IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 316/12/2020

NATIONAL MICROFINANCE BANK..... APPLICANT

VERSUS

1. **LEILA MRINGO**
2. **YAHAYA JUMA NDAO**
3. **CROSSMAN GODFREY MAKERE .....RESPONDENTS**

(An Application for Review against the Judgment and Order of the Court of the Appeal at Tanga)

(Mziray, Mwambegele, Kerefu, JJA.)

Dated the 20th May, 2020
in
Civil Appeal No. 30 of 2018

RULING OF THE COURT

4th & 7th June, 2021

MUGASHA, J.A.:

The applicant has brought this application seeking a review of the Judgment of this Court (**Mziray, Mwambegele, Kerefu, JJA.**) in Civil Appeal No. 30 of 2017 on account of a manifest error on the face of record which has occasioned a miscarriage of justice. The application made by notice of motion is predicated under Rule 66 (1) (a) and (2) of the Court of Appeal, Rules, 2009.

The background of this application as gathered from the notice of motion, the affidavits and documents accompanying the application is briefly as follows: Following termination of their employment by the applicant, the respondents successfully challenged the termination in the Commission for Mediation and Arbitration (CMA). Although the CMA found that the applicant had valid reasons to terminate the respondents, however she had not complied with the prescribed procedures and thus an order to **re-engage** them or else pay each respondent twelve months' salary in terms of section 40(3) of the Employment and Labour Relations Act [CAP 366 RE. 2002] (the ELRA).

Aggrieved, the applicant unsuccessfully filed a revision in the Labour Division of the High Court which ordered that the respondents be paid compensation of twelve months' salaries on account of unfair termination. The High Court purported to act under section 40 (1) (c) of the ELRA. Further discontented, the applicant appealed to the Court raising three grounds of complaint to the effect that: **One,** the High Court erred in law by taking into consideration matters that were not in dispute for determination; **two,** the High Court erred in law for the improper interpretation of Rule 12 of the Employment and Labour Relations Code of

Good Practice Rules, 2007 GN No 42 of 2007; and **three,** the High Court erred in law by holding that the respondent should be reinstated instead of one option of reliefs under section 40 (1) of the ELRA. Having considered the reliefs on reinstatement and re-engagement and that the available reliefs prescribed under section 40 (1) (a), (b) and (c) must be read disjunctively, the Court made a finding to the effect that:

> " .... *We thus agree with Mr. Kamala that by ordering reinstatement and compensation of twelve months" salaries conjunctively, the High Court fell into error. It should have ordered disjunctively as CMA did."*

Thus, the Court finally held as follows:

> " .... *We allow the appeal of the appellant bank to the extent stated. In consequence whereof, we set aside the order and decree of the High Court granting the reliefs conjunctively. In substitution thereof,* ***we order the appellant bank either to re-engage the respondents in their employment in terms of section 40 (1) (a) of the ELRA or, if she does not want to do so, to pay each respondent twelve months' salaries as dictated by section 40 (3) of the same Act..."***
>
> [Emphasis supplied]

It is against the said backdrop, the applicant filed the present application whereby as earlier stated, is moving the Court to review its Order on grounds stated in the notice of motion as follows: -

(a) This Honourable Court ordered the applicant to re-engage the Respondents under section 40 (1) (a) of the Employment and Labour Relations Act CAP 366 (ELRA) whereas the said provisions refer to reinstatement.

(b) This Honourable Court ordered compensation of twelve months but went ahead to direct compensation under section 40(3) of the ELRA whose interpretation would lead to absurd consequences and miscarriage of justice against the objective and spirit of ELRA.

The application is accompanied by an affidavit sworn by Consolatha Resto, the principal officer of the applicant and it has been challenged by the respondents through the affidavit in reply of **HEKIMA MWASIPU,** learned counsel for the respective respondents. Parties have filed written submissions in support of their arguments for and against the grant of the application which they adopted at the hearing.

