IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 146 OF 2020

REGINA HERMAN .....APPELLANT

VERSUS

ANDO ROOFING PRODUCTS LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Aboud, J.)

dated the 21st day of August, 2019
in
Revision No. 147 of 2018

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JUDGMENT OF THE COURT

20th March & 13th April, 2023

LILA, JA:

This appeal presents a somehow peculiar and interesting scenario in the labour jurisprudence. It is a situation where an employee (the appellant) maintains that her contract of employment was terminated and the employee (the respondent) strongly disputes that contention. The dispute culminated into the appellant instituting Labour Dispute No. CMA/DSM/KIN/R. 37/15/536 before the Commission for Mediation and Arbitration (the CMA') where she complained that the respondent had unfairly terminated her contract of employment and claimed to be paid

compensation of 36 months remuneration, payment of 15 months' salary remaining in the contract due to the respondent's breach of contract and one month salary in lieu of leave. The claims were strongly disputed by the respondent who claimed that contract of employment was not terminated and the respondent was looking for the appellant's whereabouts. The CMA agreed with the appellant and awarded the appellant payment of fifteen (15) months' salary for the period remaining in the contract equal to TZS 9,000,000.00 and TZS 120,000.00 being the balance underpaid salary for December 2014, all totaling to TZS 9,120,000.00.

The respondent was aggrieved and successfully lodged a revision application before the High Court Labour Division. The High Court held that there was no termination of the contract of employment and overturned the CMA award. Accordingly, the award was quashed and set aside. The present appeal manifests the appellant's grievances and persistence that she was terminated from employment and the CMA award should be sustained.

It has never been in controversy all along from the CMA to the High Court that the appellant was employed by the respondent as a Human Resource Manager from 18/02/2013 but was subjected to a six months'

probation period to prove that she qualified for that post to which she failed. Upon an advice by the respondent to apply for another position, she successfully applied for a post of an Assistant Human Resource Manager. She was employed in that capacity and was confirmed following which the parties entered into a two years' fixed contract that was to last from 22/03/2014 to 22/03/2016.

On the other side. The appellant contended that she was employed by the respondent as a Human Resource Manager. In her first six months she worked on probation and was confirmed on 22/03/2014 as a result of which she was offered and she accepted a contract of two years for salary of TZS 600,000/= per month. According to her, the relationship faced a number of challenges including the appellant being given two leave notices of ten days' each from 20/08/2014 and another one from 01/09/2014 and followed by the five days' leave notice. Ultimately, she alleged that the respondent served her with a letter dated 24/09/2014 informing her that her employment will come to an end on 24/12/2014 which she treated as a three months' notice of termination of the contract of employment as per the terms and conditions of the contract of employment.

The record bears out that the appellant added that she continued to work until on 29/12/2014 when she was informed about termination of her employment. She contended that the respondent refused to pay her salary while serving the notice as she only received one month salary which was however underpaid to the tune of Tshs. 480,000/= instead of Tshs. 600,000/= as per the contract. Being dissatisfied by the respondent's conduct, the appellant lodged Labour Dispute No. CMA/DSM/KIN/R. 37/15/536 before the CMA and, as earlier on hinted, the matter was decided in her favour.

Aggrieved, the respondent successfully applied for revision in the High Court of Tanzania, Labour Division (Hon. Aboud, J) vide Revision No. 147 of 2018. Having examined the CMA award, exhibits P3 and P6, the learned judge found that the CMA omitted to consider the issue whether there was termination of contract of employment which is a prerequisite condition before it considered the issue whether the termination was substantially and procedurally fair. The learned judge then subjected the evidence on record to her scrutiny and evaluation and was firmly convinced that there was no termination of employment as contended by the appellant which finding resulted in the CMA award being quashed and the orders for payment of

various terminal benefits set aside. As it were, the appellant was aggrieved by the decision of the High Court. She lodged the instant appeal raising seven (7) grounds of appeal as hereunder: -

1) *That, trial Judge erred in law and in facts for failure to analyze the introduction letter admitted as Exhibit P6 Mainly Clauses 1, as the letter reverse respondent's decision thus reaching an erroneous decision.*
2) *The trial Judge erred in Law and in facts for Ruling out that there was no termination of employment while as per notice of termination letter as per exhibit P3 clause 1 clearly stated the date of termination.*
3) *The trial Judge erred in Law and in facts for failure to understand that the introduction letter dated 10th November 2014 purposely issued to the appellant for appearing in the commission for mediation and arbitration as the respondent was sued by another employee as it appears to be submitted in the judgment at page 4 by the respondent's representative as raised it as a new issued*

4) *The trial Judge erred in law and in facts for failure to analyses the Pleadings thus relying on the afterthought testimonies of respondent's representative who was not there during applicant's termination.*

5) *The trial Judge erred in Law and in facts in ruling out that there was no termination while the managing director confirmed and testified that they terminated the applicant's employment's contract.*

6) *The trial Judge erred in Law and in facts for failure to understand that the witnesses are called to testify regarding the issues in dispute arose out of the Pleadings and not adduced new facts which were not in issue nor testified by either party.*

7) *The trial Judge erred in Law and in fact for refusing to grant the reliefs sought by the appellant following the respondent's breach of the employment agreement.*

The parties filed written submissions supporting and controverting the appeal. We shall make reference to them in the course of the judgment whenever we shall find it to be necessary and relevant. In essence, the

appellant, in her written submission, still maintained that the respondent terminated the contract of employment and the learned judge erred to hold otherwise. The respondent, at first, challenged the grounds of appeal that it does not raise issues of law as imperatively required because they fault the judge on her evaluation of the facts which, nevertheless, are unmerited.

Before us, the appellant appeared in person whereas for the respondent, Mr. Ibrahim Chiremeji Gamba, Human Resource Manager, appeared. Each side adopted its respective written submissions with minor additions which substantially were highlights of the contents of the filed written submissions.

We, in the first place, agree with the respondent that, it is a requirement of the law that appeals on labour matters to the Court ought to be on points of law only. Section 57 of the Labour Institutions Act (the LIA) which govern appeals to this Court is categorically clear on that. It provides: -

> *"57. Any party to the proceedings in Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only."*

Admittedly, the LIA does not define the phrase 'point of law' for the purposes of the above provision but the Court had occasions to interpret section 25(2) of the Tax Revenue Appeals Act, Cap. 408 R. E. 2019 which

has a similar provision requiring appeals to the Court from the Tax Appeals Tribunal to be on points of law only which is identical to the provisions of section 57 of the LIA in the case of **Atlas Copco Tanzania Limited vs Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 167 of 2019 and **Kilombero Sugar Company Limited vs Commissioner General (TRA)**, Civil Appeal No. 14 of 2007 and the Court defined the phrase 'on a point of law' to mean one of the following:

> *"...First, an issue on the interpretation of a provision of the constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. Secondly, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. Finally, a question on a conclusion arrived at by a Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

The above definition has been taken to hold true by the Court in interpreting the phrase "on a point of law" in labour proceedings when it comes to appeals to the Court in terms of section 57 of the LIA. For instance, in **CMA-CGM Tanzania Limited vs Justine Baruti**, Civil Appeal No. 23 of

2020, the Court held that the definition applies *mutatis mutandis* in appeals on labour disputes to the Court.

Before us and in response to the respondent's submission on whether the grounds of appeal in the instant appeal raise points of law, the appellant pressed that they are all points of law. We entirely agree with her. Given the wide interpretation above, we entertain no doubt that the grounds of complaint before the Court, although not expressed framed in the manner that the point of laws are easily comprehensible, they fit exactly in the definition given above. Grounds 1, 2 and 3 are faulting the learned judge for misinterpreting various documentary evidence that was before her and in grounds 4 and 6 the learned judge is being faulted for failure to relate the averments of the parties in the pleadings and the evidence adduced. Ground 5 is a clear point of law as it challenges the judge for holding that there was no termination. This is definitely a legal point and was the crux of the dispute between the parties before the CMA and the High Court. Ground 7 is about reliefs granted not having been prayed and sought by the respondent. It is a point of law, too. Having resolved the propriety of the appellant's complaints before us, we now proceed to determine the merits or otherwise of the appeal.

The record bears evidence that the learned judge determined the appeal only on a point of law; whether there was termination of the contract of employment. The same issue features in this appeal as ground 5 of appeal. Our own evaluation of the evidence on record leads to the same conclusion that such ground of complaint is decisive of this appeal.

The appellant's standpoint that the contract of employment was terminated hinges on exhibit P3. However, before delving on that issue, in view of the evidence and submissions of the parties before the CMA, the High Court and before the Court, we are compelled, albeit briefly, to address the issues whether the CMA addressed itself on the issue whether there was termination in its award.

According to the form filled by the appellant which is found at page 6 of the record referring the dispute to the CMA, the appellant's complaint was that she was terminated from employment and she was seeking;

> *"To be paid compensation of 36 months remuneration, payment of 15 months of remaining salary due to breach of contract, one month salary for leave and severance pain."*

The functions of the CMA are governed by section 14 of the LIA which are essentially to mediate any dispute referred to it in terms of any labour law and to determine any dispute referred to it by arbitration. While the appellant, in her opening statement, contended that she was terminated from employment, the respondent, in her reply statement, refuted that allegation and categorically stated, at page 16 of the record, that: -

> *"Mheshimiwa mwamuzi kwa kuwa Mlalamikiwa hakumwachisha kazi mlalamikaji, madai yaliyopo mbele ya Tume hii dhidi ya mlalamikiwa sio halali na kwa mantiki hiyo mlalamikaji hastahili malipo yoyote toka kwa mlalamikiwa."*

In terms of the complaint form and the parties opening and reply statements, the appellant was challenging termination of her contract of employment by the respondent. A clear issue that stems from that challenge is whether the respondent terminated the contract of employment with the appellant and therefore terminated her employment. The dispute, therefore, before the CMA and which ought to have been determined by the CMA first was whether the appellant's employment was terminated by the respondent. This is in line with the provisions of section 8(1) of the ELRA which provides that: -

"8.-(1) An employer may terminate the employment of an employee if he-

(a) complies with the provisions of the contract reiating to termination;

(b) ***complies with the provisions of sections 41 to 44 of the Act concerning notice****, severance pay, transport to the place of recruitment and payment*

(c) follows a fair procedure before terminating the contract; and

(d) *has a fair reason to do so as defined in section 37(2) of the Act."* (Emphasis added)

Our reading of the CMA award does not show that the issue of termination was addressed at all as was rightly held by the learned judge. All that is in the award is the evidence of the parties and the CMA's consideration whether the termination was proper both procedurally and substantially. That is evident at pages 158 to page 160 of the record. The CMA skipped that crucial step. As was rightly held by the learned judge, that was a serious omission by the CMA. On revision the High Court, quite rightly

in our view, proceeded to consider that crucial issue basing on the evidence available on the record.

We now revert to the issue whether the appellant was terminated as, again, complained by the appellant. We take note that the appellant led other pieces of evidence on which she relied to establish that she was terminated from employment including being subjected to unnecessary leave, being paid less salary and being verbally told by the Finance Manager that her service was terminated. Be that as it may, we think those actions were of no essence and they could not alter the requirement of issuing a notice stipulated in the contract of employment as the only mode of terminating the contract of employment. In our view, the crucial evidence allegedly proving her termination which the appellant could rely on and which the High Court seriously considered is the letter dated 24/9/2014 which she treated as a notice to terminate the contract of employment. This compels us to discuss, in sufficient details, the mode of termination contemplated under the contract of employment.

We shall start our deliberation with an acknowledgment that in terms of clause 8.2 of the contract of employment which applies in the present

case as the appellant was holding a managerial position, either party to the contract of employment entered between the parties (exhibit D5) could terminate the contract by giving a three months' notice. Indeed, this being a crucial term of the contract to which the parties had voluntarily agreed to be bound with, its compliance was not debatable. The provisions of section 41(1) of the ELRA read together with Rule 8(2)(d) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (the ELRA Rules) take cognizance of such mode of termination of contract of employment and the former emphasizes on the need for the notice to be issued according to the law or in compliance with the terms of the contract and in accordance with the agreed notice period in the parties' contract of employment. This appears to be the foundation of the appellant's claim because exhibit D6 which the appellant relied on as a notice to terminate the contract made reference to that clause (clause 8.2). Exhibit D6 which is dated 24/9/2014 and was referred to in the letter to the appellant is couched thus: -

"YAH: TAARIFA YA KUSIMAMISHWA MKATABA WAKO WA KAZI

Husika na kichwa cha Habari juu.

Rejea kipengele namba 8.1 na 8.2 napenda kukuarifu kuwa ajira yako itasimama ifikapo tarehe 24th December, 2014. Nakutakia maandalizi mema katika mipango yako ya baadaye.

Wako,

A. Z. MAIMU

MKURUGENZI MKUU"

Before both the CMA and the High Court, the respondent admitted to have written and served the appellant with exhibit D6 above but contended that it was a mere intention to terminate the contract not a letter terminating the contract which argument was accepted by the learned judge hence her finding that there was no termination of contract.

We have seriously examined the letter. On the face of exhibit D6, it may appear or be inferred that it was a notice to terminate the contract of employment as the appellant successfully convinced the CMA to so find but failed to move the High Court to agree with her. In her submission she, again, wished the Court to believe and agree with her view. But, the mode of termination of employment agreed between the parties is by issuance of

notice which is governed by law. Section 41(3) of the ELRA provides for the conditions to be met for a notice of termination to be valid. It states that: -

"41(3). Notice of termination shall be in writing, stating-

(i) The reasons for termination; and

(ii) The date on which the notice is given."

In the light of the above provision, it is clear that where a notice to terminate a contract of employment meets the above conditions, the contract of employment comes to end automatically at the end or expiry of notice period. There is no requirement in our labour laws that a letter of termination need be again issued at the end of the notice period.

The issue before us then is, did exhibit D6 comply with the above conditions? This is our next question to provide an answer. The answer is definitely and undoubtedly that it did not. It is unfortunate that such a concern was raised by the respondent before the High Court but, may be out of an oversight, no attention was given to it when composing a judgment. The learned judge's decision relied much on exhibit D6, the letter dated 10/11/2014 allegedly withdrawing exhibit D6 and the contention by

the appellant that she continued to work for the respondent to arrive at a finding that there was no termination of the contract of employment.

A glance on it leaves no doubt that the letter only bears a date (24/9/2014) when the letter was written and not the date from which the notice period was to be reckoned. And since termination of contract was not by agreement of the parties (employer and employee) in terms of Rule 4(1) of the ELRA Rules, exhibit D6 was also short of or lacked the reasons for termination. It did not, therefore, meet the requisite conditions for it to qualify to be a valid notice of termination of the contract of employment. Neither could it be treated as an intention to terminate the contract as was argued by the respondent and erroneously believed by the learned judge because that requirement is alien to the contract of service between the parties. The more so, the letter dated 10/11/2014 allegedly withdrawing the respondent's intention to terminate the contract of employment is ineffectual and also inconsequential. The learned judge erroneously relied on it to arrive at a conclusion that it reduced exhibit D6 to a mere intention to terminate the contract. For this reason, we are satisfied beyond peradventure that the appellant's contract of employment with the respondent was not terminated.

We cannot therefore accede to the invitation by the appellant to fault the learned judge's finding.

Our above findings render determination of the remaining grounds of appeal which relate to the issue whether the termination was later withdrawn and the appellant continued to work, whether the termination was procedurally and substantively fair and whether the reliefs granted were pleaded, superfluous. We shall not therefore delve to dwell on them.

For the foregoing reasons, this appeal is devoid of merit and it is dismissed in its entirety. We make no order for costs.

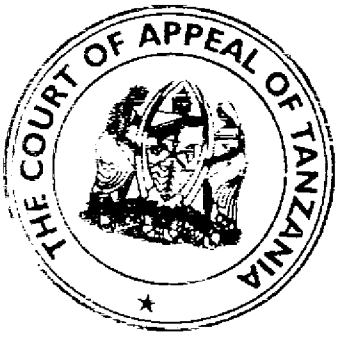
DATED at **DAR ES SALAAM** this 6th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 13th day of April, 2023 in the presence of Mr. Ibrahim Chiremeji Gamba, Human Resource Officer of the Respondent and in the Absence of the Appellant duly notified is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL