

TANZANIA / JUDGMENT

20100329 TZHC Dar es Salaam

COURT
TZHCDECIDED
29 March 2010

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cc IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL APPEAL NO. 82 OF 2008
(Originating from RM Kisutu Employment Cause No. 124 /04) CONSTANTINE F. MASALI
APPELLANT VERSUS GEMA SECURITY SERWCES RESPONDENT Date of last Order:
4/3/2010 Date of Judgment: 29/3/2010 EXPARTE

JUDGMENT

Shangwa, J. This is an appeal against the decision of the Court of the Resident Magistrate at Kisutu delivered on 10th April, 2006 in Employment Cause No. 124 of 2004 which varied the decretal sum claimed by 1 the Appellant in accordance with the decision of the Labour Conciliation Board of Ilala District. There are two grounds of appeal against the decision of the Court of the Resident Magistrate at Kisutu namely: That the trial Magistrate erred in law and in fact for entertaining the application by the Respondent to vary the decretal sum claimed. That the trial Magistrate erred in law and in fact for varying the decretal sum claimed and granted by the Board. First of all, let us look at the facts of this case which are as follows:- On 30th January, 2002, the Appellant was summarily dismissed by the Respondent. After being dismissed, he referred the matter to the Labour Conciliation Board which ordered for termination of his employment instead of summary dismissal and directed that he should be paid his terminal benefits by the Respondent. These benefits were categorized as follows: One month's salary in lieu of notice Tshs. 50,000/= Severance allowance 50,000 x 5% x 12x1 Tshs. 30,000/= Annual leave Tshs. 46,666.70 Total 126,666.70 The Respondent did not appeal to the Minister against the decision of the Board. On 27th May, 2004 the Appellant filed an application for enforcement of the Board's decision. He filed it in the Court of the Resident Magistrate at Kisutu. In his application, he included a claim of subsistence allowance of Tshs 16,553,266.70 cents. On 23rd September, 2005, the Respondent (judgment debtor) filed an application in the same court objecting to the claims by the Appellant in his application for enforcement of the Board's decision. That is a claim for payment of terminal benefits and subsistence 3 allowance. The ground of objection to this claim is found at paragraph 5 of Raphael Geras in support of that application. It reads as follows and I quote:-

5. That on the other hand the Respondent has brought herein court the same claims which were paid for, and bad enough he has brought claims for subsistence allowance while he is not entitled, since he was paid he was recruited herein Dar es Salaam on the 1st September,

2001 and being dismissed on the 30 January, 2002 with no record of children nor wife." Thus, an argument arose as to whether or not the Respondent paid the Appellant a total sum of Tshs. 126,666.70 cents as terminal benefits. Whereas the Appellant stated that he was not paid the aforesaid amount, the Respondent stated that he was paid and that it is surprising for the Appellant to seek for enforcement of the sum of money which he had already been paid. The point does arise here as to whom to believe given such an argument. It is a cardinal Principle of law that he who alleges that a certain fact or certain facts exist must prove. In this particular matter, the Respondent who alleged that the Appellant was paid the sum in dispute had a burden to prove that allegation. The Respondent did not discharge that burden. I think therefore that the Appellant is entitled to be paid by the Respondent his terminal benefits which are in dispute. The Appellant faults the Court of the Resident Magistrate at Kisutu which in law is the executing court of the decisions of the Board for entertaining an application filed by the Respondent to vary the sum in dispute and for varying it from Tshs. 126,666.70 to Tshs 79,666.70 cents. As a matter of fact, there are no clear reasons on record which were given by the trial court (E. Mbaga, RM) for varying the Appellant's terminal benefits from Tshs. 126,666.70 to Tshs. 79,666.70. I agree 5 ' S with the Appellant in his contention that the trial Magistrate was wrong in entertaining the Application for varying his terminal benefits which were varied from Tshs. 126,666.70 to Tshs. 79,666.70. I agree with him that what the trial Magistrate was supposed to do is to enforce what he deserved to be paid by the Respondent as terminal benefits and not to vary them. Let us now look at the Appellant's claim of subsistence allowance of Tshs. 16,553,266.70. It appears that the claim of subsistence allowance and its enforceability was a subject of much controversy between the parties in the Court of the Resident Magistrate at Kisutu. This claim was vehemently resisted by the Respondent who argued that it has no substance or basis. The trial Magistrate agreed with the Respondent's argument and dismissed it. From the Respondent's point of view, the Appellant is not entitled to subsistence allowance as he was recruited at Dar es Salaam and that he had no record of having a wife or children. In support of the Respondent's view, the trial Magistrate observed in his typed ruling at page 6 that for the Respondent to be entitled to subsistence allowance, he ought to have substantiated that he was entitled first to be repatriated and that his repatriation had been delayed from the date of the termination. In my view, the basis of the Appellant's claim of subsistence allowance and his request for its enforcement is the decision of the Labour Conciliation Board of Ilala District which stated in Kiswahili as follows: - BARAZA LINATENGUA UAMUZI WA MWAJIRI WA KUMFUKUZA KAZI NDUGU CONSTANTINE F. MASALI NA BADALA YAKE AACHISHWE KAZI NA. KULIPWA HAKI ZAKE TOKA TAREHE YA KUFUKUZWA KAZI..." In brief, the Conciliation Board's decision is to the effect that instead of dismissal, the Appellant should be terminated and given 7 his terminal benefits from the date of his dismissal by the Respondent. In my considered opinion, the terminal benefits that have to be paid to the Appellant by the Respondent includes subsistence allowance. Entitlement to subsistence allowance does not only depend on whether someone has to be repatriated or not as it was held by the trial Magistrate. Subsistence allowance is payable counting from the date of dismissal or termination from

employment to the date of payment of one's terminal benefits or as directed by the relevant authority. As already mentioned, the Appellant was summarily dismissed by the Respondent on 30th January, 2002. By then, he had worked with the Respondent as supervisor for a period of five months only. The decision of the Board was given on 16th June, 2003. Now as the Board held that the Appellant should be paid his terminal benefits from the date of his dismissal that is on 30/1/2002 and as its decision was given on 16/6/2003, the Appellant is entitled to subsistence allowance from 30/1/2002 when he was dismissed to 16/6/2003 when the E21 decision of the Board was given. This entitlement includes himself, his wife and four children. It sounds unfair for the Respondent to say that the Appellant had no record of being married and having children because at the time of his employment, the Respondent did not ask him to produce his marriage certificate and birth certificates for his four children for record purposes. In case of any doubt about his marital and off springs status, it would have been fair for the Respondent to ask the Appellant to swear an affidavit to that effect. In his application for enforcement of his terminal benefits, the Appellant claimed for subsistence allowance of Tshs. 72,480/= per day. For me, I think that the said sum is on the high side. I reduce it to Tshs. 7,000/= per day with effect from 30th January, 2002 up to 16th June, 2003. In summary, I hold that the Appellant was justified in applying for execution of the Board's decision for being paid his terminal benefits and subsistence allowance. The trial Magistrate was wrong in varying the amount of terminal benefits from Tshs. 126,666.70 to Tshs. 79,666.70 without clear reasons for doing so. The trial Magistrate was wrong also in failing to appreciate that the Appellant was entitled to subsistence allowance to be enforced by the court just in accordance with the Board's decision or spirit. Finally, I allow this appeal with costs. A. Shangwa JUDGE 29/3/2010 Delivered in open court this 29th day of March, 2010 in the presence of the Appellant and in the absence of the Respondent. PShan a j• ,/\ JUDGE 29/3/2010 p4... 10

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