IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 158 OF 2017

TEREVAEL M. NGALAMI .....APPELLANT

VERSUS

KAMPUNI YA SIMU (T) TTCL .....RESPONDENT

[Appeal from the judgment of the High Court of Tanzania, (Labour Division) at Dar es Salaam]

(Aboud, Wambura and Mipawa, JJ.,)

dated the 30th day of October, 2015
in

Revision No. 3 of 2011

JUDGMENT OF THE COURT

2nd July, & 16th August 2021

MWANDAMBO, J.A.:

Terevael M. Ngalami, the appellant, was aggrieved by the decision of the High Court (Labour Division), henceforth the Labour Court, quashing the decision of the defunct Industrial Court of Tanzania (the ICT) at the instance of the respondent in Revision No. 3 of 2011. The ICT had determined a labour dispute based on the validity of termination of employment contract referred to it by the Commissioner for Labour against the respondent holding that the appellant was terminated unlawfully. The instant appeal is against the decision of the Labour Court quashing the decision of the ICT.

The tale behind the instant appeal is not complex. It goes thus. The appellant was an employee of the respondent from the year 1997 starting with the post of Principal Accountant, Grade I. He served in different capacities until the termination of his employment on 16/12/2005. It is common ground that by reason of its restructuring, the respondent went through different stages of reorganization which saw several changes in its organization structure which had a bearing on the posts held by the employees, the appellant included.

The respondent's privatization in the year 2001, saw the appellant who was holding the post of Principal Financial Accountant being appointed on 18/04/2002, in the post of Treasury Manager for two years subject to satisfactory performance reviews. However, the appellant could not serve in that capacity beyond 15/05/2003, due to yet another change in the organization structure removing that post in the respondent's structure. By a letter dated 19th June, 2003, the respondent informed the appellant that in view of the abolition of the post he held in the structure, he was reverted to his former scheme of service. Through the same letter, the appellant was transferred to a newly established Credit Management Task Force (CMTF) on temporary basis to assume the role of Project Manager Special Projects for an initial period of four months.

A lot of water passed under the bridge culminating into the termination of the appellant's employment contract vide letter dated 16/12/2005. The termination was preceded by an internal memorandum four days earlier informing the appellant of the impending termination and the specifics of terms thereof to be in line with the voluntary agreement and understanding said to have been reached for managers. Two months earlier, the appellant had volunteered to be retrenched along with other employees but the respondent rejected his request on the ground that the voluntary retrenchment agreement did not include employees in the management of the employer.

Not amused, the appellant challenged the termination for being unlawful through a letter he wrote to a Labour Officer which eventually reached the Labour Commissioner. Acting under the provisions of section 8(a) of the Industrial Court of Tanzania Act [Cap. 60 R.E 2002], the Labour Commissioner referred the dispute on the appellant's termination to the defunct ICT for inquiry and decision on three specific issues; amongst others, whether the appellant's contract was terminated before the expiry of two years. That Court (William, Deputy Chairperson) sustained the appellant's complaint being satisfied that the termination was unlawful vide her decision handed down on 31st December, 2007. In

the end, it ordered the respondent to reinstate the appellant in the form of employment benefits running from 16/12/2005 to the date of the decision.

That decision aggrieved the respondent and hence the application for revision before the full bench of the Labour Court pursuant to the provisions of section 28 (1) Cap. 60 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 11 of 2010 together with the Industrial Court (Revision) Rules, GN. No. 268 of 1992. The respondent faulted the Industrial Court's decision on four grounds. Specifically, the ICT's decision was faulted for holding that the termination of the appellant was unlawful and that the procedure for the termination was flawed despite the evidence to the contrary.

