IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 73 IOF 2004

THE DIRECTOR DAR ES SALAAM
ENGLISH AND COMPUTINGCENTRE.....APPELLANT
VERSUS
ELIZABETH SHADRACK .....RESPONDENT

Date of last Order 7/12/2006
Date of Judgment 1/3/2007

JUDGEMENT

MLAY,J.

This is an appeal from the Judgment and decree of the Court of the Resident Magistrate of Dar es Salaam in Employment Cause No. 41 of 2002, which arose from a report made to the court by a Labour Officer, under section 132 of the Employment Ordinance Cap 366, which is now section 139 of the Employment Act Cap. 366 Re 2002. The Magistrate's court gave judgment and decree to the respondent who was the appellant's employee, for payment of:-

(i) *Salary arrears*

(ii) *Tshs 240,000/= for two annual leave not taken*

(iii) *Tshs 180,000 for maternity leave not taken*

(iv) *Tshs 159,960 being overtime*

(v) At the rate of Tshs 1333 x 120 hrs

Costs of the Suit.

Being aggrieved by the judgment and decree of the Magistrate's Court the appellant has appealed to this court on the following grounds:-

"*1. The magistrate erred in law and fact in holding that the Respondent is entitled to payment of salary.*

2. The honourable Magistrate erred in law and fact in holding that the Respondent is entitled to Tshs 240,000/= as untaken leave payment.

3. The honourable Magistrate erred in law in holding that the Respondent is entitled to Tshs. 180,000/= as maternity leave.

4. The honourable Magistrate erred in law in holding that the Respondent is entitled to Tshs. 159,960/= as overtime payment.

At the hearing of this appeal Mr Sabasaba advocate appearing for the Appellant and also holding brief for Mr Malamsha advocate for the Respondent prayed for and was granted leave to file written submissions on the appeal.

For the appellant it has been submitted that the lower court erred both in law and fact in holding that the Respondent is entitled to payments for untaken leave and overtime as **the said claims were not part of the Respondent's pleadings when the report of the labour officer was filed in court.** It is contended that the claims were brought in by the Respondent when replying to the Appellants written statement of Defence. The appellants advocate argued that the court is not allowed to entertain claims outside those contained in the plaint nor to amend pleadings without application of the parties. Reference was made to decisions of the Court of Appeal in NIC and Another Vs Sekulu Construction Company 1986 TWC157 and KLM Royal Durch Airlines Vs Jose Xavier Ferrier (1994) TLR 230.

The learned counsel further referred to Order 8 Rule 13 and Order 6 Rule 17 of the Civil Procedure Act and argued that parties are allowed to amend pleadings at any stage before hearing provided leave of the court is sought and obtained and that in allowing the amendments, the court is always guided by the factors provided under Order 6 Rule 17. The Appellants counsel submitted that in the present case, the said claims were neither originally pleaded nor was there an order made to amend the plaint as a result of which they were wrongly entertained.

The appellants advocate contested the Magistrates finding that the above irregularly was not fatal. He reiterated that the claims

were made when the Respondent was replying to the Appellants written statement at which stage; the Appellant did not have the chance to counter the said claims. He contended that on the strength of the stated irregularity, the pleadings were a nullity and should be struck out.

On the payment of salary arrears, which is the subject of ground No 1 of appeal, the appellant's advocate advanced two arguments. The first argument is that the respondent was not entitled to salary arrears as she did not work to earn such arrears. It has been contended that it is on record that upon being reinstated on 14/11/2002, the respondent did not report for duty for reasons that she was reinstated in a different post. The counsel asked, if the respondent refused to work in the new post and absconded how can the Respondent be entitled to payment of salaries?. The second argument is that in the original pleadings the Respondent did not claim salary arrears from the period of re- instatement but only claimed salary for the month of October Shs 60,000/=.

The advocate contended that the respondent only claimed shs. 60,000 for the month of October, because the respondent knew for sure that she absconded after being assigned new duties. He submitted that the lower court erred in ordering payment of salary arrears which had not been pleaded and for which the respondent had not worked and earned salaries.

On payment for maternity leave which is the subject of the 4th ground, the appellants counsels contended that initially the respondent claimed Tshs.120,000/= initially for maternity leave for the year 2001 but later on the claim was changed to Tshs 180,000/=. The counsel contended that the respondent took an annual leave that year and submitted that the law does not allow annual leave and maternity leave to be taken at the same time and that when maternity leave is taken, The annual leave is automatically cancelled. He submitted that the payment for maternity leave is irregular as the Respondent took annual leave in that year. In what appears to be an alternative argument the advocate submitted that payment for maternity leave ought to have been for two months only.

As regards payment of overtime Tshs.159, 960/= which is the subject of the last ground of appeal, the appellants advocate submitted that there was no tangible evidence adduced by the Respondent to justify the claim. He contended that the lower court granted the claim in total disregard to the appellants evidence that the respondent worked only for 9 hours per day for five days per week making a total of 45 working hours per week and without working on public holidays.

For the above reasons the appellant has prayed that this appeal be allowed, with costs.

The respondent has submitted in relation to claims of untaken leaves and overtime that they are well founded on the statute. He contended that "***Though not pleaded in the plaint, the court has powers to give other relieves (sic) as it deems fit on bassing on the evidence adduced".*** He contended further that the ***"Respondent" is entitled to those benefits as up to the time the appellant was brought to court she was*** *still his employee".*

He quoted from the Judgment of the Magistrate the passage:

> *" Since there is no termination and since there is failure to provide work the plaintiff is employed to do I am of the considered view that the plaintiff is entitled to full wage as if she had worked from the date she was refused her post until she is reinstated into her post on her service is terminated. For these reasons therefore it is clear that there is no termination of contract of employment ...."*

The respondent further contends that as there was no termination of employment the respondent **was entitled to all benefits accruing to an employee on permanent terms.** It is

further contended that the Respondent is therefore entitled to annual leave. He referred to section 5 A (1) (a) which is currently section 27 of Cap 366 RE 2002.

The respondents Counsel argued that if the employer does not give leave to the employee the employer must pay double the monthly wage, which is the basis for the amount claimed by the Respondent. He submitted that the lower court did not in any way err in its decision as claimed by the appellant.

On overtime, the Respondents advocate submitted that the law is very clear that an employee should not exceed eight hours of work per day. He contended that the courts of law have inherent powers to grant any other relief it deems fit so long as it is within the law. He cited the Case of LOW AND STEEL WARES LTD MATRYR AND CO. (1956) 23 EACA at 177 the it was stated:

> *" Procedural rules are intended to serve as the hand-maidens of justice, not to defeat it"*

For this he submitted that the appellants contention that procedures were not followed to amend the plaint, should not be resorted to defeat justice. These submissions would appear to cover grounds 2 and 4 of the memorandum of appeal.

On payment for maternity leave which is the subject of ground No3, the respondent contended that the evidence adduced by both parties in the lower court shows that the appellant denied the respondent of her maternity leave. He submitted that maternity leave is a right under section 25 B (1) of Cap 366. [Now section 28 of cap 366 RE 2002] and that an employee must be given 84 days when pregnant and further that should be fully paid as if she is on annual leave. He disputed therefore that the court erred to award maternity leave claim to the appellant.

On payment of salary arrears which is the subject of the 1st ground of appeal, the respondents counsel contended that the appellant was not terminated by the appellant and therefore she was legally employed and as such she was to be paid all her salaries and other entitlements until she was terminated. This argument had also been raised in the general submission by the counsel.

For the above reasons, the Respondents advocate submitted that this appeal has no merit and it should be dismissed, with costs.

The facts which are not in dispute are that the appellant employed the Respondent but later purported to terminate her employment. However upon the intervention of the Respondents Union, the appellant agreed to reinstate the respondent and did infact reinstate the Respondent but offering her a different post. The

respondent did not take up the new post and instead, made a complaint to a Labour Officer in relation to certain claims of payment from the appellant. Subsequently having failed to resolve the matter relating to the respondents claim, the Labour Officer made a report to the Magistrate pursuant to section 132 of the Employment Ordinance [S.141 Cap 340 RE 2002] A cording to the report dated 21st February, 2002, the Labour Officer reported as follows:

1. *In accordance with the provisions of Section 130 of the Employment Ordinance Cap 366, the above named plaintiff reported to me that she was employed by the defendant on 22/9/98 in the capacity of computer Instructor at a wage rate of Tshs 60,000/= per month.*
2. *That on 24/10/2001 she was dismissed from employment, but she was not paid the following terminal benefits:-*
   - *(i) Salary of August 2001 .....60,000.00*
   - *(ii) Maternity leave (February – March 2001*

= 60,000 x 2 ...

120,000.00

180,000.00

3. *That efforts to effect settlement out of court proved futile as the respondent denied all the claims without producing evidence.*
4. *That since I have been unable to effect settlement between the parties, I am therefore reporting the facts of this dispute to your Honurable Court for determination.*
5. *.....(not relevant as it relates to waiver of fees)*

The appellant filed a "WRITTEN STATEMENT OF DEFENCE " in which in essence all the plaintiffs claims contained in the Report, were denied. As for payment of maternity leave, the appellant stated in part, that:-

"6..... the plaintiff was not entitled to any paid maternity leave because before the plaintiffs confirmation of appointment the Defendant asked the plaintiff to produce a medical examination report, a condition stated in the plaintiff's letter of offer of

employment, but the plaintiff did not do so because she was already pregnant .....The plaintiff agreed ***she was not qualified to get paid maternity leave because she was still a trainee, and she was not confirmed on permanent employment terms....***"

On the payment of salary August 2nd the Appellant stated in part as follows:

"5. The Defendant states that the plaintiff had already been paid the salary for the month of August 2001 as can be seen in the copy of the payment voucher (copy of voucher enclose)....."

The Respondent then filed a "REPLY TO WRITTEN STATEMENT OF DEFENCE' in which at the end thereof prayed " *for judgment and decree against the Defendant for:-*

i) *Payment of Salary for the Month October, Tsh 60,000/-*
ii) *Payment of Maternity leave Tshs 180,000/-*
iii) *Overtime claim Tshs [not stated]*

iv) *untaken leave for two years Tshs 120,000/=*

v) *Interest on the decretal sum at the court rate*

vi) *Costs of this suit*

vii) *Any other relief this court may deem fit and just."*

Looking at the report of the Labour Officer and the respondent's Reply to the Written Statement of Defence, it is not in dispute that all the claims in the Reply to the Written Statement of Defence, apart from payment for maternity leave, were not contained in the Labour Officers Report. In other words, the Respondent had not made those claims against her employer before the Labour Officer and therefore, the Labour Officer did not refer any matter relating to those claims to the Magistrate. As for payment for maternity leave, the amount claimed in the Report of the Labour Officer is Shs 120,000/= while in the reply to the Written Statement of Defence, the amount claimed as payment far maternity leave, is Tshs 180,000/=.

In the Judgment of the Magistrates Court the trial Magistrate observed in relation to the new claims, as follows:-

" In reply to the written statement of defence the plaintiff ***in a very extra-ordinary manner brought new claims*** *where she prayed for the following orders:-"*

(i) .....

(ii) .....

(iii) .....

(iv) .....

This being a labour matter this irregulanty is not fatal....." (emphasis mine).

The fact that those claims were not contained in the report of the Labour Officer, is not disputed even by the respondents counsel.

The counsel has argued that, "**The court is empowered by our law to grant such claims. Courts of Law have inherent powers to grant any other relief it deems fit and just so long it is within the purview of law".**

The main issue in this appeal is therefore whether the Magistrates Court is empowered by law or is entitled under its discretionary powers to grant to the respondents, the claims which were not made to the Labour Officer and are not contained in the report made to the court by the Labour Officer.

The answer lies in applying the relevant previsions of the Employment Ordinance Cap 366 [Cap 366 RE 2002], which relate to reports of the Labour Officer to the Magistrate. The relevant

provisions are sections 132 [141] and 134 [143] of Cap 366, which stated and I quote from Cap 366 RE 2002:

> *" 141. Where on receipt of a report under section 139, a labour officer does not act in accordance with the provisions of section 140 and is unable to effect a settlement between the parties, he may, at the request of either party or on his own motion,* ***submit a written report to a magistrate setting out the facts of the case"***
>
> *" 143 (1) on the receipt of a report under section 141 the magistrate shall, where the facts appear to him to be such as may fried a civil suit* ***issue, such process as he may think fit to cause the parties or either of them and the witnesses to attend before him.***
>
> *(2) upon the attendance the magistrate* ***shall proceed to try the issues disclosed in the report*** *as if the proceedings before him were a civil suit,* ***without requiring the parties to file any pleading.***
>
> *(3) The provisions of the Civil Procedure Code, shall,* ***in so far as they may be applicable,*** *apply to proceedings under this section:*

Provided that the Magistrate shall hear and determine such proceedings according to substantial justice without undue regard to technicalities of procedure".

Applying the above provisions to the present case, it is very clear to me that it is only the report of the Labour Officer and the issues arising from that report, which the magistrate who has received the report, is authorized by law, *"to hear and determine".* The law is very clear in subsection (2) that the issues in the report of the Labour Officer shall be heard and determined without requiring the parties of file any pleadings. It was therefore contrary to law for the trial magistrate to require the appellant to file a Written Statement of Defence" and to allow the Respondent to file a "Reply to the Written Statement of Defence". It was also contrary to the law to allow the Respondent to bring new issues which were not contained in the report of the Labour Officer and to hear and determine such issues.

The court does not have inherent powers to consider issues which were not contained in the Report of the Labour Officer and after wards, award the reliefs claimed under those issues.

The application of the Civil Procedure Code to proceedings originating from report of a labour officer, is only to the extent that such provisions may be applicable. The provisions of section 143 (3)

of Cap 366 RE 2002 do not apply the Civil Procedure Code in whole sale, to such proceedings. As a consequence, as there are no pleadings which are by law required to be filed before a Magistrate in such proceedings, there were no pleadings which are capable of being amended upon an application for leave to amend. The court is only authorized to issue a process which will enable the parties or either of them and witnesses, to appear to try the issued contained in the report of the Labour Officer.

What the respondent did by making new claims in a reply to written statement of defence, was not only "extraordinary" as stated in the Judgment of the trial magistrate, but totally illegal. This matter is not merely an "irregularly" it is an "illegality" which is fatal to the proceedings.

As the trial magistrate allowed the parties to file pleadings contrary to law and through the respondents pleadings, the magistrate allowed claims to be made which were not contained in the Labour Officers report, all the proceedings are null and void and they are accordingly quashed and set aside.

As a result of the decision reached, it is not necessary to consider the remaining grounds on their merits.

For the above reasons the appeal is allowed, with costs. The record of the lower court is remitted to the court and it is directed that the proceedings be heard de novo before another magistrate on the basis of the report of the Labour Officer.

J.I.MLAY

JUDGE

1/3/2007

Delivered in the presence of Mr Sabasaba advocate for the appellate and in the absence of the Respondent this 1st day of March 2007.

J.I.MLAY

JUDGE

1/3/2007