

THE PARTIALLY ADDRESSED QUESTION: IS WRONGFUL TERMINATION OF EMPLOYMENT A TORT IN TANZANIA?

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ABSTRACT

This paper sets to answer the question whether wrongful termination of employment is a tort in Tanzania. It begins by examining the background to the question and it proceeds to analyse the same at common law. The legal position in Tanzania is examined by basing on the case of Kihanira Kalunge Kibaya and Mrs Georgia Mtikila. The discussion observes that though the wrong is recognised in Tanzania, it is not recognised to the extent of awarding damages in tort. The discussion concludes that wrongful termination of employment in Tanzania is not a tort in practice except probably in theory.

Key words: Wrongful termination of employment, tort

1.0 BACKGROUND

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In 1988 February 26th, the Court of Appeal of Tanzania, delivered its decision on the case of **Kihanira Kulunge Kibaya v. United Africa Company of Tanzania Limited**¹. The material facts in this case were that the appellant was employed in a managerial capacity by the respondent with effect from 6th March, 1975, eventually progressed to that of technical communicator which he held up to the time when his employment was terminated. He was terminated on the ground that the company's businesses by operations were deteriorating and was terminated in accordance with the regulations of the company. In the opinion of the Court of Appeal the company did not adhere to 'FILO', that is, 'first in last out' principle in its downsizing strategy. He was so senior in position and no one else in that section had been declared redundant. The court in deciding in favour of the appellant held that wrongful termination of employment has no effect in law, that it does not bring to an end a contract of service.

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In 1989, Michael Wambali, writing on the role of Court of Appeal, in his article entitled, "The Court of Appeal of Tanzania and the Development of the law of Torts"², commented on the very decision saying that the court made some historical break-through by recognising the existence of the tort of wrongful termination in our law. The court however, never stated anywhere that the wrong committed by the respondent was tortious in nature nor did it demonstrate, at least impliedly, through award of damages that a tort was created. The long-standing decision of the House of Lords in **Addis v. Gramophone Co Ltd.**,³ on the similar point was not referred to nor distinguished. This has created a number of questions over time from scholars and practitioners doing employment law and those doing the law of torts. This article is set to re-examine the decisions in *Kihanira (supra)* and *Mrs. Georgia Mtikila*⁴ and thus be able to state in clear terms whether or not wrongful termination is a tort in Tanzania.

1.2 Introduction

The relationship between an employer and an employee is contractual in nature. The general body of employment law and some rules of contract therefore govern it.⁵ At the formation stage we have ordinary concepts of invitation to treat and an offer coming into play. The performance stage is normally demonstrated by doing the work one is employed to do and earning his salary in return for the same. The termination of employment is by way of notice, retirement, redundancy, death or frustration of contract. In case of breach of contract of employment, one is entitled to remedies already available in that domain of law. Parties are entitled to remedies which were/ are in contemplation of the parties to contract at the formation of the contract⁶. This means, the whole issue of contract of employment falls squarely in the domain of employment and contract law.

2.0 COMMON LAW POSITION

At common law, there is a general principle laid down by the House of Lords in **Addis v. Gramophone Co Ltd.**⁷, that where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, nor for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The material facts of this case were that the appellant was employed by the defendants as manager of their business at Calcutta, he was being paid weekly and a commission on the trade done. He could be dismissed by six months' notice. In October, 1905, the defendants gave him six months' notice, but at the same time they appointed someone else to act as his successor, and took steps to prevent the plaintiff from acting any longer as a

manager. In Dec 1905, the plaintiff came back to England and brought an action to court for wrongful dismissal. The decision was in favour of the defendant.

Some years later, under Lord Denning's patronage, non-pecuniary damages gained a foothold in situations where mental distress was foreseeable. In **Cox v. Philip Industries Ltd.**⁸, such a claim first succeeded by an employee who had been demoted in face of a promise of promotion made in order to deter him from accepting a competitor's offer. The Court of Appeal in 1987 in the case of **Bliss v. S.E. Thames Regional Health Authority**⁹, considered itself bound by *Addis* and rejected the claim of an employee who had been forced to undergo a psychiatric examination after an angry dispute with a co-worker.

Commenting on the decision in *Addis* (supra), Nelson Enonchong¹⁰ states that the ratio in *Addis* is to the effect that in an action for breach of contract, the plaintiff is entitled to recover **damages only for loss flowing from a breach of contract; he is not entitled to damages for loss flowing, not from a breach but, from circumstances accompanying a breach**, even if those circumstances show harsh, oppressive, malicious, insulting or contumelious behaviour on the part of the defendant (emphasis mine).

In Canada, in 1989, in the case of **Vorvis v. Insurance Corporation of British Columbia**¹¹, the Supreme Court by (a bare) majority rejected the particular employee's claim for aggravated and punitive damages. The majority opinion by McIntyre, J. allowed that aggravated damages were possible in claims for wrongful dismissal, particularly where the conduct was independently actionable; not so, however, whereas here the supervisor's harassment proceeded the dismissal and could not therefore be regarded as having aggravated the damage resulting from the dismissal.

John G. Fleming¹², points out the main factor behind the behaviour of the court for not awarding damages to cover non-pecuniary situations being the fact that courts are determined to protect institutional defendants against vindictive jury awards of non-pecuniary, even more of punitive, damages - a prospect without parallel elsewhere. He hints however, that in England and Canada courts would not dismiss the possibility of tort damages in a suitable case.¹³ In summary, wrongful termination of employment at common law is treated as a breach of contract and no tortious damages are awarded.

3.0 THE LEGAL POSITION IN TANZANIA

The concept 'wrongful termination of employment', as applied in *Kihanira's Kalunge Kibaya* and *Mrs Georgia Mtikila* is synonymous to 'wrongful dismissal' at common law. It means bringing to an end a contract of employment without following the laid down procedures between the parties to a contract of employment and the law governing such arrangements.

For the first time in the history of Tanzania, the High Court of Tanzania in the case of **Mrs Georgia Mtikila v. The Registered Trustees of the DSM Nursery School of Tanganyika Ltd.**¹⁴, expressly stated that the defendant interfered with the plaintiff's contractual relationship with the first defendant as change of ownership does not rupture continuity of employment. That the second defendant was liable in tort to the plaintiff. The material facts in this case were that the plaintiff was employed as a secretary cum treasurer by the first defendant with effect from first January, 1983. She held that post at the time when her employment was terminated. In May 1984, the first defendant ceased. The International School of Tanganyika Ltd., the second defendant took over the DSM Nursery School. Hence, the plaintiff was given a notice for termination of employment. The court keenly observed that since the first defendant ostensibly approved the integration and dissolving the trust under which the first defendant's school was incorporated and assigning its assets to the second defendant was null and void. It followed therefore, that the termination of plaintiff's employment was wrongful.

General breaches of contract of employment in Tanzania are issues governed by the law of employment Cap. 366 and supplemented by the general principles of common law, by virtue of s. 2 of the Judicature and Application of Laws Ordinance (hereinafter referred to as JALO) Cap. 453. Common law principles come in because to-date the Employment Ordinance has not been updated to provide answers encountered within the relationship of employer and employee. Wrongful termination is one of those areas, which has recently attracted the attention of the public. It is an area regulated by general principles of common law. The authority in question is found in the House of Lords decision in **Addis (supra)**. It was stated categorically that damages were limited to earnings lost during the period of notice which the employee was entitled and did not include damages for the manner of dismissal.

Applying s.2 of the JALO, one would say that wrongful termination of employment does not entitle one any damages which go beyond pecuniary loss. However, what is noticed from the two courts' decisions is that both courts avoided being bound by the legal principle in **Addis** but without bringing forward what they aimed to do. For instance, Mkwawa, J. in **Georgia Mtikila**, despite stating categorically that the first defendant committed a tort of wrongful termination of employment, when it came to assessment of damages, only pecuniary loss was awarded. This is loss which is normally awarded in contract, that is, the loss which parties contemplate that they would suffer. This is exactly what Chitty on Contracts¹⁵ states. He states that a servant who has been wrongfully dismissed is entitled to such damages as will compensate him for the wrong he has sustained. The normal measure of damages is the amount the plaintiff would have earned under the contract.

To recognize that wrongful termination of employment is a tort, requires one to be awarded damages that one reasonably foresees that would flow from a wrong committed. That means, it is a compensation not only for direct financial losses but also for such kind of losses that are non-pecuniary. In view of this, it is submitted that wrongful termination of employment is a tortious conduct in Tanzania purely in theory but it hasn't been translated into obvious actions yet. The High Court judge in Mrs Georgia Mtikila's Case, never awarded general damages requested by the plaintiff. The Court awarded **arrears of remuneration** which was payable to her under contract of employment at the time when she was wrongfully terminated and paid interest at 30 % per annum from the date of termination to the date of the judgement and costs of the suit. The court never awarded **general damages**. General damages are a head that would have taken care of the tortious part of the wrong. Similarly, the Court of Appeal in Kihanira Kulunge Kibaya's case, the court awarded **arrears of remuneration** which were payable to him under his contract of employment at the time when he was wrongfully terminated. The court never awarded anything extra to reflect the element of victimization as it observed in the proceedings. Both courts have demonstrated reluctance to imply damages flowing from a wrong under reasonable foreseeable contemplation of parties.

4.0 CONCLUSION AND LEGAL IMPLICATIONS

The main cause of grievance in wrongful termination of employment is nothing else but dismissal of an employee from employment rather than the **manner** in which the same is terminated. It is not surprising therefore to find a court of law becoming furious about the wrong but awarding nothing beyond pecuniary loss shown to have been suffered. It will also be in order when one says that **wrongful termination in Tanzania is not a tort**. If it were a tort then in no way could the courts close their eyes in awarding damages in the two cases discussed above. Although the judgement of Justice Mkwawa does state that wrongful termination of employment is a tort, it does not tackle the juridical basis for its recognition in this context. It is therefore suggested that the legislature should intervene and rectify the anomaly rather than courts venturing into creating a remedy for such victims.

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NOTES & REFERENCES

- ¹ Civil Appeal NO. 36 of 1987, Dar es Salaam
- ² *East Africa Law Review: A Journal of Law and Development* Vol. 16 Dec.1989 NO. 2 pp.213 -228 at p. 225
- ³ [1909]A.C. 488
- ⁴ Civil Case NO 64 of 1990, Dar es Salaam High Court Registry (un-reported)
- ⁵ Bowers.J. and Honeyball,S. (1998) *Labour Law* (5thEd) p.46
- ⁶ See s. 73 of the *Law of Contract Ordinance*, Cap.433
- ⁷ Rogers,W.V.H. (ED) (1979) *Winfield & Jolowicz on Tort* (11Ed) p.1
- ⁸ [1909] A.C.488
- ⁹ [1976] 1 W.L.R. 638 (Lawson,J.)
- ¹⁰ [1987] I.C.R. 700
- ¹¹ [1989]I.S.C.R 1085
- ¹² "Breach of Contract and Damages for Mental Distress", in *The Oxford Journal of Legal Studies* Vol. 16 pp. 617 - 640 at p. 620 ; Poole,J. (1996) 'Damages for breach of Contract - Compensation and 'personal Preferences': Ruxley Electronics and Construction Ltd v Forsyth', *The Modern Law Review* Vol. 59 pp. 272 - 284
- ¹³ [1989] I.S.C.R 1085
- ¹⁴ "Is Wrongful Dismissal a Tort?", in *The Law Quarterly Review*, Vol. 106 pp. 8-11, at p.9
- ¹⁵ The High Court of New Zealand in *Whelan v. Waitaki Meats Ltd* [1991] 2 N.Z.L.R. 74. refused to follow Addis and awarded damages for mental distress, anxiety, humiliation, loss of dignity and injury to feelings.
- ¹⁶ Civil Case NO. 64 of 1990 - decision delivered on 12th August 1993
- ¹⁷ *Chitty on Contracts* 22nd ED p. 496
- ¹⁸ Rogers,W.V.H.(ED) Op.Cit. p. 1, 7