IN THE HIGH COURT OF TANZANIA

AT DAR ES SALLAM

CIVIL APPEAL NO. 176 OF 2008

GEMA SECURITY SERVICE.....APPELLANT

VERSUS

PAUL GERVAS DUWE .....RESPONDENT

JUDGMENT

MWARIJA, J.

The respondent, Paul Gervas Duwe through the Labour Officer, instituted in the District Court of Ilala an employment cause against the appellant, the Director, Gema Security Services Ltd. The claim by the respondent was for payment of Shs. 89,600/= in lieu of two years' leave and Shs. 1,227,650/= for 4,215 overtime hours.

The trial District Magistrate found that the respondent was entitled to an annual leave but was not given the same for two years claimed. He was also found to have worked

outside the normal working hours without being paid for the 4,215 hours worked. The trial Magistrate thus gave judgment for the respondent and ordered the appellant to pay the amounts claimed. Aggrieved by that judgment, the appellant preferred this appeal.

In its Memorandum of Appeal, the appellant who appeared though its Chief of Personnel and Administration Officer, Mr. Mohamed Ally, raised for grounds of Appeal which were to the effect that the trial District Magistrate erred in law and fact in :-

(1). Entertaining the case which was filed under the repealed Employment Act, Cap. 366.

(2) Ignoring to act on the preliminary objection filed on 13th November, 2007.

(3) Basing the decision on the leave and overtime claims which were not specific and clear.

(4) Entertaining the suit which was filed in court on 12th September, 2007 after commencement of the Employment and Labour Relations Act, 2004.

When the appeal was called for hearing on 29/9/2009, I ordered that the same be argued by way of written submissions. According to the schedule, the appellant was required to file its written submissions on 13/10/2009. The respondent was to file his replies on 3/11/209 and rejoinder, if any, by the appellant was to be field on 13/11/2011. The appellant filed what it considered to be its submissions on the scheduled date. The respondent did not file any replies thereto. I shall therefore proceed to decide the appeal on the basis of the submissions filed by the appellant. In its document which was intended to be written submissions, the appellant merely repeated the four grounds of appeal stated in its Memorandum of Appeal. It reiterated the points which form the grounds of

its dissatisfaction with the trial court's judgment. In grounds No. 1 and 4, the appellant's contention is that the employment cause was wrongly filed and entertained in the District Court because at the time when the case was instituted, the Employment Act Cap. 366 had been repealed and replaced by the Employment and Labour Relations Act, No. 6 of 2004. Further, in ground No. 3, it was contended that although that point was raised as a preliminary objection, it was not decided by the trial court.

To begin with ground No. 2, it is true that the appellant filed a notice of preliminary objection on 13th November, 2007 which was to the effect that the trial court did not have jurisdiction to entertain the suit on the ground that the same was instituted after the Employment and Labour Relations Act 2004 had come into force. That contention by the appellant is not correct. According to the proceedings, that point was argued in the course of

hearing and the finding was embodied in the judgment. In my considered view although the trial District Magistrate did not determine the preliminary objection first before he proceeded to hear the case the procedure which he adopted did not occasion any injustice to the parties. This is because an order overruling a preliminary objection may be made and the reasons thereto can later be embodied in the judgment. That ground of appeal is therefore without merit.

Ground No. 3 of the appeal is equally without merit. According to paragraph 3 (a) of the complaint the respondent claimed for two years unpaid leave entitlement. In his evidence he said that although he was entitled to be paid a fare annually when going for leave, the appellant did not pay him for the two years within which he was in the employment of the appellant. He also claimed under paragraph 3(b) of the complaint and in his evidence that he

was not paid overtime for the whole period of two years despite the fact that he worked for 4,215 hours of extra time.

The appellant did not seek for further and better particulars of those claims. It's representative did, instead, adduce evidence to the effect that the respondent was paid the claimed amount of overtime entitlement through his monthly salaries. That shows that the appellant properly understood the nature of the two claims, a claim for an amount payable as leave entitlement for two years, and an amount payable for overtime work for 4,215 hrs. It cannot now be heard to say that the claims were not specific and clear. Raising that point at this stage amounts to an afterthought.

Coming now to grounds No 1 and 4, it is true that the Employment Act, the Act under which the claim was brought, was repealed by the Employment and Labour

Relations Act No. 6 of 2004 which came into force on 20th December, 2006. Following the repeal of the Employment Act and after enactment of Employment and Labour Relations Act, followed by coming into force of the Labour Institutions Act, No. 7 of 2004, adjudicative jurisdiction of labour matters was exclusively vested into the High Court, Labour Division. That appears to be the basis of the appellant's contention in grounds No. 1 and 4 of appeal that the trial magistrate erred in entertaining the respondent's claim. That point which was raised by the appellant in the District Court was rightly dismissed by the trial District Magistrate. S. 103 of the employment and Labour Relations Act which repealed, among other, the Employment Act, introduced savings and transitional provisions which were set out in the 3rd schedule thereto. Item 11(2) of that schedule provides as follows:

" Any claim arising under the repealed laws before the commencement of this Act shall be dealt with as if the repealed laws has not been repealed."

There was no dispute that the claim arose in October, 2006. According to the labour officer's report the respondent's employment was terminated on 8/3/2006. That was before the commencement of the Employment and Labour Relations Act. As stated by the Labour officer in paragraph 6 of the report therefore, under the above cited provision the case was to be dealt with under the Employment Act. For that reason, I find the appellant's contention that the claim was wrongly filed and entertained under the repealed Employment Act to have been misconceived. Grounds No. 1 and 4 of appeal are therefore found to be lacking in merit.

In the final analysis and on the basis of the foregoing reasons, the appeal is accordingly dismissed. Since this is a labour dispute, I make no order as to costs.

A.G. Mwarija

JUDGE

6/4/2011

06/04/2011

Coram: Hon A.G. Mwarija, Judge

For the Appellant –

For the Respondent – ... Absent

CC: Butahe

Judgment delivered.

Order : Parties to be notified of the judgment.

A.G.Mwarija

JUDGE

6/4/2011