IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 75 OF 2020

NYANZA ROAD WORKS LIMITED...APPELLANT

VERSUS

GIOVANNI GUIDON...RESPONDENT

[Appeal from the ruling and order of the High Court of Tanzania, at Dodoma]

(Masaju, J.)

dated the 15th day of August, 2019
in
Labour Revision No. 8 of 2016

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JUDGMENT OF THE COURT

9th & 20th August, 2021

MWANDAMBO, J.A.:

The issue involved in the instant appeal revolves around a narrow compass. It relates to the exercise of discretion by the High Court in an application for revision from the decision of the Commission for Mediation and Arbitration (the CMA) rejecting an application for condonation for referring a labour dispute.

The facts giving rise to the instant appeal are by and large not in dispute between the parties. By an agreement dated 7/10/2013, the appellant employed the respondent in the post of project manager for two years commencing on 1/10/2013. That agreement was a renewal of

previous agreements the first having been executed in the year 2007. All appear to have been well between the parties until January, 2014 when the respondent noticed some unusual conduct from the appellant manifested by refusal to pay rent for his house and salaries for March and April, 2014. According to the respondent, the attempts to negotiate termination ended in vain, for on 13/05/2014, the appellant confirmed its decision to terminate the contract. Earlier on, the respondent had attempted to seek the intervention of the Prime Minister but to no avail.

Naturally, the respondent's termination gave rise to a labour dispute which had to be resolved by the CMA upon the aggrieved employee referring to it within 30 days of its occurrence pursuant to rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. However, the respondent failed to do so within the prescribed period. As he was late, he could not refer his dispute without making an application before the CMA for extension of time otherwise referred to as condonation of the delay. Accordingly, the respondent lodged an application before the CMA on 28/08/2014 for that purpose. However, that application hit some procedural obstacles resulting into it being struck out and filing a fresh one on 14/11/2014 which was dismissed on 13/02/2015.

The CMA declined to extend the time upon being satisfied that the respondent had not shown good cause for the delay. Aggrieved, the respondent challenged the decision of the CMA before the High Court by way of revision. Unlike the CMA, the High Court was satisfied that the applicant was known to be surviving on pacemaker medical device and frequently travelling to Italy for medical attention and so he had demonstrated good cause which warranted extension of time. On that score, the High Court (Masaju, J) found merit in that application and granted it resulting into an order quashing the ruling of the CMA and ordering it to determine the labour dispute on its merits. It is that decision which aggrieved the appellant and hence the instant appeal.

The appellant, who was represented by Mr. Ludovick Joseph Ringia, learned advocate, has preferred a memorandum upon three grounds of appeal. However, we think all grounds boil into one major issue, that is to say; whether the High Court was right in holding that the respondent's delay in referring a labour dispute before the CMA was due to his sickness. Initially, the respondent who, during the hearing of the appeal was represented by Messrs. Elias Machibya and Nkumuke Yongolo, learned advocates, had raised a preliminary objection challenging the competence of the appeal premised on section 5(2)(d) of

the Appellate Jurisdiction Act [Cap.141 R.E. 2019] (the AJA). Upon reflection, the learned advocates prayed to abandon the said objection and the Court marked it withdrawn thereby paving a way for the determination of the appeal on its merits.

The learned advocate for the appellant implored the Court to find merit in the appeal on the strength of the written submissions he had lodged earlier on pursuant to rule 106(1) of the Court of Appeal Rules, 2009, henceforth the Rules. He did not find it necessary to be heard orally so did the learned advocates for the respondents who had filed their written submissions in reply pursuant to rule 106(8) of the Rules. Admittedly, the learned advocate for the appellant made fairly lengthy submissions on the grounds of appeal. Without any disrespect to him, we shall not belabor much on them considering that the issue for our consideration and determination revolves around a narrow compass.

The learned advocate's starting point was rule 31 of G.N. No. 64 of 2007 which empowers the CMA to condone any failure to comply with the time frame therein on good cause. Relying on various decided cases by this Court the High Court as well as outside our jurisdiction, the learned advocate argues that condoning or refusing to condone the delay is solely on the CMA's discretion which must be exercised

judiciously in like manner courts do in applications for extension of time. He cited the cases of **Juma Posanyi Madati v. Hambasia N'kela Maeda** [2017] TLS LR 306 and **Amani Girls Home v. Isack Charles Kanela**, Misc. Labour Application No. 20 of 2017 (unreported) to reinforce that proposition. The Court's decision in of **Attorney General v. Twiga Paper Products Limited**, Civil Application No. 108 of 2008 reported as [2011] EA 16 was cited to reinforce the proposition that in considering an application for extension of time, the Court must be guided by reasonable explanation behind the delay.

It is the learned advocate's submission that the respondent did not offer reasonable explanation how his sickness prevented him from referring his dispute timeously before the CMA and in consequence, the CMA rightly refused his application. Contrary to the established guidelines in exercising discretion, the learned advocate argues, the High Court quashed the CMA's decision based on sympathy rather than reasonable explanation justifying the delay. For this proposition, Mr. Ringia relied on the decision of the High Court in **Daphne Parry v. Murray Alexander Carson** [1963] IEA 546 to which this Court subscribed in **Daud s/o Haga v. Jenitha Abdon Mchafu**, Civil Application No.19 of 2006 (unreported). He also referred to the Court's

decision in **Shembilu Shefaya v. Omary Ally** [1992] T.L.R. 245 to reinforce the argument that where sickness is relied on as a reason for the delay, there must be elaborate explanation in the affidavit the extent to which sickness prevented the litigant from taking a step in Court. At any rate, the learned advocate argued, even assuming sickness were to be taken as the reason for the delay in referring the labour dispute before the CMA, there was no material before the CMA on which the High Court could have placed its reliance in holding that the respondent's sickness covered the whole period of the delay.

For the above proposition, Mr. Ringia placed reliance on one of the factors the Court has applied in exercising its discretion in granting extension of time; accounting for each day of delay discussed in various decisions, amongst others**, Bashiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 referred by the High Court in **Waziri Mgovano v. Jenipher Enson Kayani** (2013) LCCD 30, **Elifazi Nyatega & 3 Others v. Caspian Mining Ltd,** Civil Application No. 44/08 of 2017, **Nyanza Co-operative Union (1984) v. BP Tanzania Limited, Jibrea Auction Mart & Court Brokers & Antonia Zakaria**, Civil Reference No. 18 of 2008 (all unreported).

On the basis of the foregoing, the learned advocate urged us to find that the High Court made an error as it did in quashing the decision of the CMA which had rightly exercised its discretion refusing to condone the delay. He implored us to reverse the decision of the High Court and set aside the order condoning the delay.

Not surprisingly, the submissions in reply by the learned advocates for the respondent are essentially to debunk the appellant's submissions and distinguish the authorities cited for being irrelevant. According to the respondent's advocates, the CMA erroneously refused condonation despite evidence before it that the respondent was sick attending medication in Italy. The Court's decision in **Samweli Sichone v. Bulebe Hamis**, Civil Application No. 8 of 2015(unreported) was cited to reinforce the proposition that what amounts to good cause is not defined and so, the respondent's sickness was one of the factors to be considered which ought to have been taken into account by the CMA. For that reason, the learned advocates argued that the High Court rightly held that the respondent's heart complication constituted good cause in extending the time for referring the dispute before the CMA.

Taking the argument further, the learned advocates contended that sickness and for that matter heart complications, was properly relied

upon by the High Court in quashing the decision of the CMA. They sought refuge from the Court's decision in **John David Kashekya v. The Attorney General,** Civil Application No. 1 of 2012 (unreported) in which the applicant's illness was held to be a sufficient cause in extending time. They thus implored the Court to dismiss the appeal and uphold the decision of the High Court.

From the learned advocates' submissions, there is no dispute with regard to the factors to be taken into account in exercising discretion. The authorities relied upon by the learned advocates are quite felicitous to the issue for our determination in this appeal. Without specifically referring to each, we shall have regard to them in determining the appeal.

As alluded to earlier on, the central question for our determination is whether the High Court exercised its discretion properly in quashing the decision of the CMA and condoning the delay on the ground of the respondent's sickness. What appears to be in dispute is whether there was sufficient material before the High Court for the exercise of its discretion in the manner it did.

Before arriving at the impugned decision, the learned Judge was satisfied that the main reason for the respondent's delay was, but his

sickness and medical attention in Italy. Having scanned through the affidavit, counter affidavit and reply before him in an application for revision, the learned Judge set himself to determine the issue whether or not the applicant (now respondent) advanced good cause for the condonation before the CMA. He said as follows:

> *"That said, the court is of the considered position that a Heart failure condition of which the Applicant is a known case to the Respondent and there are medical reports to that effect which was made available to the CMA Tribunal, and that the Applicant was surviving on peacemaker(sic!) medical device implanted into his heart and that the Applicant was frequenting Italy for medical attention of his condition merit good cause for delay hence the need for condonation accordingly upon such facts being made known and proved to the court or tribunal. "[at pages 326 and 327]*

Concluding, the learned judge stated:

> *"That being the case, the CMA Tribunal was wrong when it held that the Applicant had to demonstrate how the sickness prevented him from acting timely for all the time of delay. The sooner the rights to be heard fairly and the legal remedies thereof are appreciated by courts and tribunals the better." [at page* 326-327 of the record of appeal].

Simply stated, the learned Judge was satisfied that the respondent's delay was wholly attributable to his heart complications and the attendant medical attention which is at centre of the appellant's complaint. There is no dispute that the respondent had heart complications and attending medical attention in Italy. The respondent had been implanted with a pacemaker as early as 2007 judged from the document marked annexure MPA 3 at page 51 of the record of appeal. That would suggest that the heart complications did not emerge immediately after the occurrence of the labour dispute. The record shows that the early symptoms of the dispute started as early as January 2014 when the appellant refused to pay rent for the respondent's rented house in Dodoma which was one of the terms of the employment contract. Further, in March 2014 the appellant refused to pay the respondent's monthly salary and that continued in April 2014 reaching a climax on 13/05/2014 when the appellant confirmed the termination of the respondent's employment contract following abortive negotiations for a termination agreement.

What it means by the foregoing is that the dispute on the terms of employment contract had indeed begun much earlier than 13/05/2014. Instead of the respondent referring the dispute to the CMA, he chose to

complain to the Prime Minister's office for intervention as evident at page 46 and 47 of the record of appeal. Even though the respondent had indicated in CMA F1 that the dispute arose on 31/03/2014, the CMA found as a fact that it arose on 13/05/2014 when the appellant terminated the employment. Nonetheless, he did not take any step to refer his dispute to the CMA immediately thereafter. It follows thus that since the CMA ruled that the cause of action arose on 13/05/2014, the respondent had, in terms of rule 10 (1) of G. N. No. 64 of 2007, up to 13/06/2014 to refer his dispute before the CMA which he didn't. From the learned advocates' submissions, there is no dispute with regard to the factors to be taken into account in exercising discretion. The authorities relied upon by the learned advocates are quite felicitous to the issue for our determination in this appeal. There was no dispute that the respondent travelled to Italy for treatment on 25/05/2014; twelve days after the occurrence of the dispute and returned to Tanzania on 9/06/2014 before the expiry of the period for referring the dispute to the CMA. As the record will bear testimony, the respondent referred his dispute with an application for condonation before the CMA on 28/08/2014 long after the expiry of the period for referring his dispute. It is for this reason the CMA was not satisfied that the heart

complications and medical attention were the only reasons for the delay; the respondent had failed to account for a period from 9/6/2014 to 28/08/2014 and hence the dismissal of his application.

From the foregoing, we have no lurking in endorsing the submission by the learned advocate for the appellant that the learned High Court Judge appears to have placed much weight on the respondent's sickness and undeniably he was carried away by sympathy. Judged by the extract from the ruling reproduced above, the learned Judge appear to have in mind expeditious resolution of the dispute to prevail over the compliance with the timelines for referring labour disputes before the CMA. With respect, we do not share his sentiments however well-intentioned they may have been made. **Firstly,** it is long settled that the court's discretion must be exercised judiciously as opposed to capriciousness on the basis of material placed before it for consideration. While there is no dispute on the respondent's heart complications which would ordinarily constitute good cause, the respondent did not satisfy the CMA that the delay was solely due to sickness. We think the learned advocates for the respondent's reference to **John David Kashekya v. The Attorney General** (supra) can only be relevant where sickness is the sole reason for the delay and properly

explained. At any rate, even assuming the respondent's illness prevented him from referring his dispute within the prescribed time, there is no explanation why he delayed in applying for condonation for as long as more than two months reckoned from 13/06/2014. Unfortunately, the learned Judge directed his attention to the respondent's illness in the absence of evidence how was it material to not only the delay but also failure to lodge his application for condonation immediately after the lapse of 30 days.

Secondly, while we agree with the learned Judge on the expeditious resolution of disputes, we think that expeditiousness must be subject to the dictates of the law and justice. As we had occasion to remark in **Independent Power Tanzania Ltd & Another v. Standard Chartered Bank (Hong Kong) Limited,** Civil Revision No. 1 of 2009 (unreported), speed is good but justice is best (at page 26). And by justice we mean justice to both parties to the dispute. In this regard, we think it may not be completely out of place to refer to yet another old maxim; **Vigilantibus non dormientibus jura subveniut** which literally means that the law assists the vigilant and not those who sleep. We have no doubt the passage from an old decision delivered on

20/01/1874 in **Lindsey Petroleum Company v. Hurd and Others** (1873-74) LR 5 PC 221 is still valid where the Privy Council stated:

> *"The doctrine of laches in Court of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waived that remedy, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."*

We appreciate that in terms of rule 3(1) of the Labour Court Rules, G.N. No. 106 of 2007, the High Court exercising jurisdiction as a Labour Court is a court of law and equity which ought to have regard to the fact that the duty to act promptly is not a mere technical aspect without any consequences in case of failure by a litigant to exercise his remedy as it were. We have no doubt that had the High Court have regard to the above, it should not have exercised its discretion in the respondent's favour and quashed the decision of the CMA as it did.

That said, we find merit in the appeal and allow it with net effect that the decision of the High Court is hereby reversed restoring that of

the CMA dismissing the application for condonation. As the appeal arose from a labour dispute in which costs are not ordinarily awarded, we allow the appeal with no order as to costs.

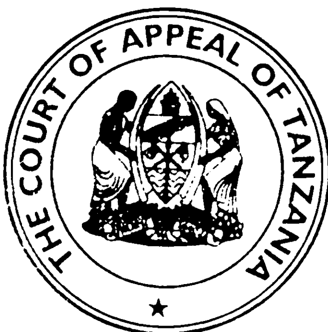
DATED at **DODOMA** this 19th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on 20th day of August, 2021 in the presence of Ms. Margreth Mbasha learned counsel for the respondent who is also holding brief for Mr. Lodrick Joseph for the appellant, is hereby certified as a true copy of original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL