**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**CORAM: MKUYE, J.A., LEVIRA , J.A., And MAIGE, J.A.)**

**CIVIL APPEAL NO. 186 OF 2019**

**MIC TANZANIA LIMITED .....APPELLANT**

**VERSUS**

**IMELDA GERALD .....RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania, Labour Revision at Dar es Salaam)**

**(Aboud, J )**
**22nd day of February, 2019**
**in**
**Labour Revision No. 246 of 2018**

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**JUDGMENT OF THE COURT**

16th & 23rd March, 2022

**MAIGE, J.A.:**

From 12th August 2004 to 3rd day of January, 2012, the respondent had been in the service of the appellant in different capacities. It is not in dispute that, until on the date just referred (henceforward, "the termination date"), the respondent was holding the position of media and advertisement manager. As the record speaks, on the termination date, the respondent was dismissed from her service for the reason of misconduct.

Unhappy with the termination, the respondent commenced, on 31st January 2012, a complaint at the Commission for Mediation and Arbitration ("the arbitral tribunal"). She was challenging the termination of her service for being unfair both substantially and procedurally. After several adjournments subsequent to the closure of the appellant's case, on 11th day of July, 2016, the arbitral tribunal dismissed the complaint for non-appearance of the respondent. Aggrieved, the respondent filed an application for setting aside the dismissal order for the reason that she was prevented from appearing at the arbitral tribunal by sickness and her counsel for the reason of appearance in the High Court. The arbitral tribunal dismissed the application for want of sufficient reasons to justify the non-appearance.

Once again aggrieved, the respondent initiated an application for revision at the High Court, Labour Division ("the Labour Court"). Upon hearing, the Labour Court held that, there was sufficient cause to justify restoration of the arbitral proceedings. It thus reversed the decision of the arbitral tribunal refusing to set aside the dismissal order and ordered for restoration of the same.

The appellant is displeased with the decision of the Labour Court and hence the instant appeal wherein she is faulting the said decision on the following grounds:

1. That the learned High Court Judge erred at law by setting aside the Commission for Mediation and Arbitration's dismissal order without evidence for non-appearance by the Respondent.
2. That the learned High Court Judge erred at law by treating irregularities of Commission for Mediation and Arbitration's records as reasons for setting aside the dismissal order.

In the conduct of this appeal, Messrs. Rahim Mbwambo and Soften Mbedule, both learned advocates, represented the appellant and the respondent, respectively. In their brief oral arguments for and against the appeal, each of the counsel fully adopted his written submissions earlier on filed with some highlights and additions. We commend the counsel for their well-researched submissions which have added value to this judgment.

Having appropriately considered the rival submissions and examined the record, it is desirable that we determine the substance of the appeal. We understand that the appeal at hand arises from a decision on revision against the decision of the arbitral tribunal refusing

to set aside a dismissal order. Much as we subscribe to Mr. Mbwambo that, a trial court or tribunal enjoys a wide discretion to grant or not an application for setting aside a dismissal order, such discretion has as of law to be exercised reasonably, judiciously and on sound legal principles.

Therefore, although as a general rule, an appellate court or revisional court would not interfere with the discretion of the lower court, where the discretion is exercised in violation of the principle above mentioned, the appellate court may, where the result thereof leads to miscarriage of justice., interfere. See for instance, **Swabaha Mohamed Shosi v. Saburina Mohamed Shosi,** Civil Appeal No. 98 of 2018 and **Tusekile Dancan v. Republic**, Criminal Appeal No. 202 of 2009 (both unreported).

It has further to be observed that, the appeal at hand being against a decision of the Labour Court, it is only limited to the extent of points of law and not more. This is according to section 57 (1) of the Labour Institutions Act [Act No. 7 of 2004] ("the LIA").

In the second ground, the Labour Court is faulted for treating the irregularities in the records of the arbitral tribunal as reasons for setting aside the dismissal order. We see no merit on this complaint.