At the hearing, the applicant was represented by Mr. Paschal Kamala, learned counsel and Mr. Yona Lucas, learned counsel appeared for the respondents.

It was Mr. Kamala's submission that, the review is sought particularly on the portion of the Court's decision which ordered the applicant to re-engage the respondents, however, in error, the Court referred to section 40 (1) (a) of the ELRA instead of section 40 (1) (b) which specifically prescribes a relief of re-engagement unlike the provision cited in the Judgment which refers to a relief for reinstatement. It was contended that, while reinstatement implies that the contract of employment has been revived together with the incidental rights during the period of absence in terms of section 4 of the ELRA, re-engagement means commencement of a fresh relationship of employment which might not be similar to the old arrangement. In this regard, Mr. Kamala argued that, since the Court ordered the re-engagement under section 40 (1) (a) of ELRA and not section 40 (1) (b) of ELRA, that constitutes a manifest error on the face of the record which has to be reviewed so as to put in place a correct provision of the law under which a relief of re-engagement in the employment is envisaged, that is; section 40 (1) (b) of the ELRA.

In addressing the aspect of miscarriage of justice, it was submitted for the applicant that, if the judgment and order of the Court is to be maintained as it is, this will mean that the respondents are entitled to be paid salaries from the date of termination to the date of full compliance with the order of the Court. He argued this not the spirit envisaged for the relief of re-engagement envisaged under section 40 (1) (b) of the ELRA which does prescribe a relief on payment of salaries from the date of unfair termination.

On the other hand, Mr. Yona challenged the application on ground that it is all out to challenge the decision of the Court which is not a ground for review and as such, he urged the Court to dismiss the application. He submitted that since the Court was satisfied that the respondents were unfairly terminated, as held by both the CMA and the High Court, the Court in the impugned decision, had in mind a relief of reinstatement as envisaged under section 40 (1) (a) of the ELRA and not otherwise. Apart from supporting what was earlier on submitted by his counterpart on the differences on the legal meaning of re-instatement and re-engagement and related in the distinct reliefs, he argued that, much as the word re-engagement being a slip of the pen in the impugned decision, there is no

manifest error apparent on the face of the record to warrant the review as such, it is deserving to have the application dismissed.

We are aware that, the principle that a review is by no means an appeal in disguise because it is a matter of policy that litigation must come to an end. (**RIZALI RAJABU VS REPUBLIC**, Criminal Application No. 4 of 2011 (unreported)). There is also no doubt that this Court has jurisdiction to review its own decision in any given case which is aimed at ensuring that a manifest injustice does not go uncorrected See **CHANDRANK JOSHIBHAI PATEL vs R.** [2004] TLR. 218. The grounds on which this Court could review its decisions are at present limited to only five as listed under Rule 66 (1) (a) to (d) of the Rules namely: **One,** the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; **two,** a party was wrongly deprived of an opportunity to be heard; **three,** the court's decision is a nullity; or **four,** the court had no jurisdiction to entertain the case and **five,** the judgment was procured illegally, or by fraud or perjury.

We have carefully considered the rival arguments of the parties and in disposing of this application we shall be guided by Rule 66(1) (a) of the

Rules under which the review is sought. Since this is a matter related to the reliefs for unfair termination, we begin with the governing provision of the law that is is section 40 of the ELRA which stipulates as follows:

> *40.-(1) Where 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 period that the employee was absent from work due to the 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.*
>
> *(2) As order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.*
>
> *(3) Where an order to reinstatement or re-engagement is made by an arbitrator or Court and*

the employee decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months' wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

As earlier stated, parties locked horns as to whether the present application meets the threshold of a review. While the learned counsel for the applicant was of the view that it is the provision of the law which has to be reviewed for it to be compatible with the ordered relief for re-engagement, Mr. Yona viewed the envisaged relief for reinstatement to be discerned from the provisions of the law cited in the Court's decision.

In terms of the provisions of section 40 (1) (a) of the ELRA, where the arbitrator or Labour Court finds that termination is unfair, it may order the employer to reinstate the employee from the date of termination without loss of remuneration during the period of absence. In determining Civil Appeal No. 30 of 2017, it is glaring as earlier pointed out, the Court was satisfied that the respondents were unfairly terminated. However, the Court faulted the High Court which ordered reinstatement and compensation of twelve months' salaries conjunctively and then proceeded to order that the respondents be re-engaged in terms of section 40 (1) (a)

of the ELRA. Thus, next for consideration is whether this was an error apparent on the face of the record? While the applicant's counsel submitted that it is the cited section 40 (1) (a) of the ELRA which constitutes a manifest error on the face of the record, Mr. Yona was of the view that since the Court had envisaged to reinstate the respondents the phrase re-engagement is a mere slip of the pen and not a manifest error on the face of the record.

What constitutes an error must be patent on the face of the record and not that which can be established vide a long drawn process of argument with a likelihood of having two diverse opinions or conclusions. This was emphasized in the case of **CHANDRAKANT JOSHUBHAI PATEL VS REPUBLIC** (supra) whereby the Court quoted with approval an excerpt from the learned authors of MULLA, 14th edition at page 225 as follows:

> *"An error apparent on the face of the record must be such as can* ***be seen by one who runs and reads, that is, an obvious and patent mistake*** *and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions... A mere error of law is not a ground for ordering review... it can*

be said of an ***error that is self-apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."***

[Emphasis supplied]

There are no hard and fast rules that can be laid down to categorize what may constitute errors apparent on the face of the record. Each case would depend on its own facts, but in each case the basic principle underlying review must be considered; which is whether, the Court would have acted as it did if all the circumstances had been known. **(See - NGUZA VIKINGS @ BABU SEYA AND ANOTHER vs REPUBLIC.,** Criminal Application No. 5 of 2010 (unreported) **and CHANDRANK JOSHUBHAI PATEL vs REPUBLIC.** (supra),

Guided by the stated principles governing a review on what constitutes an error apparent on the face of the record, it is our considered view that, the order that the respondents be re-engaged in the employment in terms of section 40 (1) (a) which prescribes a relief of reinstatement is obvious and a patent mistake which is self-evident in the impugned decision constituting a manifest error apparent on the face of

the record. We think, this addresses the concern of the respondents' counsel who viewed such error as a mere slip of the pen. We say so because as there are no hard and fast rules that can be laid down to categorize what may constitute errors apparent on the face of the record, each case would depend on its own peculiar facts like what surrounds the present application.

In this regard, although we are satisfied that the present application meets the threshold for a review however, we do not go along with Mr. Kamala's line of argument who viewed that what should be reviewed is the provision of the law. We are fortified in that account because a mere error of law is not a ground for ordering review.

As we are satisfied that the order of the Court has a manifest error which is apparent on the face of record, it is deserving to review the Court's order as we hereby do. We accordingly reverse our decision dated 22/4/2020 by removing an order that "In *substitution therefor, we order the appellant bank to re-engage the respondents in their employment in terms of section 40 (1) (a) of the ELRA...*". In terms of Rule 66 (6) of the Rules, the order is modified and substituted with an order that: "In

substitution therefor, we order the appellant bank to reinstate the respondents in their employment in terms of section 40 (1) (a) of the ELRA...". We make no order as to costs.

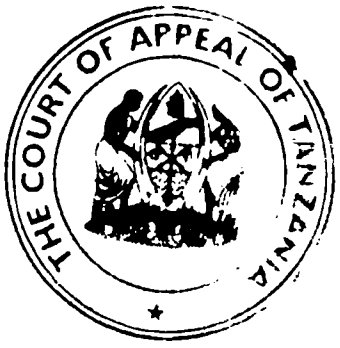
DATED at **TANGA** this 5th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 7th day of June, 2021 in the presence of Mr. Yona Lucas, learned counsel for the Respondents also holding brief for Mr. Pascal Kamala, learned counsel for the Applicant, is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL