

**IN THE HIGH COURT OF TANZANIA AT**

**DAR ES SALAAM**

**CIVIL CASE NO. 413 OF 2002**

**ABDON MAPUNDA.....PLAINTIFF**

**VERSUS**

**THE COUNTRY DIRETOR**

**ENTERPRISES WORKS/TANZANIA.....DEFENDANT**

*Date of last order - 21/3/2006*

*Date of judgment - 31/3/2006*

**JUDGMENT**

**Mlav. J.**

The plaintiff ABDON MAPUNDA who was employed by ENTERPRISE WORKS TANZANIA as an Extension Agent instituted a suit in this court against the Country Director of Enterprise Works Tanzania, the Defendant. In the plaint the plaintiff has averredjn part as follows:

*5. "That the plaintiff on 13<sup>th</sup> May 2002 in the course of performing his duties driving the defendants in o tor cycle Registration No. TZS 38835 had services accident which broke his upper arm The accident was reported to the police and Inspection report number MFG/TR/IR/383/2002.*

*6. Further to paragraph 5 above the plaintiff was rushed to Iringa Regional Hospital, where then referred to Muhimbili Medical Centre. However due to lack of ex-rayat the Muhimbili on the arrival day, the plaintiff went*

to BURERE HOSPITAL at Kibaha, Coast Region where he was admitted and treated by Doctor Joseph Bake.

7. That after a clinical checkup at Burere Hospital the plaintiff was found severely broken upper arm and was advised to stop long travels. Further that until when this suit was filed in court the plaintiff is attending checkup at Burere Hospital.

8. That **the defendant on 16<sup>th</sup> October unlawfully terminated the plaintiffs service** with effect from 31<sup>st</sup> July 2002.....

9. That the plaintiff before termination by the defendant was not given an opportunity to be heard.

10. That the plaintiff claims against the defendant Tshs. 1.5. million specific damages for medical expenses.

**One month salary in lieu of notice,** Tshs. 25 million compensation for injuries suffered. Tshs.2,000,000/= damages for the breach of contract, Tshs.300,000/= transport allowance, Tshs. 15,000/= per day subsistence allowance from the date of unlawful termination to the date of repatriation. Tshs.6,982,500/=, 2 months salaries the plaintiff ought to receive.

11.....

12.....

WHEREFORE the plaintiff prays for judgment and decree as Follows:-

- (i) One month salary in lieu of notice
- (ii) Tsh s.1.5 million specific damages for

*medical expenses.*

*(iii) Tshs.25,000,000/= compensation for the injuries suffered.*

*(iv) Tshs. 2,000,000/= damages for breach of contract.*

*(v) Tshs. 300,000/= transport allowance.*

*(vi) Tshs. 15,000/= per day as subsistence allowance from the date of unlawful termination to the date of repatriation.*

*(vii) Tshs.6,982,500/= 21 months salaries the plaintiff was ought to receive.*

*(viii) Subsistence allowance.*

*(ix) Statutory compensation.*

*(x) Costs of the suit.*

The defendant through their advocate Dr. Lamwai Mdemu and Company filed a written statement of defence in which it is averred in part, as follows:

ever been a pre-requisite requirement before termination is preferred ....

8. That contents of paragraph 10 are denied to a very strict proof thereof. The defendant avers that the plaintiff is not entitled to the alleged allegory claims on at all.

9.....

10. That ***jurisdiction of this honourable***

***court is at issue'***

At the hearing of the suit, the following three issues were framed:-

1. whether the plaintiffs motorcycle accident occurred in the court of his employment with the defendant.
2. whether the plaintiff is entitled to the reliefs.

Two support the plaintiffs case, two witnesses Dr. JOSEPH THEODORE BAKE and ABDON MAPUNDA the plaintiff, gave evidence, led by Dr. Safari, learned advocate. PW1 Dr. Joseph Theodore Bake told this court that he is an

4. That the contents of paragraph [5?] are denied to strict proof thereof. The defendant avers that he had not been aware of the alleged accident not until after the letter of termination, and even if it occurred then it was not in the course of performing his duties own frolics and in contravention of working regulations.
5. that the contents of para 6 and 7 are noted. The defendant further states that he was never informed of the treatment arrangements and in any case they were not related to the employment contract.
6. That contents of paragraphs are admitted and the defendant submits that he duly exercised his contractual rights under clause 1.1 of the employment contract ....
7. That contents of paragraph 9 are vehemently denied to a very strict proof. The defendant states that an opportunity to be heard had never

the Enterprise Work Prime Project as a Tree-Crop Extension Agent in March 2002 and his working station was at Iringa. He further said

that he had a contract of employment which he produced as exhibit P4 and that according to the contract he was to work for two years from March 2002 and not for 21 months. He further said he was given working instructions which he produced as exhibit P5. He said his work was to advise peasant farmers on tree-crops and that he used to follow them in their villages on a motorcycle. He named some of the villagers he visited as KIBENGU, KIGEREKE, WAMI, VIKULA all in Mafinga District and Kilolo and Bomang'ombe in Iringa District. PW1 told this court that he used a motorcycle YAMAHA TZS 3835. He went on to say that on 13/5/2002 when he was in the course of his work to visit Kibengu, Ijebeke, Wami and Vitura Villagers he overturned with the motorcycle while negotiating a corner. He said he broke his left arm on the humorous. PW1 stated that some people who were at the scene took him to Mafinga hospital where he was referred to Iringa Regional Hospital. He produced a report from Iringa Regional Hospital as exhibit P6. PW1 said he stayed at Iringa Regional Hospital for one day and from there he went to Muhimbili hospital. PW1 said he stayed at Muhimbili Hospital for one day and he was not treated. He said he went to be treated at Burere Hospital and that his doctor at Burere Hospital was PWI. He stated that he was operated on and stayed at the hospital for a period which he does not remember but it was from 20/5/2002. PWI said that his employer was informed of the accident on the day of the accident and was informed of his being treated at the hospital. He further stated that he paid for his own treatment. PW2 went on to say that he resumed his employment in October 2002 but he was not received on his employment. He said he was informed that he had been out of his employment for a long time and he was given a letter of termination, which he produced as exhibit P7. He said the letter is dated 16/10/2002 and his termination is stated to be effective from 31/7/2002. He said he was not given an opportunity to defend himself before getting the letter of termination. He further stated that he had been warned only

once before the letter of termination and that the warning was in writing. He produced the letter of warning as exhibit P8. PW2 said he did not sign exhibit P8 because he did not agree with its contents. He further stated that his termination was not referred to any arbitration as provided for by paragraph 7.1 of the contract of Employment, exhibit P4. He further stated that the accident was reported to the police who made an inspection report which he produced as exhibit P9. He further stated that he was terminated from employment since the employer did not return PW2 to his former employer who had sent him to his new employer. He said he asked for a letter which his employer refused to give

him. PW2 stated that the Director of his employer is an American. Returning to the plaint, PW2 stated that he was claiming one months salary in lieu of notice; 1.5 million shilling as specific damages; Tshs.25 million as compensation for the injury suffered; Tshs.2 million as damages for breach of contract; Tshs.300,000/= Transport Allowance; Tshs.15,000/= per day subsistence allowance from the date of unlawful termination to the date of repatriation, Tshs.982,500/= being monthly salary for 21 months, several allowance statutory compensation and costs of the suit plus interest.

Upon cross examination by Mr. Mdamo PW2 told this court that the accident occurred in the morning and that he was under probation. He further stated that the defendant has an office at Iringa and that employees of the defendant were required to report of the office at 8.00 am. He stated that he was not the only extension officer employed by the defendant and that extension officers were assigned to different zones by the employer. PW2 stated that his motorcycle had a passenger sit and that he knew one FATHREST KIMARO who was an extension officer like himself.

He denied that extension officers were prohibited to carry a passenger on the motorcycle and that it was not true that on the date of the accident he was carrying FAITH REST KIMARO on his motorcycle. He further stated that it was not true that on the date of the accident he was assigned to work at Igereke, Vikula, Ibenga and Wami Villages. He said he did not know the distance from Iringa to the spot of the accident or the time it took to get there. He further stated that on that day he reported at the office at 800 am and was assigned tasks by one RICHARD MWANAKUNDYA who was his Component Manager on that day. He said he had stated that he stayed at Mafinga Hospital for one day and went to Iringa Regional Hospital where he stayed for one day and then went to Dar es Salaam. PW2 told this court that he was not the one who reported the accident to the police and that his employer was informed by phone of the accident by the people who took him to hospital and his employer sent Richard Mwanakundya to Mafinga to take him to Iringa Regional Hospital. PW2 went on to say that the Director of the Project were to Iringa Regional Hospital and he showed him the referral letter to go to Muhimbili Hospital. Upon further cross-examination by Mr. Mdemu PW2 stated that he did not say that the Director went to see him at the Regional Hospital. He said the Director went to Iringa from Mbeya and PW2 went to the office to show him the referral letter to go to Muhimbili Hospital which the Director did not accept, instead the Director gave him a letter of reprimand exhibit P8. PW2 went on to say that there was no decision made at the Iringa office. He said RICHARD MWANAKUNDYA was incharge of the Iringa office. PW2 stated he did not write a letter to his employer about the referral to Muhimbili because he had the referral letter. He also said he did not write a letter to oppose the letter of reprimand exhibit P8. He said he objected to it by refusing to sign the letter. PW2 stated further that he did not write a letter to the employer to explain that he was undergoing treatment and unable to return to work and he did not

write a letter to dispute the decision to terminate his employment. He conceded that under paragraph 7.1 of the contract of employment exhibit P7, any of the parties could refer the matter to an arbitrator. He said he referred the matter to the Law of Equity Chambers whom he did not know were only a firm of lawyers and not arbitrators. He stated that the law firm invited the employer to come but he did not do so. He stated further that he was not wrong to bring the matter to court because he had already referred the matter to an arbitrator. PW2 was on to say that he had not sent his claims to the Insurance. He stated that he has seen Clause 4 of the Contract of Employment exhibit P4. He further said the arbitrator sent the insurance claims to the employer but the employer did not respond. He denied to have been treated free of charge by PW1. He said he paid Tshs. 1,500,000/=. He stated that he did not bring the receipts but the day the receipts are required for payment he will produce them. He said the sum of shs.25 million claimed as compensation for injuries is small compared to the incapacity he has suffered as a graduate trained in tree crops. He further stated that after the accident he was paid one salary for the following month and up to the date of the accident he had been paid all his salaries. He went on to say that the 21 months salary he has claimed are unpaid salaries. He conceded that he was employed on a contract of 21 months. He said the Tshs.6 million plus he is claiming can have the salaries already paid deducted therefrom. He further said the transport allowance is for transporting him from Iringa back to Dar es Salaam where he had been engaged and that the transportation is based on the costs of hiring transport from Iringa to transport his personal effects and family from Iringa to Dar es Salaam. Upon reexamination by Dr. Safari PW2 said before being given a letter of termination he was not given the opportunity to defend himself. He further said there was no existing arbitrator mutually agreed upon between himself and his employer. He said there was no arbitrator he could have gone to and that he could not



have waited for his insurance benefits to be treated. He said that he had to save his arm instead of waiting for insurance. Upon further examination by the court PW2 stated that after treatment he did not go to insurance because he did not know which insurance to go to. With this evidence Dr. Safari closed the plaintiffs case.

The defence case began with the testimony of DW1 RICHARD MWANAKULYA. He told this court that he lives in Iringa Municipality and employed by ENTERPRISE WORKS. He said he started working with that employer from 15/3/2002. He said he knows ABDON MAPUNDA DW2 who was working under him in the tree Crops Unit. He went on to say that the Enterprises Works runs a Project known as "PRIME" or Project for Rural Initiatives In Micro Enterprise Development. DW1 said "Prime" has three units which are Tree Crops, Small Scale Irrigated Horticulture and Oil Seed Production and Processing. DW1 said he was the head of the Tree Crops Unit and the other units also had heads like himself. He further said as head of the Tree Coops Unit, he was responsible for the supervision of the implementation of the goals of the project. He said PW2 was an Extension Agent whose duties were to work directly with peasant farmers in the villages, according to the activities in the project document. He said his duty was to supervise the extension agents like PW2 in implementing the activities assigned to them in the project documents, including to inspect the activities they perform in the villages. DW2 said each Extension Agent was assigned a motorcycle. He said he did not remember the Registration Number of the motorcycle assigned to PW2. He went on to say that on 13/05/2002 he travelled to Mbeya and he knew that PW2 was to go to work in Wami and Usokeni Villages in Mufindi District. He said he had met PW2 on Saturday 11/5/2002 to discuss his journey to Mbeya and PW2's journey to the Villages. He said while he was in Mbeya, he was informed by the Country Director of Enterprises that PW2 who was riding with FAITH REST KIMARO who was also an Extension Agent, had been involved in an accident on

their way to villages and that PW2 had sustained a broken arm. He said at that time he was in the office of the Country Director which was at Mbeya. He said the Country Director instructed him to go to Mafinga where the accident had occurred. DW2 and FAITH REST KIMARO and he was informed by the hospital authorities that he would be able to take the two victims of the accident to Iringa for further treatment after the initial treatment at Mafinga District Hospital. PW2 said the hospital did not ask him to make any payment but some employees of HIMA, a project operated by Mafinga District and assisted by the Danish Development Agency (DANIDA) and who had picked up the victims of the accident from the scene, demanded to be refunded by him costs which they had incurred at the hospital for the treatment of PW2 and FAITH REST KIMARO. DW2 said the people gave him receipts which he took to his office and the people were paid. He said he did not know the amount paid. DW2 went on to say he asked the victims of the accident where he should send them and they both said they wanted first to go to their homes where they were living while working with Enterprise Works. He further said the motorcycle assigned to PW2 had only one seat for the rider. He further said he asked PW2 and FAITH REST KIMARO why they rode on one motorcycle and also asked FAITH REST KIMARO why he went with PW2 while he had been sick and had been instructed by him DW2 to rest. DW2 said FAITH REST KIMARO told him that he had gone with PW2 because the tasks to be performed would have been too much for one person. DW2 said he did not know the instructions given regarding the use of motorcycles. He further stated that all employees of ENTERPRISE WORKS have a health insurance scheme with AAR and they are given an identification card of AAR. He further stated that employees were being treated at AGHA KHAN HOSPITAL at Iringa by showing the identify card. He said PW2 had such a card from AAR. DW2 produced the AAR card for PW2 as exhibit D.I. DW1 further said according to office procedures PW2

had to go to AGHA KHAN HOSPITAL if he required treatment. He said as the Component Manager he did not know that PW2 had gone to be treated in other hospitals such as Muhimbili and Burere Hospitals. He further said as the Component Manager he has not seen any bills from these hospitals at their office and if such bills were brought to the office he would have known. DW1 further stated that he knew PW2 was terminated from service because he had not been seen at work for a long period without any explanation. DW1 further told this court that he did not visit PW2 at home which he was sick. He said PW2 told him he had to consult an orthopedic expert but he did not know if he got permission to go for treatment. DW1 said he was not responsible for granting permission as his duties are not administrative. He further stated that it was true that PW2 was not seen at work and he did not know where PW2 had gone.

Upon cross examination by Dr. Safari DW1 said he was the immediate supervisor of PW2. He said he did not remember PW2's salary and that the Country Director is one MICHAEL FREDDRICK SEN who lives at Mbeya. He further told this court that FAITH REST KIMARO is no longer working with them and that he returned to his village in Kilimanjaro. DW1 went on to say the accident occurred on 13/3/2002. He said according to exhibit D.I. PW2 was a member of AAR since 15/6/2002 but there was an arrangement before the cards were issued for employees to be treated at AG HA KHAN. He conceded that at the time of the accident PW2 did not have the card. He further said he knew that PW2 had a broken arm. He further said that for his health PW2 may have thought it right to go to Muhimbili Hospital but he had to follow the procedures at the place of work. He further said that termination of PW2 from employment is proper according to the letter of termination. He said he had not seen a letter asking PW2 to show cause why he should not be terminated.

Upon re-examination by Mr. Mdemu DW1 said he did not know the difference between dismiss and termination. After DW1 had completed his testimony Mr. Mdamu prayed for another date for defence hearing because he wanted to call another witness who can testify on administrative matters. Dr. Safari said he would reluctantly agree. I then orderd that further defence hearing to take place on 10/8/2005. On that date the case was before the District Registrar. The plaintiff PW2 is recorded to have been present but the defendant and his advocate Mr. Mdamu were absent. The case was then fixed for hearing on 27/9/2005 but on the hearing date neither the defendant or his advocate appeared. Dr. Safari prayed for the date of judgment.

Having given consideration to the fact that the defence had been given the opportunity to call another witness for hearing on 10/8/2005 but the defence being aware of the hearing date had not appeared and that they did not also appear on the second hearing date fixed by the District Registrar, and as no reasons had been given for the non appearance, this court cocluded that the defence had failed to offer further defence. Order XVII Rule 3 of the Civil Procedure Code, 1966 provides as follows: *n3 Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses or to perform any other act necessary to further progress of the suit, for which time has been allowed, the court may notwithstanding such default, proceed to decide the suit forthwith/*

In accordance with the provisions of the rule above, this court set the schedule for which the counsels should make written submissions, following a prayer from Dr. Safari to file written submissions. Both counsels filed written submissions in accordance with the schedule and hence the present judgment.

Mr. Mdamu learned advocate for the defendants started his

submissions by complaining about the court's decision to proceed with the case after the defence had failed to appear. Strangely, he alleges that the court was informed of his absence by "the advocate who was handling the case" that Mr. Mdamu was attending a Criminal Sessions. I do not know how the advocate who was "handling the case" who is Mr. Mdamu himself, informed this court of his engagement, when he was absent on the day of the hearing without leave and was also absent on the second day of hearing. It is disheartening for an officer of the court to fabricate an excuse by blaming the court for his own shortcomings. However, having regard to the provisions of the powers of the court under Order XVII Rule 3 of the Civil Procedure Code, 1966 to which I have referred to earlier on, in this judgment, nothing more needs to be said about Mr. Mdamus complaint.

Mr. Mdamu submitted that the agreed issues are three. The first whether the motorcycle accident occurred in the course of employment, second whether the plaintiff is entitled to damages from the injuries sustained in the accident and the last is whether the plaintiff was fully (sic) terminated: He contended that it is an undisputed fact that the plaintiff as an employee of the defendant met an accident on 13/5/2002 while heading to duty stations (villages). He argued that the plaintiff nevertheless never even officially reported the incidence to his employer. Neither did he inform him of his desire for further treatment in a better hospital other than those found in Iringa Municipality. He submitted that the plaintiff's treatment at PW2's (sic) hospital or elsewhere was without the defendant's knowledge and or approval, hence a justification for the latter's unilateral decision to terminate the plaintiff's employment in October, vide exhibit P7. He further submitted that apart from the fact that the plaintiff got injured and treated at PW2's hospital there is no evidence to

establish the extent of the claims prayed for by the plaintiff. He said the plaintiff would for instance have produced receipts for payments made against treatment at PW2's hospital. He concluded that there is not proof against all the claims made by the plaintiff on the balance probabilities and therefore the suit should be dismissed with costs.

I think reference to PW2 in Mr. Mdamus submissions is a slip of the pen as Doctor Bake testified as PW1 not PW2.

As for the plaintiff, I was unable to find any submissions filed by Dr. Safari, although he is the one who prayed to have written submission filed. I do not therefore have the benefit of the views of the plaintiffs counsel on this clients case.

Before going into the specific issues framed, it appears from the pleadings and also from the plaintiffs evidence, that the entire suit is based on the alleged "**unlawful termination**" of the plaintiffs employment by the defendant. This is alleged in paragraph 8 of the plaint. As the result of the "**unlawful termination**" one of the plaintiffs claim, as can be seen from paragraph 12 (b) (i) of the plaint, is "**one month salary in lieu of notice**". In the plaintiffs evidence, he alleged that before being given the letter of termination, he was not given the opportunity to be heard. It is clear from the plaintiffs claims that his unlawful termination, which was without notice amounts to summary dismissal. It has been held that termination without notice is summary dismissal. See **MOHAMED AND OTHERS V. MANAGER KUNDUCHU SISAL ESTATE (1)** and **KLM ROYAL DUTCH AIRLINES V. JOSE XAVIER FERERA**

[1994] TLR 230. Since the plaintiffs complaint that he was terminated without notice, which is summary dismissal, the jurisdiction of this court to entertain the suit is ousted by the provisions of section 28 of the Security of Employment Act, 1964

which is now, section 29 of the Security of Employment Act Cap. 387 R.E. 2002. The section provides as follows:

29 (1) **No suit** or the proceedings to enforce a decision of the Minister of the Board on a reference under this part **shall be entertained in any civil court with regard to summary dismissal** or proposed summary dismissal, or a deduction by way of a disciplinary penalty from the wages of an employee.

(2) In this section, "civil proceeding" includes a cross suit, or counter claim, any set off and any civil proceedings under Part XII of the Employment Act, (emphasis mine)

As it was decided by the Court of Appeal in **Kitundus Case** (2) and in **KLM V. FERERA**, summary dismissal under section 29 of the Security of Employment Act, is not defined with reference to disciplinary proceedings. In other words, although no disciplinary proceedings were instituted against the plaintiff, the termination of his employment without notice, still amounted to summary dismissal.

An issue arose in the KLM V. FERERA's case whether some of the claims in the suit which did not relate to summary dismissal could be severed off and considered by the court. The court held the "all the respondents claims are so interwoven on their foundation that they fall within the ambit of the prohibitory provisions of the Security of Employment Act". The court also said severing off some of the claims "amounted in amending the *plaint*" which a judge could not take it upon himself to amend the cause of action without application from the parties merely to take the claim away from the prohibitory provisions of Section 28.

[P.236]. Applying the decision of the Court of Appeal in the KLM FERRERAS case to the present case, the plaintiffs claims in the suit are equally interwoven with the basic claim of unlawful termination without notice. At any rate no claims can be severed off for consideration by this court, without running the risk of amending the plaint without an application having been made by the parties.

As this court lacks jurisdiction to entertain this suit it is dismissed for want of jurisdiction. The defendant will have the costs in this suit. On the strength of this decision there is no need to consider the issues on their merits.

J I Mlay  
JUDGE

Delivered in the presence of the plaintiff and Dr. Safari advocate for the plaintiff in the absence of the defendant, this 31<sup>st</sup> day of March, 2006

J I Mlay  
**JUDGE**  
31/03/2006

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**5,297 words**