We shall assign our reasons gradually as we go on. The powers of the Labour Court on revision are set out in section 91 (1) and (2) of the Employment and Labour Relations Act [Act No. 6 of 2004] ("the ELRA") as elaborated in rule 28(1) of the Labour Courts Rules (G.N. 106 OF 2007] ("the Rules"). The latter provides as follows:

> *"28-(1) The Court may, on its own motion or on application by any party or interested person, call for the record of any proceedings which have been decided by any responsible person or body implementing the provisions of the Acts and which no appeal lies or has been taken thereto, and if such responsible person or body appears-*
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> *(a) to have exercised jurisdiction not vested in it by law; or*
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> *(b) to have failed to exercise its jurisdiction so vested; or*
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> *(c) to have acted in exercise its jurisdiction illegally or with material irregularity; or*
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> *(d) that there has been an error material to the merits of the subject matter before such responsible person or body involving injustice,*

*(e) the Court may revise the proceedings and make such order as it deems fit."*

What is apparent from the above provisions is that, the Labour Court when exercising its revisional jurisdiction, may revise any proceedings of the arbitral tribunal where among others, it acted on material irregularity or there has been material errors involving injustice. In this case, the Labour Court having examined the record, it established of there being material irregularities and errors which might have created confusion to the counsel for the respondent on the dates set for hearing. On her own words, the Labour Court Judge observed at pages 298 and 299 of the record as follows:

*"I have also noted some material irregularities necessitating revision of the CMA decision. First, the record does not contain all the proceedings as reflected above and in the submissions by the parties. For instance it is on record that ruling to restore the first dismissal order was to be ready in writing by 6/6/2016 according to the Arbitrator's order of unknown date as is reflected in page 12 of the CMA proceedings. That being the case it is vivid clear that the applicant's application for restoration was filed without the order of the CMA which was ready by 6/6/2016. And there is no record of 18/1/2016 the day the Arbitrator BATENGA overturned her dismissal order of 18/1/2016, which was*

*made under inapplicable provision of the law that is Rule 28(1) (b) of the G.N. 67 of 2007. Also there is no record of the ruling of 27/05/2016 when the Arbitrator said it was delivered and parties were notified about the Arbitration hearing to proceed on 11/07/2016. Another anomaly is that there is a lot of uncertain dates which reflect the matter was going front and backwards and before different arbitrators. This could have contributed to the complainant advocate to focus on the dates set for the High Court cases as he advanced, and the applicant had no control or influence of the advocate as was decided in Felix Tumbo Kisima (supra)"*

Mr. Mbwambo in the first place submitted that, the Labour Court was not justified to revise the decision of the arbitral tribunal on the ground of irregularities. We do not agree with him because under the express provision of rule 28 (1) (c) and (d) of the Rules, the Labour Court is empowered to revise any proceedings of the arbitral tribunal for the reason of material irregularity or material errors involving injustice.

In the second place, it was Mr. Mbwambo's submission that, the irregularities in question did not exist. Again, we cannot agree with him. We have prudently gone through the proceedings of the arbitral tribunal appearing at pages 322 to 394 of the record and we are satisfied that, all the irregularities and errors pointed out in the

judgment of the Labour Court as above quoted are apparent on the record.

Mr. Mbwambo submitted further or in the alternative that, the said irregularities if at all existed, neither touched the root of the complaint nor caused any injustice. With all respects to the counsel, we are unable to buy his view. The missing records and orders reflected in the judgment being in relation to the dismissal order in question and the application to set it aside, were very material in determining the correctness or otherwise of the order refusing to set aside the dismissal order. Besides, the confusions and uncertainties on the dates when the parties were to appear before the arbitral tribunal were serious errors which, as rightly observed by the Labour Court, was likely to cause confusions on the part of the counsel for the respondent on the time table of the arbitral tribunal.

The above finding in our view was sufficient to establish that the error in question involved injustice. We say so because in determining whether the error involved injustice within the meaning of rule 28 (1) (d) of the Rules, the test should not be that the error or omission actually caused injustice, it suffices in our judgment, if the same had a reasonable possibility of causing injustice. The Labour Court Judge

can, therefore, not be faulted for mere reason that there was no proof of actual failure of justice as intimated in the submissions for the appellant. In the circumstance, the second ground of appeal is without merit and it is dismissed.

We shall now turn to the first ground as to justification of non-appearance by the respondent. The complaint by Mr. Mbwambo in his submissions is two-fold. First, there was no sufficient evidence on the record that, the non-appearance of the counsel for the respondent on the date of dismissal was caused by his appearance in the High Court. In here, the issue involved pertains to the correctness of the assessment of evidence in the affidavit and counter affidavit by the Labour Court. This is a pure point of fact which in accordance with section 57 of the LIA is not within the scope of an appeal envisaged therein. For that reason we shall not accept it.

On the second place, it is the contention for the appellant that the Labour Court did not exercise its discretion judiciously for not basing its decision on existence or non-existence of sufficient cause. We do not buy that view. As we noted above, besides existence of sufficient cause, the application was granted on account of material errors and irregularities which is a good cause for reversing a decision

of the arbitral tribunal according to rule 28 (1) ( c) and (d) of the Rules. That would by itself suffice to depose of the appeal.

That aside, contrary to the expression of the counsel for the appellant, it is not true that, the Labour Court did not consider existence or non-existence of sufficient cause. It clearly stated at page 297 of the record that, sufficient cause was the overriding consideration in such an application. In its decision however the Labour Court applied the wide concept of the term sufficient cause as set out in the case of **Felix Tumbo Kisima v. TTCL Limited and Another**, Civil Application No. 1 of 1997 (unreported), which we fully subscribe to, where the Court stated that:

> *"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step".*

With above authority in mind, and having considered the facts of the case in totality in line with the decision of the arbitral tribunal, the Labour Court held that there was sufficient cause for restoration of the complaint. Its decision was based on three reasons. **First**, the dismissal was caused by non-appearance of the respondent for just a

day while the proceedings had remained unresolved for almost five years for the reasons not associated with the respondent. **Two,** the complaint was dismissed just on the first day of hearing after restoration of the proceedings. **Three**, the dismissal was made while the appellant's case had been closed and the respondent's case was about to commence. In conclusion therefore, the Labour Court took the view that, restoration of the proceedings was in line with the policy objective of the labour laws which is substantive justice. In her own words, the Labour Court Judge observed as follows:-

> *"In my view the decision to set aside the dismissal order would not bring inconvenience to the respondent rather will enhance the spirit of our labour laws as was decided by the court in Hamid Mfaume Ibrahim case (supra). In the spirit of labour laws our focus should always be in social justice. I fully agree with Hon. Arbitrator that our labour laws discourages unnecessary delays of labour matter to allow parties to engage fully in productive economic activities for the growth of the national economy, however I am of the view that it should not be done to the detriment of substantive right of either party depending on the circumstances of each case. In this case the matter had reached a stage of arbitration hearing of the complaint. According to the record she is not the person who caused delay of arbitration which took almost*

*five years laying on CMA shelves. So it was wrong for the Arbitrator to say the delay of only one day on 11/7/2016 caused injustice."*

At this juncture, we find it necessary to observe that, in the affidavit in support of the application for setting aside the dismissal order, Mr. Seni Malimi, the advocate who was in the conduct of the matter for the respondent at the arbitral tribunal, deposed that he did not appear because he was attending some matters in the High Court while his client was prevented from appearing by reason of sickness.

Admittedly, unlike at the Labourt Court where the proceedings of the High Court and medical report were attached in the affidavits to establish the grounds for the non-appearance of the advocate and the respondent, respectively, at the arbitral tribunal, the factual claims in the affidavit were not founded on any document. Conversely, there is nothing in the decision of the arbitral tribunal to the effect that, the evidence in the affidavit was not believed because of absence of such documents. Instead, the arbitral tribunal spent much time blaming the respondent to be the cause of the delay, the blame, which as revealed above, was correctly rejected by the Labour Court. For clarity, we shall reproduce hereunder the whole part of the ruling constituting the determination of the application. Thus:

*"In balance therefore; the commission is on the opinion that; the intention of the employment and labor laws is to do away with unnecessary delays of labor cases, because doing so would impose additional cost of the parties to refer the matter and create nonproductive business which ultimately will always harm the applicant, respondent the economy of the society as whole.*

*Indeed aim of the view that, the applicant has failed to provide before the commission on the grounds that he raised above, also the matter or the dispute was leady dismissed but the commission due to frequently nonappearance of the Applicant, and it should be noted so that the entire concept of justice to be seen and done. Therefore the application is dismissed accordingly"[sic]*

That being the decision of the arbitral tribunal, it is surprising why the Labour Court is faulted in not properly directing its mind on the issue of sufficient cause for non-appearance. In our view, the Labour Court rightly interfered with the discretion of the arbitral tribunal for failure of the same to properly exercise its jurisdiction by making a judicial inquiry into the matter before it. We think, for the arbitral tribunal to reject the evidence in the affidavit, it was bound to assign reasons therefor. For, it is trite law that, every witness is entitled to

credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations. (See for instance, **Goodluck Kyando v. Republic**, Criminal Appeal No. 218 of 2003 (unreported).

Before we conclude our judgment, we find ourselves unable to do without remarking though briefly on the two legal issues raised by the counsel for the respondent in the course of submissions.

The first point is on the appealability of the judgment in question. It was submitted that the same was not appealable because it does not have the effect of finally determining the dispute as per rule 50 of the Rules. For the appellant, it was submitted to the contrary. We have considered the rival submissions on this issue. Much as it is the law under rule 50 of the Rules that, an appeal does not lie against a decision of the Labour Court unless it has the effect of finally determining the dispute; we are of the view that, the phrase "dispute" used in the respective provision refers to the dispute in the proceedings at the Labour Court and not at the arbitral tribunal. The dispute at the Labour Court was on the correctness of the decision of the arbitral tribunal refusing to set aside the dismissal order. In its judgment, the Labour Court disposed of the dispute finally when it held the said

decision incorrect and set the same aside. The appellant, in as long as she was aggrieved by such a final decision, had a right to appeal contrary to the complaint by the respondent and her counsel.

Another point raised are on the defects in the proceedings constituting the evidence of the appellant's witnesses. They are criticized for being taken without oaths as mandatorily required by rule 19(2) (a) and 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. 67 of 2007 ("the GN No. 67 of 2007") and for want of signature of the presiding arbitrator. Relying on the authority in the case of the **Copycat Tanzania Limited v. Mariam Chamb**a, Civil Appeal No. 404 of 2020 (unreported), we were invited to nullify the respective proceedings and order that, the hearing starts afresh. In rebuttal, Mr. Mbwambo submitted that, the issue is premature as the decision of the arbitral tribunal was not based on evidence but default of the respondent to appear. With respect, we agree with him. As we indicated herein above, what was in dispute at the Labour Court was the decision dismissing the complaint for want of appearance. Such a decision could have been made even if no witness from the appellant had testified.

In any event, the trial at the arbitral tribunal was still in progress when the dismissal order was issued. It would follow therefore that, if the proceedings are restored, the arbitral tribunal will still be seized with powers to eliminate the defects. It is on that account that we shall dismiss this complaint.

In the upshot and for the reasons as afore stated, we find the appeal without merit. It is accordingly dismissed with costs.

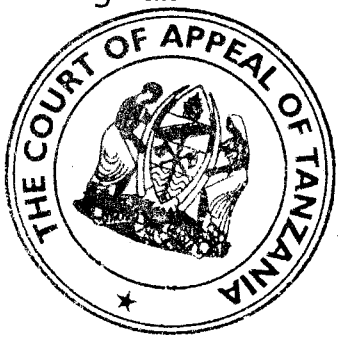
**DATED** at **DAR ES SALAAM** this 22nd day of March, 2022.

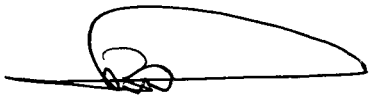
R.K. MKUYE
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The judgment delivered this 23rd day of March, 2022 in the presence of Ms. Julither Surumbu, learned counsel for the appellant and in the absence of the respondent is hereby certified as a true copy of the original.



J. E. Fovo
**DEPUTY REGISTRAR**
**COURT OF APPEAL**