The Labour Court sustained the revision having been satisfied that the respondent had valid reasons to terminate the appellant in compliance with a fair process in that regard. Dismissing the submissions of the appellant's counsel, the said court stated: -

> *"In the event we found the submission of the learned counsel for the respondent employee devoid of merit and mere kicks of a dying house* ***in articulo mortis*** *(at the point of death) we believe*

that the respondent was fairly terminated and a fair process to retrench and terminate was followed by the employer respectively as we devoted to explain ***supra.***" [At page 64 of the record of appeal].

Initially, the appellant had sought to challenge the impugned decision on four grounds. However, at the hearing of the appeal, Mr. Evans Nzowa, learned advocate who represented him sought and was granted leave to abandon ground four in the memorandum of appeal thereby remaining with three grounds. In the remaining grounds of appeal, the appellant faults the Labour Court contending as he does that its decision was erroneous on three aspects as a result of which it quashed the decision of the ICT namely: - **one**, failure to hold that the termination was unfair; **two**, holding that the termination was procedurally fair; and, **three**, taking into consideration and according weight to the appellant's letter for voluntarily retrenchment as justification for the impugned termination.

Earlier on, the learned counsel for the parties filed their respective written submissions for and against the appeal pursuant to rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules). During the hearing, each made oral address before us highlighting on some

aspects in the grounds of appeal except ground four which was marked abandoned at the instance of the learned advocate who appeared to represent the appellant at the hearing of the appeal, as earlier shown. In ground one, Mr. Nzowa submits that the Labour Court was wrong in its decision holding that the decision of the ICT was flawed for concluding that the respondent had no valid reason to terminate the appellant. Mr. Nzowa premised his arguments on the contention that contrary to the respondent's letter terminating the appellant dated 16/12/2005, his post of Chief Financial Accountant remained intact. If we understood him correctly which we think we did, the learned advocate was intent to suggest that the respondent should have reverted the appellant to the position he held prior to his appointment to the post of Treasury Manager.

For her part, Ms. Pauline Mdendemi, learned State Attorney who teamed up with Ms. Debora Mcharo and Lilian Machage, both learned State Attorneys, adopted the written submissions in reply lodged earlier on by Mr. Elisa Abel Msuya, learned advocate who had represented the respondent before the ICT, the Labour Court and partly in this Court. She invited the Court to dismiss ground one because, the Labour Court correctly held that the appellant was terminated lawfully due to

abolition of the post he held as a result of structural reorganization in the respondent company. There was also an argument from Ms. Mcharo to the effect that the appellant was paid his terminal benefits upon his termination by reason of redundancy and thus, there was no cause for any complaint.

Rejoining, whilst conceding payment being made to his client, Mr. Nzowa argued that such payment did not validate the unlawful termination.

The determination of this ground compels us to go back to the appellant's complaint before the Labour Officer which culminated into the Labour Commissioner's letter, Ref. No. KZ/U.10/MG/1914/6 dated 10/10/2006 appearing at pages 369 and 370 of the record of appeal. It is through that letter from which one can easily identify the cause of action and the issues referred by the Labour Commissioner for inquiry and decision by the ICT. It is plain from that letter that, the appellant had a two years contract in the post of Treasury Manager running from 18/04/2002 through 17/04/2004. The basis of his complaint was the respondent's alleged unlawful termination of his contract before its expiry by reason of change in the organization structure. The respondent's response was that the appellant was terminated along

with other managers whose posts had been abolished as a result of the restructuring which entailed change in its organization structure.

From the above, the Labour Commissioner formed an opinion that there was indeed a labour dispute fit to be dealt with by the ICT. Acting under section 8(a) of Cap.60, the Labour Commissioner referred the dispute to the ICT for inquiry on three specific aspects to wit; **one**, whether the appellant was terminated before the expiry of two years; **two**, whether he was in the management of the employer; **three**, whether the respondent's decision to terminate the appellant was proper. In addition, the Labour Commissioner asked the defunct ICT to inquire into any other matters which may arise and found to be necessary to ensure that justice is done to the parties.

It is obvious to us that the second issue appears to have arisen from the appellant's complaint that his request for voluntary retrenchment along with other employees was rejected by the respondent. The ICT found no difficult answering that issue affirmatively upon being satisfied that the appellant was in the management of the respondent who could not have been covered by the Voluntary Agreement on whose basis he had asked the respondent to be voluntarily retrenched along with other employees. It follows thus

that the complaint against the respondent's refusal to include the appellant in the list of the employees covered by the Voluntary Agreement did not arise for determination by the ICT.

With regard to the first issue, the learned Deputy Chairperson reasoned that the appellant served only four months in the post of Treasury Manager, subject of the contract which was to expire on 17/04/2004. With some process of reasoning largely not supported by evidence, she concluded that the appellant was terminated as a result of spite and hatred. However, she does not appear to have directed her mind to the real question; whether the contract of employment was terminated before the expiry of two years.

The Labour Court was satisfied that the appellant's termination was a result of operational requirements caused by "technological and structural change or needs" (at page 199 of the record of appeal). It did not share the same view with the learned Deputy Chairperson who had concluded that the termination was punitive against the appellant as a result of spite and hatred. This would appear to explain the Labour Court's retort that the learned Deputy Chairperson glued her mind on the aspect that the respondent (now appellant) was left without any work to do and thus holding that termination unfair instead of considering the real

reason for termination. The nagging question which we shall turn our attention to shortly is whether the Labour Court's decision had regard to the context of the issue the Labour Commissioner referred to the ICT for inquiry and decision.

As seen above, the Labour Commissioner formed an opinion that the dispute centred on the termination of the appellant before the expiry of two years in accordance with the letter of appointment dated 18/04/2002. According to para 3 of the said letter, the terms and conditions of service applicable to the appellant in the post of Chief Financial Accountant a post he held immediately before the appointment to Treasury Manager remained intact despite the abolition of that position. The terms and conditions in the former post were contained in a letter; PF 23767 dated 30/02/1999 (at page 378 of the record of appeal). It is noteworthy that none of the letters of appointments from the appellant's initial post to that of Treasury Manager revoked the principal terms and conditions in his first letter of appointment to the post of Principal Accountant Grade I in October 1997. One of the principal terms and conditions was continued employment into permanent establishment.

What emerges from the foregoing is that, whereas the appellant's appointment in the post of Treasury Manager did not continue to the

expiry period of two years, his employment contract remained intact. That explains why the appellant has never complained of not being paid his monthly salaries during the whole period he remained redundant. Unfortunately, this aspect eluded the mind of the ICT resulting into the decision it reached holding that the appellant's contract was terminated before the expiry of two years. In our view, that was an obvious misconception because the letter appointing the appellant to the post of Treasury Manager was not itself a contract of employment. It did not supersede the appellant's principal terms of employment. Indeed, cognisant of that fact, the letter appointing the appellant to the post of project manager task force, CMTF dated 19/06/2003, informed the appellant that the post he had held was removed in the organisation structure with the effect that he reverted to the former scheme of service. By any stretch of imagination, it is hard to read termination of the appellant's contract of employment from that letter. At any rate, the appellant was terminated on 16/12/2005 long after the expiry of the two years in the post of Treasury Manager. In our view, the appointment letter to that post was not the same as a contract of employment. Otherwise, had it been so, the appellant had no contract capable of being terminated after its expiry.

On the other hand, the ICT appears to have mixed the period the appellant served in the post of Treasury Manager and Project Manager, CMTF which influenced its decision thereby concluding that the appellant was one of the employees who was subjected to spite and humiliation in the hands of the respondent. The record shows that the appellant served as Treasury Manager till 21/05/2003 before he was temporarily transferred to CMTF as project manager for four months as evidenced by an internal memorandum appearing at page 395 of the record of appeal. Apparently, like the ICT, the Labour Court glossed over the key issue before the learned Deputy Chairperson regardless of the fact that it correctly held that the appellant's termination was due to valid reason; operational requirements. Without any disrespect to the Labour Court, we think that had it directed its mind to the issue, it could not have failed to fault the learned Deputy Chairperson for avoiding to address the issue raised by the Labour Commissioner which required the defunct ICT to inquire into the dispute and determine whether the appellant's contract of employment was terminated before the expiry of two years. Logic and common sense would dictate that the reason for termination would have arisen only after determining the fundamental question as directed by the Labour Commissioner. In our view, since the appellant's employment contract as opposed to appointment to the post of Treasury Manager was

