

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 16 OF 2005

TANZANIA REVENUE AUTHORITY APPELLANT

VERSUS

AGNES MKEMWA RESPONDENT

Date of last order 25/4/2007

Date of Judgment – 29/6/2007

J U D G M E N T

Oriyo, J.

The brief background of the matter began on 30/9/2001 when the appellant summarily dismissed the respondent from employment for allegations of breach of the Disciplinary Code under the Security of Employment Act, (Cap.387, R.E. 2003). The respondent was aggrieved by the dismissal. She made a reference to the Conciliation Board which ordered the appellant to reinstate her. The appellant was not satisfied with the order of reinstatement and appealed to the Minister of Labour. On 17/12/2002, the Minister dismissed the appeal and upheld the decision of the Board.

At this juncture the appellant decided to exercise the option to pay the respondent in lieu of reinstatement in terms of SECTION 40A (5) (now SECTION 42) of the Security of Employment Act [Cap. 387, R.E. 2002].

On being paid, the respondent felt that she was not adequately paid as required by law. She sought the enforcement of the Ministers decision in Miscellaneous Civil Application No. 62 of 2004 in the District Court of Ilala, Dar es Salaam. The respondent asked the District Court to order the appellant to pay all her dues arising under the provisions of Section 42 above. The District Court, (learned Mlawwa RM), granted the orders as prayed. The appellant is appealing against the trial court's decision with 5 grounds of appeal.

At the appellate level, parties retained the same representation as in the trial court. The appellant was represented by counsel from its legal department. The respondent was represented by Mr. Magafu, learned counsel.

Having studied the trial record, the Memorandum of Appeal and the written submissions by parties; I am inclined to agree with the respondent that the 5 heads of complaints contained in the Memorandum of Appeal can be summed up into 2 grounds of appeal. Grounds 1 to 4 can be consolidated into 1st Ground of Appeal on whether the respondent worked for the appellant from 7/3/1973 or from 1/7/1996. Ground 5 becomes 2nd Ground of appeal on whether the payments envisaged under SECTION 42 covers the period up to the date the employer unlawfully terminated the employee or up to the date of actual termination by virtue of SECTION 42 (5) of the Security of Employment Act.

On the first ground of appeal the issue is whether the respondent worked in the appellants employment from 7/3/73 as held by the trial court or from 1/7/1996 as submitted by the appellant.

My perusal of the trial record, revealed a document attached to the counter affidavit of one Kephass J.S. Ndossi, a Human Resources Officer, with the appellant. The document is

a letter from the Ministry of Finance where the respondent worked prior to joining the appellant. The letter is dated 15/11/99 bearing reference No. TYR/56063/185 and is addressed to the respondent. It is in the Kiswahili language and is titled:-

*"UHAMISHO WA MOJA KWA MOJA KWENDA
MAMLAKA YA MAPATO (TRA)
WATUMISHI WALIOAJIRIWA NA SERIKALI KATIKA
MASHARTI YA KUDUMU NA MALIPO YA UZEENI
BAADA YA IDARA ZA KODI KUVUNJWA."*

The contents of the letter make it quite clear to the respondent that the cut off date of her employment with the Ministry of Finance where she was before joining the appellant's service, is 30/6/1996. Further the letter states that the respondent's employment with the appellant became effective from 1/7/1996. The Ministry of Finance acknowledges its liability for the respondents pension up to 30/6/1996. The respondent disputes the letter in the submissions filed, on ground that it is not part of the record. However, there is no evidence that the respondent raised the objection in the trial

court; as observed; it was annexed to the counter affidavit. The objection is raised for the first time in the appellate court. Had the appellant made references to the letter for the first time during the instant appeal, the same would have been summarily rejected; but that is not the case. The appellant's references to the letter is in order because it forms part of the trial record.

In view of the clear language of the letter; it is beyond controversy that the appellant's liability for the respondents employment started to run from 1/7/1996. Therefore the 1st ground of appeal succeeds and is allowed.

Ground 2 of appeal revolves around the provisions of SECTION 42 (5) of the Security of Employment Act which states:-

“(5) Where a reinstatement or reengagement has been ordered under this section and the employer refuses or fails to comply with the order –

(a) N/A

- (b) In the case of an order made by the Minister on a further reference to him, **within fourteen days of the order being made by the Minister,**

The employer **shall be liable to pay the employee compensation of an amount equal to the aggregate of –**

- (i) the statutory compensation computed in accordance with section 36 (formerly 35); and
- (ii) a sum equal to twelve months' wages at the rate of wages to which the employee was entitled immediately before the termination of his employment or, as the case may be, his dismissal and such compensation shall be recoverable in the same manner as statutory compensation, the payment of which has been

*ordered under section 40 (formerly
section 39) (underlining supplied).*

My understanding of the provision is that an employer who exercises the option to reinstate has a maximum period of 14 days of the order to do so. Immediately thereafter, the employer is taken to have refused or failed to reinstate and is liable to pay the employee statutory compensation and 12 months wages. The consequences of failure by an employer to effect reinstatement within the prescribed period; in law; the affected employee is automatically reinstated on the same terms and conditions of service as it was before the unlawful termination. Strictly speaking, where an employer fails to reinstate within 14 days; the option to pay in lieu of reinstatement becomes automatic. In the event the employer does not pay, the employee is forthwith deemed to have resumed employment and the employers liability on the employees employment is continuous as if there was no unlawful termination. The employers liability is continuous until payment is made to the employee under Section 42 (5) (b) above. (See Court of Appeal decision in the case of **PIUS**

SANGALI AND OTHERS VS. TANZANIA PORTLAND CEMENT, C/A

100/2001; unreported). It is only when the appellant in the instant case, makes the full payment to the respondent that the exercise of the option becomes effective in terms of Section 42 (5) (b); that is on the date of actual payment.

On the foregoing discussions; and on the import of Section 42 (5) (b) stipulated above; it is now beyond controversy that the trial court was correct in holding that statutory compensation and wages payable to the respondent by virtue of Section 42 (5) (b) ought to be paid up to the date she is lawfully terminated.

In the result, the 2nd ground of appeal has no merit and is dismissed with costs.

In the upshot the appeal partly succeeds and partly fails.

Order accordingly.

K. K. Oriyo

JUDGE

29/6/2007

1,248 words