IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And MZIRAY, J.A.)

CIVIL APPLICATION NO. 44 OF 2013

MUHIMBILI NATIONAL HOSPITAL..... APPLICANT
VERSUS
COSTANTINE VICTOR JOHN ..... RESPONDENT

(Application For Revision from the decision of High Court of Tanzania, Labour Division at Dar es Salaam)

(Moshi, J.)

Dated the 8th day of February, 2013
in
Revision No. 186 of 2011

RULING OF THE COURT

30th Nov, 2015 & 29th Jan, 2016

MWARIJA, J.A.:

In this application, the applicant has moved the Court to revise the decision of the High Court, Labour Division (Moshi, J.) dated 8/2/2013. The application which has been brought under Section 4(3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] and Rule 65 (1) (2) and (3) of the Court of Appeal Rules, 2009 (the Rules) is supported by an affidavit sworn by Veronica Hellar, the Senior Legal Advisor of the applicant.

The background facts of the application are simple. The respondent is a former employee of the applicant. He was employed on

20/1/1992. He worked in different sections of the applicant Hospital including radiography department. In 2007, he was granted three years study leave to enable him undertake a Diploma course in Diagnostic Radiography (DDR) at the School of Radiography, Institute of Allied Health Sciences. After he had completed the first academic year, he decided to postpone the studies because he was unable to pay fees due to financial constrains. As a result, he applied to return to work during the postponed second academic year. He was granted permission and returned to work in the radiograph (X-ray) department.

Later however, by a letter dated 2/9/2009 (Exh.2), he was transferred from radiography department to nursing directorate. The transfer was to take effect form 7/9/2009. The letter of transfer was followed by another letter dated 25/9/2009 received by him on 25/9/2009. In the letter, he was informed by the applicant that his employment had been terminated because of his absenteeism from work as from 7/9/2009 to 25/9/2009. He was thus required to pay all his outstanding debts and statutory one month salary in lieu of notice of termination of his employment with the applicant.

The respondent was aggrieved by the applicant's decision. He therefore filed a labour dispute in the Commission for Mediation and

Arbitration, Dar es Salaam (hereinafter "the CMA") where mediation was unsuccessfully conducted. The dispute then went for arbitration. In his decision, the arbitrator (P.M. Chuwa) found that the respondent was unfairly terminated and ordered his reinstatement as well as payment of all unpaid salaries from the date of his termination.

The applicant was dissatisfied with the arbitrator's award. It unsuccessfully applied for revision before the High Court, Labour Division (the Labour Court). Aggrieved further, the applicant preferred this application praying for the following:

> *"(a) An order setting aside the High Court decision dismissing the applicant's Application for revision.*
>
> *(b) An order replacing the High Court order of dismissal of the Revision Application with an order granting the same and consequently setting aside the CMA decision.*
>
> *(c) A declaration that termination of the respondent by the Applicant was not unfair."*

The applicant challenged the finding of the Labour Court on five grounds. The substratum of the complaint rests however, on two main grounds:

1. That the learned High Court judge erred in holding that the academic year in which the respondent postponed his studies ended on 7/9/2009.
2. That the learned High Court judge erred in acting on an unreliable letter of the respondent dated 11/9/2009 which neither shows that it was forwarded as intended nor received by the applicant.

At the hearing of the application, the applicant was represented by Mr. Audax Vedasto assisted by Ms. Veronica Hellar, learned Advocates. On his part, the respondent appeared in person and unrepresented by a counsel. Before we proceeded to hear the application on merit, we required the learned counsel for the applicant and the respondent to address us on the issue whether in bringing the application, the applicant has properly invoked the revisional jurisdiction of the Court. Mr. Vedasto submitted in response that by virtue of the provisions of Section 57 of the Labour Institutions Act [Cap. 300 R.E. 2006] (the Act), a party who is aggrieved by a decision of the Labour Court may appeal to this Court on a point of law only. For this reason, Mr. Vedasto argued, since in the case at hand, the applicant is challenging the findings of that Court on matters of facts, it had to come to this Court by way of

revision and that therefore, the applicant has properly invoked the Court's revisional jurisdiction.

The learned counsel went on to argue that although S. 57 of the Act bars institution of appeals from decisions of the Labour Court except on points of law, the provision does not bar an aggrieved party from applying for revision before this Court. He submitted therefore that where a party is aggrieved by a decision of the Labour Court on a finding of fact, the available remedy for him is to apply for revision because the law bars him from appealing on matters of fact. Mr. Vedasto submitted therefore that this application has been properly brought under S. 4(3) of the Appellate Jurisdiction Act.

The respondent did not have any argument to make on the appropriateness or otherwise of the application. This was for obvious reason that the issue is one of law and as stated above, he did not have the services of a counsel.

Having considered the arguments made by the learned counsel for the applicant, we agree with Mr. Vedasto that since by virtue of the provisions of S. 57 of the Act, the applicant is barred from appealing against the findings of the Labour Court on matters of fact, the available remedy for it was to invoke revisional powers of the Court. The principle

as stated in the case of **Halais Pro – Chemie v. Wella A.G.** [1996] TLR 269 is that a party to the proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which, like in this case, are not appealable. The Court held *inter alia* as follows:

> *"A party to proceedings in the High Court could invoke the revisional jurisdiction of the Court in matters which were not appealable with or without leave."*

Since as stated above, the applicant could not appeal on the finding of the Labour Court on matters of fact, the applicant has properly invoked the revisional jurisdiction of the Court by filing this application for revision.

Having so found, we now turn to consider the application on merit. Both parties filed their written submissions in compliance with Rule 106(1) of the Rules. At the hearing, they adopted the submissions and their respective affidavits. Expounding his written submission in support of the first ground, Mr. Vedasto argued that from the evidence, the respondent postponed his studies for academic year 2008/2009 and had thus to resume the studies in the academic year 2009/2010. According to the learned counsel, as evidenced by the respondent's letter dated 28/9/2009 (Exh.5), the date of commencement of that

academic year was 12/10/2009. For this reason, Mr. Vedasto argued that the learned High Court judge erred in holding that the academic year commenced on 7/9/2009. He argued further that the finding was erroneous for two other reasons. Firstly, is that by his letter dated 11/9/2009 (Exh. 16), the respondent notified the appiicant that he would be engaged in supplementary examinations from 14/9/2009 to 15/9/2009. According to the learned counsel, for that reason, the respondent would not have started studies on 7/9/2009 because he ought to have passed the supplementary examinations first. Furthermore, the learned counsel argued, the respondent should have asked for permission to resume studies if it is true that the academic year had started.

Secondly, Mr. Vedasto argued that the letter was wrongly acted upon, because the same was unreliable in that it neither shows that it was forwarded by the Director of the Institute as intended nor received by the applicant. He argued thus that since the letter was not received and acted upon, the respondent did not get permission to go for supplementary examinations and thus his absence from duty was without excusable reasons.

The responded did not make any reply to the oral arguments made by the counsel for the applicant. As stated above, he relied on the written submission which he filed in opposition of the application as well as his counter affidavit. In his written submission, he argued that the fact concerning the date on which the academic year 2009/2010 commenced has been improperly raised by the applicant because it was not an issue both in the CMA and the Labour Court. He submitted however that the period in which he had to work after postponement of his studies was one year which ended on 30/8/2009. He also raised some legal issues, arguing for example, that his termantion was made in contravention of S. 41 (4) of the Employment and Labour Relations Act, 2004. This he said, is because he was at the material time, on study leave. He also argued that his employment during postponement of studies was one of a fixed term contract and that he was, on that ground, not liable to disciplinary measures taken against him by the applicant.

From the submissions, the main issue for our determination is whether or not the learned judge erred in upholding the finding of the arbitrator that the respondent's absence from duty between 7/9/2009 and 25/9/2009 was excusable because the academic year 2009/2010

had commenced. We have to state at the outset that the issue as to when did the academic year 2009/2010 commence formed the basis of decisions of both the CMA and the Labour Court. We do not, therefore, find merit in the respondent's contention that the issue did not arise in the proceedings. We also find that the issues raised by the respondent concerning the nature of his employment are not only legal issues but new matters which were not considered both in the CMA and the Labour Court. The same were therefore improperly raised at this appellate stage of proceedings.

It is not in dispute that the respondent returned to work after he had postponed his studies for the academic year 2008/2009. According to the applicant, between 7/9/2009 and 25/9/2009, the respondent absented himself from work and as a result, his services were terminated. Agreeing with the decision of the arbitrator, the learned High Court judge found that on the date when the respondent was transferred to the nursing directorate, the academic year 2009/2010 had started and for that reason, the period on which the respondent had to work during the postponement of his studies had ended. The learned judge stated as follows:

"However, on 7/9/2009 the applicant wrote a letter of departmental transfer to respondent. The respondent was being transferred from X - Ray department to a nursing department. The transfer was effective irrespective applicant being aware of the fact that the respondent's one year working period was ending and the fact that the respondent had still some exams to undertake; so as to complete studies .... Also the respondent received the letter on 10/9/2009 while preparing for exams; the exams were to start on 14/9/2009 – 18/9/2009. He wrote to his employer informing them of the fact that he had exams for those days..... From the facts; I am of the view, as held by the arbitrator that the respondent had acceptable reasons for not attending work for the reasons that; the applicant had permitted the respondent to go for studies up to 2010. Later on, the respondent was allowed one year postponement of the studies up to 7/9/2009 the respondent wrote to the applicant telling him that he had to sit for exams. So, the applicant should have considered the fact that the respondent was already allowed to go for studies; and the postponed period had ended."

Having gone through the available evidence on record, we are unhesistantly of the view that both the arbitrator and the learned judge misdirected themselves in holding that the absence of the respondent from work between 7/9/2009 and 25/9/2009 was due to acceptable reasons. To start with the respondent's argument that the working period of one year ended on 30/8/2009, that argument lacks substance. In his letter dated 15/9/2009 the respondent applied and was granted permission to work during the postponed academic year 2008/2009. The relevant part of the letter reads as follows:

> *"Kutokana na sababu hizo naomba kurudi kazini sehemu ya idara ya x-ray ili niweze kuendelea kujifunza kwa vitendo mwaka wa masomo 2009/2010 nitakapomaliza kulipa ada na kuruhusiwa kuendelea na masomo 2009/2010."*

By that letter, whose relevant part has been quoted above, the respondent requested to suspend his study leave and return to work until the end of academic year 2008/2009. His request was granted and had therefore to remain on duty for that academic year. The period which he had to work during the postponement of his studies was for this reason, not a calendar year but an academic year.

With regard to the date on which the academic year 2009/2010 was to commence, the same is specified in the respondent's letter dated 28/9/2009 (Ekxh.5). In that letter, he states as follows;

> *"Baada ya kumaliza kipindi cha mwaka mmoja, nachukua nafasi hii kutoa taarifa kwamba baada ya kufanya mitihani ya marudio (supplementary) ambayo ilianza tarehe 14/9/ 2009 – 15/9/2009, kutokana na majibu yaliyotolewa tarehe 25/9/2009 nimefanikiwa kufanya vizuri katika mitihani niliyofanya hivyo kutakiwa kuendelea na masomo katika mwaka wa masomo 2009/2010 ambao unaanza 12/10/2009 nikiwa naingia mwaka wa pili."*

The literal translation of this statement is as follows:

> *"After having completed a period of one year, I take this opportunity to give an information that after having sat for supplementary examinations which began on 14/9/2009 – 15/9/2009, from the results which were released on 25/9/2009, I have managed to do well in the examinations which I had sat for and have been required to continue with studies in the academic year 2009/2010 which*

commences on 12/10/2009 when I will be entering the second year."

It is clearly evident from the respondent's own evidence that the second academic year commenced on 12/10/2009. He was therefore supposed to be on duty until that date. He ought, as a result, to have excusable reasons for his absence from 7/9/2009 – 25/9/2009. According to the evidence on record, the only reason for his absence is contained in his letter dated 11/9/2009. In the letter, he notified the applicant that as from 14/9/2009 to 15/9/2009 he would be doing his supplementary examinations. Although as argued by Mr. Vedasto, the respondent's absence within that period is not excusable because he ought to have asked and obtain permission instead of merely notifying his employer about his absence, even if the duration of supplementary examinations is to be excluded from his period of absence between 7/9/2009 and 25/9/2009, the respondent would still have been absent for unexplained period of 7 days between 19/9/2009 and 25/9/2009.

It is on the basis of these reasons, we stated above that both the arbitrator and the learned judge misdirected themselves on the evidence by erroneously holding that between 7/9/2009 and 25/9/2009, the academic year 2009/2010 had started thus justifying the respondent's

absence from duty. Had they properly considered the evidence on that point of fact, they would have found that the respondent's absence from work was without excusable reasons.

On the basis of the above stated reasons, we hereby grant the application. In the exercise of the powers conferred on the Court by S. 4 (3) of the Appellate Jurisdiction Act, we hereby revise and set aside both decisions of the Labour Court and the CMA. The termination of the respondent is, as a result, found to have been based on justifiable reasons.

DATED at **DAR ES SALAAM** this 25th day of January, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL