

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 136 OF 2002.

CHUO CHA UONGOZI WA MAENDELEO

(IDM) APPLICANT

VERSUS

JONATHAN N.K. KAINI RESPONDENT

Date of last Order: 16/07/2007

Date of Judgment : 09/10/2007

JUDGMENT.

MLAY, J.

This is an appeal from the judgment and decree of the District Court of Morogoro, (V. Saduka RM) in Labour Civil Case No. 2/2002 . The proceedings were instituted by way of a report of the Labour Officer to the Magistrate, pursuant to section 132 of the Employment Ordinance, Cap 366, as the result of a complaint made to the Labour Officer by the respondent, under section 130 of the Employment Ordinance.

According to the "**PLAINT**", the respondent whose employment with the Appellant was terminated by a three months notice, was claiming from the appellant, employment benefits amounting to shs. 10,257,196 the particulars of which were set out in Annexure "A" to the plaint and also shs.364,770, as monthly allowances from 1/8/97, and costs of the "**suit**" .

At the hearing of the suit, the trial Resident Magistrate framed the following issues:

- i) Whether the Plaintiff terminal benefits (sic) were properly computed
- ii) Whether the Plaintiff is entitled to substance (sic) allowance the period his terminal benefits remaind unpaid .

On the first issue, the trial Resident Magistrate found:

"The employer was supposed to send to PPF office in time. He failed to do so. The Plaintiff was terminated on 31/7/1997. He was paid on 17th February, 1998. This is answered in favour of the Plaintiff".

On the second issue, the trial. Magistrate found:

From the evidence above the Plaintiff was at his station from 31st July 5th 1999. He was waiting to be paid his terminal (sic) benefits which was not properly computed as per issue No. 1. I agree that the Plaintiff to be paid substance allowance (sic) till to day he has paid lastly on 17th July by old circular. This is in the famer (sic) the Plaintiff".

The trial court also found that various allowance claimed by the Plaintiff (respondent) were payable at the old rate of salary, which implies the rate of salary paid to the plaintiff up to the time of termination and also that, the plaintiff was not entitled to be paid at the new rate stipulated in a circular which came into operation in August 1997, after the termination of the Plaintiffs service. The period for which the Plaintiff was to be paid subsistence allowance, was found to be from 31/7/91 to 5th November 1999. Finally, the trial court entered "**judgment in favour of the plaintiff**" and awarded costs of the suit to the Plaintiff/ Respondent.

The Appellant/ Defendant being aggrieved, has appealed to this court, on that following grounds:

1. The trial Magistrate erred in fact in holding that the Respondents benefits were not properly computed and at the same time holding that the Respondent was entitled to have his benefits computed at the old rate, and that he was properly paid.
2. Having held that the Respondent was properly paid of his repatriation expenses such as transport of himself and his family to his place of domicile by using reasonable means in February 1998 and having found that all his other claims were properly paid at the old rates, the trial court erred in fact and in law in holding that the Respondent was forced to wait to collect his benefits up to 5th November 1999. The trial court should have found that the Respondent was entitled to subsistence allowance only up to February 1998.
3. The trial court failed to take into account and appreciate the intent and purpose of the payment of Shs. 1,114,446/= on 5/11/99 paid and acknowledged by the Respondent as compensation for the delay in settlement of his

claims for 6 months and 17 days (i.e from 31st July 1997 to 17/2/98 the period that the Respondent could lawfully claim to have been waiting for his dues. The trial court should therefore have held that the Respondent was estopped from making any further claims against the Appellant.

4. The trial court did not properly direct its mind on the law relating to mitigation of damages, and wrongly held that even after receiving his properly computed repatriation expenses, the respondent could still cross his legs and wait for his imagined properly computed benefits to come.
5. The trial court erred in law in condemning the Appellant to costs when the Respondent succeeded only in part of his claims.

The appeal was heard by way of written submissions, which were duly filed by the Professional Centre Advocate, and Ngalo and Co. Advocates, counsels for the Appellant and Respondent, respectively. I propose to dispose of each ground of appeal as argued.

On the first ground of appeal, the Appellants counsel submitted that it “***emanates from the contradictions in the***

trial courts findings regarding the issue whether the Respondents terminal benefits were properly computed which was also the ground in issue at the trial". The counsel contended that *"from the Respondents own evidence at trial his claim was that his benefits were to be computed according to the Government Circular dated 3/8/98 in which his salary would have been Tsh.297,770/= (exhibit p.6)".* He submitted that *"in answering this issue, the trial court completely overlooked the issue as framed and wondered into delay in the PPF'S of dwelling on the order of claims".* He further argued that terminal benefits did not include PPF contributions, which are payable by the Fund and not by the employer. The Appellants counsel contended that during trial it was proved that all contributions payable by the appellant were paid in good time and the delay in paying the Respondent his PPF entitlements was not attributable to the Appellant. Finally, the Appellants counsel argued that a finding that the Respondent was paid on 17/2/98 was not sufficiently disposed of. If I understand the learned counsel's argument correctly, his argument is that the trial court finding that the respondents transport allowance, luggage allowance and salary allowance was already paid per promised rate and that the transportation of the Respondent by bus was reasonable transport, was irreconcilable with the court's finding that the Respondent was not paid on 17/2/98.

In reply to the first ground, the Respondents counsel submitted that the ground is misconceived and without merit. He contended that the trial court did not hold that all the terminal benefits the respondent was entitled to were properly paid and at the same time hold that they were improperly computed.

He referred to page 4 of the Judgment and contended that ***“the trial court held that all other terminal benefits i.e transport allowance, luggage allowance and salary allowance were properly computed but that the PPF benefit was not properly computed and paid as the appellant had not remitted some of the Respondent’s benefit to PPF which resulted into the under payment to the Respondent”***

Like the Appellant’s counsel, the Respondent counsel was in agreement that the 1st ground of appeal arises out of the first issue framed, which was ***“whether the Plaintiffs terminal benefits were properly computed”***.

He contended that the trial magistrate found that:

- a) ***“The Respondents PPF contributions were not properly computed***

- b) ***The Appellant delayed to send the Respondents contributions to PPF***
- c) ***The Respondent could not be paid according (to) the new rate because the circular exhibit P6 came into operation after the Respondents services had been terminated; and***
- d) ***All allowance the respondent received were proper”***

The learned counsel contends that these findings are page 4 of the judgment and do not pose only controversy. He submitted that the Appellants submission that the trial Magistrate completely overlooked the issue, is unfounded. On the finding that the Appellant delayed to remit the Respondents PPF contributions, the Respondents counsel argued that there is ample evidence on record that the appellant had not remitted the contributions. He referred to Exh. P4, a letter from PPF addressed to the Appellant. He contended that the statement in the letter, “***We have received your claim instructions for the above ex-employee.....***” is clear and loud that the Appellant is the one who was handling the Respondent’s claim for pension benefits from PPF. He further referred to the paragraph which reads:

“however, we would like to inform you that there are lapses of unremitted

contributions for the periods from May to October 1996, January and February 1997 as well as July to September 1997. Kindly furnish us with monies as contributions for the periods mentioned above for us to effect the correct benefits to our member”.

The learned counsel went on to contend that the Appellant wrote to the Respondent in 2001 to collect his PPF contributions and referred to the Respondents response to cross examination by the Appellant’s counsel in which the Respondent stated:

“I was not paid well PPF contributions. In May 2001 IDM wrote a letter to me that I still own them PPF allowance, I have not yet gone to IDM as I have this case”.

He also quoted the Respondents reply to re-examination at page 12 of the typed proceedings, as follows:

“Normally PPF paid to our employer my employer is supposed to pay me”

The leaned counsel contended that the evidence reverted to above, demonstrates and underscores, the point that PPF claims were being handled by the appellant who delayed to remit the Respondents contributions which accounted for the delay it took PPF to pay the Respondent the correct benefits. He submitted therefore that the trial Magistrate cannot be faulted for the findings as regards the respondents pensions benefits from PPF.

In a rejoinder to the Respondents submissions, the appellants counsel reiterated that “***what the trial Magistrate held was simply that all terminal benefits were properly computed but PPF contributions were not properly computed and paid because the Appellant had not remitted some of the respondents benefits to PPF resulting into under payment of that Respondent terminal benefits***”. He contended that the trial Magistrate made a finding that the respondent’s benefits were not paid on the 31st July 1997 when his employment ceased and went on to hold that the same were paid on 17th February 1998, and that the terminal benefits which were paid on the 17th February 1998, were properly computed. He contended that what is in dispute according to the Respondents counsel, is the computation of PPF contributions. The counsel referred to and quoted from some of the testimony of the Respondent during trial and argued that the evidence shows that as soon

as the respondent was paid his terminal benefits on 17th February 1998 “**he sued the appellant to the Labour officer to be paid under the increased rates**”. He contended further that eventually an agreement was reached whereby it was agreed that the respondent be paid subsistence allowance which was paid on 5th November 1999. he submitted that the Respondent is therefore estopped from claiming further subsistence allowance. The Appellants counsel further contended that the Respondent was not satisfied with the rate to which his terminal benefits had been pegged and therefore decided to pursue the matter with the Labour Officer for the difference between the old rate and the new rate. He submitted that the proper terminal benefits were paid on 17/2/98 and there was no justification for the Respondent to remain at the place of employment.

He further contended that the Respondents claims for the difference between the old salary scale and the new salary scale were dismissed and there has not been an appeal.

On the PPF contributions, the Appellants counsel contended that the Appellant made all the statutory contributions as required by law otherwise the Appellant would have been punished by PPF under section 9 of the Parastatal Organisations Pensions Scheme Act, Cap 372 RE 2002 which imposes an obligation on the employer as well as

the member, to make compulsory contributions. He also referred to section 8 (2) which imposes a duty on the employer to remit the deductions to the Fund within 30 days after the end of the month to which they relate. It was contended that the witness who gave evidence on behalf of the Appellant testified that PPF admitted a mistake in their records while preparing the PPF benefits payable to the Respondent and argued that if the Appellant had not remitted the contributions, the Appellant would have been penalized. He reiterated that the delay to pay the PPF contributions to the Respondent is wholly attributable to the mistake or lapses by PPF and the Appellant cannot be punished for the mistakes of the PPF. The Appellants counsel argued that since the trial magistrate held that terminal benefits had been properly computed but PPF benefits were not, it follows that what was paid to the Respondent in 1999 could not have been part of terminal benefits but subsistence allowance which was paid under the agreement which was brokered by the Labour Officer.

Having given due consideration to the 1st ground of appeal and the spirited arguments contained in the submissions by both counsels, and having carefully scrutinized the judgment and decree drawn thereunder, what appears to be in dispute, is what exactly the Resident Magistrate decided and decreed, in relation to the

Respondents claims. The claim as stated in the "Plaint signed by both the Labour Office and the Respondent is stated as follows:

"The Plaintiff seeks to recover from the defendant the amount of shs. 10,252,196 being employment benefits as per attached sheets marked "A" plus shs.364,770/= from 1/8/99 as continuing (increasing) monthly allowances to the date of judgment".

Annexure A to the Plaintiff contains seven (7) itemised claims which in Kiswahili are stated in short, as follows:

"1 *Kujikimu wakati ninachongojea malipo ya haki yangu. Tangu 1/8/1997 hadi nitakapolipwa kwa kiwango cha shs.120,000/= [Subsistence allowance from 1/8/97 until payment of terminal benefits].*

2. *DAI LINALOONGEZEKA KWA SHS.327,770.00 KWA KILA MWEZI HADI HAPO NITAKAPOLIPWA (Increasing monthly pay until I am paid).*

3. *Makato ya Pensheni ambayo hayakuwakilishwa. PPF kwa muda wa Miezi 11 (Pension contributions unremitted to PPF for 11 months).*
4. *Likizo ambayo haikuchukuliwa kwa mwaka moja sawa na mshahara wa mwezi moja. (Annual leave not taken equal to one months salary).*
5. *Bakshishi (Mkataba wa Hiari) miezi 12 Handshake [voluntary Agreement] for 12 months.*
6. *Monthly House Allowance shs.40,000/- per month from 1/8/97 until payment.*
7. *Arrears of Salary from 1st July 1996 to 31 July 1997- 13 months”.*

Annexure A also contains further claims of:

“A-Repatriation Allowances.

B- Expends for transporting luggage (Mizigo – TON 3) from Morogoro to Mbeya”.

In the judgment of the District Court, the trial Magistrate summarized the respondent/ Plaintiffs claims, as follows:

“The Plaintiff in this case one Jonathan M.K. Main is claiming to recover from the

Defendant (IDM) Mzumbe the amount of Tshs.10,257,196/- being PPF pension (b) fare to place of domicile for himself, wife and children (c) one month salary (d) Luggage expenses according to his post (e) Traveling allowance for himself and his family (f) Allowance for the years he worked for IDM”

At the hearing, the following issues were framed:

- “i) Whether the plaintiff’s terminal benefits were properly computed.
- ii). Whether the plaintiff is entitled to allowance for the period his terminal benefits remained unpaid.
- ii) To what reliefs the parties entitled to”.

The claims which are being contested by the appellant in this appeal are those relating to PPF pension, which is the subject of the first issue (i) which was framed and payment of subsistence allowance, which is the subject of the second issue. As for the other claims, the trial Magistrate found in favour of the Appellant/ Defendant, that those claims had been paid to the Respondent/ Plaintiff, and at the correct rate

said allowances, which the Appellant/ defendant claims to have paid on 17/2/98, the Respondent/Plaintiff was only entitled to subsistence allowance from 31/7/97 when he was terminated to 17/2/98 when the Appellant/ defendant paid the respondent/Plaintiff the said allowances, which are the only terminal benefits payable by the Appellant/defendant, and that the substance allowances for this period, were agreed upon before the Labour Officer, and paid on 5/11/99 in the sum of Shs.1,114,446/= . The second argument raised by the Appellant/ defendant is that, having been paid his allowances or terminal benefits, even if the Respondent/ Plaintiff had additional claims, the Respondent/ Plaintiff was obliged to mitigate damages, by transporting his family to their home then and then return to persue the additional claims.

Coming back to the claim relating to PPF contributions, which is the first issue which was framed, the trial magistrate having summarized the submissions from both parties, considered and determined this claim at page 4 of the typed judgment, as follows:

“ I therefore have on obligation to see whether the framed issues have been answered and to whose favour:-

- (1) Whether the Plaintiff terminal benefit were properly computed. In his testimony the Plaintiff*

told the court that his terminal benefits were not properly computed i.e PPF contribution. The employer was supposed to send to PPF office in time. He failed to do so. The Plaintiff was terminated on 31/7/1997 He was paid 17th February, 1998. this is answered in favour of the Plaintiff”.

The Appellant has challenged this finding in the first ground of appeal, which states:

“1. The trial Magistrate erred in fact in holding that the Respondent’s terminal benefits here not properly competence and at the same time holding that the respondent was entitled to have his benefits computed at the old rate and that he was in fact properly paid”.

Looking at the finding of the trial court on the first framed issue and as it appears at page 4 of the judgment which has been quoted in full earlier on in the judgment, the trial Magistrate confined it to PPF contributions. The trial magistrate stated:

“in testimony the plaintiff told the court that his terminal benefits were not properly computed i.e PPF contribution. The employer was supposed to send to PPF contribution. The employer was supposed to send to PPF office in time. He failed to do so.....”

The trial magistrate however, did not end there. She went on to state:

“The plaintiff was terminated on 31/7/1997. He was paid on 17th February 1998. This is answered in favour of the Plaintiff”.

I think looking at the finding of the trial Magistrate on the issue of PPF contributions, there is a confusion as to what the real issue was. Was it that the PPF contributions were not properly calculated or “computed” or was the issue that the PPF pension was paid late by reason of late remittance of contributions by the Appellant/defendant? Or is it being claimed that the PPF contributions were not properly calculated or “computed” by reason of the appellant/defendant having applied or used the wrong salary scale applicable to the Respondent/ Plaintiff ?. The record shows the respondent

be paid subsistence allowance from 31/7/97 to 5/11/99 by his old rate”.

From the contents of the decree above, it appears that the first ground of appeal is based on the wording of the decree rather than the finding in the judgment but both of which are equally confusing in relation to the claim based a PPF contributions. I agree with the Appellants counsel that what has been decreed in relation is PPF contributions, is contradictory in that, it is stated in the decree that:

“..... The plaintiffs terminal benefits.....such as.....his PPF contributions which he was paid on 17th February 1998”, but it is also decreed that the Plaintiff was forced “to remain at his station from 31st July to 5th November 1999 waiting to be paid his terminal benefits”.

Surely, if the Respondent/ Plaintiff was paid his terminal benefits on 17th February 1998 as stated in the decree, there was no basis for also decreeing that the respondent / Plaintiff had been forced to remain at his station waiting to be paid the same terminal benefits which he had already been paid on 17th February 1998. All the same, on the decree, the court did not

award the Respondent Plaintiff anything, in relation to improper computation of PPF contributions. What was awarded, was subsistence allowance for the alleged delay to pay terminal benefits, which is subject of the second framed issue and the second ground of appeal.

On the basis of the finding in the judgment and the contents of the decree, regarding improper computation of PPF contributions as demonstrated above, the finding is not only contradictory but is also confused. The contradiction is further compounded by the fact that although the trial magistrate found for the Respondent/ Plaintiff on this claim, the court awarded nothing to the Respondent/Plaintiff for it both in the judgment and in the decree. I find no justification in the judgment of the court, that the PPF contributions were not properly computed. The trial magistrate made no pretext or attempt to demonstrate how the contributions were improperly computed. All that the trial magistrate did, was to show that there was late payment of contributions to PPF which made the basis for awarding subsistence allowance. But late payment of contributions to PPF, is not the same as improper computation of PPF contributions.

It is even doubtful if as a matter of law, the Appellant/ Defendant as the employer of the Respondent/Plaintiff, is liable in a civil suit at the instance of the employee, for making

late contributions to PPF. As argued by the Appellants counsel, section 8 (3) of the Parastatal Organisations Pensions Act Cap 372 R.E 2002 imposes a mandatory obligation on the employer to remit the contributions deducted from the employee's salary and the employer's contribution to PPF within 30 days "**after the end of the month to which they relate**". The "**Act**" provides the machinery for the collection and enforcement of making contributions to the Fund. Section 9 (1) provides for payment of additional contributions by the employer in case of failure to make remittances of contributions within the prescribed period and also creates a criminal offence for such failure, for which the employer can be prosecuted. Section 10 (1) of "**the Act**" provides:

"10 (1) Any contribution or additional contribution payable under this Act shall be a debt due to the Board and shall be recoverable accordingly".

According to section 10(1) above, unremitted contributions are a debt due to the Board and not to the employee and they are recoverable by the Board. I do not therefore think that unremitted contributions are recoverable directly from the employer by an employee, by way of proceedings instituted through the Labour Officer, under the

Employment Ordinance. An employee who is a member of the

earlier on, this finding was in relation to the second framed issue, which states as follows:

“(iii) Whether the plaintiff is entitled to subsistence allowance [for] the period his terminal benefits remained unpaid”..

The finding of the trial Magistrate which follows immediately below the framed issue at page 4 of the typed judgment, is as follows:

“From the evidence above the plaintiff was at his station from 31st July 5th 1999. he was waiting to be paid his terminal (sic) benefit which was not properly computed as per issue No.1. I agree that the plaintiff be paid subsistence (sic) allowance full. A day he has paid lastly on 17th July by old circular. This is in the favour (sic) of the plaintiff”.

According to this finding, the trial court decided that the respondent was entitled to be paid subsistence allowance because the respondent/Plaintiff was waiting for the wrongly computed PPF contributions, which are the subject of the first issue which was decided in favour of the Respondent/

Plaintiff. It is the Appellants contention that, the respondent is only entitled to subsistence allowance from 31st July 1997 to 17/2/98, when the Appellant/ Defendant claims to have paid the respondent all his retirement benefits. It is also the Appellants contention that such payable subsistence allowances have infact been paid to the respondent on 5/11/1999. This contention was also made before the Labour Officer who reduced it to writing in the report to the Magistrate, in paragraphs 8 thereof, as follows:

- “7. Baada ya Mazungumzo hayo Mwajiri alieleza kuwa Chuo kilichelewesha mafao hadi tarehe 17th February kilikuwa tayari kulipa Shs.1,218,602.60 kama gharama za kujihifadhi i.e Shs. 185,574 kwa mwezi (muda wa miezi sita (6).
8. Mlalamikaji alikubaliana na usuluhishi huo na kuafiki malipo hayo kwa barua yake aliyomwandikia ofisa wa kazi ya tarehe 26/10/1999 na nakala kumpelekea Mkuu wa Chuo. Kufuatia kukubali huko Chuo kilimlipa mlalamikaji shs. 1,218,602.60 tarehe 5/11/99 kwa hundi Na.05172999 ya tarehe 4/11/1999 hapa Ofisi ya Kazi Mkoa”.

At page 8 of the typed proceedings the Respondent / Plaintiff admitted in cross examination to have been paid the above subsistence allowance. He stated as follows:

*“..... My Employer was supposed to take care from that date up to date. **He gave me only 1,218,602.60 . he paid me on 5/11/99”. Substance allowance**”*
(sic).

He conceded the same fact when being cross examined by Mr. Massati advocate for the Appellant/Defendant. He stated at page 11 of the proceedings, as follows:

*“ I was padi (sic) substance (sic) allowance in November 1999 **November 1999 I was paid substance (sic) allowance of 1,218,602.60**”.*

It is therefore a common ground that the Appellant did not pay the respondents terminal benefits in time and also it is not in dispute that the Appellant paid the respondent subsistence allowance for a period of six months; from 31 July 11997 when the termination became effective, to 17/2/98. the Appellant, through DW1 Didas Balasha, stated in evidence

when being cross examined by the Respondent/ Plaintiff's advocate Mr. Ngula at page 15 of the proceedings, as follows:

“We paid last payment on 17/2/1998 We paid his substance allowance. We paid as agreed to Labour Officer. On 5/11/1999 was paid Tsh. 1,218,602.60 . We paid from 1/2/1998 – 5/11/1998. He found that the delayed to pay him in time. We did not pay him from 1/2/1998 – 5/11/999. This was not in our agreement to Labour Officer. He is not supposed to be paid subsistence allowance form 1/2/98 – 5/11/99”

In the finding of the trial Magistrate, no consideration was put on the undisputed fact that the Respondent/ Plaintiff had been paid subsistence allowance for the period 31/7/97 to 1/2/1998. If any subsistence allowance was payable to the Respondent / Plaintiff from 31/7/97 to 5/11/99, a matter which as partly in dispute, the subsistence allowance already paid, should have been deducted from the amount payable for the whole period up to 5/11/99. That being the position, the finding of the trial magistrate that the Respondent/Plaintiff was entitled to subsistence allowance from 31/07/97 – 5th November 1999, to the extent that it ignored the amount

already paid, was wrong. If any additional subsistence allowance was payable, which is being contested, it was for the period from 1/2/98 to 5/11/99.

The issue is therefore whether additional subsistence allowance was payable to cover that period. According to the report of the Labour Officer in paragraphs 8 thereof, the Respondent / Plaintiff had agreed in a settlement by the Labour Officer to be paid subsistence allowance of shs.1,218,602.60 for the late payment of benefits by the appellant /defendant on 17/2/98. This amount was paid to the respondent/plaintiff on 5/11/99 by cheque No.K.05172999 dated 4/11/99, in the office of the Labour Officer and the Respondent / Plaintiff acknowledged the payment to the Labour Officer by a letter dated 26/10/99 which was copied to the appellant. In paragraph 9 of the said letter by the Labour officer to the Magistrate, the Labour Officer stated that on 10/12/99, the respondent/plaintiff wrote another letter saying he was not satisfied with the payment and wanted the matter to be reported to the court.

First, the respondent/Plaintiff's claim of subsistence allowance was based on the late payments of benefits which it is not in dispute that the benefits were paid on 17/2/98. In the circumstances any subsistence allowance payable could only be claimed from the time of termination to the date of the

Delivered in the presence of Mr. Njau advocate for the Respondent who is also holding brief for Mr. Matunda advocate for the Appellant this 9th day of October, 2007.



J. I. Mlay,

JUDGE

09/10/2007.

Words: 5,633