IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KITUSI, J.A.)

CIVIL APPEAL NO. 111 OF 2017

SALHINA MFAUME AND 7 OTHERS.....APPELLANT

VERSUS

TANZANIA BREWERIES CO.LTD.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mruma, J.)

dated 5th day of May, 2009
in
Civil Case No. 329 of 1997

JUDGMENT OF THE COURT

5th & 19th May, 2021

MUGASHA, J.A.:

The appellants herein were employees of the respondent up to March 1993. Following a redundancy exercise, the appellants were among those who were retrenched. About four years later, that is, on 24/11/1997, the appellants instituted a suit against the respondent claiming that they were not paid their terminal benefits according to the Voluntary Agreement.

Apparently, for the plaintiff's case it is only the first appellant who testified at the trial. He recalled to have been formerly employed as a stores clerk at the respondent's depot at Magomeni up to 1993 and that

upon being retrenched, he was informed that the terminal benefits would be paid in terms of the Voluntary Agreement which was tendered as Exhibit P4. According to him, such benefits were four (4) months' salary for each year served; transport of personal belongings 3 ½ tonnes and family members and bonus. He contended that though he was not involved in the preparation of the Voluntary Agreement, he managed to get a copy of it from the offices of the Organisation of Tanzania Trade Unions (OTTU). He added that, after being served with retrenchment letters, they realized that their terminal benefits worth TZS. 10,934,316.00 were not paid and that is a subject of their claim. Upon being cross-examined by the respondent's counsel, the 1st appellant conceded that the Voluntary Agreement was not registered and that they had accepted a package of terminal benefits pursuant to another agreed procedure contained in the Tamko Rasmi (Exhibit P1) which was however, not compatible with the terms on the Voluntary Agreement.

Robert Charles Mwaimu (DW1) was the only witness for the defence. He recalled that while serving as a Director of Human Resources in the respondent Company he came across the appellants' complaint that the payment of terminal benefits upon retrenchment in 1993 violated the Voluntary Agreement. He told the trial court that the terminal benefits

could not be paid in accordance with the Voluntary Agreement because being in a draft form it was not registered. As such he testified that this necessitated parties to enter into another arrangement upon which it was agreed that the appellants be paid a sum of money constituting full and final payments of their claims against the respondent. According to DW1 the respective payments were as follows: the 1st appellant: TZS. 459,522.00; Ayub Fundi Lema (2nd appellant) TZS. 436,488.00; Deogratias Shillinde (3rd appellant) TZS. 502,515.00; Willy Mwandembwa (5th appellant) TZS. 381,108.00; Raina Libana (6th appellant) TZS. 260,000.00; Michael Chitete (7th appellant) TZS. 476,932.50 and Musa Augosti (8th appellant) TZS. 537,216.00.

After a full trial, the trial Judge concluded that the unsigned Voluntary Agreement was unenforceable because parties did not express their willingness to be bound by the terms and conditions therein. Consequently, the suit was dismissed with costs.

Aggrieved, the appellants have preferred this appeal to the Court raising three grounds of complaint in the Memorandum of Appeal as follows:

1. That the Honourable trial Judge erred in law to hold as he did that the appellants were not entitled to claim on unsigned agreement.
2. That the honourable trial Judge erred in law as he did to raise an issue in the judgment which was not an issue in the course of hearing.
3. That the Honourable Judge erred in law to hold as he did that the unsigned agreement was unenforceable.

To bolster their arguments parties filed written submissions for and against the appeal which were adopted at the hearing.

The appellants were represented by Mr. Jethro Turyamwesiga, learned counsel whereas the respondent had the services of Mr. Rahim Mbwambo, learned counsel.

In addressing the 1st and 3rd grounds of appeal it was submitted that, the learned trial Judge erred in concluding that the appellants were not entitled to claim on unsigned Voluntary Agreement whose original copy was in the hands of the respondent and it was admitted in the evidence without any objection from the respondent. He argued the absence of the objection as an indication that the respondent did not intend to challenge

the unsigned Voluntary Agreement. In this regard, it was the submission of the appellants that the learned trial Judge had raised *suo motu* the issue of unsigned agreement and concluded the same to be unenforceable without hearing the appellants considering that the issue was neither pleaded nor did it feature in the proceedings. That apart, it was argued that the law does not render the unsigned agreement unenforceable.

On the other hand, in opposition of the appeal, it was the respondent's submission that, the learned trial Judge was justified to conclude that the voluntary agreement was unenforceable because it was frustrated and substituted by some other arrangement in which the 1st appellant had abandoned all claims against the respondent as reflected at page 90 of the record of appeal. In this regard, it was argued that the appellants are estopped from relying on the unsigned agreement because it was abandoned by the parties and that is why it was not signed and could not be registered in order to be binding and enforceable in terms of section 2 (1) (a) and (b) of the Law of Contract. It was thus argued that, in the wake of unsigned Voluntary Agreement the appellants were not entitled to claim terminal benefits under it.

The respondent challenged the appellants' claim about the learned trial Judge raising *suo motu* an issue which was not in the pleadings and

was not canvassed in the evidence. On the contrary, it was contended that the learned trial Judge's decision is based on the pleadings and issues framed by the parties.

Having carefully considered the submissions of the parties, grounds of appeal and the record before us, they all boil down to two crucial issues that is, **One,** whether the appellants did prove their case on the balance of probabilities, **Two,** whether the appellants were not accorded a right to be heard. Before resolving the said issues, it is crucial to re-state the principle that this being a first appeal, the Court is mandated by law to re-evaluate the evidence before the trial court as well as the judgment and may arrive at its own conclusions See: **PETER VS SUNDAY POST LIMITED** [1958 E.A 424] and **DOMINA KAGARUKI VS FARIDA F, MBARAK AND 5 OTHERS,** Civil Appeal No. 60 of 2016 (unreported).

It is not in dispute that the appellants were retrenched and declared redundant and were paid their terminal benefits. What is contested is whether or not the terminal benefits were paid in accordance with the unsigned Voluntary Agreement. The basis of any claim in a civil suit is founded on the pleadings and the respective evidence comes into play to cement in support of what is pleaded. At this juncture we begin with what

was pleaded by the appellants as reflected in the respective plaint at pages 5 to 7 of the record of appeal:

Paragraph 3

> *"The Plaintiff's claim against defendant arises from the defendant's agreement to pay the plaintiffs as declared redundant employees their terminal benefits four months' salaries for each year they served the company at the rate of their salaries during redundancy exercise together with corrugated iron sheets and cement. Annexed hereto and marked 'A' is the intended agreement."*

Paragraph 4

> *"The plaintiff's claim against the defendant is for the sum of Shs. 10,934,316.00 being the total of four months' salaries for the period served by the plaintiffs, 30 corrugated iron sheets and 30 bags of cement. Annexed hereto and marked 'B' is the schedule for the required payments."*

Denying the claims, the respondent in the written statement of defence at pages 87 to 97 of the record of appeal among other things, in paragraphs 3 and 4 it is averred as follows:

Paragraph 3

> *"As regards paragraph 3 of the plaint, the defendant admit that the plaintiffs were employees of the defendant and their services were terminated together with other employees on redundancy exercise in 1993 and that their terminal benefits were subject to registration of* ***intended voluntary agreement*** *which is annexture B 11 of the plaint".*

Paragraph 4

Further to paragraph 3 above, the defendants state that the registration process of the intended agreement was frustrated and the parties herein entered into a substituted agreement whereby the plaintiffs abandoned their claims envisaged under the intended voluntary agreement.

> *"Annexture TBL A are a Photostat copies of undertaking signed by the plaintiffs accepting payments in full satisfaction of whatever claim existed out of their employment with the defendant. Leave is hereby craved to refer to them as part of the defence."*

It is glaring that, according to the plaint the claim of the appellants hinged on the intended Voluntary Agreement which is alleged to have stated the terminal benefits payable to the appellants following their

retrenchment. The learned trial Judge dismissed the suit on ground the unsigned Voluntary Agreement was unenforceable to warrant the same to be registered.

At the outset, we agree with the learned trial Judge but in addition, on another angle and we shall give our reasons. The circumstances surrounding the absence of the signatures of the parties in the Voluntary Agreement can be discerned from paragraph 3 of the plaint whereby the appellants intimated that their claims were based on intended agreement. This was as well, cemented by the 1st appellant's own account that the terminal benefits paid to them were pursuant to some other arrangements and not the Voluntary Agreement. That apart, the last nail to the coffin was the evidence of DW1 for the respondent who testified that, the respondent had agreed to pay the appellants who in turn made an undertaking to relinquish any claim arising out of employment against the respondent and as exhibited in Exhibit P1 which speaks in loud tone as follows:

"I SALHINA MFAUME hereby confirm that I was an employee of TBL/TALF/TAMACO and was retrenched in 1993.

I certify that I am nor presently pursuing nay claim against TBL/TALF/TAMACO and undertake not to institute any claim arising out of or connected with my past employment with TBL/TALF/TAMACO at any time in the future.

In consideration for this undertaking, I acknowledge receipt of the amount of TAS. 489,552.00 (excluding tax) from TBL.

Signed in DSM this TUE day of 14 Nov 1995.

Witnesses...SGD.....

.....SGD.....

...SGD......"

A similar undertaking was effected by the 2nd appellant, 5th appellant, 6th appellant, 7th appellant and the 8th appellant. In the circumstances, it is our considered opinion that apart from the said evidence exhibiting that the appellants had no claim of right whatsoever on the intended Voluntary Agreement is not enforceable on account of not being finalized as there was no meeting of the minds of parties to be bound by the terms and conditions therein as justifiably found by the learned trial Judge. On that account, since the appellants were claiming the right to be paid the terminal benefits under the Voluntary Agreement, the burden was on them to establish if the agreement was binding and enforceable. We are satisfied that there was no serious attempt to discharge this burden and too much was left to speculation.

Moreover, the appellants were paid their terminal benefits basing on another agreed modality as expressed in Exhibit P1 on condition that they relinquish all other claims against the respondent arising from the

employment. That apart, nowhere is it stated in Exhibit P1 that parties had agreed that the payment of the terminal benefits would be in accordance with the intended Voluntary Agreement. Thus, in the absence of any other evidence to the contrary, we are satisfied that, in the wake of the payment reflected in Exhibit P1, the matter was sealed and so to speak amicably settled and as such, the appellants are estopped from claiming on the basis of the intended Voluntary Agreement that never was. This render the 1st and 3rd grounds of appeal not merited and are hereby dismissed.

We shall now address the appellants' complaint which is to the effect that, having concluded that the Voluntary Agreement was unenforceable on account of not being signed, the learned trial Judge had raised *suo motu* and determined an issue which was neither pleaded nor framed by the parties.

The right to be heard is a cardinal principle of natural justice which is entrenched as a fundamental right and it includes the right to be heard amongst the attributes of equality before the law in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). In this regard, the courts are enjoined not decide on a matter affecting the rights of the parties without giving them an opportunity to express their views or else that would be a contravention of

the Constitution and the decision would be rendered void and of no effect. **See – SAMSON NGWALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 86 of 2008**; R. S. A. LIMITED VS HANSPAUL AUTOMECHS LIMITED AND ANOTHER,** Civil Appeal No. 179 of 2016 and **CHRISTIAN MAKONDORO VS THE INSPECTOR GENERAL OF POLICE AND ANOTHER,** Civil Appeal No. 40 of (all unreported). In all the said cases, the Court had to nullify the decisions of the trial court because parties were denied the right to be heard in matters which were raised *suo motu* and determined in the course of writing the respective judgments without re-summoning the parties.

At page 233 of the record of appeal, the learned trial Judge posed a following question:

> *"The question then is would the parties and particularly the plaintiffs have legal recourse based on unsigned voluntary agreement?"*

He answered the above question in the negative on among others, the ground that, the absence of the signatures of the parties that signified that the parties had not agreed to be bound by the unsigned Voluntary Agreement which was thus unenforceable.

In the premises, the question to be answered is whether in the present matter the appellants were denied the opportunity to be heard on the issue of the intended Voluntary Agreement being unenforceable on ground that it was not signed. We found this wanting because, **firstly,** it is glaring in the plaint that, the appellants intimated that their claims on the terminal benefits hinged on the Voluntary Agreement which was annexed to the plaint and marked as an intended agreement. **Secondly**, the 1st appellant's own testimony was to the effect that the terminal benefits paid to them were not in accordance with the intended Voluntary Agreement but rather another different arrangement. This supports the respondent's case considering that, DW1 in his uncontested account testified that the terminal benefits could not be paid on the basis of the Voluntary Agreement because it was not signed and that is why another modality was agreed upon which the appellants were paid the sums constituting the terminal benefits and they acknowledged the same. Thus, there is nothing to prove that the appellants were condemned without being heard which renders the 2nd ground of appeal to lack merit.

In view of what we have endeavoured to discuss, in a nutshell the appellants fell short of proving their pleaded claims on the balance of probabilities. Therefore, having re-evaluated the entire evidence we do not

find any cogent reason to fault the judgment of the learned trial Judge and as such, this appeal is not merited and it is hereby dismissed with costs.

DATED at **DAR-ES-SALAAM** this 17th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 19th day of May, 2021 in the absence, of the 2nd ,4th, 5th, 7th and 8th Appellants and in presence of 1st, 3rd and 6th Appellants and in presence of Mr. Victor Kikwasi, the learned counsel for the Respondent, is hereby certified as a true copy of original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL