his lonely testimony, while on the part of the respondent, two witnesses testified in support of the termination. The learned trial Judge after evaluating the evidence that was placed before him, was satisfied on balance of probabilities that the termination of the appellant was fairly done. In the instant appeal the appellant is assailing such finding of the trial Judge.

On 08th December, 2020 when the appeal was called on for hearing before us, Messrs. Salum Bushiri Khamis and Haji Suleiman Teterere, learned counsel, entered appearance to jointly represent the

appellant, whereas the respondent enjoyed the services of Mr. Rajabu Abdallah Rajabu also learned counsel. Upon the counsel for the appellant being invited by the Court to address it on the grounds of appeal, he first presented a prayer which was granted by the Court unresisted by his learned friend, to abandon the fourth ground of appeal.

With regard to the remaining grounds of appeal, Mr. Khamis sought leave of the Court which was also granted, to adopt the written submissions which were lodged by the appellant in support of the appeal on 11th May, 2018 and the list of authorities which was lodged on 04th December, 2020 with nothing more.

It is the submission of the appellant in the written submissions to amplify the first ground of appeal, that the learned trial Judge erred in law in upholding the purported redundancy of the appellant from his employment, while it was done without complying with the requirement of the law. According to him, for proper redundancy to be carried out against him, the provisions of section 121 of the Employment Act, No. 11 of 2005 (**the Employment Act**) had to mandatorily be complied with. Nevertheless, in the instant appeal, nothing of the sort was done.

As regards to the second ground of appeal, the learned trial Judge is challenged for blessing the redundancy which was made to the

appellant under the provisions of section 11 (5) of the Public Investment Act No. 4 of 2002 (**the Investment Act**), as reflected in the letter which was served on the appellant on 05th February, 2010, while at the material time, the corporation had no staff regulations to empower the Board to terminate the appellant as required by the said law. He argued that such staff regulations were published in the Government Notice No. 127 of 2012 which was signed by the Minister on 28th September, 2012. In that regard, the appellant contended that during his purported termination, the Board did not have such powers to do what it did.

The submission of the appellant in respect of the third ground is that, the learned trial Judge erred in law and fact, in determining the appellant's complaint without ascertaining the areas in which the parties were at variance and frame the issues for determination. The omission by the learned Judge to frame issues, offended the provisions of Order XVI (1) (5) of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar (**the Civil Procedure Decree**), he argued.

On the basis of the errors occasioned by the learned trial Judge in dealing with the complaint which was lodged by the appellant in court as highlighted above, the learned counsel for the appellant implored the Court to quash the decision of the Industrial Court of Zanzibar and set

aside its orders and in lieu thereof, it be pleased to order for reinstatement of the appellant in his employment and, he also be paid all his entitlements.

There were no written submissions which were lodged by the respondent in reply to the ones filed by the appellant. By virtue of the provisions of rule 106 (10) (b) of the Tanzania Court of Appeal Rules, 2019 (**the Rules**), the learned counsel for the respondent was permitted by the Court, to respond to the written submissions filed by the appellant, orally.

In responding orally to what had been submitted on behalf of the appellant, Mr. Rajabu on behalf of the respondent was fully in agreement with his learned friend, that the termination of the appellant was not in compliance with the law. He argued that the provisions of section 11 (5) of **the Investment Act** under which the Board purported to have declared redundancy to the appellant, had nothing to do with such a thing. This was from the fact that the said provision deals with employment, termination, dismissal and suspension of employees. That being the position, the said provision of law was improperly applied by the Board. He therefore reiterated the prayer which was presented by his learned friend, that the Court quashes the decision of the trial

Industrial Court, and direct the respondent to reinstate the appellant in his employment as well as paying him his entitlements. He however implored the Court, that in ordering for the payment of the appellant's entitlements, consideration be made to the payments which had already been made to the appellant, while the respondent was executing the termination which they argue to have been unlawfully made.

In the light of the grounds of appeal lodged by the appellant and the submissions which have been made by the counsel from either side above, the germane issue which stands for determination by the Court, is whether the appellant's appeal is founded. We propose to consider the first and second grounds of appeal conjointly because they both challenge the propriety of the procedure which was adopted by the respondent in terminating the appellant's employment. The issue which arises from those grounds, is whether there was compliance with the law in terminating the appellant.

To begin with, there was a problem with the type of termination which was made to the appellant by the Board. When we inquired from the learned counsel from either side as to whether the appellant's termination from employment was based on dismissal or redundancy, neither of them was in a position to clarify the position. On one hand,

what we could gather from the testimony of DW2 one Hamza Mohamed Alli, who happened to be the Director of Administration in the respondent corporation and in particular, during cross-examination by the appellant, tended to suggest that the termination of the appellant was based on disciplinary misconduct. This was so for the reason that what triggered the process for termination, was the loss which was occasioned by his act of absenting himself from work and thereby, leading to theft at his working place. Part of the witness's response to the questions put to him by the appellant as reflected on page 61 of the record of appeal went thus: -

"The fact that you were absent from it is already an offence and you have caused loss to the corporation. I don't know who was given that machine. We were informed about the act and you have caused that. You failed to give explanation as ordered. Not being present at work is among the disciplinary offences. Yes, the law so directs as per the Public Investment Act."

However, on the other hand according to the testimony of the appellant (PW1) as well as the DW2 whose testimonies tallied with the contents of the termination letter that was served on the appellant on 5th February, 2010, which even though it was annexed to the plaint was

not tendered in evidence, the appellant was declared redundant by the Board under section 11 (5) of the **Investment Act**. In any case, whether the appellant's termination from employment was under redundancy or dismissal, in either way, it contravened the procedural law which has been put in place. The wording of section 11 (5) of the **Investment Act** under which the redundancy is claimed to have been made, reads that: -

"For avoidance of doubt it is expressly provided that the Board shall have the power to employ, terminate, dismiss and suspend staff of a public corporation in accordance with staff regulation of such corporation."

What is evident from the wording of the above quoted provision of law is the fact that **first**, it does not invest any powers on the Board to declare an employee redundant. **Secondly**, in case of effecting any other forms of termination of an employee, the law to be applied by the Board, is the Staff Regulation of the corporation which in this case, was the Staff Regulations of Zanzibar Harbours Corporation. Apart from the fact that at the time the appellant's employment was terminated that is in 2010, there were no regulations in place to empower the Board to

terminate the appellant as argued by Mr. Rajabu, the Board had no powers to declare redundancy to the appellant.

The grounds in which an employer may declare redundancy to an employee are provided for under the provisions of section 121 (2) of the Employment Act, No. 11 of 2005 (**the Employment Act**), which reads that: -

"(2) An employer may be allowed to declare redundancy upon proof of the following: -

(a) That, the number of employees in the establishment is in excess to the extent of causing inefficiency;

(b) That, he or she intends to cancel some of the positions for reasons provided under paragraph (a) of the subsection;

(c) That, the performance of the employee subject of the redundancy is inadequate and that his or her skill does not fit the technology introduced in the establishment;

(d) That, consultation has been made with the relevant trade union."

Since there was no evidence tendered by the respondent, to establish that the requirements stipulated under the provisions of

section 121 (2) of **the Employment Act** quoted above were complied with, there was no way in which the redundancy purported to have been declared by the respondent against the appellant, could be sustained. That said, we answer the first issue which we posed above in the negative, that the provisions of law were infringed in terminating the appellant from employment.

The second issue which arises from the third ground of appeal, is whether the learned trial Judge erred in law in determining the dispute between the appellant and the respondent without framing issues. Framing of issues is a legal requirement in the process of determining a civil matter, which is provided under the provisions of Order XVI (1) (5) of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar (**the Civil Procedure**) which reads that: -

*"At the first hearing of the suit the court shall, after reading the plaint and written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material prepositions of fact or law the parties are at variance, and **may there upon proceed to frame and record the issues** on which the right decision of the case appears to depend."*

[Emphasis supplied]

The records of the proceedings under scrutiny, reveal that the hearing of the suit commenced on 27th November, 2013 without the learned trial Judge framing issues. The issue which arises from such omission, is whether it was fatal. This issue is being posed in view of the bolded words in the provision quoted above, wherein the provision has not been couched in mandatory terms with the use of the word **may**. The decision of the defunct Court of Appeal of East Africa in **Odd Jobs Vs Mubia** [1970] E.A at page 476, had almost similar to that of the provision words when it stated that: -

*"It is therefore the duty of the court to frame such issues as **may be necessary** for determining the matters in controversy between the parties."*

[Emphasis supplied]

Another position regarding the omission to frame issues was that which was given by this Court in the case of **the Attorney General Vs Christopher Mtikila**, Civil Appeal No. 45 of 2009 (unreported), where we stated that: -

"Where issues were not framed by the trial Judge, and the parties being ad idem (in agreement) to what was at stake and had fully

addressed the points in dispute and no injustice was occasioned, then the omission to frame the issues was not fatal."

What we glean from the above holdings, is the fact that as a general rule it is mandatory to frame issues so as to guide the court in resolving the disputed points of law and fact. It is only where the parties from both sides are in agreement to forego the requirement as it was in **Mtikila's case** (supra), that the omission could be said not to be fatal.

There having been no such consensus of the parties in regard to the omission occasioned in the instant appeal, and furthermore, after having held above that the type of termination which was made by the respondent to the appellant was problematic, we think that had the trial Judge framed issues before commencement of hearing the suit, undoubtedly the issue as to whether the appellant had been dismissed or declared redundant, could have been discovered and thereby leading him arrive at a proper conclusion that there was neither redundancy nor dismissal which had been made by the respondent in compliance with the law. To that end, we answer the second issue in the affirmative, that the learned trial Judge, erred in failing to frame issues.

Basing on what have been highlighted above, we accede to the prayer by both learned counsel and quash the finding of the trial court

as well as setting aside its consequential orders. In lieu thereof, we order for reinstatement of the appellant in his employment. Additionally, he is to be paid the rights correlating to his reinstatement after deducting the amount which had already been paid to him in respect of the termination which we have held to be illegal.

Order accordingly.

DATED at **ZANZIBAR** this 15th day of December, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of December, 2020 in the presence of Mr. Haji Suleiman Tetere, learned counsel for the Appellant and Mr. Rajabu Abdallah Rajabu, learned counsel for the Respondent is hereby certified as a true copy of the original.

