IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MWARIJA, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 35 OF 2017

GASPAR PETER ……..……..…..……. APPELLANT

VERSUS

MTWARA URBAN WATER SUPPLY AUTHORITY (MTUWASA) ……..……..…. RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Mtwara)

(Nyerere, J.)

dated the 6th day of May, 2016
in
Labour Revision Case No. 14 of 2015

JUDGMENT OF THE COURT

20th & 28th February, 2019

MWARIJA, J.A.:

In this appeal, the appellant, Gaspar Peter challenges the decision of the High Court of Tanzania (Labour Division) in Labour Revision No. 14 of 2015.

In the revision, the High Court, Nyerere J. (as she then was) varied the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MTW/LD/127/2014 dated 19/2/2015, (the Labour Dispute).

The facts giving rise to the appeal can be briefly stated as follows: On 3/9/2012, the appellant entered into a fixed term employment contract with the respondent, the Mtwara Urban Water Supply Authority (MTUWASA). He held the post of Finance and Administrative Manager. The term of contract was four years with an option by either party to terminate it upon issuing to the other a three

months' notice. Having worked for one and a half years, on 27/3/2014, the appellant issued to his employer (the respondent) a notice of resignation from his employment. His notice was accepted and after its expiration on 1/4/2014, he resigned from employment.

Following his resignation, the appellant claimed for terminal benefits; cost of transporting him, his family and personal effects to Moshi, the place of his recruitment. The respondent refused to pay the benefits claimed by the appellant on account that he did not qualify for such benefits because he decided to resign before expiration of the fixed term of employment. As a result, he filed the Labour Dispute in the CMA.

In its decision, the CMA found that the appellant was entitled to be paid the claimed benefits as provided under S. 43(1) of the Employment and Labour Relations Act, [Cap. 366 R.E. 2009] (the ELRA). It ordered the respondent to pay him as follows:-

a) *TZS 240,000/= being the cost of transport for the appellant, his wife and two children from Mtwara to Moshi.*

b) *TZS 1,177,050.00 being the cost of transporting 3 tons of his personal effects from Mtwara to Moshi, and*

c) *TZS 8,466,224.00 as subsistence allowance calculated in the form of his salary for 8 months (from the date of resignation to the date of the decision of the CMA).*

The respondent was aggrieved by the decision of the CMA and therefore appealed to the High Court. The appeal was based on the following issues:-

"(i) Whether the Arbitration Award issued by the Arbitrator Hon. KWEKA, A.J. on 19th February 2015 bases on substantive and procedural law.

(ii) Whether the Arbitration Award issued by the Arbitrator Hon. KWEKA A.J. on 19th February 2015 is capable of determined (sic) rights that are enforceable.

(iii) Whether the reliefs given to the Respondents (sic) in the Arbitration award are legally justifiable in law.

(iv) Whether the Arbitrator was correct in facts and law finding (sic) that the Respondent was entitled to the awarded costs for transportation and salaries after resignation."

During the hearing of the appeal in the High Court, the parties' contest was mainly on whether or not, from the circumstances under which the appellant's employment was terminated, the provisions of S. 43(1) of the ELRA were applicable to him. The respondent's case was that, since by his own will, the

appellant decided to resign from employment, he was not covered by the stated provision of the law. It was argued that the section covers an employee whose employment has been terminated by his employer or where employment comes to an end by virtue of expiration of a term of the contract or the law. It was argued further that the appellant's place of recruitment was Mtwara not Moshi and that therefore, in any case, he was not entitled to repatriation costs. The respondent also contested the award of TZS 9,283,274 which included subsistence allowance of TZS 8,466,224.00 contending that the CMA awarded more than what was claimed by the appellant; that is TZS 6,489,000.00.

On the other hand, the appellant maintained that he was entitled to be paid terminal benefits because he issued a notice of termination of his employment in accordance with the contract and the respondent accepted his resignation.

Having considered the parties' submissions, the learned High Court judge held firstly, that since there was a valid contract of employment between the appellant and the respondent as evidenced by exhibit M1, the appellant was covered by S. 43(1) of the ELRA and was therefore, entitled to the terminal benefits specified in that provision. Secondly, the learned judge found that, for the purpose of repatriation, the appellant was recruited from Moshi, not at Mtwara as contended by the respondent.

Despite the above stated findings, although the learned High Court judge upheld the decision of the CMA awarding the appellant the amount of TZS 1,177,050 as costs of transportation from Mtwara to Moshi, she set aside the award of subsistence allowance of TZS 8,466,224.00. In so doing, she reasoned as follows:-

> *"In the present case despite the facts that the applicant was under a legal obligation to repatriate the respondent from Mtwara to Moshi the evidence available in records does not reveal that respondent remained on the place of employment after terminating his employment service with applicant. Therefore the arbitrator order of payment of subsistence allowance was irrational and I quash it."*

That part of the decision of the High Court reversing the award of subsistence allowance aggrieved the appellant hence this appeal which is predicated on two grounds as follows:-

> *"1. That, the learned Honourable Judge erred in law by entertaining and allowing the respondent to argue on an issue of substance allowance which was not raised in the grounds of appeal.*
>
> *2. That, the learned Honourable Judge erred in law by finding that the appellant is not entitled to subsistence allowance."*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent had the services of Mr. Hussein Mtembwa, learned counsel. The learned counsel had, by a notice filed on 20/2/2019, raised a preliminary objection consisting of four grounds as follows:-

> *"1. That the appeal is incompetent for failure to serve the Notice of Appeal in view of Rule 84(1) of the Tanzania Court of Appeal Rules, 2009.*
>
> *2. That the Appeal is incompetent for failure to comply with Rule 96(1) and (2) of the Tanzania Court of Appeal Rules, 2009.*
>
> *3. That the Appeal is incompetent for failure to serve the Memorandum and Record of Appeal in view of Rule 97 (1) of the Tanzania Court of Appeal Rules, 2009.*
>
> *4. That the Appeal is incompetent for failure to comply with Rule 106 (1) and (7) of Court of Appeal Rules, 2009."*

In order to expedite determination of the matter, we proceeded to hear the objection raised by the respondent's counsel together with the appeal so that, in case the preliminary objection does not succeed, the appeal will be disposed of.

Submitting in support of the 1st and 3rd grounds of the preliminary objection, Mr. Mtembwa argued firstly, that the appellant did not serve the respondent with a notice of appeal within the period of fourteen days after the date of its lodgment and secondly, that the appellant did not serve the respondent with a copy of the memorandum and record of appeal within the period of seven days from the date of filing the appeal thus contravening the provisions of Rules 84(1) and 97 (1) of the Rules respectively. In support of his argument on the 1st ground, the learned counsel cited the Court's decision in the case of **Tina and Co. Ltd and 2 Others v. Eurafrica Bank (T) Ltd & Another**, Civil Appeal No. 73 of 2009 (unreported).

On the 2nd ground, Mr. Mtembwa contended that the appellant has failed to include in the record of appeal, certain documents including the pleadings filed in the CMA, particularly Form No. 1 which, in terms of S.86(1) of the ELRA, instituted a complaint in the CMA. The other documents are a copy of the proceedings in the CMA and some of the tendered exhibits. It was the learned counsel's argument that the omission contravened the provisions of Rule 96(1) and (2) of the Rules thereby rendering the appeal incompetent. To bolster his argument, he cited the Court's decisions in the cases of **Elias Ramin Bachu v. Joseph Paul Zenda**, Civil Appeal No. 10 of 2016 and **Richard Emilian Njovu T/A Njovu Enterprises v. Benedictine Fathers Ndanda Abbey**, Civil Appeal No. 11 of 2016 (both unreported)

With regard to the 4th ground, the respondent's counsel challenged the competence of the appeal on account of the appellant's failure to file written submission. He relied on Rule 106(1) of the Rules which requires an appellant to lodge, within 60 days after filing an appeal, a written submission in support of the appeal. He argued further that the Court cannot waive the requirement because the appellant has not moved it to exercise its discretion under Sub rule (19) of Rule

106 of the Rules.

Responding to the 1st and 3rd grounds of the preliminary objection, the appellant contended that, both the notice and memorandum of appeal which were prepared by his counsel, Mr. Gide Magila, were served to the respondent's previous advocate, Mr. Kassim, learned counsel. As for the submission made in support of the 2nd ground, the appellant conceded that the mentioned documents were not included in the record of appeal. He also conceded that he did not file written submission in support of the appeal. He placed the blame on his advocate.

Having considered the submissions of the parties on the preliminary objection, we hold the view that the 1st and 3rd grounds are not based on pure points of law. In the case of **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd** [1969] E.A. 696 which has often been cited with approval by the Court, the nature of a preliminary objection was stated as follows:-

> *"A preliminary objection is in the nature of what used to be a demurrer.* ***It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained*** *or if what is sought is the exercise of judicial discretion."* [Emphasis added].

In the present case, the parties were at issue as to whether or not the documents referred to in the 1st and 3rd grounds of the preliminary objection were timely served to the respondent. Since therefore, determination of this issue requires evidence, the two grounds do not raise pure points of law.

We are also of the considered view that the 4th ground is untenable. After amendment of the Rules by GN No. 362 of 22/9/2017, a new sub-rule (10) was introduced in Rule 106 of the Rules. That sub-rule reads as follows:-

> *"Failure to file written submission under sub-rule (1) or a reply under sub-rule (8) shall not be a ground for applying for additional time for oral submission under the provisions of this rule."*

The effect of a failure to file written submission does not therefore, affect the competence of the appeal. It only deprives the appellant of the opportunity to apply for additional time for making oral submission. Although the appeal was filed before the amendment of Rule 106, guided by the rules of construction of statutes, the amendment operates retrospectively – See the Court's decision in the case of **Makongoro v. Consigilio** [2005] EA 247 in which the Court held as follows:-

> *"The general rule is that unless there is a clear indication either from the subject matter or from the working of the Parliament, that Act should not be given a retrospective construction. One of the rules of construction that a court uses to ascertain the intention behind the legislation is that if the legislation affects*

> *substantive rights it will not be construed to have retrospective operation, unless a clear intention to that effect is manifested, whereas* ***if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary.****"*
>
> [Emphasis added].

As regards the missing documents, we think that, from the particular circumstances of this appeal which originates from a labour dispute, the omission to include them in the record is not a fatal irregularity. We say so because, as can be gleaned from the grounds of appeal, the same raise issues of law which can be determined without recourse to those documents. Furthermore, the parties are not at issue as regards the missing documents, the contents of which were extensively analysed and acted upon by the CMA in its decision. This approach becomes more sound following introduction of the overriding objective Principle in our jurisprudence by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018. Section 3A (1) of that Act enjoins the Court to apply the principle with a view of facilitating "*the just, expeditions, proportionate and affordable resolution of all matters governed by the Appellate Jurisdiction Act [Cap. 141 R.E. 2002]."* In the case of **The Director of Public Prosecutions v. Jackson Sifael Mtares**, Criminal Appeal No. 2 of 2018 for example, the Court held that where the record is adequate for determination of the issues raised in the appeal without the missing documents, the appeal cannot be found to be incompetent. The Court took inspiration from a persuasive decision of the Supreme Court of Ghana in the case of **Bonuah v. Republic** [2005] GHA 10. In that case, the court had this to say:-

> *"The Cardinal Principle is that the law does not demand a hundred percent perfect record of proceedings, but adequate record that can answer to the issues raised on appeal. Adequacy of the record test is therefore a question determinable in the facts by reference to the grounds of appeal; weighed against the available record or alternatively the lost or destroyed record."*

On that finding, this ground of the preliminary objection is also devoid of merit. In the end result the preliminary objection is hereby overruled.

Turning now to the appeal, the two grounds revolve around one issue, whether or not the appellant was entitled to be paid subsistence allowance for the period between the termination of his employment to the date of the decision of the CMA. As pointed out above, the learned High Court judge found that the appellant was not residing in Mtwara during the pendency of the dispute in the CMA and that therefore, he was not entitled to subsistence allowance. She found further that although the appellant had claimed for TZS 6,489,000.00 the CMA awarded TZS 8,466,224.00 the fact which was not disputed by the appellant.

So, in effect the High Court found that the appellant was only entitled to be paid transportation costs but not subsistence allowance. The learned High Court judge was of the view that there was evidence that he was not

staying in Mtwara after his termination.

In conclusion she stated as follows in her judgment at page 48 of the record:-

> *"Having reasoned as I did I confirm the arbitrator order for payment of Tsh. 240,000/= bus fare for respondent, his wife and two children, for transport of personal effects. I quash the subsistence allowance of Tsh. 8,466.224/=."*

In the 1st ground of appeal, the appellant challenged that finding contending that the issue concerning his entitlement to subsistence allowance was not raised in the High Court. That contention is not supported by the record. As stated above, one of the issues for determination by the High Court was whether or not the appellant was entitled to be *"awarded cost for transportation and salaries after resignation"*. It is an undisputable fact that the appellant was paid 8 months salary in lieu of subsistence allowance. That award was the subject matter of issue No. (iv) in the respondent's affidavit filed in support of the application for revision. We therefore agree with the respondent's counsel that this ground of appeal is untenable. In the circumstances, we do not find merit in the first ground of appeal.

With regard to the 2nd ground of appeal, the appellant maintained that he was entitled to the award of subsistence allowance in the form of monthly salary as ordered by the CMA. He stressed that the High Court erred in reversing that award on account that he was not leaving at Mtwara before the payment of his transportation costs.

As correctly observed by the CMA and the High Court, under S. 43 (1) of the ELRA, upon termination of employment, an employee is entitled to *inter alia*, subsistence allowance during the period between termination of his employment and the date of payment of costs of his transportation to the place of recruitment.

That provision states as follows:-

> *"43 – (1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either:-*
>
> a) *transport the employee and his personal effects to the place of recruitment,*
>
> b) *pay for the transportation of the employee to the place of recruitment, or*
>
> c) *pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses*

during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment."

From its wording, the section does not, in our view, have a condition tying an employee to the place of his employment for the whole period until the date of his transportation. In that regard Mr. Mtembwa conceded that employee's entitlement to subsistence allowance is not conditional upon his confinement to the place of his employment pending payment of his transportation costs.

On the basis of the above stated position therefore, we find with respect, that the learned High Court judge erred in reversing the award of the CMA grating the appellant his claim for subsistence allowance. We however agree with the learned judge that since the appellant claimed for TZS 6,489,000 the fact which he did not dispute, the CMA erred in awarding him TZS 8,466,224.00. For that reason, the appellant is entitled to the claimed amount of TZS 6,489,000.00.

On the basis of the foregoing, we allow the appeal to the extent shown herein above. Since the appeal originates from a labour dispute, we order each party to bear its own costs.

DATED at **MTWARA** this 27th day of February, 2019.

I. H. JUMA
CHIEF JUSTICE

A.G. MWARIJA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

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