IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 23 OF 2020

CMA-CGM TANZANIA LIMITED ..... APPELLANT

VERSUS

JUSTINE BARUTI ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)
(Mashaka, J.)

dated the 23rd day of May, 2018
in
Revision No. 28 of 2016

.....

RULING OF THE COURT

31st May & 15th June, 2021

NDIKA, J.A.:

The appellant, CMA-CGM Tanzania Limited, lost in Labour Revision No. 28 of 2016 in the High Court of Tanzania, Labour Division at Dar es Salaam in which she contested an award made by the Commission for Mediation and Arbitration (henceforth "the CMA") in favour of the respondent, Justine Baruti. In its decision dated 23rd May, 2018, the High Court (Mashaka, J., as she then was) upheld the CMA's finding that the respondent's termination of employment by the appellant was substantively unfair. The court also upheld the CMA's order that the respondent be

reinstated to his position of employment in terms of section 40 (1) (a) of the Employment and Labour Relations Act, 2004 (now Cap. 366 RE 2019) (henceforth "the ELRA") without loss of remuneration or, in the alternative, that the appellant pay the respondent compensation pursuant to section 40 (3) of the ELRA. Aggrieved, the appellant has appealed to this Court on four grounds as follows:

> *"1. The Honourable Judge erred in law in dismissing the issue of jurisdiction of the Commission for Mediation and Arbitration to entertain the dispute before it. The Honourable Judge did not address herself on the question whether the Referral Form CMA F1 which was allegedly filed by the respondent herein to the Commission for Mediation and Arbitration prior to serving the employer was filed in accordance with the law.*
>
> *2.The Honourable Judge erred in law in holding that the appellant herein failed to prove valid reasons for termination thereby dismissing Revision No. 28 of 2016.*
>
> *3. The Honourable Judge misdirected herself in upholding the arbitrator's decision which was based on the alleged failure by the appellant herein to tender at the CMA printouts to corroborate the offences with which the respondent had been charged despite the fact that the said offences were admitted by the respondent and in law did not require proof.*

4. The Honourable Judge erred in holding that the arbitrator's decision was not based on factors which were beyond the two issues raised before the Commission for Mediation and Arbitration, namely:

1) Whether there was a fair reason for termination; and

2) What are the reliefs to which the parties are entitled."

The present appeal has been greeted by two sets of preliminary objection lodged on 5th March, 2020 and 26th May, 2021 challenging its competence. In the first set, the respondent demurred, on two points, that:

"1. This Court has no jurisdiction to entertain the 1st, 2nd and 3rd grounds of appeal as they are not based on points of law as required under section 57 of the Labour Institutions Act, No. 7 of 2004. (They are based on points of facts while others on mixed points of law and facts).

2.That the record of appeal is incomplete for want of a copy of certificate of delay issued by the High Court of Tanzania, Tanga Registry on the 23rd May, 2019, a letter from the Registrar informing the appellant that the proceedings are ready for collection dated 23rd May, 2019, a notice of address dated 11th June, 2018 served to (sic) the appellant on the 15th June, 2018, a letter applying for transfer of Revision No. 28 of 2016 from the High Court of Tanzania, Tanga Registry to Dar es Salaam

Registry, a letter from the Registrar of the High Court informing the parties on the transfer of Revision No. 28 of 2016, and order of the Court transferring Revision No. 28 of 2016 into (sic) Dar es Salaam Registry and therefore, incurably defective for contravening the provisions of rule 96 (1) of the Court of Appeal Rules, 2009 as amended from time to time."

In the second set, the respondent raises two further points as follows:

"1. That the appeal before the Court is hopelessly time-barred.

2. The appellant is not entitled to rely on exclusion of [the] period required for [the] preparation and delivery of the copy of the proceedings to the appellant for contravening the requirement of rule 90 (3) of the Rules."

At the hearing of the two sets of the preliminary objection, Mr. Daimu Halfan, learned counsel, who teamed up with Mr. Mashaka Ngole, learned counsel, to represent the respondent, argued the points raised in the first set as well as the first point in the second set. He abandoned the second point in the second set.

On the first point in the first set, Mr. Halfan contended that the first three grounds of appeal raise matters of fact as opposed to pure points of law contrary to the dictates of section 57 of the Labour Institutions Act, Act

No. 7 of 2004 (now Cap. 300 RE 2019) (henceforth "the LIA"). He stoutly submitted that a point of law raises a question on the interpretation and application of a rule or principle of law or the Constitution and that such question must be manifest on the record. He was quite emphatic that a point of law would not involve evaluation of the evidence on record. When probed by the Court if he had any authority to support his proposition, he said the definition he gave was his own formulation. Applying his definition as formulated, Mr. Haifan argued that the first ground of appeal was bad for mixing up a point of law alleging want of jurisdiction with a purely factual contention that Referral Form CMA F1 was not duly filed. On the second ground, he claimed that it challenges the finding on the validity of termination of contract of employment which was plainly a factual disputation. As regards the third ground, he contended that it was mixed point of law and fact, not within the Court's jurisdiction. Accordingly, he urged us to strike out the aforesaid grounds of appeal.

Coming to the second point of objection alleging incompleteness of the record, the learned counsel argued that contrary to the dictates of rule 96 (1) of the Rules the record of appeal lacks all the documents mentioned in the notice of preliminary objection. However, he expressed his

cognizance that in terms of rule 96 (6) of the Rules, the Court could grant the appellant leave to lodge the omitted documents by way of a supplementary record so as to perfect the record of appeal.

Finally on the sole point in the second set of preliminary objection, Mr. Halfan assailed the certificate of delay, shown at page 148 of the record of appeal, on two grounds: first, that it wrongly excluded the period for preparation and delivery of the requested copy of proceedings from 31st May, 2018 instead of 1st June, 2018 when the appellant lodged her written request for a copy of the proceedings from the High Court. Secondly, that the certificate of delay reveals no total number of days excluded from the reckoning of the sixty days limitation period prescribed by rule 90 (1) of the Rules. Ultimately, Mr. Halfan urged us to find the certificate of delay defective, and hence the appeal, lodged on a defective certificate after the sixty days limitation period had elapsed, time-barred.

For the respondent, Dr. Wilbert Kapinga, learned counsel, disagreed with his learned friend. While acknowledging that in terms of section 57 of the LIA an appeal to the Court from any proceedings in the Labour Court lay on a point of law only, he submitted that the three assailed grounds of appeal raise points of law. Elaborating on each ground of appeal, he argued

that the first ground raises the issue whether the Referral Form CMA F1 was filed in accordance with section 86 (1) and (2) of the ELRA, which requires a party referring a dispute to the CMA to satisfy the CMA that a copy of the referral has been served on the other parties to the dispute. The said ground, he added, was intended to challenge the CMA's ruling (at pages 205 to 207 of the record of appeal) dismissing the appellant's preliminary objection against the competence of the referral.

As regards the second ground of appeal, Dr. Kapinga contended that it raised a point of law questioning the High Court for finding that there was no valid reason for terminating the respondent's employment in terms of section 37 of the ELRA. Similarly, on the third ground of appeal, he argued that the said ground faults the High Court for a misdirection on the evidence that the appellant failed to tender to the CMA printouts to corroborate the offences with which the respondent had been charged despite the fact that the said offences were admitted by the respondent and in law did not require proof. It was contended, therefore, that the issue was whether the respondent's admission of the offences constituted a valid reason for the termination. Alternatively, relying on **Remigious Muganga v. Barrick Bulyanhulu Gold Mine**, Civil Appeal No. 47 of 2017

(unreported), Dr. Kapinga urged the Court to proceed with the hearing of the appeal upon the grounds of appeal that it will find unobjectionable and discard any of those found to be raising pure factual matters.

Coming to the alleged incompleteness of the record, Dr. Kapinga acknowledged, at first, that all the documents cited by the respondent to be missing were indeed omitted. However, he argued that the appeal was lodged upon a certificate of delay dated 11th December, 2019, which is found at page 148 of the record of appeal. It was his further contention that none of the missing documents were core in terms of rule 96 (1) of the Rules.

Turning to the second set of the preliminary objection, Dr. Kapinga firstly argued that the notice of the preliminary objection was served upon him on Friday 28th May, 2021 in breach of rule 107 (1) of the Rules requiring such an objection to be raised upon three clear days' notice before the hearing scheduled on 31st May, 2021. On that basis, he argued that the second set of preliminary objection ought to have not been entertained.

Arguing the sole point in the second set in the alternative, Dr. Kapinga conceded that the date stated on the certificate of delay for reckoning the

beginning of the exclusion of the period for the preparation and delivery of the copy of the High Court's proceedings should have been stated as 1st June, 2018 instead of 31st May, 2018. However, he urged us to ignore that error because it did not go to the root of the matter nor did it give the appellant any advantage bearing in mind that the appeal was duly lodged on 5th February, 2020, which was about four days before the expiry of the prescribed limitation period of sixty days.

In a brief rejoinder, Mr. Halfan maintained that the essence of the three impugned grounds was wrong factual contentions. He urged us to strike them out. On the missing documents, he reiterated that they were core documents that ought to have been included in the record of appeal in terms of rule 96 (1) of the Rules.

We have carefully examined the record of appeal, the memorandum of appeal and taken account of the contending oral arguments of the learned counsel for the parties. Beginning with the challenge against the first three grounds of appeal, it is common ground that any appeal to this Court from a decision of the High Court, Labour Division is governed by section 57 of the LIA, which stipulates as follows:

> *"Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania* ***on a point of law only.*** *"*[Emphasis added]

At this point, it is pertinent to determine what a "point of law" entails. Certainly, it is not the first time that the Court is confronting such a question. Recently, in yet to be reported cases of **Atlas Copco Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 167 of 2019; and **Kilombero Sugar Company Limited v. Commissioner General (TRA)**, Civil Appeal No. 14 of 2007, the Court defined the phrase "matters involving questions of law only" upon which a party could appeal to the Court from any decision of the Tax Revenue Appeals Tribunal in terms of section 25 (2) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2006 (now R.E. 2019 (henceforth "the TRAA"). Having referred to its earlier decision in **Insignia Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 14 of 2007 (unreported), the Court reviewed the decision of the Supreme Court of India in **Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras** (1957) AIR 49, 1956 SCR 691 as well as that of the Supreme Court of Kenya in **Gatirau Peter Munya v. Dickson Mwenda Kithinji &**

Three Others [2014] eKLR on what amounts to a question of law as opposed to a matter of fact. The Court, then, defined the phrase "question of law" as follows:

> *"Thus, for the purpose of section 25 (2) of the TRAA, we think, a question of law means any of the foilowing:* ***first****, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration.* ***Secondly****, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record.* ***Finally****, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

We are of the firm view that the above definition would apply, *mutatis mutandis*, to the instant appeal concerning a labour dispute. Guided by the said definition, we now answer the issue whether the three grounds raised in this appeal involve points of law.

Beginning with the first ground, we think that its gravamen is clearly jurisdictional. We are persuaded by Dr. Kapinga that this ground raises a point of law as it faults the learned High Court Judge for not addressing her mind to the issue whether the Referral Form CMA F1 was filed in accordance with section 86 (1) and (2) of the ELRA requiring a party referring a dispute to the CMA to satisfy the CMA that a copy of the referral has been served on the other parties to the dispute. Evidently, the said ground had its origin from the CMA's ruling shown at pages 205 to 207 of the record of appeal dismissing the appellant's preliminary objection to the competence of the referral. In our view, the determination of this ground would entail interpretation of section 86 (1) and (2) of the ELRA as well as its application to the facts of the case on the question whether the referral form was duly filed and served.

Equally unmerited is the complaint regarding the second ground of appeal. The essence of this ground is a contention that the Honourable High Court Judge erred in law in holding that the appellant failed to establish a valid reason for terminating the respondent's employment. This is evidently a point of law fitting neatly within section 37 (1) and (2) of the ELRA, which not only places on the employer the onus of proving validity

and fairness of termination of employment but also defines what a valid reason for termination is:

> *"37. -(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason-*
>
> > *(i) related to the employee's conduct, capacity or compatibility; or*
> >
> > *(ii) based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*
>
> *(3) It shall not be a fair reason to terminate the employment of an employee –*
>
> *(a) for the reason that the employee –*
>
> > *(i) discloses information that the employee is entitled or required to disclose to another person under this Act or any other law;*
> >
> > *(ii) fails or refuses to do anything that an employer may not lawfully permit or require the employee to do;*
> >
> > *(iii) exercises any right conferred by agreement, this Act or any other law;*

(iii) belongs, or belonged, to any trade union; or

(iv) participates in the lawful activities of a trade union, including a lawful strike;

(b) for reasons –

(i) related to pregnancy;

(ii) related to disability; and

(iii) that constitute discrimination under this Act.

(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99."

The second ground, in our view, questions the application of the above provisions to the facts of the case in the High Court's finding that no valid reason for termination had been established. It is a pure point of law.

The challenge against the third ground of appeal is no better. It is similarly desolate. As rightly argued by Dr. Kapinga, this ground, on its face, faults the learned High Court Judge for a misdirection on the evidence on record. As it is apparent that the appellant alleges that the respondent admitted to have committed certain charged offences, it is indeed a question of law, not fact, whether the appellant still had the onus to produce documentary evidence in the form of the printouts alluded to before the CMA to prove the offences. Here the contention is that the

commission of the said offences was a fact that in law required no proof. We thus affirm that the third ground of appeal is a suitable point of law.

Based on the foregoing discussion, we find that the three impugned grounds of appeal present proper points of law. We thus overrule the first point of the first set of preliminary objection.

We now turn to the complaint that the record of appeal is deficient due to the omission of a number of core documents. It is noteworthy that Dr. Kapinga admitted that, indeed, all the documents cited by the respondent to be missing were omitted including the alleged certificate of delay dated 23rd May, 2019. We wish to confirm that the cited documents are certainly missing but that the appeal was lodged on the certificate of delay dated 11th December, 2019, which forms part of the record. The sticking issue, then, is whether the aforesaid omission has a deleterious effect to the competence of the appeal.

Having examined the record of appeal, we go along with Dr. Kapinga that in terms of rule 96 (1) and (2) of the Rules the omitted documents are not core. These mainly cover the initial certificate of delay dated 23rd May, 2019 which seems to have been subsequently cancelled and replaced as

well as documents on the transfer of the proceedings from the High Court at Tanga to the High Court, Labour Division at Dar es Salaam. These documents are not necessary for the proper determination of the points of controversy in the appeal. Certainly, the appeal was not lodged upon the above cited initial certificate of delay but the one dated 11th December, 2019 at page 148 of the record of appeal. None of the issues raised in the grounds of appeal questions the propriety of the transfer of the proceedings. The second point of preliminary objection in the first set is similarly devoid of merit.

Turning to the second set of the preliminary objection, we recall that Dr. Kapinga demurred that the notice thereof was served upon him on Friday 28th May, 2021 in breach of rule 107 (1) of the Rules requiring a preliminary objection to be raised upon three clear days' notice before the hearing, in this case the hearing took place on 31st May, 2021. At first, we wish to affirm that the appellant was entitled to a three clear days' notice of the preliminary objection in terms of rule 107 (1) of the Rules. Section 60 (1) (f) of the Interpretation of Laws Act, Cap. 1 R.E. 2019 defines the phrase "clear days" thus:

"60. -(1) In computing time for the purposes of a written law-

(a) to (e) [Omitted]

(f) where there is a reference to a number of ***clear days*** *or "at least" or "not less than"* ***a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen;***

(g) to (h) [Omitted]"[Emphasis added]

In terms of the above provision, the notice served on the appellant on 28th May, 2021 was insufficient because there were only two clear days between its service on the appellant and the hearing schedules on 31st May, 2021. We, therefore, agree with Dr. Kapinga that the respondent contravened rule 107 (1) of the Rules in filing and serving the notice. On account of this infraction, Dr. Kapinga urged us to refrain from entertaining the preliminary objection but then proceeded to reply to Mr. Halfan's submissions on its substance. It is of note that Mr. Halfan did not submit on this issue in his rejoinder.

While we have affirmed the appellant's entitlement to sufficient notice in terms of rule 107 (1) of the Rules so as to prepare a proper response to the points raised and avoid her being taken by surprise, we think that the respondent's contravention would not vitiate or deflate the substance of the

points raised in the notice. If Dr. Kapinga needed more time to prepare, he should have pleaded for it and we would have undoubtedly considered the prayer auspiciously. Given that Dr. Kapinga was prepared to proceed with oral argument on the points raised, we would reject his plea that the second set of preliminary objection should not be entertained.

The above said, we now address the substance of the sole point in the second set. On the issue at hand, it is common ground that the impugned certificate of delay erroneously reckoned the exclusion of the period for the preparation and delivery of the copy of the High Court's proceedings from 31st May, 2018 instead of 1st June, 2018 when the request for the copy was made to the High Court along with the filing of the notice of appeal. We also agree with Mr. Halfan that the total number of excluded days up to 11th December, 2019 when the certificate was issued should have been stated but it was not. We would also add that the impugned certificate was purportedly issue by the High Court, Labour Division at Tanga instead of the High Court, Labour Division at Dar es Salaam which heard and determined the matter following the transfer of the proceedings.

The above patent errors, in our view, vitiate the certificate of delay – see the unreported decisions of the Court in **M/S Flycathcher Safaris**

Ltd. v. Hon. Minister for Lands and Human Settlements Development and Another, Civil Appeal No. 142 of 2017; **Hamisi Mdida and Another v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 59 of 2020; and **Ecobank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 142 of 2017. It is, therefore, pertinent to ask what would be result from the aforesaid defects?

As we held in **Ecobank Tanzania Limited** (*supra*), we do not think the errors complained of should result in the appellant being automatically barred from benefitting from the exclusion of time under rule 90 (1) of the Rules. In our view, the misstatement of the date for reckoning the exclusion in the present matter is an innocuous typographical error. Similarly, the omission to state the total number of excluded days is clearly inoffensive. At any rate, the defects gave no undue advantage to the appellant bearing in mind that the appeal was duly lodged on 5th February, 2020, four days before the expiry of the prescribed limitation period of sixty days. In the premises, in order to facilitate a just and proportionate solution to the defects in terms of the overriding objective under section 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and rule 2 of the Rules we find it fitting to grant the appellant an opportunity to seek rectification of

the certificate of delay from the Registrar, High Court, Labour Division at Dar es Salaam.

Consequently, we order that a rectified version of the certificate of delay be lodged in form of a supplementary record of appeal within thirty days from the date of delivery of this ruling. In the meantime, the hearing of the appeal is adjourned to a date to be fixed by the Registrar.

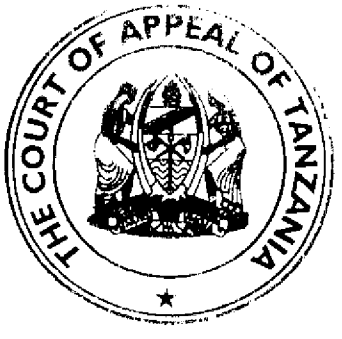
DATED at **DAR ES SALAAM** this 20th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered on this 15th day of June, 2021, in the presence of Ms. Flora Mukasa, learned counsel for the appellant and in the presence respondent in person is hereby, certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL