IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.278 OF 2004

LUKILILE M.A. ..... APPELLANTS

VERSUS

LADHA INDUSTRIES LTD..... RESPONDENT

JUDGMENT

MANENTO, JK:

The appellant Likulile M.A. had instituted a civil suit at Kisutu Resident Magistrates' Court against the respondent for terminal benefits amounting to shs.813,885/= for his unlawful termination of services. He had itemized the benefits to include notice, areas of wages, leave pay, severance allowance and transport allowances. The respondents had raised a preliminary objection on a point of law that, the Kisutu District Court had no jurisdiction to hear and determine the suit. The said District court, which was presided over by a Principal Resident Magistrate upheld the objection. The basis of that ruling was that the suit was founded on an action of summary dismissal, which under section 28 of the Security of Employment Act, 1964, Cap.574 the courts jurisdiction had been ousted. The appellant was aggrieved by that ruling, hence this appeal.

The appellant raised two grounds of appeal namely:

(1) That the Principal Resident Magistrate erred in law in holding that the court had no jurisdiction to entertain the suit when the plaintiff before the court was not one covered by the Security of Employment Act, 1964.

(2) That the Principal Resident Magistrate erred in law in failing to construe that the termination of appellants could only be done under a specific contract between the appellant and the respondent and had nothing to do with disciplinary offences under the Security of Employment Act, 1964.

The parties were all represented by learned counsel. The appellant was represented by Mr. Kashumbugu, learned counsel while the respondent was represented by Mr. Kariwa, learned counsel. Mr. Kariwa had raised a preliminary objection in that the memorandum of appeal was not accompanied by a certified copy of the decree. By consent, both the preliminary objection and the appeal were urged simultaneously and by way of written submissions. That act served time and multiple rulings or and judgments.

On the preliminary objection on a point of law, Mr. Kariwa, based his arguments on Or xxxix rule 1 of the Civil Procedure Code

1966. He urged that the decree/order to accompany the memorandum of appeal should be certified. The basis of that reasoning is that by a certified copy of decree or order leads to avoidance of the use of unofficial, unauthenticated or in accurate copies of decrees or orders. He cited the East African Court of Appeal decision in **Mushran & Co. vs. Star Soda** Factory (1934) 16 E.A.A. 50 where it was held that failure to lodge a certified copy of the order appealed from renders the appeal incompetent. On the other hand, Mr. Kashumbugu, learned counsel for the appellant submitted briefly that the said requirement is not mandatory as per order xxxixr(1) of the Civil Procedure Code, 1966. For ease of reference, I hereby reproduce Order xxxix r.1 so that it can speak by itself"

1(i)- Every appeal shall be preferred in the form of memorandum signed by the appellant or his advocate and presented to the High Court (.....) or to such officer as it appoints in this behalf. The memorandum **shall be accompanied by a copy of the decree appealed from (.....)** of the judgment on which it is founded.

The wording of Order xxxix r(1) of the Civil Procedure Code, 1966 did not put it as a mandatory requirement for the copy of the

decree/order appeal against to be certified. That reasoning is fortified in the more recent case than that one cited by Mr. Kariwa, learned counsel. That is **Stanley Kahama Mariki** v. **Chilinyo Kwisila w/o Nderingo Ngomuo** (1981) TLR 143 where it was inter alia held that:

> "(i) a memorandum of appeal must be accompanied by a copy of the order appealed from (vide order 39 r (1) and order 40 r.2 of the Civil Procedure Code).

The same reasoning was repeated by this court in the case of **H.J. Stanley & Sons Limited v. Ally Ramadhani Kanyamale (1988) T.L.R. 250**. Since my judgment is not based on that preliminary objection, it is then enough for me to say that on the basis of the wording of order xxxix r.1(1) of the Civil Procedure Code and the cited cases, one by the Court of Appeal and the other by this court I would not struck out the appeal for the reason that the copy of the decree was not certified. It is not mandatory, though a certified copy is more relied upon.

On the memorandum of appeal itself, the appellants learned counsel urged that the trial Principal Resident Magistrate erred in holding that he was bound by section 28 of the Security of Employment Act, 1964. He said that, that was a misdirection because even though the appellant was not covered by the definition of the an employee in Security of Employment Act,

yet he remained an employee and as the labour officers opinion existed then the court was duty bound to hold that its jurisdiction was not ousted as the appellant was employed in the Management of the Employer's Business and if it found that the labour officers report was not authentic, then it was duty bound to stay the proceedings and obtain an authentic, opinion of the labour officer as it was done in the case of Walter Joger v. Cordura Ltd. (1972) HCD 133. On this attack, the learned Principal Resident Magistrate had considered the issue of the labour officer's report and had this to say:

> "On careful examination of all the pleadings and the submissions by the learned counsel, I am of the view that the objection raised has merits notwithstanding the letter from the labour officer which was obtained and submitted as a result of the rejoinder of the learned counsel for the defendant, that a certificate I find that this court has no jurisdiction to entertain this suit as the action is founded on an action of summary dismissal...."

On the other hand, Mr. Kariwa submitted that since the appellant had no certificate from the labour officer that he was not an employee within the meaning of the Security of Employment Act, 1964, he can not be heard to recategorise himself as not being an employee under the law. He cited two

cases to fortify his submissions, that is to say, **Tanzania- Zambia Road Services Ltd v. Pallangyo (1987) TLR 24 and** High Court decision in **Mamta Saehdev. V. Standard Chartered Bank (T) Ltd. Civil Case No.53/2002 (unreported)** where it was held:

> "The definition of an **"employee"** is very wide. It covers every person who is gainfully employed except those who, in the opinion of the labour officer, are in the management of the employer's business. In the present case **there is no certificate from the labour officer** categorizing the plaintiff being employed in the Management ..." (emphasis supplied).

Now that it was not shown in the pleadings that there was a certificate from the labour officer, whose opinion was binding upon the court, then the court was not to presume, that the appellant was employed in the management of the employers business. I agree with that submissions. That argument found support in the **Walter Joger Case** (supra). In that case, Walter Joger was the hotel manager and when he urged that he was not an employee within the meaning of the Security of Employment Act, 1964, the Court ruled that it was the labour officer who was to give the opinion. That was repeated in the case of **Sankey v. Caltex Oil Tanzania Ltd. (1973)** E.A

335. However, in the Walter Joger's case, **the court stayed the proceedings** awaiting for the report of the labour officer under section 4© of the Security of Employment Act as amended by Act No.45/1969 which provides that:-

> "an employee who in the opinion of the labour officer, is employed in the management of the business of his employer, is not an employee for the purposes of the Security of Employment Act".

The same approach of staying the proceedings had been taken by the Court of Appeal in Civil Appeal No.3 of 1996, of **Internal Trade v. Yohana Mapenzi (unreported) where the Court of Appeal** said at page 12 of the typed judgment that:

> "if the complaint was for non compliance of rules of natural justice i.e denying the respondent the right of being heard, the complaint is merely on the procedure adopted not on substances..... the proper remedy is to order a fresh inquiry in which the proper procedure would be followed.
>
> But I don't think that the procedure to be followed here is to stay the proceedings. I say so, as I shall show here under,

there is a question of jurisdiction involved, with the current decisions of this court."

On the second ground of appeal that the termination of the appellant had nothing to do with disciplinary offences under the Security of Employment Act, 1964 is very much true. He was terminated on his alleged poor performance in his duties, leading to payments of people not entitled to be paid. He did not, though after prayer for pardon, complain that he was wrongly terminated. What he wanted are his terminal benefits.

In a dispute for the rights and or liabilities of either party to a contract of service is first to be reported to the labour officer under section 139 of the Employment Act, cap.366. The labour officer if he fails to reach to a settlement, would forward to subordinate court under section 141 of the Employment Act, Cap.366 whereby a labour officer could report a dispute. But again, since the appellant claimed to be working in the management of his employers business, then he was required to refer his dispute to the Industrial Court under section 10 of Act 41/1977 as amended from time to time. However, the requirement of the opinion of a labour officer that he is working in the management of his employers business is a precedent condition for an employee to file a trade dispute in the absence of the support of his trade union.

I say that the appellant's dispute could legally be dealt with by the Industrial Court because that is the court move specialised to determine labour disputes. This court had previously held that:

> "where there is a court specifically created to cater for particular type of cases, such as trade disputes between employer (s) and employees the ordinary civil courts should desist from entertaining such suits unless there are exceptional circumstances so to do"

See Civil **case No.216/1999 Rose Lyimo & 8 others v. Price Water House Coopers Consultants Ltd (unreported)** Dar es Salaam Registry and the recent **Civil Case No.89/2004 Tanzania Plantation and Agricultural Workers Union on behalf of Stanley Kimaro, V. P.S.R.C. and another, Dar es Salaam** Registry, (unreported). On those reasons, the civil court where the suit was instituted lacked jurisdiction for many reasons. Those stated by the trial court and those stated by this court.

Before I pen off, I would like to comment on the plaint before the subordinate court. The plaint is headed as follows:

IN THE DISTRICT COURT OF DAR ES SALAAM

AT KISUTU

CIVIL CASE NO.356 OF1988.

There is no District Court of Dar es Salaam at Kisutu in this country. There are three District courts in Dar es Salaam Region, namely, Ilala, Kinondoni and Temeke. Kisutu is a court of Resident Magistrate by Government Notice No.68/1981 which specifically provides as follows:

> The Magistrate's courts (Court of a Resident Magistrate) (re designation) Order, 1981

The Government Notices established courts of a Resident magistrate which exercises jurisdictions in the specified area. In case of Dar es Salaam "the court of the Resident Magistrate of Dar es Salaam Region. This court has offices at Kisutu and Kinondoni for the time being. There is no District Court of Dar es Salaam at Kisutu. Therefore, the plaint before the court of Resident Magistrate in Civil Case No.356/1998 was improperly before the court, so that it ought to be rejected.

All what I have been saying leads to one conclusion, that the trial magistrate never erred in law by dismissing the suit and I hereby uphold that ruling and dismiss the appeal with costs.

A.R. Manento

JAJI KIONGOZI.

21/9/2005

4-10-2005

Coram: A.R. Manento, JK

For the Appellant – Mr. Kashumbugu Advocate

For the Respondent – Mr. Adeladi Advocate

Cc: Livanga.

Court: The judgment is read in the presence of the parties.

A.R. Manento
JAJI KIONGOZI.
21/9/2005