IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A, KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 224 OF 2020

JIMMY LUGENDO ..... APPELLANT

VERSUS

CRDB BANK LTD.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam

(Mwarija, Kaduri and Utamwa, JJ.)

Dated the 27th day of August, 2015)

in

Misc. Civil Appeal No. 1 of 2009

.....

JUDGMENT OF THE COURT

3rd June & 4th July, 2023

RUMANYIKA, J.A.:

Jimmy Lugendo (the appellant), was recruited on 24th June, 1979 and employed by the CRDB BANK LTD (the respondent) in the position of a bank controller, Arusha Branch in Arusha Region. However, his employment contract was terminated on 1st November, 2000 for being accused and charged with underperformance and failure to comply with the bank procedures and instructions. Aggrieved with that termination, he instituted a labour dispute before the local Labour Office. During the mediation, it

transpired that he had worked diligently with the respondent for more than twenty one years, and had few years remaining to retire and thus if terminated as earlier intended and agreed upon by the parties, the appellant would miss out retirement benefits. In those circumstances therefore, both parties agreed that the appellant should be deemed to have been retired, to enable him to get PPF and group endowment scheme benefits. They therefore executed an agreement to that effect on 15th December, 2000. Then the appellant was paid the agreed retirement benefits package which included group endowment and pension from the Parastatal Pensions Fund (PPF).

On the other hand, it is on record that, on 1st February, 1999, the respondent had entered into a Voluntary Agreement between her and OTTU/TUICO, on behalf of the employees including the appellant. That agreement covered the latter's terminal benefits as shown at pages 55-62 of the record of appeal, if were retrenched by the respondent. The appellant also wanted to get the proposed retirement benefits and the retrenchment package together, as stipulated under the said Voluntary Agreement. He successfully initiated Trade Inquiry No. 65 of 2006 claiming TZS. 215,332, 161.30, under the old labour laws before the Defunct Industrial Court. In that

inquiry, the main issue was whether he was entitled to both the retrenchment benefits as per 1999 Voluntary Agreement and the retirement benefits packages agreed upon in 2000 simultaneously. Upon hearing the parties, the Deputy Chairperson of the Industrial Court decided it in favour of the appellant. It was decided that the appellant was entitled to the benefits stipulated under the Voluntary Agreement. Aggrieved by that decision, the respondent successfully challenged it before a panel of three members of the same court comprising the Chairperson and two deputy chairpersons vide Revision No. 37 of 2007. The panel reversed it whereby replacing the parties' agreement on retrenchment with the one on retirement. Dissatisfied, through Civil Appeal No. 1 of 2009, the appellant challenged that decision before the High Court. In its decision, the High Court appellant awarded him the retirement benefits including the monthly pension package which he would have not been entitled if he was terminated. The High Court therefore, dismissed his appeal.

Undaunted, the appellant has now appealed to this Court with three grounds of grievance, which are reproduced as follows:

1. *That, having agreed the fact that the appellant was retired from employment following a retrenchment exercise, the High Court erred in*

law by holding that the appellant was not entitled to the retrenchment benefits under the Voluntary Agreement between OTTU/TUICO, which the appellant was a member and the respondent.

2. *That, the honourable court erred in law by failing to interpret the meaning of retirement benefits and retrenchment benefits and thus denied the appellant the benefits he would be entitled under the terms of the Voluntary Agreement; and*
3. *That, having wrongly held that the appellant was not entitled to the retrenchment benefits, the honourable court being the first appellate court failed in law to interpret the benefits which the appellants would have been entitled to under the Voluntary Agreement.*

At the hearing of the appeal, Messrs. Edward Peter Chuwa and Anna Lugendo learned counsel represented the appellant whereas Mr. Gaspar Nyika learned counsel represented the respondent.

Before elaborating on the written submission filed on 7th September, 2020, for clarity, we invited Mr. Chuwa to address the Court on the gist of the 1st ground of appeal. Upon reflection, he reformulated and corrected it to read as follows:

> That, *the High Court erred in law by holding that the appellant was not entitled to the retrenchment benefits under the Voluntary Agreement between OTTU/TUICO, which the appellant and respondent were members.*

Submitting in support of the amended 1st ground of appeal, he contended that, the High Court erroneously relied on the purported parties' agreement to retire the appellant which the latter signed under protest because he should have been retrenched as previously agreed by the parties before the local Labour Officer. He added that, the appellant was also entitled to retrenchment benefits because such cause of action arose from a labour dispute. To show that, in fact the appellant was retrenched and not retired, Mr. Chuwa referred us to the respondent's letter dated 15th January, 2001, which was addressed to the Director General, PPF. It is titled: *"Retrenchment of Mr. Jimmy Lugendo"*, calling for the processing of the contribution withdrawal and pension benefits payment in favour of the appellant. Further, Mr. Chuwa argued that, by that letter, the respondent is admitting the fact that the appellant was retrenched from employment and is estopped from denying that truth.

Attempting to cement his point, Mr. Chuwa referred us to the Black's Law Dictionary by Bryan A. Garner, 8th Edition on the meaning of the two contending words as follows: Retirement is the fact of stopping work because you have reached a particular age whereas retrenchment is to tell somebody that they cannot be working for you. Stressing on that point, he stated that

the sanctity of contract requires that, the parties are bound by their agreement, in this case, the said Voluntary Agreement. To bolster his point, he cited the decision of the Court in **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 [2021] TZCA 43: [26 February 2021: TANZLII].

Additionally, Mr. Chuwa forcefully submitted that, retirement is a law-governed process which does not depend on the agreement or disagreement by the parties. It was his further submission that the parties' agreement to retire the appellant, instead of being retrenched contravened the PPF's retirement law because, by that time the appellant had not attained the threshold age of fifty-five years and therefore, he argued, any agreement to retire him was illegal, and therefore not binding upon them.

As regards the 2nd and 3rd grounds of appeal which Mr. Chuwa argued together, he faulted the High Court judges allegedly for their failure to re-evaluate the evidence on record. He beseeched us to look at it and decide the appeal in accordance with the law. To buttress his point, he cited the Court's decision in **Salum Mhando v. R** [1993] T.L.R. 170.

Winding up, Mr. Chuwa asserted that, had the High Court considered the evidence of DW1 in Labour Inquiry No.65 of 2006, the contents of the

Voluntary Agreement and the respondent's letter to the Director General, PPF (exhibit D3), it would have arrived at a different conclusion by awarding the appellant TZS. 215, 332, 161.30/ claimed. Because, he stated, by the said letter, the respondent admitted that in fact the appellant was retrenched and entitled to the respective benefits stipulated under Article 6 of the said Voluntary Agreement. Mr. Chuwa urged us to allow the appeal.

In reply, Mr. Nyika adopted the respondent's written submission filed on 12th October, 2020 and contended that, by the agreement entered on 15th December, 2000 deeming the appellant retired, they parties vacated their previous Voluntary Agreement to retrench him. Mr. Nyika further argued that, from there, the appellant was no longer entitled to retrenchment benefits but the retirement benefits because, he stated, those two were different schemes yielding different benefits. He added that, with that development, the pivotal issue arising was whether the appellant was retrenched or retired. It is not on illegality of the parties' agreement to retire the appellant as now raised in disguise by Mr. Chuwa. On that one, Mr. Nyika further contended that, the alleged illegality had never featured before the Industrial Court or High Court nor is one of the grounds of appeal before this Court.

Mr. Nyika also argued that, the respondent's letter to the Director General, PPF which inadvertently addressed the issue of retrenchment and its benefits did not vitiate the existing parties' agreement that the appellant be retired instead of being retrenched.

On the 2nd ground of appeal which concerns the High Court's allegedly failure to distinguish the deserving retrenchment benefits from the retirement benefits, Mr. Nyika contended that, it was correct to find that the appellant deserved the retirement benefits only as agreed by the parties. Because, he argued, the respondent's letter dated 15th January, 2001 to the Director General, PPF (exhibit D3) did not communicate the correct status of the appellant's employment and the deserving terminal benefits.

On the 3rd ground of appeal, which is about the High Court's failure to discharge its duty as a first appellate court, Mr. Nyika argued that, as a matter of fact, it entertained the matter as a third appeal and not as a second appellate court as alleged by the learned appellant's counsel. To conclude, he urged the Court to dismiss the appeal for being devoid of merits.

Having heard the learned counsel's contending submissions and considering the record of appeal as regards the first ground of appeal, it is

not disputed that, after such long services with the respondent, the appellant was retired on 3rd November, 2009 and paid the retirement benefits.

It is also undeniable fact that his retirement followed his being suspected of inability to perform the duties satisfactorily and failure to observe the procedures laid by the respondent. However, upon the parties noticing that if terminated, the appellant would get lesser terminal benefits of one-month salary in lieu of notice and the salary earned up to the date of termination, and having considered that, by that time the appellant had worked with the respondent for more than 21 years with a short period of time remaining before the compulsory retirement age, they agreed that the former be retired, qualifying him to get the PPF benefits and the group endowment scheme which he would not get on termination. In the circumstances, we decline to disregard the above unshaken evidence. The parties are bound by the said agreement as per the dictates of sanctity of contracts. See- our decision in **Lulu Victor Kayombo v. Oceanic Bay Limited & Another**, Consolidated Civil Appeals No. 22 & 155 of 2020 [2021] TZCA 228: [02 June 2021: TANZLII] from the long list of authorities. Having signed the said agreement, therefore, the appellant could not claim any terminal benefits beyond the scope of respectively agreed terms and

conditions. It is noteworthy that, by the agreement dated 15th December, 2000, the appellant waived all the retrenchment benefits listed under Part VI of the Voluntary Agreement which is found at page 55 of the record of appeal. He is estopped from denying that truth, just as he cannot claim back the said terminal benefits.

With regard to the effect of the respondent's letter to the Director General, PPF about the status of the appellant's employment and the need for processing the deserving retrenchment benefits, we agree with Mr. Nyika's submission, as rightly held by the High Court that, that letter did not convey the correct position as the appellant was actually retired and not retrenched. We do not also respectfully agree with Mr. Chuwa that it was intended by the labour laws that, the schemes of retirement and retrenchment of an employee be carried out simultaneously, to entitle the outgoing employee the respective benefits cumulatively. We thus hasten to stress that, the said respondent's letter was inconsequential because, it was neither revocation of the parties' agreement to retire the appellant nor an amended version of that agreement.

We are of the considered view that the High Court was right to have declared that the said letter could not have nullified the parties' agreement.

We are thus satisfied that, by agreement executed by the parties on 15th December, 2000 the appellant was to be retired instead of being retrenched as the previously intended and agreed by them. They are bound by such terms and conditions.

As regards Mr. Chuwas' concern that, the parties' agreement to retire the appellant was illegal for contravening the pension laws, for the appellant had not attained the age limit of fifty-five years, we have noted that, this point was never raised before. It is an afterthought which we cannot accept. This is so because, according to the record of appeal, before the High Court the appellant had one ground of grievance, namely:

> *"The panel of Revision erred in law and in fact in deciding that the appellant's services were terminated and that his terminal benefits were based on the Agreement reached between the Appellant and the Respondent as per Exh. D1".*

From the above quoted ground therefore, we agree with Mr. Nyika's argument that, the point of illegality of the parties' agreement assuming that the appellant retired, instead of being retrenched was not raised before the first appellate court nor is one of the grounds in the present appeal before us. To entertain that new factual issue at this stage is tantamount to

attempting to fault the High Court judges on a matter which was not presented before them let alone deciding on it. We are hesitant to assume such jurisdiction being requested by Mr. Chuwa because, doing so will contravene section 4 (1) of the Appellate Jurisdiction Act. Holding so, we are guided by what we have reiterated in a number of cases including **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 [2016] TZCA 301: [13 April 2016:TANZLII] and **Marwa Chacha @ Nyaisure v. Republic**, Criminal Appeal No. 243 of 2018 [2022] TZCA 253: [09 May 2022:TANZLII].

With respect, from the above discussion, as regards the status of the appellant's employment, we hasten to hold that, the issue raised by Mr. Chuwa that the appellant signed the agreement dated 15th December, 2000 under protest is an afterthought. It is neither here nor there. The more so, is the long-established legal principle that the parties are bound by the terms of their contracts. See- **Lulu Victor Kayombo v. Oceanic Bay Ltd and Another** (supra) and **Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 [2016] TZCA 24: [09 March 2016: TANZLII]. For instance, in **Unilever Tanzania Ltd** (supra), the Court held that:-

> *"Strictly speaking, under our laws,* ***once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves****...It is not the role of the courts to re-draft clauses in agreements* ***but to enforce those clauses where parties are in dispute****". (Emphasis added).*

In the circumstances, we agree with Mr. Nyika that, the 15th December, 2000 agreement entered freely by the parties had the effect of retiring the appellant, replacing the previous Voluntary Agreement to retrench him.

From the foregoing discussion, we respectfully do not agree with Mr. Chuwa's argument that, even when the parties had agreed to retire the appellant, that agreement was thus illegal and inconsequential for contravening the provisions of the Pensions Fund which prohibit retirement of the Fund members who have not attained the age of fifty-five years. Unfortunately, Mr. Chuwa did not point out to us any law which prohibits voluntary pre-mature retirement to support his proposition. We also revisited the law but did not find any such provisions of the law. We therefore hold that, the High Court was right in its decision by leaving the parties' agreement undisturbed. We thus dismiss the 1st ground of appeal.

On the 2nd and 3rd grounds of appeal about the court's failure to distinguish "termination" from "retrenchment", also the failure to determine on the deserving terminal benefits, basing on what we have endeavoured to discuss on the preceding ground of appeal, we wish to stress that, the issue of denial of the appellant's contractual rights not awarding him both retirement and retrenchment benefits should have not been raised. We are saying so because, in the circumstances, it is both undisputed and logical that: **one**, the appellant's employment was terminated by retirement and not retrenchment as was previously agreed by the parties and **two**, the above said two schemes are, by operation of law distinct. They do not co-exist. That is to say, an employee who seeks to be retired and retrenched at the same time and get paid such allied terminal benefits together is taken to attempt to ride two horses at the same time which is not permitted. It is either you retire as was opted by the appellant or be retrenched and get the respective benefits, as the case may be. We are of the view that, if employees had such unjustified "double enrichment" exit at their disposal, not only majority of them would have rushed to it, but also, the possibilities of the majority of the employers closing the business for being bankrupt would not be ruled out. In any case, therefore, the procedure to be followed

in retirement and retrenchment exercises are not similar. We thus dismiss the 2nd and 3rd grounds of appeal.

In the end, we do not find merits in this appeal. Consequently, we dismiss it. On the other hand, it being a labour matter thus considering the circumstances of the appeal, we make no order as to costs.

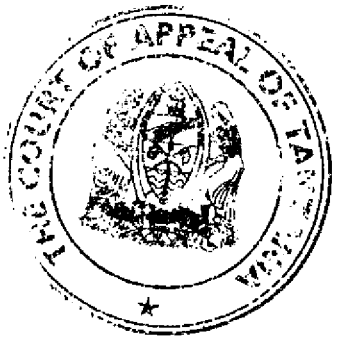
DATED at **DAR ES SALAAM** this 30th day of June, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of July, 2023 in the absence of the Appellant despite being informed and Ms. Antonia Agapiti, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL