

TANZANIA / JUDGMENT

victoria fisheries co ltd vs julius jwangi another 2007 tzhc 418 11 september 2007

COURT
TZHCDECIDED
11 September 2007

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA AT MWANZA ORIGINAL
JURISDICTION (HC) CIVIL APPEAL NO. 03 OF 2005 VICTORIA FISHERIES CO LTD
APPELLANT VERSUS

1. JULIUS JWANGI..... RESPONDENTS
2. ZAKARIA MGETA

JUDGMENT

MACKANJA.J. The respondent was employed by the appellant has a security guide sometime in July, 1995. That relationship I ended in May, 1996. As a result^ of termination of his employment the respondent lodgejd a complaint with the labour Office in Mwanza which, having failed to reconcile them, referred the dispute to the then Mwanza District Court. The complaint was received and, by it, Employment Cause No. 3 of 1998 was instituted. In that cause the respondent claimed the following employment benefits: unpaid half salaries for April and May, 1996 amounting a sum of 17,500/=; un paid overtime for work done during March, 1996, payment in lieu of 28 days leave which accrued in the sum of Shs. 16,333. and repatriation expenses and allowances to Sumbawanga where he was born. At the end of the trial the learned trial Resident Magistrate awarded the respondent a sum of Shs. 869,667 as repatriation expenses, Shs. 1,665,966 as substance allowance from 21st May, 2006 to 31st November, 2006 and a sum of Shs. 17,500 as unpaid half salaries for April, 1996 and May, 1996. According to the evidence which was tendered in court the appellant demands repatriation to Sumbawanga because that is where he hails from. It is also common ground that at the time of his engagement he was living in Mwanza and that he got wind of the job announcement after reading it on the door of the appellant. He, however, places for repatriation to Sumbawanga because the employer paid for the transport of the respondent's family from Sumbawanga to Mwanza were they joined him. This request, and: the consent, were orally made, he said. Salmin Mashenene (PW3) who was the appellant's accountant, and who recruited the respondent, could not remember where, between Mbeya and Sumbawanga, the respondent went collect his family from. He wound up his testimony by saying that the respondent went to the factory and asked for employment, which he got. The employer did not go to employ the respondent from his place of birth. On his part Muzika Kahanu (DW1)

disputed all the respondent's claims, swearing that he was paid all his rights. It From the above evidence the major it is the appellant's contention in the first and the second grounds of appeal that the trial court errdd in law and in fact in awarding repatriation expenses and substance allowance to the respondent on the basis that the respondent's domicil is Kabwe in Sumbawanga, and thjat had the learned trial Resident Magistrate property appreciated the evidence he would have held that the respondent was recruited and engaged at Mwanza, consequent ijpon which he would have i dismissed that claim. In his submissions Mr. Malongo, learned Counsel for the appellant, argued that the respondent is not entitled to repatriation expenses and allowances because he was engaged at Mwanza under terms of an oral contract. He cited the provisions of section 59(1) read with section 43 of the Employment Act Cap. 366 RE 2002 In support of his argument. On his part the respondent argued that his terms of employment entitled him to the allowances he sought from the trial Court. He finds protection in the provisions of section 35 of the Employment Act. Those where the arguments in!relation to the first two grounds of appeal. I propose to determine them right away because the greater part of the appeal may be determined upon consideration in that behalf. Now, the basis of repatriation expenses and allowances may be found in section 59(1) of the Employment /j^ct which provides thus:- "Every employee who is a party to a contract and who has been brought to th6 place of employment by the employer or by any person acting on behalf of the employer shall have the right to engagement in the following cases -

- (a) on the expiry of the period of service stipulated in the contract;
 - (b) on the termination of the contract by reason of the inability of the employer to fulfil the contract;
 - (c) on the termination of the contract by reason of the inability of the employee to fulfil the contract owing to sickness or accident;
 - (d) on the termination of the contract by agreement between the parties, unless the agreement otherwise provides;
 - (e) on the termination of the contract by order of a court in pursuance of its powers under Part XII of this Act on the application of either of the parties, unless the court otherwise decides".
i! The law as stipulated in section 59(1) of the Employment Act his fairly plain. By its terms an employee will be entitled to those reliefs i where the following i conditions have been satisfied - j
- (a) the employee is a party to a contract Which is provided for under section 46 of the employment Act;
 - (b) a contract under section 46, unless the contest otherwise requires means a written contract;
 - (c) the employee has been engaged at some place other than his place of work. Therefore, in order to qualify for the reliefs the appellant was required to prove that he was engaged under terms which were contained in a written contract. Secondary, had to prove that he was engaged at some place other than Mwanza where he worked. Thirdly, he was required to

prove that he was brought to Mwanza from some some I other place at which he was engaged by the employer or by the some other person acting on behalf of the employer. From the facts of this case the respondent stumbled on the job when he read an announcement on the employer's door. It follows that the place of his engagement is 1 Mwanza. Even assuming that the appellant was engaged I I elsewhere he would not be entitled to be repatriated to i where he was born unless it was also the place of his i engagement. The respondent argues that he is entitled to the benefits because the appellant failed to comply with the provision of section 35 of Employment Act which provides as follows:...

- "(1) Every employer shall prepare and maintain, or cause to be prepared or maintained, a record of contract for every employee employed by him under an oral contract of service, other than a casual employee.
- (2) A record of contract shall contain the following particulars -
 - (a) the name, age and sex of the employee and details of his domicile (i.e. his village, area and region);
 - (b) the name, address and occupation of the employer;
 - (c) the work to be performed by the1employee;
 - (d) the type of contract (e.g. daily, jweekly, fortnightly, monthly); J
 - (e) the place of work;
 - (f) the number of hours normally worked per day, week, fortnight or month, as the case may be;
 - (g) the rate of wages and whether calculated on time, task or piece rates;
 - (h) any other recompense provided for the employee (e.g. a commission, or a share in profits);
 - (i) details of payments in kind (e.g. rations, housing, water);
 - (j) the intervals of payment and, if it is other than the place of work, the place of payment;
 - (k) the full names, addresses and relationships of the employee's1 next-of-kin; (I) any Trade Union membership number of the employee;
 - (m) any National Provident Fund membership number of the employee;
 - (n) any additional terms of the contract;
 - (o) the date on which the employment commenced;

- (p) the date and signatures of the employer and employee, or the employee's thumb print witnessed by a person acceptable to an illiterate employee and who has explained the terms of the contract to him: ' Provided hat it shall not be nedessary to include I in any such record and conditions arising from i custom, usage or law, or any behefits or rights so conferred on employees, and |he provisions of i subsection (5) of this section 3shall not apply in relation to such conditions, rightsj or benefits.
- (3) Every record of contract shall be prepared in duplicate and one copy shall be given to the employee at the time of his engagement (or, in the case of employees engaged before the commencement of Part V of the Security of Employment Act, within one month of such commencement) and one copy retained by the employer; and each copy shall be amended by the employer in the event of any change in the particulars required to be recorded.
- (4) An employer who fails -
- (a) to prepare or cause to be prepared such record: or
- (b) to issue a copy of an appropriate record to the employee concerned, shall be guilty of an offence against this Act and shall be liable upon conviction to a fine not exceeding two thousand shillings. I I I
- (5) Where any dispute arisesj as to the terms and conditions of an oral contract <j>ther than a contract for the employment of a casual employee, and the employer fails to produce a record of such contract made in accordance with the provisions of this section, the statement of the employee as to the nature of the terms and conditions shall be receivable as evidence / of such terms and conditions unless the employer satisfied the court to the contrary". Obviously, as the law provides, section 35 relates to an oral contract of service and an employer may be bound by provisions of section 35(5) only as relates to the particulars which have been stipulated under subsection (2). None of those particulars entitles the respondent to repatriation and expenses and allowances which are concomitant thereto. Upon the foregoing considerations I fully associate myself with the decision of this /court in Secretary General, Mara Conference ofSDA Church v Jophley Maken [HC] Civ App. No. 8 of 1997 in which it was held, inter alia, that proof of a written contract is the document itself. Thus if the appellant was employed under* a written contract of service it was is duty to produce it in' evidence. Section 35 of th(employment Act cannot be (applied to give rights to th' respondent to which he is not entitled. This takes care (the third, forth, and fifth ground of the appeal in which the appellant states that the trial court slept into error by holding that the appellant had a duty to produce documents relating to the history of respondent employment, and that such failure should be construed to mean that the respondent was hiding something. Of course, such a requirement would not only have shifted the onus of proof of the appellant, it would literally require the appellant to prove the respondents case for him. Upon the above considerations the appeal fails, and it is accordingly dismissed. There will be no order to costs as this matter arises from employment. The judgment shall be delivered by the District Registrar. SgcCjoseptiat M . M acfianja JUDGE Mwanza 5th

September, 2007 Date 11/09/2007 Coram : H.S. Mushi Ag. DR Appellant: M r. Nkengi- Advocate present. 1st Respondent: Present in person 2nd Respondent: Absent B/C : Bosco Court:- Judgment has been delivered in the DR's chambers in the presence of Mr. Nkengi advocate on behalf of the appellant and 1st respondent Mr. Julius Jwagi at the absence of the 2nd respondent Mr. Zakaria Mgeta. SgcC: 3-C.S. M u s f i i A.g. WR i 11/ 9 /20 0 7 i I certify that this is a true copy of the original. MWANZA

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