terminated after two years of his appointment in that post, any discussion on the reason thereof was superfluous. Be it as it may, we are constrained to agree with the finding of the Labour Court that the termination of the appellant's contract was lawful due to operational requirements. Indeed, evidence is abundant that by reason of operational requirements, a number of managers, the appellant included became redundant and hence the need to terminate their contracts. Consequently, we find no merit in ground one and dismiss it.

Next for our consideration is whether the termination of the appellant's contract was procedurally fair, the subject of ground two in the memorandum of appeal. Having dismissed ground one, a discussion on this ground would be superfluous. However, we find it necessary to discuss it. The Labour Court did not specifically address the issue presumably by reason of its conclusion that the termination was valid. Mr. Nzowa argued that the respondent flouted the procedure in terminating the appellant in as much as it did not give him the right to be heard. According to him, the respondent should have complied with the provisions of section 58 of the Employment Act (now repealed) by seeking consent from the Labour Officer or an agreement with consent of the administrative officer or Labour Officer. The respondent's submission

on this ground was predicated on the appellant's contract of employment containing a clause for its termination by either party subject to three months' notice or payment of one month's salary in lieu of such notice. To reinforce the submission, the respondent's counsel referred to us two decided cases from this Court and the High Court in **Joseph M. Mutashobya v. M/S Kibo Match Group Limited** [2004] T.L.R 242 and **Twikasyege Mwaigombe v. Mbeya Regional Trading Co. Limited** [1988] T.L.R 239, respectively, for the proposition that a contract of employment may be terminated by invoking a termination clause. The learned counsel discounted the application of section 58 of the repealed Employment Act for being misplaced.

With respect, we agree that section 58 of the repealed Employment Act is wholly irrelevant to the case at hand the more so because the appellant's contract was not attested by the Labour Officer or an administrative officer in terms of section 50(1) of the repealed law. Mr. Nzowa did not cite any authority supporting his argument on the application of section 58 of the repealed Act to the appellant's contract. To the contrary, notwithstanding Mr. Nzowa's submission, we endorse the submissions by the learned counsel for the respondent premised on our decision in **Joseph M. Mutashobya's** case (supra) that the respondent

properly terminated the contract on the basis of the termination clause by payment of one month's salary. The respondent did so in accordance with clause 4 of the letter of employment Ref. No. DF.600 appearing at page 370 of the record of appeal. The appellant's termination was not a result of any disciplinary grounds which would have required the respondent to give him an opportunity to be heard as contended by Mr. Nzowa. Indeed, that argument falls on the face of the appellant's own request for voluntary retrenchment. In the end, we think the whole thing is more a question of semantics than substance considering that, for all intents and purposes, despite the respondent's refusal to accede to the request for voluntary retrenchment, the appellant achieved the same thing through termination considering the respondent's internal memorandum dated 12/12/2005 which specified the terms of termination in line with the voluntary agreement. This appears to us to give credence to Ms. Mcharo's submission that the appellant had no cause for complaint having been paid his terminal benefits which has never been disputed by the appellant. In the upshot, this ground is likewise dismissed for being baseless.

Having dismissed the two grounds, any discussion on ground three will be superfluous.

In the event, we find no merit in the appeal and dismiss it. As the appeal arises from a labour dispute, we make no order as to costs.

DATED at **DAR ES SALAAM** this 3rd day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of August, 2021 in the presence of the appellant in person and Mr. Lukelo Samuel, Principal State Attorney for the respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL