

TANZANIA / JUDGMENT

security group t ltd vs kurwa joseph another 2005 tzhc 204 1 november 2005

COURT
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IN THE HIGH COURT OF TANZANIA AT DARES SALAAM CIVIL APPEAL NO.19 OF 2004 (Appeal from Kisutu Court Employment Case No.24 of 2002) SECURITY GROUP (T) LTD.....
APPELLANT VERSUS

1. KURWA JOSEPH)
2. SALUM KITUA) RESPONDENTS

JUDGMENT

MANENTO. JK> This appeal originated from the Employment Cause No. 24/2002 filed at a Resident Magistrate's Court at Kisutu Dar es Salaam. The employment cause reached the chambers of the Court through a report to a magistrate by a labour officer, made under the section 132 of the Employment Ordinance Cap.366. The complainants are now the respondents. The magistrate, after hearing the parties, entered judgment for employees as presented by the labour officer. The employer was aggrieved by that decision, hence this appeal. I am of the considered opinion that, though this is an appeal, yet I should first visit the report of the labour officers, which led to the decision of the court. I say so because, as I have been reading the judgment of the trial court, the memorandum of appeal and the submissions, I doubt if the parties were at ad idem on the really issue before the court. It is not clear whether the respondents had been paid half salary during the time the criminal charge was pending before the court or not and if they were paid, they were now demanding for the other half because of their acquittal in the criminal charge. For that matter therefore, I have to reproduce the important parts of the labour officer's report to the magistrate. r e p o r t t o m a g i s t r a t e Mr. Salum Kitua and Kurwa Joseph under section 130 of the Employment Ordinance Cap. 366 reported to me as follows:- 1■ That they were employed by the defendant by permanent terms in the capacity security guards with effect from (to wit Salum Kitua 24/11/98 up to 11/10/2001) and Kurwa Joseph employed 2/8/1994.

2. That before termination of contract of service he was suspended from employment from 22/2/99 on disciplinary grounds on the allegations that they have stolen the employer's properties and the matter was taken to court 3/3/99 and were acquitted on 4/9/2001 accordingly. 3• That in the period of suspension pending the determination of the criminal case defendant was not paid 1/2 salary from April, 1999 to 4/9/2001.
4. Each of them claimed half salary from 3/4/99 to 4/9/2001, accumulated leave for the years 1999, 2000 and 2001; leave allowance of two years and unpaid transport allowances. From the extract above, paragraph number three (3) is more of concern, in regard to the issue of the time the payment were due to the respondents. In her judgment, the trial learned Resident Magistrate appeared to understand the period in issue, which the respondents were not paid their half pay to be that period when the criminal proceedings were in progress. She did not say that it is the extra half withheld by their employer during the period the criminal proceedings were in progress. Her words are clearly stated as follows "As regards on the issue above I am satisfied that, the complainants are entitled to be paid the amount of money claims accordingly. I am also satisfied with the labour officer's report that since the period of suspension pending the determination of criminal case complainants were not paid 1/2 salary from April, 1999 to 4/9/2001and I am of the considered view that the complainants are entitled to the claims 4 as prayed in the labour officer's report and in the result judgment is entered in favour of the complainants as prayed. Mr. Jadeja learned counsel who appeared for the appellant's company filed four (4) grounds of appeal, namely:-
 - (1) The learned magistrate erred in law in allowing the claim of each of the two Respondents for 1/2 salary from 3/4/99 to 4/9/2001
 - (2) The learned magistrate erred in law in allowing the claim of each of the two Respondents for accumulated leave for the year 1999, 2000 and 2001.
 - (3) The learned magistrate erred in-law in allowing the claim of each of the two Respondents for leave allowance.
 - (4) The learned magistrate erred in law in allowing the claim of each of the Respondents for unpaid transport allowance. Both the appellants advocate and the respondents urged the appeal by way of written submissions. In their written submission, the respondent raised an issue of limitation, in that the appeal was filed out of the time required by law. Mr. Jadeja explained the circumstances under which the delay was caused, and that he was not supplied with the copy of the judgment and decree in time, and immediately he was in possession of those documents, he filed the memorandum of appeal which he had long time prepared. I am satisfied of the explanations given by Mr. Jadeja, learned counsel, that the time started to run on the day he was supplied with the copy of judgment and decree. Having said so, I dismiss the preliminary objection and I now move to the substance of the appeal itself. In the first ground of appeal, the learned counsel submitted that there is no legal obligation to pay the other half pay is supported by the decision of this court in Yusuf

Mzowa v. Spgnalet (1978) LRT No.28. Not only that decided case is against the demands of the respondent, but even the Security of Employment Act, 1964 is in support of that claim. But the respondents on the other hand are of the view that the Court of Appeal in an unreported case of Esso Tanzania Ltd. v. Kaijage, Civil Appeal No.6/1989 where the Court of Appeal ordered reinstatement of the employee and payment of the arrears of salaries for the duration when he was unlawfully terminated. They also submitted that, that the Court of Appeal in Kaijage's case" (supra) had settled two conflicting views of the High Court as regards payment of the other half when the employee was suspended on half pay upon his acquittal. Those cases were that of Yusuph Mzowa (supra) and Tanzania Harbours Authority v. Wondelin Lodge, High Court Civil Appeal No.8/1986. Now, from the submissions of the learned counsel and those of the respondents, it is clear that the issue before the trial court was the other half of the salaries of the respondents, during the time of their suspension. I say so because as I had shown before, the report of the labour officer in his paragraph 3 which I reproduced above, related to the half salary payment which the respondent were entitled during their suspension. The labour officer had reported that the respondents had not been paid Vi salary in the period of their suspension pending determination of the criminal case, from the months of April, 1999 to 4/9/2001. That is why I said that perhaps the parties were not at ad idem as to the period of payment. The labour officer's report was in regard to a half pay of the salary during the pending of the determination of the criminal charge while the respondents were in the view of the half pay withheld by the appellant's company since the respondents were not rendering any services to him. The copies of the cited Court of Appeal decisions were not made available to this court to see exactly what they were about. But from the submissions of the Respondents, there was an issue of unlawful termination of Kaijage in the Esso Tanzania Ltd case (supra) whereas in the case before this court, there is no issue of unlawful termination which had been determined by the subordinate court or this court. The decision in the Esso Tanzania Ltd is similar to that of Georgia Celestine Mtikila v. The Registered Trustees of the Dr es Salaam Nursery School and International School of Tanganyika Ltd, Civil app. No.42/1996 whose copy was made available to me by the respondents. In that case, the Court of Appeal found that once the termination is unlawful, it followed that there was no termination of employment and because in the eyes of the law the employment was not terminated, then the respondent, Mrs. Mtikila was deemed to be in employment for the period in question and consequently, entitled to all benefits enjoyed by an employee who was actually in actual service. Therefore then, both the Esso and Mrs. Georgia Mtikila's cases are distinguished from the case before this court. The issue now is whether, the respondents were entitled to I/2 pay of their salary during the time the criminal case was pending and if acquitted, whether they were entitled to the other half salary. Mr. Jadeja, learned counsel submitted that they were not entitled as supported by the decision in Yusufu Mzowa (supra). Obvious, the decision of the case in Mzowa's case was based on the Security of Employment Act, 1964, which explains what are the entitlement of an employee when charged in a criminal charge. Section 30(3) of the now Revised Security of Employment Act, 387 RE

2002) under the marginal note, criminal proceedings state as follows:- S.30(3): Notwithstanding the foregoing provisions of this section, an employer may suspend on half pay any employee charged with any criminal offence which is also a breach of the Disciplinary Code, or a conviction for which is a breach of the Disciplinary Code, but the suspension of an employee on half pay pursuant to the provisions of this section shall not extend later than the acquittal of the employee on such charge unless another such charge is pending and no employee shall be entitled to be so suspended or shall be suspended on less than half pay.” On the basis of subsection (3) of section 30 of the Security of Employment Act, Cap.387, the respondent’s suspension were lawful because the respondents were facing a criminal charge. Again, the appellant was required by law to pay the respondents half pay of their salaries, which payments ended on the day of their acquittal. Therefore then, taking the report of the labour officer to the magistrate, that the respondents were to be paid /2 salary during the period of suspension, then the trial magistrate was correct to hold so. However, the respondents, under the law, were not entitled to payment of the other half pay withheld by the appellant, and that had never been an issue before the trial court. That disposes the 1st ground of appeal. On the second ground of appeal the appellant urged that the respondents were not entitled to any leave because they were not in work. Mr. Jadeja, learned counsel rightly submitted that the rationale of a leave is to allow an employ time to rest. That is why the Employment Ordinance Cap.360 allowed employees to have one day rest in every seven days of a week and in every year there is an annual leave of seven days for every four full month’s service as per section 25 of the Employment Act, Cap. 366. However, he submitted that the cordlary of this rationale is that when an employee has not put any work he cannot get an off day or leave. This suspended employee does not put any work and therefore cannot get off days and annual leave related to the period of suspension. On the other hand, basing their arguments in the decided case of Georgia Ceiestine Mtikila (supra) the respondents are entitled to annual leave. The relevant part of that decision which is relied upon found at page 10 of the typed judgment reads:- “The trial judge found that the termination of the appellant’s employment was unlawful, and that the appellant was still in the employment of the first respondent. Once that finding was 10 made, that meant that the appellant was entitled to her annual leave for the whole period her employment remained unlawfully terminated, but that the appellant could not have gone on leave during that period because that was the time she was continuously challenging and fighting against the unlawful termination of the employment.” As I said earlier, the Georgia’s Mtikila’s case is distinguished from this one. In that case, the termination was first found to be illegal. Hence, there was no cessation of employment in the eyes of the law by Mrs. Mtikila. Thus, she was entitled to all of the entitlement of any employee. But in this case, there was no termination of employment. Secondly, the suspension was lawful. The respondents were not rendering any services to the appellant. Section 27(1)(a) allows annual paid leave on full four months service. That is when an employee is allowed to have 7 days leave, but if there are no service in the four months, and then in a year, the issue of an annual leave does not arise. The part of section 27(1)(a) of the Employment Act, Cap. 366 provides that:- “Every employee, once in every

calendar year, be entitled to a holiday with full pay at the expense of his employer at the rate 11 of seven days in respect of each period of full four month's service (underline supplied). The condition precedent for the annual leave is rendering of services. If there were no services rendered during that period in question, then I don't see how one could qualify for the paid annual leave. Therefore, leave is conditional upon prior input of actual work. Regard to the 3rd ground of appeal, its answer depends entirely on the second ground of appeal. If the respondents were not entitled to any annual leave for the reason stated, they cannot then be paid any leave allowance for the time of their suspension. Lastly, I agree with the submissions of the learned counsel, Mr. Jadeja that transport allowance is given to an employee to enable him to go to his working place from his home and back home. If he does not go to work then he is not entitled to the transport allowance. The condition precedent to the monthly transport allowance is evidently the fact that he actually goes to work and it is not meant to supplement the employee's income. Once he goes to work, even if he walks, or boards a friend's motor vehicle an employee qualifies for the transport allowance. But while suspended, the transport allowances and other allowances becomes automatically suspended. In the final analysis, except for the 1st ground of appeal which I have already dismissed, then the appeal is allowed on the other three grounds of 12 appeal. In short, the appeal is partly dismissed and partly allowed. Costs will lie where they fall. JAJIKIONGOZI. 1-11-2005 Coram: E. Mbise, DR-HC For the Appellant - Mr. Jadeja For the Respondent - Present in person Cc: Livanga Court: Ruling read on 1/11/2005 in the presence of Mr. Jadeja for the Appellant and Respondents in person. E. Mbise DEPUTY REGISTRAR-HC 1/11/2005

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