IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

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

CIVIL APPEAL NO. 295 OF 2019

ZANZIBAR TELECOMMUNICATION LIMITED ---------- APPELLANT

VERSUS

ALI HAMADI ALI AND 105 OTHERS ---------- RESPONDENTS

(Appeal from the decision of the High Court of Zanzibar (Industrial Court) at Vuga)

(Sepetu, J.)

dated the 31st day of September, 2018
in
Civil Case No. 01 of 2015

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JUDGMENT OF THE COURT

14th & 18th December, 2020

MWANGESI, J.A.:

Prior to the lodgment of the suit leading to the decision which is being impugned in the instant appeal by the appellant, the appellant and the respondents had an employer and employee relationships whereby, all respondents had been employed by the appellant in different periods, in the capacities of watchmen. According to the testimony of one Said Habubu Salim (DW2), who happened to be the Human Resources Officer of

the appellant company at the material time, the company got a new management which resolved to restructure it by laying off employees from some departments which were not performing core functions, that of the security involving the respondents herein, inclusive. In effecting the process, the employees laid of who had worked with the company for more than five years including all respondents, were paid their terminal benefits.

All respondents herein, were aggrieved by the payments made to them by the appellant and hence, instituted proceedings in the Industrial Court each claiming to be paid an amount of TZS 20,000,000/=, being terminal benefits for shortening his contract of employment, salaries for the remaining months of work and compensation for disturbance. The claims by the respondents were strongly resisted by the appellant.

Upon the learned trial Judge who was sitting with two assessors, hearing evidence from four witnesses who testified on behalf of the other respondents, as well as the defence evidence which came from two witnesses, he was convinced on balance of probabilities that the respondents' claims were founded and established, hence, awarded their claimed reliefs in the following form *verbatim*: -

(a) For unlawful termination, defendant to pay all plaintiffs in accordance with section 120 of Act No. 11 of 2005 mentioned above;

(b) Defendant to pay sum of 10,000,000 to each plaintiff for breach of their employment contract;

(c) Defendant to pay each plaintiff sum of 3,000,000/= TZS for disturbance;

(d) Defendant to issue certificate of service to all plaintiffs;

(e) Defendant to pay costs for this suit.

The appellant was dissatisfied by the decision of the trial Court and the consequential orders and hence, through its learned counsel Mr. Rajab Abdallah Rajab of AJM Solicitor and Advocate Chamber, preferred the instant appeal to assail it premising his grievance on seven grounds out of which, three of them are in the alternative. They read thus: -

1. *That, the High Court (Industrial Division Court), did err in law in deciding the Civil Case No. 01 of 2015 without properly involving assessors in the trial;*

2. *That, the High Court (Industrial Division Court), did err in law in considering and determining the documents which were neither tendered nor admitted as exhibit by the court;*
3. *That, the High Court (Industrial Court Division), did err in law in entertaining and deciding Civil Case No. 01 of 2015 based on special damages which were neither properly pleaded nor proved;*
4. *Generally, the decision of the High Court (Industrial Division Court), is otherwise bad in law.*

IN THE ALTERNATIVE

5. *That, the High Court (Industrial Division Court), did err in law and fact in deciding the Civil Case No. 01 of 2015 in favour of the respondents without evidence;*
6. *That, the High Court (Industrial Division Court), did err in law and fact in deciding the Civil Case No.01 of 2015 in favour of the respondents without considering strong evidence of the appellant;*
7. *Generally, Civil Case No. 01 of 2015 was not proved beyond the yard stick required by law.*

On the 20th day of September, 2019 the appellant lodged written submissions in support of the appeal in terms of rule 106 (1) of the Court of Appeal Rules, 2019 **(the Rules)**, which were replied by the respondent in compliance with the requirement stipulated under the provisions of rule 106 (7) of **the Rules.**

When the appeal was called on for hearing before us on 14th December, 2020, the appellant was represented by Mr. Rajab Abdallah Rajab, learned counsel, while all respondents had the services of Mr. Ussi K. Haji also learned counsel. Upon Mr. Rajab being invited by the Court to argue the grounds of appeal, he prayed to adopt the written submissions which were lodged by the appellant on 20th September, 2019 as earlier intimated above, as well as the list of authorities lodged on 04th December, 2020.

In the written submissions, the appellant grouped the grounds challenging the decision of the trial Court in mainly four categories that is, **one**, non - involvement of both assessors in the determination of the suit; **two**, the use of a document which was not tendered and admitted in evidence in deciding the suit; **three,** the award of special damages which

were neither pleaded nor proved; and **four**, deciding the suit in favour of the respondents against the weighty of the evidence.

Starting with the first category, it was submitted that the decision of the trial Industrial court, was faulty for not having fully involved the two assessors who sat with the learned Judge during trial of the suit. The contention was expounded by referring the Court on pages 252, 255 and 262 of the record of appeal, wherein the proceedings disclose that on those particular days, there was participation of only one assessor during trial. In the view of the appellant, the proceeding in those days was vitiated and thereby making the trial a nullity. He urged us to hold so.

In the second category of the grounds of appeal, the decision of the High Court is faulted on account that it was based on a document which was not tendered and admitted in evidence. Reference was made to annexure ZLT3 which was heavily relied upon by the learned Judge in his judgment, while the said document was never tendered as exhibit in Court during trial. Placing reliance on the decisions of the Court in **MENEJA MKUU KARAFUU HOTEL Vs. EVANS PETER,** Civil Appeal No. 17 of 2009 and **SABRY HAFIDH KHALFAN Vs. ZANZIBAR**

TELECOMMUNICATION LIMITED (ZANTEL) ZANZIBAR, Civil Appeal No. 47 of 2009 (both unreported), Mr. Rajab asked us to treat the proceedings of the trial Industrial Court, a nullity and be pleased to nullify them accordingly.

Submitting on the third category of the grounds of appeal, the learned counsel for the appellant argued that it was legally improper for the learned trial Judge, to determine and award the claims of the respondents against the appellant for special damages, while such claims were neither pleaded nor specifically established as required by the law. According to Mr. Rajab, what were pleaded by the respondents as reflected in paragraph four (4) of their plaint, were general claims for compensation for breach of their employment contracts. In that regard, the flat award made by the trial Court of TZS 10,000,000/= for each respondent, had no legal basis and hence unjustifiable. The same was the case for the award of TZS 3,000,000/= for each of them. After all, he went on to argue, each employee had his own period of employment and retirement. The holding in the case of **DIRECTOR MOSHI MUNICIPAL COUNCIL Vs.**

STANLENARD MNESI ROISIEPEACE SOSPETER, Civil Case Appeal No. 246 of 2017 (unreported), was cited to bolster the contention.

As regards the fourth and last category of the grounds of appeal, it is the submission on behalf of the appellant, that the decision of the trial Industrial Court, was bad in law for being against the weighty of the evidence which was placed before it. While the appellant tendered cogent evidence to resist the claims of the respondents from her two witnesses which she paraded in court, as against the weak evidence from the four witnesses who testified on behalf of the rest of the respondents. To their surprise the learned trial Judge gave a decision in their disfavor. He invited us to re-evaluate the said evidence and come out with our own finding which in his belief, would be in favour of the appellant. Mr. Rajab, concluded his submission by urging us to allow the appeal by quashing the decision of the trial Industrial Court with costs.

On his part, Mr. Haji on behalf of the respondents, also prayed to adopt the written submissions which were lodged by the respondents in reply to the one lodged by the appellant. The response on the first category of the grounds of appeal which concern the involvement of

assessors in the trial of the suit, it is argued that the assessors were fully and effectively involved in compliance with the law. The learned counsel, referred us to the provisions of section 83 (3) of the Labour Relations Act No. 01 of 2005 **(the Labour Relations Act)**, which permits the trial of the suit to continue in a situation where in the course of the trial, one of the assessors happens to be absent. He therefore argued that, the trial Judge was legally justified to proceed with hearing of the suit on the days when one of the assessors was absent in the pages which were pointed out by his learned friend in the record of appeal. He asked us to dismiss this ground of appeal.

Mr. Haji was in agreement with his learned friend in regard to the second category of the grounds of appeal, that indeed annexure ZLT3, a document which had not been tendered and admitted in evidence was relied upon by the Judge. He was however of the firm view that in so doing the trial Judge committed no procedural wrong. Since the said ZLT3 had been annexed to the written statement of defence of the appellant, by virtue of the wording of section 84 (a) (i) and (ii) of **the Labour Relations Act**, the trial Judge correctly relied on the said document

because they had been presented or tendered in Court. This ground was also said to be devoid of merit.

On the issue of the weighty of the evidence to establish the claims of the respondents, which constitutes the third category of grounds of appeal, it was submitted by Mr. Haji that cogent evidence was given by the four witnesses who testified on behalf of the other respondents, that the appellant terminated their employment contracts without complying with the law. As all respondents had been performing the same type of work, the need for each respondent to testify in establishing his claim, did not arise. He thus urged us to also dismiss this ground of appeal.

With regard to the fourth category of the grounds of appeal that the respondents were granted special damages which they never pleaded nor tendered evidence to establish them, the learned counsel for the respondents strongly resisted. It was his argument that the respondents' claims were properly lodged in compliance with the provisions of Order VI rules 2, 3 and 4 of the Civil Procedure Decree Cap 8 of the Laws of Zanzibar (**the Civil Decree).** He therefore, asked the Court to dismiss this

ground as well and the entire appeal which has been lodged by the appellant without founded basis with costs.

In the light of the grounds of appeal lodged by the appellant and the submissions made by the counsel for either side, what stands for the Court's determination, is the germane issue as to whether the appeal is merited. Two basic issues arise from the grounds of appeal that is, **first,** which arises from grounds number 1 to 3 is whether there were procedural irregularities in the proceeding before the trial Industrial Court. **Secondly,** which arises from the remaining grounds, is whether the suit was decided against the weighty of the evidence. We propose to start with the first issue on procedural irregularities.

The first procedural irregularity which has been complained of, is in regard to the involvement of assessors in the determination of the suit. While Mr. Rajab argued that the failure by the learned trial Judge to fully involve both assessors in the entire proceeding was fatal, his learned friend Mr. Haji, was of the view that the failure to involve both of them in some days was not fatal. At this juncture, we think it is apposite to look on the provision stipulating for the involvement of assessors in the trial which was

relied upon by Mr. Haji that is, section 83 (2) and (3) of **the Labour Relations Act,** which reads: -

> *"(2) For the purpose of holding proceedings in exercise of the functions of the Court under this Act, the Court shall be properly constituted if presided over by the presiding Judge and two assessors."*

(3) Notwithstanding the provision of subsection (2) of this section-

> *"(a) If in the course of any proceedings before the Court one or both of the assessors who were present at the commencement of the proceeding is or are for any reason absent, the presiding Judge and the remaining assessor, if any, any continue and conclude the proceeding.*
>
> *(b) If for any reason at the commencement of any proceeding any of the assessors is absent, the presiding Judge and the assessor present shall properly constitute the Court."*

Our understanding of the wording of section 83 (3) of the **Labour Relations Act** quoted above, is that commencement or continuation of

hearing of a suit, can take place or proceed even where one of the assessors is absent for any reason. That being the case, we find merit in the submission of Mr. Haji that the proceeding of the trial Court in the days when one of the assessors was not present as indicated in the pages which were pointed out by Mr. Rajab in the record of appeal, was not vitiated. The appeal on this ground therefore fails, and we dismiss it.

The second procedural irregularity was in respect of the document which was relied upon by the learned Judge in his decision, while it had not been tendered and admitted in evidence. It was strongly argued by Mr. Rajab, that the act by the learned Judge of the Industrial Court to base his decision on a document which was not tendered and admitted in evidence was legally improper, and that it rendered the proceeding a nullity. On his part, Mr. Haji opposed the stance taken by his learned friend, arguing that since the document had been annexed to the written statement of defence, by necessary implication it meant that the document had been presented in Court and hence, subject of being applied. In support of this stance, Mr. Haji relied on the provision of section 84 (a) (i) and (ii) of **the Labour Relations Act**, which is couched in these words: -

"Where any labour dispute or other matter is referred to the Court, the Court shall proceed to inquire into such labour dispute or matter, and-

(a) Shall hear, receive and consider any submissions, ***arguments or evidence made, presented or tendered*** *by or on behalf of -*

i The employees concerned;

ii The trade union of which such employees may be members."

[Emphasis supplied]

To be in a better position of appreciating the complained of act against the trial Judge of the trial Industrial Court, we hereby reproduce part of the judgment of the Court as reflected on pages 278 and 279 where he stated thus: -

"---In this aspect and from the above mentioned provisions of the law it has been seen that the defendant has failed fully to comply with the above cited laws. As there the agreement was not signed by both parties this was during hearing and from the annexure attached with WSD. The said letter dated 12 May, 2014 addressed to Commissioner

marked as ZLT3 at page 12 on the first line from the top written in Kiswahili language as: -

Pamoja na maelezo ya kina na ufafanuzi uliotolewa na maafisa toka ofisi yako tarehe 31.03.2014 na 03.04.2014 kuwa hakuna stahili zozote za kisheria na za ziada zimejumuishwa kwenye ripoti hiyo na zitalipwa kama zilivyoainishwa; bado TEWUTA waligoma kusaini na kudai kuwa kada nyingine wanaweza kuendelea na zoezi lakini kada ya walinzi hawako tayari kusaini.

From above citation is clearly seen that defendant have forced whole exercise without compliance with above cited provisions of the law which they claim to have been complied with. The section 121 (1) (b) of Act No. 11 of 2005 requires submit (sic) to Commissioner the report of the discussion and the agreement signed by both parties together with suggestion of how they are going to implement the redundancy exercise. The said report was never tendered before this Court nor has been attached with WSD as annexure.

In this matter it has been seen that defendant just intended to terminate plaintiffs and the redundancy is a creature created by defendant to justify their

action against (sic). Upon such turn it is clear that defendant un-procedurally terminated all plaintiffs and indeed I join hand with opinion of assessors to this regard."

It is evident in view of the excerpt reproduced above that, the decision of the trial Industrial Court in the dispute between the appellant and the respondents, was basically based on annexure LZT3, which as it has been conceded by learned counsel from both sides, was not tendered and admitted in evidence. The question which we had to ask ourselves in view of the wording of the provision of section 84 (a) (i) and (ii) of **the Labour Relations Act,** is whether it is in support of the contention of the learned counsel for the respondents, that the act of annexure LZT3 being annexed to the written statement of defence, constituted part of the record of the Court. With due respect to the learned counsel, we think it does not. By merely annexing a document to the one lodged in court, cannot be equated to **tendering** the said document or **presenting** the same in Court, as envisaged under the provision of section 84 (a) of **the Labour Relations Act** quoted above. In our considered view, presentation or tendering of a document in court, infers to the document being presented

or tendered in court in the course of the proceeding whereby, each of the party/parties to the proceeding, is/are availed the chance of discussing it. Where the chance to discuss the document has not been given to the party/parties, using such a document in composing the decision is tantamount to condemning the party/parties unheard.

Our holding in **SHEMSA KHALIFA AND OTHERS VS SULEIMAN HAMED ABDALLA** (supra), as cited by Mr. Rajab in his submission, supports the stance which we have discussed above. We stated in the said case that:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in the case to have relied on a document whlch was neither tendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice."*

The Court also commented in regard to improper application of annexures in proceedings in the case of **SABRY HAFIDH KHALFAN VS ZANZIBAR TELECOMMUNICATION** (supra) where it stated that: -

> *"We wish to point out that annexures attached along with either plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence, is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."*

See also: **GODBLESS JONATHAN LEMA VS MUSSA HAMIS MKANGA AND TWO OTHERS**, Civil Appeal No. 47 of 2012 (unreported).

We note that in terms of the provisions of section 88 (1) of the **Labour Relations Act,** the Industrial Court is not bound in the conduct of its proceedings by the strict rules of procedure in receiving evidence. In its own words the provision reads that: -

"A mediator, arbitrator or the Court, for the purpose of dealing with any matter referred to it under this Act, shall be entitled to elicit all such information as in the circumstances may be considered necessary, without being bound by the rules of evidence in civil or criminal proceedings ---"

Nonetheless, we are firm in our mind that the flexibility envisaged by the Parliament in the above provision, was not aimed to be applied by the Court in situations when it is dealing with fundamental issues. As earlier alluded to above, applying a document which was not tendered/presented in evidence as exhibit, is tantamount to condemning the party/parties without according him/them the basic right of being heard. Since the right to be heard is a cardinal principle of Natural Justice, we are sufficiently convinced by the submission which was made by the learned counsel for the appellant, that the act by the learned trial Judge, to base his judgment on a document which had not been tendered and admitted in evidence as exhibit, vitiated the proceedings.

With the foregoing finding, we find the need to canvass on the other grounds of appeal not pressing. In view of the nullity proceeding which led to the appeal under scrutiny, we invoke the revisional powers conferred on

us under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (**the AJA**), to nullify the proceeding of the trial Industrial Court, and in lieu thereof, we direct for fresh hearing of the suit before another Judge with a different set of assessors.

Order accordingly.

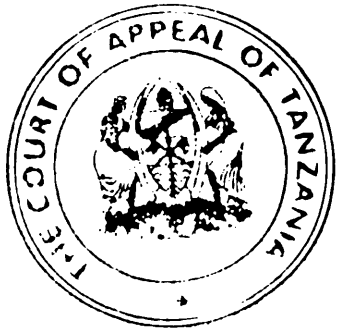
DATED at **ZANZIBAR** this 17th day of December, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of December, 2020 in the presence of Mr. Rajabu Abdallah Rajabu, learned counsel for the Appellant and also holding brief of Mr. Ussi K. Haji, learned counsel for the Appellant is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL