IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 32 OF 2010

KAPAPA KUMPINDI ..... APPELLANT

VERSUS

THE PLANT MANAGER,
TANZANIA BREWERIES LTD. ..... RESPONDENT

(Appeal from the decision, Judgment and Decree of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

dated the 19th day of May, 2009
in
Civil Appeal No. 30 of 2008

JUDGMENT OF THE COURT

29th May & 1st June 2012

RUTAKANGWA, J.A.:

The labour dispute between the parties to this appeal is a long story. It all started on 28th June, 1997, when the appellant's services with the respondent were unilaterally terminated, by being summarily dismissed. The appellant was aggrieved at the appellant's said decision. What happened between that day and 20th September,

2001 is not of moment here. What can be confidently asserted, however, is that after going through different venues of adjudication, both judicial and quasi-judicial, the end result was the institution, on 20/9/2001, of Civil Case No. 38 of 2001 in the High Court at Mwanza (the suit).

In the suit, the appellant was seeking "judgment and decree against the Defendant" in respect of subsistence allowance "pursuant to section 53 of the Employment Ordinance", interest thereon and costs. Following the enhancement of the District Court's pecuniary jurisdiction, the suit was transferred to the District Court of Mwanza, by Masanche, J. (as he then was) on 12th October, 2004. It was registered as Civil Case No. 11 of 2005, in the District Court of Nyamagana, at Mwanza.

The trial of the suit started on 23rd May, 2007 before one Mushi, Resident Magistrate. It was concluded by one J.E. Masesa, Resident Magistrate, on 17th July, 2008. The learned second trial Resident Magistrate held that his court had "no jurisdiction to

entertain the claim", by virtue of the mandatory provisions of section 28 (1) of the then Security of Employment Act, Cap. 574. He accordingly struck out the suit. The appellant was aggrieved and preferred an appeal to the High Court at Mwanza.

The appellant went to the High Court with only one ground of appeal. Briefly, he was complaining that the trial Resident Magistrate had erred in law and fact in declining to exercise his jurisdiction to entertain the suit, because the suit was not based on the claim that he had been summarily dismissed.

In the High Court, as before us, the appellant appeared unrepresented. He made a brief oral submission trying to fault the learned trial Resident Magistrate. The thrust of his arguments was that the subsistence allowance he was claiming had "nothing to do with the summary dismissal." He was no longer an employee of the respondent and so his claims were "not governed by the employer/employee relationship", he argued. He accordingly urged

the learned first appellate judge to quash the judgment of the trial District Court.

The respondent which was represented by one Mr. Malima, learned advocate, rigorously resisted the appeal. In his equally short oral submission, Mr. Malima pressed the learned first appellate judge to dismiss the appeal. He confidently argued that the learned trial Resident Magistrate correctly interpreted the facts before him and rightly concluded that the trial court had no jurisdiction to entertain the suit. This was because, he said, "under section 28 (1) of the repealed Security of Employment Act, only Labour Courts" had jurisdiction. In the alternative, he alluded that since the parties in the appeal had earlier reached an out of court settlement, the case was **res-judicata.**

The learned first appellate judge, in the first sentence of his judgment made it absolutely clear that the case was **res-judicata.** To vindicate his stance, he thus said in the course of his discussion:-

"Appellant therefore had no power to institute on his own proceedings for this matter in 2001. By that time, it were before ***The Employment and Labour Relations Act, 6 of 2006 and The Labour Institutions Act No. 7 of 2004*** *came into force from 05.01.2006 vide GN.01/2006 or from 01.02.2005 vide GN. 24/2005 respectively. The legislation which was in force during that time was* ***The Employment Act, Cap. 366 (Vol. IX, R.E. 2002).*** *Under section 139 of that Act, this claim should have been referred initially to the Labour Officer. Then under section 141 of the same repealed Act, that Labour Officer could have reported the same to the magistrate. Therefore the decision by the court (Hon. J.E. Massesa, RM) to dismiss the appellant's claim in Nyamagana District Court Civil Case No. 11/2005 is sustained." [Emphasis is supplied.]*

Thereafter, he embarked on an elaboration of the procedure to institute labour proceedings under the new labour law regime. At the

end of, in our respectful opinion, this needless exercise and analysis, he ended up holding:-

> *"All that suffice to show how the thing which appellant is complaining about is already* ***res-judicata."***

The appeal was dismissed.

Although, we must confess, it has been difficult for us to follow the curious reasoning which led to the dismissal of the appeal, we have not failed to glean from the judgment three flaws which have disturbed us most. First of all, the hasty holding that the case of the appellant was **res-judicata** was arrived at by the learned appellate judge without affording the appellant before him and before us, an opportunity to be heard on the issue. This alone would be a good ground to vitiate his decision.

Secondly, having dispassionately studied the entire proceedings before him, we have found out that the parties in the appeal were

not heard at all on the issue of lack of right by the appellant to institute a labour dispute suit on his own under the then old labour regime. It was an issue which he raised **suo motu** as he was composing his judgment. If the learned first appellate judge had found it as a crucial issue in the determination of the appeal before him, he was enjoined by law to summon the parties, reconvene the court and ask the parties to address him on it (See **Zaidi Sozy Mziba v. Director of Broadcasting, RTD and The Attorney General,** Civil Appeal No. 4 of 2001 (unreported)). Had he done so, he would not have fallen into an incurable error of condemning the appellant unheard and sustaining the "dismissal" order which never was.

Thirdly, the learned trial magistrate did not "dismiss the appellant's claim" on the basis that he was barred by the then Employment Act to institute the suit. As we have elaborately shown earlier on, the appellant's suit was found incompetent and **struck out** for being barred by section 28 (1) of the Security of Employment

Act. Indeed that was the complaint of the appellant before him which he never resolved and remains undecided to date.

The appellant was naturally aggrieved by the entire judgment of the High Court. He accordingly preferred this appeal. In his memorandum of appeal he is challenging the soundness in law of the holdings of the learned first appellate judge.

The appellant lodged a written submission in support of the grounds of complaint, which he adopted at the hearing of the appeal. It was brief but focused. The appellant tellingly argued that:-

> *"... the learned appellate Judge, failed to determine the ground of Appeal on SUMMARY DISMISSAL, but instead, dismissed the Appeal on the ground that the suit was "RES JUDICATA", the matter which the Appellant did not raised (sic) it before the High Court in my Appeal."*

He accordingly urged us to allow his appeal.

The respondent was ably represented before us by Mr. Cuthbert Tenga, learned advocate. Counsel for the respondent (not Mr. Tenga) had also lodged a detailed written submission, which Mr. Tenga adopted. He at, first, impressed upon us that the appeal lacked merits. All the same, on full reflection of the appellant's major grievance as shown immediately above, he with transparent honesty and quite correctly in our view, conceded the fatal legal error committed by the learned first appellate judge. As any honest lawyer of his calibre would have done, he agreed that indeed the High Court never decided the crucial issue which was the basis of the appeal before it but based its decision on non issues, on which the parties were not heard. He accordingly submitted that the High Court decision be quashed and the appeal be remitted to the High Court for a re-hearing before another judge.

On our part, on the basis of the earlier elaboration, we are at one with both parties to this appeal that the learned first appellate judge acted without jurisdiction. He abdicated his duty to decide the

issue before him in the appeal on which the parties fully addressed him. He, instead, purported to predicate his decision on issues which not only were never specifically raised in the appeal, but were also never canvassed by the appellant at all and/or only fleetingly mentioned by the respondent in respect of the issue of **res-judicata** only. As we have already demonstrated, the key issue of whether or not the learned trial Resident Magistrate rightly struck out the suit remains undecided to date. We would not be wrong, therefore, in asserting that this was one of the rare instances of a "mistrial" at the appellate stage. We say so deliberately because it is settled law that a first appeal is in the form of a re-hearing.

It is our conviction, therefore, that this is not a proper case in which we can justifiably put on the shoes of the High Court and decide the undecided appeal in the High Court. We are accordingly constrained to accede to the call of Mr. Tenga, for we believe this is a fit case for an order of a re-hearing.

All said and done, we allow this appeal. The High Court judgment is hereby quashed and set aside. We order that the record be sent back to the High Court for a fresh hearing before another Judge. Each party to bear his or its own costs in this Court and the High Court.

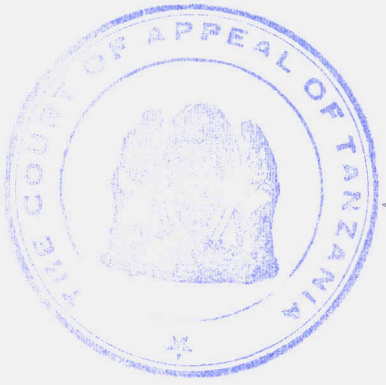
DATED at MWANZA this 31st day of May, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. Mkwizu
DEPUTY REGISTRAR