

20000619 TZHC Dar es Salaam

DECIDED
19 June 2000

CIVIL APPEAL NO. 42/98 TANZANIA HUMAN RIGHTS COURT • APPELLANT Versus
SAIDI ISSA • RESPONDENT

---, --, ,---, .- .---w IHEMA J: This is an appeal by the Tanzania Harbours Authority from the decision of the Kisumu Resident Magistrates Court (Hon. Mtotele PRM) in Elnplo)111ent &)/93. In that cause SAIDI LSSA !.MBUNDA, now the respondent, had Cause No. filed a complaint, through Mr. G.R.MIHJJ\11UGA a Labour Officer, under Section 132 of the Employment Ordinance for wrongful termination, to wit that he was prematurely terminated four years before reaching the compulsory age of retirement of 55 years. The respondent had deposed in his affidavit dated 14/12/89 that he was born on 14th May 1939., It is important to note here that the affidavit was prepared consequent upon the receipt of the notice of retirement dated August 1989. Indeed it is the contention of the appellant that the official record, ie the East African Cargo Handling Services Ltd Staff Pension Scheme / Application & Admission Form signed by the complainant/ respondent on 10/7/75 and admitted as Exh. D1 at the trial, shows that SAIDI ISSA AMBUNDA the respondent ..., as born in 1934, thus making the affidavit under reference a mere after thought in anticipation of the suit now under consideration. I am inclined to agree with this contention for the obvious reason that the respondent took fourteen years since 1975 when he signed the record form to realise that he was not born in 1934 but on 14th May, 1939. In addition I have found it unacceptable that the learned trial Magistrate did not give exh., D1 the weight it deserves: that the respondent's date of birth, ie 1934 is quite clear from Exh. D1 both in its original as well as photocopy form in the court record. The erasure referred to by the learned Principal Resident Magistrate appears to me to be the work of somebody else after the said document had been tendered, in court otherwise the admissibility of it at the hearing could not have been easily accepted. The appellant has filed five grounds in his memorandum of appeal and for ease of reference I wish to reproduce them hereunder. (i) error in law and fact by learned Principal Resident Magistrate in holding that the matter was not Res Judicata;

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- ,~ .. ' -"! • ,.... 2 (ii) error in 13w in -shifting the burden of proof to the respondent nO\ -J appellant; (iii) error in lnw iJt a, l? .rding meal allowance as well as transp•rt • allowance; (iv) error in law in awarding incidentD.l expen.ses es wen as consulte.tion expen.e.;es without proof::
- (v) error in l.:lw in awarding the plsintiff noi-, re8pondent a cumulative interest of 1o% per month on the decretal. [;>mount from 1st ~hrch 1990 to the date off inal payment On the first ground of appeal it is on record that the learned Principal Resident Magistrate over - ruled, although not in very clear terms, this preliminary point of objection. It i.s on record tha.t the High Court of Tl?..llzania at Mtwara was seized with the Tespondent's applice.tion for lee.ve to apply for I Orders of Certiorari and Mandamu..~ under the Law Reform (Fatal Accidents and Miscellaneous Previsions) .Amendment 1\ct 1968 in Miscelleneou.s Civil Application No. 12/900 In dismissing the application the Court (Kazimoto J) held and I quote:- II It appears to me the objection -should have been b-;i_c:-ed on subsection (2) quoted •. (S0cti0-:, 1B (2) of the Law Reform (Fatal Accident and Miscellaneous PreviF:iow-) Acto Noo 55 of 1968) o T'tle re.snondent retired the applicant on 28/2/90 .. He wa::: bound in law to he.ve filed his application within six months as from 28/2/900 The fact, if any, th,"%t respondent made e:ny misrepresantations to him or to Juwata, are extraneour as far as the •time within which to file •hii:: application for orders are concernedo There was no evidence that the respondent had rescinded his deciziono I am therefore Ga.tiBfied that the application for orders prayed for has been filed six months after the expivy of thE: statutory period and cannot be entertained in la.w" His Lordship, having found for the respondent the Tanzn..riia Harbour}f Authority dismissed the application with costs for being incompetent o It is noted that after the dismiz.sal of the applice.tion for leave to apply for Orders of Certiorari and Mandamus, admittedly to remove into the Hip;h Court and quash the decision of retirement of tie o.pplicant by The Tanzania Harbours Authority on 7th February 1991, the respondent on 1st September 1993 filed a report to the Resident Magistrates Court at Kisutu a" Tuiployment Case No. &l/93, alleging that his termi.ri:i.tion of employment wa<;; p:reml'\ture as he had not attained .
- 0 o o o O O C' ./? ~ 3 thY'nge of compul.c;ory retirement. ThiG then gave rfr•e to the question whether or not the principle of res judicab could be invoked in the situation. Mr. • Erio learned /,dvocnte for appellant ru-gued the.t t~ res judicab. can be . l invoked, while I understood -Ma. •nso The Labour Officer for tho respondent to deny that this point was raised at in the lower cburt. Suffice it to remark regrettably that Ms Ui13o 1 s bold assertion i.s not supported by what fa d~rly on the reco:cd of the nesident Magistrate. Be as it may it is Gettled law that condition;::: for successful invocation of the plea of res judicata are thf:'t the pB.rties in the previous suit must be the same .:>cs in the subsequent e:ui t ancl. that the m~tters at issue frwe been finD.lly disposed of in the previous suit• It i.s app2.rent from the record the.t the two .conditions exir:-t in the matter before me; that is the p. -::rties o.re the 0 same and that my brother Kazimoto J. as he then wan, finelly determined the matter in the miscellaneous Civil Application No. 12/90. Upon dismissing it for being time barred by opera.tion of law. 'The report filed as employment cause is an attempt to circumvent the

Im, ;J,s the respondent' 8 right to bring a cause of o.ction hacJ been extinguir:-hed by operation of le.w. The srnne cannot . ' ----- bL~l}_te.!:t~:iP.~.SLi.-.~}.~::~'. (empha'cis i:, mine). I therefore hold th::it the the learned Principal Resident Magi.r:::ratc i:a.s wrong in deciding tho.t the w:tter before him was not re/3 judicata. Conseq_uentlY the first ground of B.ppea~ ellrceed.s and as the .~eme sufficiently di.sposes of the m;itter in -!hil:: appee.l I hr.i.ve found it unnecessary to deal with thee other ground.s of 0.ppea.l • In the event for the reasono I hc:ive given I e.llow the appeal with costs. The appellant to have his costs in this court r.u3 well e.s the court below • .. ,-,.....: S.IHEMA JUroE --- 16/6/?JJOO COURT: Right of Appeal explained • S .IHEMA JUme 19/6/!JJOO

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