IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., LILA, J.A. And WAMBALI, J.A.)

CIVIL APPLICATION NO. 187/18 OF 2018

1. ELIA KASALILE
2. NYAMONI WARIOBA
3. VISCAL KIHONGO
4. KINSWEMI MALINGO
5. RINDSTONE BILABAMU EZEKIEL
6. DEODATUS MKUMBE
7. AZIEL ELINIPENDA
8. RITA MINGI
9. ADROPHINA SALVATORY
10. ELIZABETH EDWARD BITEGELE
11. DAUD CHANILA
12. SUSAN SAMSON
13. JOSEPH FRANCIS SUNGUYA
14. CONSTANTINE NJALAMBAYA
15. CAROLINE L. MUTAGWABA
16. MARIANA MAKUU
17. NZIGU FAUSTINE
18. MACHUMBANA MCHELELI

..... APPLICANTS

VERSUS

INSTITUTE OF SOCIAL WORK ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mjasiri, Mmilla, Mkuye, JJ.A.)

dated the 10th day of April, 2018
in
Civil Appeal No. 145 of 2016

.....

RULING OF THE COURT

5th November, 2018 & 25th March, 2019

LILA, J.A.:

The applicants' employment was terminated by the respondent consequent upon which they registered a dispute with the CMA. Both the

applicants and respondent were aggrieved by the CMA decision. Each of them preferred a revision application to the High Court (Labour Division) which were consolidated and determined in Consolidated Revisions No. 187 and 199 of 2013. Still aggrieved, the applicants filed an appeal and the respondent filed a cross appeal to the Court which were heard and determined in Civil Appeal No.145 of 2016. Undaunted, the applicants preferred the present application for review.

This review application arises from the aforesaid Courts' decision (Hon. Mjasiri, JA, Mmila, JA and Mkuye, JA) in Civil Appeal No. 145 of 2016 dated 10th April 2018. It is predicated under section 4(4) of the Appellate Jurisdiction Act Cap. 141 R.E 2002 as amended by Act No. 3 of 2016 (The AJA) and Rules 66(1) (a) and 66(6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by an affidavit sworn by Mr. Audax Kahendaguza Vedasto, the applicants' counsel.

Briefly, the facts leading to the institution of the present application is this. The present 18 applicants were among the 21 employees who were employed by the respondent in various capacities. The record is silent on the status of each applicant. It is apparent, however, that they were either Assistant Lecturers or Tutorial Assistants. Their employment was terminated by the respondent following a Disciplinary Committee meeting

held by the respondent. That termination was challenged by the applicants before the Commission for Mediation and Arbitration (CMA). For avoidance of doubts and ease reference we quote, in extenso, the finding of the CMA as hereunder:-

> *"Kutokana na aina ya ushahidi huo ni rai ya tume kwamba walalamikaji hawakupewa nafasi ya kusikilizwa na kujitetea (right to be heard) dhidi ya tuhuma za mgomo walizokuwa wanakabiliwa nazo kabla ya kuachishwa kazi, hivyo basi pamoja na kwamba mlalamikiwa alikuwa na sababu za msingi za kusitisha ajira za walalamikaji, alisitisha ajira hizo bila ya kufuata/kuzingatia taratibu zilizowekwa kisheria hivyo usitishwaji wa ajira za walalamikaji haukuwa halali kwa mujibu wa matakwa ya Sheria ya Ajira na Mahusiano Kazini Na. 6/2004."*

It is noteworthy here that the above is what has been taken by the High Court to mean that termination was **substantively proper but procedurally unfair.**

The CMA went ahead to consider the reliefs sought by the applicants. In its ruling, the CMA paraphrased the reliefs sought by the applicants before it thus:-

"Walalmikaji kwenye CMA F No. 1 waliomba kurudishwa kazini (reinstatement) au kulipwa fidia isiyopungua mishahara ya miezi 12 kwa kila mfanyakazi , notisi, likizo, kiinua mgongo, Alawansi za matibabu, usafiri, umeme, na nyumba kwa kila mmoja, malipo ya nyongeza za mishahara yao, Gharama za kuendesha mgogoro, malipo ya makato ambayo mwajiri wao alikuwa akiwakata kinyume cha sheria, Malipo ya kujikimu toka walipoachishwa kazi, Gharama za kusafirisha mizigo kurudi sehemu walipokuwa wanaishi kabla ya kuajiriwa, Malipo ya michango yao katika mfuko wa jamii pamoja na vyeti safi vya utumishi."

In awarding the reliefs, the CMA had this to say:-

"Baada ya kutazama mazingira halisi ya jinsi zoezi zima lilivyofanywa, muda ambao walalamikaji wamekuwa nje ya ajira na athari mbalimbali ambazo katika hali ya kawaida mtu yeyote mwenye uwezo wa kufikiri analazimika kuamini kuwa zimewapata walalamikaji, tume inaamuru walalamikaji walipwe fidia ya mishahara ya miezi 12 kwa kila mlalamikaji, kiinua mgongo kwa kila mmoja kwa muda alifanya kazi katika taasisi ya ustawi wa jamii, pamoja na mshahra wa mwezi mmoja (1) badala ya notisi, malipo hayo yakiwa ni kwa mujibu wa vifungu vya 40(1)(c) na 44(1)(d) na (e) vya Sheria ya Ajira na Mahusiano Kazini Na. 6/2004.

Walalamikaji hawastahili malipo mengine yoyote kwa kuwa mbali na kutaja kwenye viapo vyao hakuna ushahidi wa vielelezo kuthibitisha madai hayo hasa baada ya kupingwa na mlalamikiwa."

Unhappy with the findings of the CMA, both sides preferred revision applications to the High Court (Labour Division). As aforesaid, they were consolidated and heard in Consolidated Revision No. 187 and 199 of 2013. Like the CMA, the High Court was of the view that termination of service was substantially proper but the procedure followed was unfair. A one month salary in lieu of notice was maintained while the award of twelve months salary pay was reduced to four month salary pay. Severance pay was also set aside. The High Court declined to order reinstatement of the applicants.

As it were, both sides felt aggrieved. While the applicants filed an appeal to the Court, the respondent filed a cross appeal which were heard and determined in Civil Appeal No. 145 of 2016. In its decision, the Court substantially agreed with the findings of both the CMA and the High Court and, in part, stated:-

"Having so discussed, we find that the suit involved all the appellant; and that since the appellants were not charged and heard before being terminated from their

employment, it is obvious that the respondent violated the cardinal principle of right to be heard. Consequently, the appellants' termination was void and of no effect.

In the final event, we find the appellants' appeal meritorious and allow it, while the respondent's cross appeal has no merit and dismiss it in its entirety. Hence, since the appellants were denied their fundamental right to be heard, we quash all the proceedings of the CMA and the High Court and set aside their decisions thereof. We further order that the appellants may, if they so wish, institute proceedings against their employer before the CMA so that their rights can be determined. Given the fact that this matter originates from a labour dispute, we order that each party shall bear its own costs."

The decision of the Court aggrieved the applicants. They are of the view that there are errors apparent on the face of it resulting in the miscarriage of justice. They consequently preferred the present application for review which is based on two grounds that:-

"(a) That the Honourable Court, having found that the termination of employment of the applicants was unfair substantively and procedurally and that their appeal succeeded, erred in law not to

remedy them with the reliefs prayed and/or provided by the law;

(b) *That the Honourable Court, having not found any problem with the proceedings and with the orders of the CMA and the High Court that held the termination unfair procedurally and that granting some reliefs in result and having heard and determined all employment complaints lodged by the applicants against the respondent's decision to terminate their employment, erred in law to quash such proceedings and such orders and also to order the applicants, if they so wish, to institute proceedings against their employer before the CMA for determination of their rights."*

In addition to filing an affidavit in support of the application, the applicants dully and timely filed written submission elaborating the grounds upon which the application is based. In opposition, the respondent filed an affidavit in reply as well as a reply written submission.

Before us when the application was called on for hearing was Mr. Audax Kahendaguza Vedasto, learned advocate, who entered appearance representing the applicants. He also held the brief of Mr. Emanuel Safari,

learned advocate, for the respondent who could not enter appearance on account of being bereaved.

At the outset Mr. Vedasto informed the Court that he had instructions from Mr. Safari to proceed with the hearing of the application and that the latter urges the Court to adopt and take into consideration the contents of the filed reply written submission in determination of the application and that he had nothing to add. On his part, Mr. Vedasto also urged the Court to adopt the written submission filed and made some few elaborations, which we have noted are contained in the written submission.

Admittedly, the submissions by both sides are long and supported by various court decisions. We highly appreciate the efforts made by counsel of the parties which resulted in the lucid and elaborate submissions which, no doubt, will assist the Court reach a just decision. We commend them for that. We, however, propose to refer to them whenever we find it relevant and desirable.

As we were about to commence hearing of the application, Mr. Vedasto brought to the attention of the Court the concern raised by Mr. Safari by way of a letter regard being non- inclusion of Madam Justice Mkuye, JA. who formed part of the panel which determined the matter

now subject of this review application. Mr. Vedasto had no problem with the constituted panel of justices. We proposed to provide our decision as part of this ruling.

We agree with Mr. Safari that the former panel constituted of Honourable Justices Mjasiri, Mmilla and Mkuye and that Honourable Justice Mjasiri retired from service. The present panel is constituted of Honourable Justices Mmilla, Lila and Wambali. Mr. Safari has indicated that he is alive of the provisions of Rule 66(5) of the Rules which require a review application as far as practicable to be heard by the same justice or bench of justices that delivered the judgment. We entirely agree with him that his contention is the correct position of the law. We should, however, quickly inform him that assignment of cases to justices and constitution of panel of justices is purely an administrative function vested with the Honourable Chief Justice. We are unable to speculate why he decided to constitute the panel the way he did. However, like Mr. Vedasto, we see no harm with the change of members of the panel particularly so when we consider that one of those justices who sat in that appeal has prevailed. After all, the law permits such change.

Another preliminary matter raised by Mr. Safari is that a judgment of the Court in Civil Appeal No.145 of 2016 dated 10/4/2018 subject of this

application for review does not exist. He accordingly urged the Court to strike out the application. To say the least, this amounted to a preliminary objection brought through the backdoor. This is unacceptable. That notwithstanding, we wish to remind Mr. Safari that under Rule 39(9) of the Rules, the date of judgment is the date of delivery of that judgment. The extracted order in the record (page 86-87) is clear that judgment of the Court subject of this application for review was delivered on 10/4/2018 which is the date reflected in the notice of motion. The date appearing in the Court judgment (4/4/2018) is simply the date it was composed and signed by the honourable justices.

We have duly considered the arguments by counsel of the parties. The applicants complaints, comprehensively considered, seem to suggest that the dispute between the parties has been exhaustively determined by the Court save for the reliefs granted to the applicants not being spelt out clearly in accordance with section 40(1) of the Employment and Labour relations Act, No. 6 of 2004 (ELRA) and the order quashing the proceedings of the CMA and High Court and a direction that the applicants, if they still wish, may institute proceedings against their employer before the CMA so as to determine their rights.

As alluded to above, this is an application for review. The Court's power to review its own decision is restrictive in scope. The grounds upon which such an application can be entertained are well spelt under Rule 66 (1)(a) to (e) of the Rules. That aside, the Court has developed some principles to be observed by the Court when exercising such powers. For instance, in **Chandrankat Joshubhai Patel v. The Republic,** [2004] TLR 218 having examined a number of Indian decisions the Court stated:

> *"... Such an error must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinions. That a decision is erroneous in law is no ground for ordering review. Thus the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third, the error must have resulted in miscarriage of justice.".*

It is worth noting here that the above cited case was decided in the backdrop of the 1979 Court of Appeal Rules. However, closely examined, the principles laid therein were the ones that were restated in Rule 66 of the 2009 Rules. [See **Omary Makunja Vs. Republic,** Criminal Application No. 22 of 2014 (Unreported)].

We can also borrow a leaf from a persuasive decision of the Court of Appeal of Kenya in **National Bank Of Kenya Limited v. Ndungu Njau** [1997] *eKLR* which provides a guide when it stated:

> *"...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.* ***The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.***
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> *In the instant case* ***the matters in dispute had been fully canvassed before the learned Judge.*** *He* ***made a conscious decision on the matters in controversy*** *and exercised his discretion in favour of the respondent.* ***If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.*** *Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.* ***An issue***

which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it." [Emphasis added].

As would be gleaned from the cited decisions, the Court has powers, in the exercise of its powers of review, to correct an error or omission provided that such error exists, is manifest on the face of the record and has resulted in the miscarriage of justice.

The issue for determination by the Court is whether the two grounds for review raised by the Applicants fall squarely within the ambits of the conditions for the grant of review.

We will start with the first ground. Principally, the applicants' complaint is that after the Honorable Court had found that the termination of employment of the applicants was unfair substantively and procedurally and that their appeal succeeded, the applicants were left to go home with nothing because the Court did not grant them with the reliefs prayed and/or provided by the law.

According to Mr. Vedasto after the Court had found that the termination of the applicants' employment was void and of no effect, it meant that there was no termination and the innocent applicants deserved to be awarded an order of reinstatement. In bolstering his argument he

referred us to the persuasive decision of the House of Lords of England in the case of **Sun Life assurance Company v. Jervis** (1944) 1 All ER 469 at page 470-1. He also contended that as the law, section 40 (1) of the ELRA, provides for three possible consequences in case the court finds that there is unfair termination the Court omitted to make an order as to which amongst the three reliefs the applicants are entitled to. Put it simply, Mr. Vedasto contended that, the Court made an omission to consider the issue of reliefs.

On his part, Mr. Safari is emphatic that the orders made by the Court allowing the appeal and dismissing the cross appeal, quashing all the proceedings of the CMA and the High Court and setting aside their decisions thereof and ordering the applicants to institute proceedings against their employer before the CMA if they still wish their rights be determined are sufficient reliefs.

We have carefully examined the record and the judgment of the Court, in particular, and we are satisfied that in grounds 6, 7, 8 and 9 of appeal the applicants' complaints were in respect of both the CMA and the High Court not making an order of reinstatement instead of ordering payment of compensatory wages.

As demonstrated in the above quoted part of the Court's judgment, the Court agreed with both the CMA and the High Court that the termination of employment of the applicants was void and of no effect following failure by the respondent to charge and accord the applicants the right of being heard. The applicants' appeal was accordingly allowed. It is, however, apparent that nothing was said about the reliefs.

We have indicated above that the CMA, after being satisfied that the applicants' termination of employment was substantively proper but procedurally unfair, it awarded the applicants some reliefs which were however reduced by the High Court as indicated above. The Court is, in its judgment, silent on whether the reliefs awarded by the High Court were maintained or not. This was definitely an apparent error and as rightly submitted by Mr. Vedasto, the applicant left the Court not knowing their fate. The error occasioned injustice to the applicants.

Given the fact that the Court sitting on review can correct any omission done in its decision, we think we are endowed with powers to consider the issue of reliefs and make a finding thereon.

As rightly submitted by Mr. Vedasto, the law [section 40(1) of ELRA] provides for the rights of the employee whose employment is brought to an end by the employer unfairly. That section states:-

"If an arbitrator or labour court finds a termination is unfair, the arbitrator or court may order the employer-

(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the employee was absent from work due to unfair termination: or

(b) To re-engage the employee on any terms that the arbitrator or court may decide: or

(c) To pay compensation to the employee of not less than twelve months remuneration."

It is vividly clear that the arbitrator or court has, save for the compensatory wages which has the stipulated statutory minimum number of months payable, the discretion to award any of the above stipulated three reliefs once it finds that the termination of employment is unfair. This being a judicial function, the discretion must judiciously be exercised. This is the position of the law as it now stands. It vests the arbitrator and the court with the discretion to decide which remedy or relief fits certain circumstances. There must, however, be justification for the decision to be made.

Mr. Vedasto's contention that since the termination of employment was found to be unfair then the innocent applicants ought to have been reinstated is interesting but this is a Court of law hence bound to apply the law as it is until it is either amended or declared null and void through proper procedures.

Further, according to the principles for review set in the case of **National Bank Of Kenya Limited v. Ndungu Njau** and **Chandrankat Joshubhai Patel v. The Republic** (supra), the arbitrator and the High Court cannot be faulted for opting to order the applicants be paid compensatory wages instead of being reinstated. Even section 40(1) of ELRA provides for that discretion (See **International Medical & Technological University v. Eliwangu Ngowi**, High Court (Labour Division, DSM, Revision No.54 of 2008 (unreported) cited in the book THE NEW EMPLOYMENT AND LABOUR RELATIONS LAW IN TANZANIA, An Analysis of Labour Legislation in Tanzania, pages 142-144). The exercise of discretional powers is not a ground of review. The two decisions are very clear that it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other

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ground of review.

Upon our serious consideration, we are inclined to agree with the award granted by the CMA indicated above. In arriving at that finding, the CMA reasoned thus:-

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"Ni rai ya tume kwamba ombi la kuwarudisha kazini walalamikaji linawezekana lakini kwa aina ya shughuli zinazoendeshwa na tasisi husika na muda ambao mgogoro huu umechukuwa nafasi za walalamikaji zitakuwa zimechukuliwa, hivyo dai hili la kurejeshwa kazini litakuwa gumu kutekelezwa."

It is doubtless that the matter has taken too long to be concluded. The record bears out clearly that the dispute was registered at the CMA on 2/9/2011. The CMA pronounced its verdict on 11/4/2013, just close to one and a half years after the matter was registered. The CMA found that to be a long time. Considering that the respondent was dealing with training, we strongly think, that the CMA was justified to arrive at that decision. It is now over eight years since the dispute was registered at the CMA. We equally think that the grant of an award of reinstatement is improper. We therefore order the applicants be paid their entitlements as were stated by the CMA which not only are in accordance with the law but also commands to reason. The awards by the High Court are hereby quashed and set aside for a simple reason that the compensatory wages awarded are below the statutory minimum and no reason let alone good reason was given for denial of other entitlements.

We now turn to consider the second ground upon which this application is based. It is apparently clear that the CMA, the High Court and the Court concurrently found that the applicants were not afforded an opportunity to be heard before the Disciplinary Committee. This is reflected at pages 78 to 84 of the record of appeal (pages 23 to 29 of the typed copy of the Court's Judgment). It is crystal clear that the proceedings which resulted in the applicants' termination of services were conducted by the disciplinary Committee. It is, as amply shown above, before this Committee where the applicants were not properly charged and were denied the right to be heard. We, in the circumstances, agree with Mr. Vedasto's submission that it was incorrect for the Court to hold at page 79 of the record that:-

> *"In our view, after the High Court ruled that the appellants were not given opportunity to be heard in the Disciplinary Committee of which we subscribe, it was required to nullify the proceedings and the decision of the CMA and order of the appellants to be served properly and heard before the Committee, instead of proceeding to determine the application on merits as it did."*

The same error was repeated at page 84 (page 29 of the copy of typed Court's judgment) of the record where the Court stated that:-

"Hence, since the appellants were denied their fundamental right to be heard, we quash all the proceedings of the CMA and the High Court and set aside their decisions thereof."

Since the applicants were denied the right to be heard only before the Disciplinary Committee, the proceedings which were supposed to be quashed and nullified were those of the Disciplinary Committee only not those before the CMA and the High Court. We are accordingly convinced that the Court made an error and the same is manifest on the record. We therefore correct that error by removing the above parts of the Court's judgment and replace them with the words "*we quash all the proceedings of the Disciplinary Committee and the decision thereof.*" It therefore follows that the proceedings before the CMA and the High Court remain intact and valid. And, the Court in its judgment, as rightly submitted by Mr. Vedasto, did not fault them in any way. Similarly, the order by the Court that "*we further order that the appellants may, if they so wish, institute proceedings against their employer before the CMA so that their rights can be determined*" was also erroneously made. Given the fact that the proceedings before the CMA are still valid instituting another proceeding before it would be undesired. That was an error apparent on the face of

the record which we hereby corrected by removing it from the Court's judgment.

In fine, the application is granted to the extent indicated herein. Each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 20th day of March, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL