IN THE HIGH COURT OF TANZANIA

AT TANGA

DC. CIVIL APPEAL NO.7 OF 2008

(Originating from Empl.Civil Case No.7/2007
RM'S COURT TANGA)

THE DIRECTOR, PHARMACEUTICAL AND PLASTICS LIMITED .....APPELLANTS

VERSUS

KITOJO SIMON AND 26 OTHERS.....RESPONDENT

Date of last order: 4/2/2009
Date of Judgment:16/4/2010

JUDGMENT

Teemba, J.

The respondents, namely KITOJO SIMON and 26 OTHERS sued the appellant for terminal and fringe benefits – one month's salary in lieu of notice, leave pay and severance allowance. Their suit was referred to the District Court of Tanga by the Labour Officer under the provisions of section 141 of the Employment Act Cap.366 R.E. 2002.

The plaintiffs alleged that they were employed by the defendant on different dates between 5th July 1998 to 1st November 2006 when their employment was terminated. They were employed in the Cosmetic and plastic packaging section under a daily contract of employment. Their salary was shs.2,200/= per day but were receiving their payment on weekly basis. It was also claimed that when their services were terminated, the defendant failed and refused to pay them statutory benefits.

On the other hand, the defendant admitted to have employed the plaintiffs but as casual employees and their payments were effected on the same day. The defendant further claimed that the plaintiffs being

casual employees were not entitled to any terminal benefits. The defendant relied on section 2 of the **Employment Act** (supra) and the **Regulations of Wages and Terms of Employment Act, Cap.300.** The District Court granted all reliefs as prayed. Aggrieved, the appellant has preferred the instant appeal.

In this appeal, the appellant is represented by Mr. Akaro, learned counsel. The respondents appeared in persons. There are four grounds of appeal which are reproduced hereunder as follows:

1. That the learned trial magistrate erred in law by basing his decision on submissions of the parties only without recording their evidence on oath or in any other manner.
2. That the learned trial magistrate erred in law in holding that payment of overtime, issuing of identification plastic cards to the respondents and payment of NSSF contributions were **ipso facto** evidence that the respondents were not casual employees.
3. That the learned magistrate erred in law and fact in holding that the respondents were daily contract employees and not casual employees.
4. That the learned trial magistrate erred in law by holding the appellant liable to pay both NSSF Contributions and severance allowance.

On 23/9/2009 I allowed the parties to argue the appeal by way of written submissions. Both sides were present and by their own consent, they preferred to file written submissions. The appellant was supposed to file the submissions on 15th October 2009 and then the respondents to file theirs on 5th November 2009. The respondent did not file their submission. They were granted an extension of time to file their submission by 2nd December 2009. Once again they failed but they were given another

extension to do so by 4th January 2010 and the matter to be mentioned on 4th February 2010. On 4/2/2010, the respondent did not appear and had not responded by filing their submissions as earlier requested. Mr. Akaro then moved this court to proceed and consider the appeal exparte. So, there is only submissions from the appellant in support of this appeal.

I now turn to consider the first issue, that is, whether it was appropriate for the trial court to determine the dispute by basing on submissions of the parties only without recording evidence. I have perused the record of the trial court and satisfy myself that the decision was based on the parties submissions. No evidence was recorded by the trial court because there were no witnesses called to testify in court. I will therefore agree entirely with the learned counsel – Mr. Akaro, that the procedure adopted by the trial Magistrate was totally against the spirit of the law.

There is no doubt that the Labour Officer referred the dispute to court under section 141 of the Employment Act, Cap.366 (R.E. 2002). The same Act provides for a procedure to be followed when a dispute is referred to court by the Labour Officer. **Section 143** is the relevant provision. Where a report is received and the magistrate is satisfied that the facts (in a report) disclose a civil suit, then the magistrate shall cause the parties and their witnesses to attend before him. For purposes of clarity, let the law speaks by itself:

1) 143: On the receipt of a report under section 141 the magistrate **shall**, where the facts appear to him to be such as may found 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 of the parties **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 or any party to file any pleading.

3). .....(emphasis added).

The wording of the above section 143 is clear and without any ambiguity. I do agree with the learned counsel that the purpose of calling witnesses and trying the issues disclosed is for the trial court to establish the facts by way of recording evidence. It is the requirement of law and practice that witnesses give evidence on oath. On the contrary, in the present case, the trial magistrate decided the issues on mere assertions/allegations without any evidence but only on unsubstantiated submissions. It is for this reason, I am satisfied that this ground of appeal has merit. The procedure employed in determining the suit was against the law and therefore renders the proceedings a nullity. Thus, the proceedings of the lower court are hereby nullified and the decision is set aside. This ground alone disposes of the whole appeal and I have no reason to consider other grounds of appeal. The record is returned to the District Court for trial before another Magistrate of competent jurisdiction. This being an employment matter, I give no orders for costs. It is so decided.

R.A. TEEMBA, J.
16/4/2010

The judgment is delivered in the presence of Mr. Akaro for the appellant and in the absence of respondents.

THE HIGH COURT OF TANZANIA

R.A. TEEMBA, J.
16/4/2010