

TANZANIA / JUDGMENT

mathias kanondo vs tanu regional secretary 1974 tzhc 4 28 june 1974

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IN THE HIGH COURT? OF TANZANIA AT TABORA' CIVIL APPEAL NO: 44 OF 1973 (Original Tabora Misc. Employment Cause No:4 of 1973) Before: P. Msiska, Esq., Resident Magistrate* Mathias Kanondo Appellant (Original Plaintiff) v e r s u s TANU Regional Secretary Respondent (Original Defendant) —.. J U D G M E N T MWAKASENDO, J. - The appellant, MATHIAS KAN(5NDOj--appeals against the judgment of the Resident M a g i s t r a t e ' s Court, Tabora, ir* Misc. Employment Cause No.4 of 1973, dismissing a suit brought by - him against the TANU Regional Executive Secretary,. Tabora, in his capacity as the Regional Executive representative of the Party Organisation. The matter in dispute, to which I will refer in some detail later in this judgment, was brought before the Court by way of reference from the Area Labour Officer, Tabora in accordance with the provisions of Section 132 of the Employment Ordinance, C a p . 366 of the Laws which provide: " Where, on receipt of a report under Section 13f,* a labour officer does not act in accordance with the provisions of section 131 and is unable to effect a settlement between the parties, he may, at the request of either party or on his own motion, submit a written report to a Magistrate setting out the facts of the case.7' The labour officer's report to the Magistrate is in the form of a letter which, for ease of reference is set out in full here below: M The Resident Magistrate, P. O. Box f3, Tabora. THE EMPLOYMENT ORDINANCE CAP. 366,. MR. MATHIAS KANONDO I have the honour to inform you that under section 130 of the Employment Ordinance C a p , 365 of the laws, the above named who stated that he was employed by the Regional TANU Executive Secretary, P. O. Bex 3C1, Tabora has lodged a complaint to this office the substance of which is as follows:— That he was employed by the Regional TANU Executive Secretary as a Nightwatchman at the Regional TANU Headquarters office, Tabora from 1st February, 1972 to 10th December, 1972 at the rate of Shs«150/= per month. That according to the Wages Regulation Order G.N. No. 152 of 28th July, 1972 which came into operation on 1st July, 1972 he was entitled to the salary of Shs.240/= per month. He is claiming for 3hs.450/= being arrears of wages due as from 1st July, 1972 to 10th December, 1972. He also claims for Severance Allowance due for the period of service which is Shs.l20/=* being his 15 days* wages." The Regional TANU Executive Secretary on the other hand stated that he did not employ one Mr. Mathias Kanondo. But stated that Mr* Kanondo who was a member of the TANU Youth League was requested to act as a nightwatchman at the TANU Regional Headquarters office, Tabora and was given Shs.5/= per day as bonus and not wages. The available records at the

TANU office show that the pay was based on Shs.5/- per day, " As I could not effect settlement of the case out of Court, I am thus referring the facts of the case to you under Section 132 of the Employment Ordinance, C a p . 366 as replaced by Act No.5 of 1969, at the request of the Complainant .rt On receipt of the aforesaid labour officer's report the learned Resident Magistrate proceeded to try the issues disclosed in the report in accordance with the procedure laid down in Section 134 of the Employment Ordinance, C a p . 366 of the Laws. Section 134 provides; »* 1 3 4 _ (1) On the receipt of a report under Section 132 the magistrate shall, where the facts appear to him to be such as may be 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 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 proceedings.
- (3) The provisions of Civil Procedure Code, 1966 shall, in so far as they may be applicable, apply to proceedings under this section: Provided that the Magistrate shall hear and determine such proceedings according to substantial justice without undue regard to technicalities of procedure Although the issues in dispute would appear to have been clearly and lucidly set out by the labour officer in his report to the Resident Magistrate, the learned Resident Magistrate for some inexplicable reason misconstrued the report with the result that instead of trying the issues as disclosed in the labour o f ficer's reports he formulated his own issue which he describes in his judgment as "the only crucial question to be decided" and proceeded to try this non-issue as if it were the crucial issue in the case before him* issue in dispute as understood by the learned trial Resident Magistrate is set out in the second paragraph of his judgment and reads: " TVe only crucial question to be decided was whether the plaintiff was an employee of the party, TANU or whether he was rendering voluntary services to TANU as a Party member. The plaintiff stated that he was employed by TANU on monthly basis and therefore, should have been paid Shs.240/= per month, instead of Shs.150/ = that was being given to him and so claimed Shs.450/= as arrears of wages. He also stated that as he was dismissed from work without notice then he was entitled to Shs.240/= as wages in lieu of notice and also in terms of the Severance Allowance Act, 1962 he was entitled to Shs.120/= as Severance Allowance. He stated categorically that nowhere did he agree to do this work for TANU on self-help b asis." Be that as it may, as I see it the proper issues in the dispute between the appellant and the TANU Regional Executive Secretary were:
 - (a) Whether or not the appellant was employed by the Respondent Organisation as a nightwatchman on -
 - (i) daily basis as contended by the respondent or; (ii) monthly basis as asserted by the appellant.

- (b) Whatever the terms of his employment as nightwatchman - whether his employment fell within the ambit of the provisions of the Regulation of Wages and Terms of Employment Order, 1972 - G . N a N o . 152 of 28th July, 1972, or not, and
- (c) If the answer to (b) above is in the affirmative - whether the plaintiff/appellant was entitled to -
- (i) Severance Allowance and; (ii) one month's wages in lieu of notice, on the day of his termination of employment by the respondent Organisation. ... On the first issue the parties are clearly agreed that the appellant/plaintiff was employed by the respondent Organisation as a nightwatchman between 1st February, 1972 and 10th December, 1972 and the only matter in dispute is as regards the terms under which he was employed. It was contended and it is still contended by the appellant/ plaintiff that he was employed on monthly basis and not, as contended by the respondent, on daily basis. On consideration of the evidence on record I fail to see that there is anything in it to support the contention advanced by the appellant. The Regional Executive Secretary of TANU in his evidence before the trial Court described in full the circumstances which led them i.e. TANU to employ the plaintiff/ appellant as a nightwatchman at TANU House. These circumstances can be briefly stated as follows: On or about 1st February, 1972 the appellant who was in need of employment went to the District TANU office where he had an interview with the District Executive Secretary of TANU. As a result of this interview the plaintiff/appellant was given a letter addressed to the TANU Regional Executive Secretary and asked to hand over the same to the Regional Executive Secretary,, This letter was tendered in evidence and appears on the record as Exhibit A. The letter is dated 1st February, 1972 and reads: 11 Katibu wa Mkoa 5 TANU Tabora* Uhuru na Kazi. BW, MATHIAS KANONDO Tafadhali badala ya marehemu rviyu tunamtuma kama mlinzi wa ofisi kwa muda mpaka tutakapopaca mlir'si wa kuajiriwa. Tafadhali mwelekezt; juu ya utekeleza^i kuhusu zamu ya hapo." The letter was signed by the District Secretary of TANU. The TANU Regional Executive Secretary in his evidence was quite emphatic that when he received the letter Exhibit A from the District Executive Secretary he explained to the appellant the terms under which he was being employed by the Party and these were that he was taken in as nightwatchman on daily terms of pay. And according to the Regional Executive Secretary the appellant took up his duties of nightwatchman from 1st February, 1972 on this understanding and was paid on the agreed terms until his employment was terminated on 10th December, 1972. The Regional Executive Secretary also produced another letter from the District Executive Secretary, the meaning of which is self-evident^*^*; . % This letter appears on record as Exhibit B and reads as follows: .. " Katibu wa Mkoa, TANU T a b o r a . Uhuru na Kazi-, MALIPO YA BW. Mo KANONDO Tumekubaliana na Katibu Mtendaji wa Wilaya kuwa ndugu aliyetajwa hapo juu atalipwa kutwa Shs.5/= kama posho ya kawaida kwa wafanya kazi wote wa TANU wanaojitolea. Naye tumemwelekeza na amekubaliana na utaratibu huo, na hii inategemea mawasilisho ya fedha toka matawini ndipo atapewa posho yake ya kutwa. Uhuru na Umoja." The letter is signed by someone on behalf of the ^t:_i cv. Executive Secretary of TANUo A3 though it. v<as the carrr for the p l a i m -hat the contents of the two letters set out supra

were never made known to him or that the alleged applicant or his part to work for TANU and receive daily wages for his services never regained either by the District Executive Secretary/ < y: ae Regional Executive Secretary, I am quite prepared on a balance of probability to accept the account given by the TANU Regional Executive Secretary and would accordingly hold on the first is that the plaintiff/appellant took up employment with TANU as its nightwatchman on terms that he would receive Shs #5/= daily as his wage, -. In view of this finding the next issue to consider is whether the appellant/plaintiff employed on the terms aforesaid fell within the ambit of the provisions of the Regulation of Wages and Terms of Employment Order, 1972 or not. On this I do not think there can be any dispute that the appellant was one of the classes of workers for whose benefit the Order aforesaid was promulgated. A person engaged in the type of activity as the present appellant was engaged in at the material time and paid in the manner the appellant was remunerated in this case clearly in my view falls within the description of an employee who is defined in it.; Employment Ordinance as a "Casual Employee." Section 11 of the Ordinance defines the term "Casual Employee." as: " means any employee the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time? Therefore accepting the two letters, Exhibits A and I :1 setting out the terms on which the Appellant was engaged and, paid by T.M.C there can be no doubt in my mind that the appellant in this case was at the material times a Casual Employee of the Party and as the -2 *-c:-rr. MC-su' 1. Employee" bears the same meaning in the Regulation Wages and Terms of Employment Order, 12/2 as bears in the Employment Ordinance what remains to be considered is whether or not the Order in question applies to the appellant, that is, to the appellant as a casual employee. Regulation of the Regulation of Wages and Terms of Employment Order, 1972 provides: " C — (1) Subject to the provisions of this Order, the basic minimum wage payable to a Casual Employee employee. any employment to which Part A or First Schedule would apply if he were not a - employee, shall be at the appropriate rate as specified in Part C of the First Schedule hereto.

- (2) Subject to the provisions of this Order, the basic minimum wage payable to any casual employee employed in an employment to which Part B of the First Schedule hereto would apply if he was not a casual employee, shall be at the appropriate rates specified in respect of such employee in Part A of the First Schedule hereto." And Regulation 4 (1) (a) of the Order provides: " 4 - (1) Subject to the provisions of this Order, the basic minimum wage payable to -
 - (a) an employee of whatever category whose place of employment is in an urban area; shall be at the appropriate rates specified in respect of such employee in Part A of the First Schedule hereto," The appellant who was at the material time employed as nightwatchman at the TANU Regional offices in Tabora Township falls, in my considered view, in the category of employees who would, were he not a casual employee, be entitled to receive the minimum wage under the Order specified at the appropriate rates in Part A of the First Schedule to the Order. But as he was a casual employee, the provisions of Regulation 6(1) of the Order would

apply. In other words, the appellant as a casual employee of the Party would receive a basic daily wage computed by reference to the appropriate rates specified in Part C of the First Schedule to the Order. Part C of the First Schedule provides the daily or hourly rates of wages as the case may be. Part C is set out hereunder for ease of reference.

Persons of or over 18 Years	Persons of or over 15 Years but under 18 Years	Hourly	Shs.
1.40	0.90	11.00	7.30

The appellant, as it is generally admitted by both parties, is an adult aged over 18 years. And as I have already found that the appellant was at the material time employed by the Party as a casual employee on daily basis of pay it follows that the rate at which he should have been paid was Shs.11.00 per day as from 1st July, 1972 to 9th December, 1972 the day before his employment was terminated. He was, accordingly, in terms of the Regulation of Wages and Terms of Employment Order, 1972, under paid by Shs. 6/= per day from 1st July, 1972 to 9th December, 1972, a total of 162 days. 162 days multiplied by Shs. 6/= we get Shs.972/= to which sum, as it seems to me, the appellant was entitled but was never paid by the Party. To conclude on issue (b) I find that the appellant's terms of engagement with the Party fell within the ambit of the provisions of the Regulation of Wages and Terms of Employment Order, 1972 and as his wages fell short of the rates prescribed in Part C of the First Schedule to the order by Shs. 6/= daily I find that the appellant is entitled to an extra payment by the Party in the sum of Shs.972/= arrived at by multiplying Shs.6/= (the daily underpayment) by 162 days, I direct and order the Regional Executive Secretary of TANU, Tabora on behalf of the Party to pay this sum, i.e. Shs.972/= to the appellant; Mathias Kanondo, with the least of delay. The final issue to be decided is issue (c) which is whether the appellant is also entitled to (i) Severance Allowance in the sum of Shs.120/= and/or (ii) one month's wages in lieu of notice. On the question of notice or payment in lieu thereof, I am perfectly satisfied that in terms of the provisions of Section 3i(2)(a) of the Employment Ordinance, Cap. 366 of the Laws, the appellant was given the requisite notice under the law and accordingly he was not and is not entitled to any payment under this limb of claim and I so find. And as for Severance Allowance I think the provisions of Section 4 of the Severance Allowance Act, 1962, Cap.487 of the Laws, makes it absolutely plain that a casual employee - a term which has the same meaning under the Act as it has under the Employment Ordinance - which type of employee the appellant in this case was at all material times, is not entitled to the payment of any Severance Allowance on cessation of his employment. The relevant part of Section 4 aforesaid provides: * 4 - (1) An employer shall not be liable to pay any severance allowance to or in respect of any employee who - the cessation of his employment is due to (ii) a casual employee;" In view of this clear and unambiguous provision of the law I must hold, as I indeed do, that the appellant on termination of his employment on 10th December, 1972 was not entitled to the payment of any severance allowance and it is so found. For the foregoing reasons, the appeal by appellant, Mathias Kanondo, is allowed. The order of the trial Resident Magistrate's Court dismissing the suit filed by the appellant/plaintiff in Misc. Employment Cause No.4 of 1973 is quashed and set aside and there is substituted therefor an order giving judgment for the Plaintiff/Appellant, Mathias Kanondo, in the sum of Shs.972/= being the difference between the wages he should have been paid under the Regulation of Wages and Terms of Employment Order, 1972 and the wages he was

actually paid between 1st July, 1972 and 9th> December, 1972. There will be no order for costs. Ordered accordingly. Dated at Tabora 28th June, 1974.

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