

TANZANIA / JUDGMENT

19970114 TZHC Dar es Salaam

COURT
TZHCDECIDED
14 January 1997

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IN THE HIGH COURT OF TANZANIA -- AT DAR ES SALAAM CIVIL APPEAL NOo 12/95 · versus YAHJiYA So NGdJJ.tto O O O O. O O t O ,RESPONDENT ·. J U D G E M E N T LUANDA, PRM EXTe,r• One RAJ.@..£._ MAULID.1 (hereinafter referred to as the Appellant) . . eomplained to a Labour Officer for non payments of Tshs. 32 1 000/• arising out of employment ~ontract he claimed he had entered between himself and Y1ilif~Y.£~ NGOTA · (hereinafter referred to as the Respondent)". The Labour Officer failed to settle.the dispute. He referred the matter to the Court of the Resident Magistrate of Dar es Salaam at Kisutu as provided under section 132 of the Employment Ordinance, Cap. 366 for determination • • :In the said court the Respondent denied the claim. He however, put a •ounter claim of Tshs. 2,500t000/• for the upkeep of the Appellant. After hearing both parties the Learned trial Resident Magistrate'dfsmwwe<l the appell~t . . Lclaim. &:t lisomewhat11 _she awarded the Re5pondent :shs.500 1 000/- for . what-the reoord ·is silent. I say somehow because the award was not part of the judgement, · It was al?- order of the court after .judgment was delivered. Be that as it may, the appellant is dissatisfied, hencee this. appeal.· Mr. Mrugaruga, Senior Labour Officer represented the·Appellant in this appeal. He. did so under sec.141(1) of the Employment.Ordinance,. cap. 366 which provides; Notwithstanding. the provision of any other written law the Labour Commissioner or any officer duly authori~ '. by him in writing in that behalf.shall have the right . to appear and be heard in any •:cri.ininal or Civil prooeed.i.Dgs under this Ordinance,3 9 and may represe1!t an~ party to such . . appeal where he· satisfies the tourt that he has been duly aut~orized by such party to so represent him: Mr. M:rugaruga ·fil~d six grounds of a.9p.eal,. namely: 1 e Tba t the Lew:ned. ~.ant 113-gistra te Seriously er:r:-Qd in l~w in drawing a da.eree and order f~r payment ot shs.. ~,000/- by ttle a ~ to, the Respondent eoa/2 - . • 2 .. which is not referred to in the judgemento

2. That on the admission by the Respondent that he came to know the Appellant in 1990, the Learned .Resident .Magistrate should have held that the ilppellant and the Respondent are not of one family.
3. That the admission by the Respondent t~t the Appellant was brought to him by his friend slanged· BUKI NDEVU in 1990 for the purposes of employment and that the Respondent accepted the Appellant the · Learned Resident Magistrate should have held that the Appellant was employed by the Respondent. Li.. That the Learned Resident Magistrate S~riously erred in law in not holding that the Respondent could not treat the appellant as his son without proof of adopt.ion under the ~doption Ordinance Capo 335. . 5. That on the

admission of the Respondent that he accepted the Appellant who was seeking employment in 1990. Through his friend, that Learned Resident Magistrate should have held that the Respondent was required as an employer, to prepare and maintain a record of contract under section 35 of the Employment Ordinance, Cap. 366 as amended under the Third Schedule of the Security of Employment Act Cap. 574, 6. That after holding as per paragraph 5 supra, the Learned Resident Magistrate should have further held that the statement of the Appellant, as to the terms and conditions of employment is true. At the trial neither the Appellant nor the Respondent called witnesses. It is a version of the Appellant against that of the Respondent. It is the version of the Appellant that he was employed by the Respondent from 10/10/1988 as a flour mill operator and that he was paid shs. 4500/- per month. He then asked the Respondent - where the record is silent, to increase the salary so that it reaches shs. 5000/- as a minimum wage. He did not say under what law. Be that as it may, as the respondent did not pay him the minimum wage, the Appellant complained to the Labour Officer. The Labour Officer wrote letters to the Respondent but to no avail. He told the trial court that: he was claiming shs. 32,000/- being one month salary in lieu of notice, 1/3.

- 3 - annual leave and terminal benefits. He did not say how much is he claiming for each item. In cross-examination the Appellant said at the beginning he was paid shs. 1000/- per month. He further told the trial court during cross-examination that in 1992 his salary was increased from shs. 4000/- to shs. 4500/-. The Respondent on the other hand denied to have employed the Appellant. He however told the trial court that he knows the applicant since 1990 after being brought by Buki Ndevu. The Appellant is said to have some problem - which problems the record is silent. The Respondent took the appellant and stayed with him. The appellant helped him in domestic duties and in return he was given neo3ssarius. ' ' He denied to have employed the appellant. He demanded shs. 2,500,000/- from the appellant as disbursement of the necessities he had provided to him. I prefer to discuss ground 2 to 6 of the appeal together as all they boil down to the issue of whether or not there was a contract of Service either oral or written, entered between the Appellant and the Respondent. The trial Learned Resident Magistrate held that there is none. The reason being that the appellant failed to bring evidence in support of his claim. Let me start .. by stating who has the burden of proof in Civil Cases. It is a cardinal principle that asserts who avers holds the onus of proving it. In this case the burden was on the shoulders
- of the Appellant to show that there was a contract of Service and he should spell out terms and conditions attached thereto. The Appellant did say in his evidence in ... that he was employed by the Respondent in 1988. And he elaborated it during cross-examination that he was employed on 10/10/88. But the report made by a Labour Officer, which is the basis of his claim retroactively stated that he was employed by the Respondent from January, 1990 up to 29/2/94. One is at loss to know exactly when was the appellant employed, if at all he was. Furthermore, the appellant did not spell out the terms and conditions of the contract whether it was a monthly contract or daily rated etc. Mr Mrugaruga, contended in his memo of appeal that the Respondent was required to prepare and maintain

a record of contract as provided under s.35 (1) of the Employment Ordinance, Chap.366.

- DO / .., ,,,,' I quite agree with himo .ilctually the same is provided under sub-section. (1) of Section 35. I-t; reads: . Every employer shall prepare and maintain or
- . ,or- · caused to be prepared /. maintained a record of (contract for every employee employed by him under an oral contract of service, other than a (f;""..a,.-J employee. What sanctions are imposed for failure to abide with t~e above sub-section? The answer to the question is provided under subsection 5 of the same section. 35 (5). Where any dispute arises as to the terms and oonditions of an ~ral contract other than a contract for the employment of a casual employee, and the employer fails ,to produce a recorri of such contract made in ae:ordance with the provisions of this section, the statement of the employee as to the nature of the t~_Jl)~d. _c,_y,1ldJ.~.i.O.~ shall be receivable as evidence of such terms and conditions unless the employer satisfies the court to the contrary. In my view this subsection first presupposes that there is an oral contract of employment entered between an employee and employer which is not disputed. Second in case there is a dispute as to the terms and - conditti<ns of the eontract and an employer failed to produce a record of such contract, then a word of an employee prevail unless the employer satisfied the court on the contrary. In the instant case the Learned Resident M3.gistrate made a finding, ' correctly to my view that the appellant failed to satisfy the court that there was such an oral eontract entered between himself and the Respondent. As such the quoted subsection cannot come to the appellant's aid. So there is no merit on ground 2 to 6 of the memo of appeal. As regards to the 1st ground of appeal; I joined hards with ¥.II'. Mrugaruga's contention that the Learned Resident Magistrate erred in awardiug the Respondent shs. 500,000/- which amount was not embodied in the judgment. Even if it was in the judgment still it was not free from criticism in ~hat the Learned Resident Magistrate did not show how she had a.n-ived5 ,
- 5 at that figure. There is no evidence on record to.support the figure. In sum therefore the appeal in relation to whether there was a contract of service is dismissed. The appeal against an order of shs. 500,000/- awarded to the Respondent is hereby allowed. In view of the above that no one is a winner., each party to bear his costs. Order accordingly. B. I:~ _Ltt..1JDi1,PRM. ElCT.Jo / / 29/12/96 Judgement read in chamber in presence of ~he Respondent and absence of the Appellant. ., ., /'. \ _./~ ~,.....,~_, ~-- ... 1, : ~ " ~--. .• ~..._, B. :M,, LUANDi~, ;PRMo E:XToJ •'14/J/~,J

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