IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 457/18 OF 2019

REGINA MOSHI ..... APPELLANT

VERSUS

THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND (NSSF)..... RESPONDENT

[Revision of the Exparte judgment, decree and proceedings of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Wambura, J.)

dated the 30th day of August, 2019

in

Revision No. 730 of 2018

RULING OF THE COURT

23rd February & 19th May, 2022

KITUSI, J.A.:

The applicant Regina Moshi, a former employee of the respondent, the Board of Trustees of the National Social Security Fund (NSSF), lost at the Commission for Mediation and Arbitration (CMA) where she had instituted a complaint challenging termination of her employment by the said respondent. After hearing and evaluating evidence by the two contending sides, the CMA found the termination to have been substantively and procedurally fair. The aggrieved applicant applied for revision to the High Court, but Wambura J, conducting hearing in the

absence of the respondents, dismissed it concluding that the CMA's finding was correct.

The applicant has come to us by way of revision preferred under section 4 (3) of the Appellate Jurisdiction Act Cap 141 R.E. 2002 (AJA) and rule 65 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The notice of motion cites nine (9) grounds. As the discussion that will follow later in this case involves examination of the tenor of those grounds, we have to reproduce them as under: -

1. The High Court erred in upholding the CMA decision that the Applicant was negligent in handling cheque No. 504848 contrary to the parties' testimonies and exhibits tendered in evidence.

2. The Court erred in disregarding the evidence on record which clearly shows that the CMA misapprehended the facts of the nature of the dispute by substituting the alleged forgery to negligence while in actual fact negligence was not part of allegations by the Respondent before the Commission and was not one of the reasons for termination.

3. The Court erred by 'failure' to fault the CMA by its 'failure' to rule that the Respondent (i) denied to supply the part of disciplinary proceedings to the Applicant (ii) failed to communicate the outcome of the appeal to the Applicant (iii) failed to avail the charge sheet to the Applicant (iv) failed to give reasons leading to termination and (v) failed to state reasons of termination in termination letter.

4. The proceedings referred to in this application were conduced irregularly, without due regard to the law and court procedure and with apparent bias against the Applicant. The trial Judge deliberately and with bias handled proceedings by creating her own issues out of the tabled grounds.

5. The Court failed to hold that the act of the Respondent to initiate criminal proceedings later followed by termination, was a double jeopardy to the Applicant and as a result the Applicant suffered damages as pleaded under CMAF-1.

6. In the absence of the actual proof that the Applicant forged cheque No. 504848, the Court failed to hold that the burden on forgery of cheque lies with the Respondent and due to her failure, the termination by the Respondent was based on unfair reason.

7. In the presence of the uncontested proof that the cheque subject of forgery was a crossed one and actually was directly handled to the beneficiary, the court erred by failure to hold that the Applicant did not accompany the beneficiary to the bank to influence the immediate payment.

8. The Court erred by condemning the Applicant unheard by reaching to the conclusion that the reliefs sought by the Applicant under prescribed under CMAF-1 were not done in good faith, a total departure from CMA's findings and testimony adduced by the Respondent.

9. It is in the interest of justice that the correctness, propriety and legality of the cited proceedings and decision of the High Court of Tanzania be examined by this Honourable Court.

The grounds of the application are invariably the same as those featuring in the supporting affidavit taken by Mr. Sylivatus Sylivanus Mayenga, learned advocate for the applicant. Mr. Mayenga argued the application before the High Court and before us, during which he abandoned the 3rd and 9th grounds. Mr. Deodatus Nyoni, learned Principal State Attorney argued the respondent's case flanked with Mr. Abubakar Mrisha, also learned Principal State Attorney and Mr. Kange

Kalokola, learned State Attorney. We will refer to the learned arguments in due course. First, we have to set out the brief background of the matter.

The applicant was employed by the respondent as an accountant since on 3/8/1992, and during the times material to this case she was under immediate supervision of Dorise Nangay (PW1). The applicant's duty was to draw cheques which would then be placed before PW1 for signature and thereafter proceed to other sections. In 2008 a cheque of TZS 5,169,953.00 was drawn in favour of a beneficiary known as Charles Ndyetabula. However, when the cheque was later presented to the bank for payment, the amount indicated on it turned out to be TZS 15,169, 953.00, instead of the original TZS 5,169 953.00. When this fact was disclosed to the authorities of the respondent, there was immediate suspicion of forgery and the applicant was suspected to be involved in the scum. She was booked for criminal charges of forgery but she never saw a day in court because on 27/11/2009 the charges were dropped. In her testimony, PW1 stated that she was never summoned to give evidence on the criminal matter, suggesting that lack of evidence could not have been the reason for dropping the charges. The applicant was discharged.

According to the applicant, it was when she thereafter wrote to her employer demanding to go back to work, that disciplinary proceedings were instituted against her. One Ana Malimi (PW2), a human resource officer in the respondent's office, testified that the disciplinary hearing was conducted as per the letter of the law governing such proceedings. According to PW2, the applicant was found guilty and therefore liable to have her employment terminated.

The form by which the applicant referred the matter to the CMA challenged both the reason and procedure of termination for being unfair, raising complaints of malice, inordinate delay in instituting disciplinary proceedings, denial of the right to be heard and double jeopardy.

In her testimony going to prove unfairness and malice, the applicant stated that after her discharge in November, 2009 the employer sat back until on 17th May, 2010 when she wrote a letter demanding explanation from her. Further that even when she responded by a letter dated 4th June 2010, the disciplinary hearing would not be instituted until on 23rd April, 2013. Not in so many words, we think, she was insinuating that termination of her employment was actuated by ulterior motives.

In essence, the applicant's evidence was that much as the cheque in question was indeed forged by inserting a different figure, there was no evidence that she was the perpetrator of the forgery. She led evidence to the effect that after preparing the cheque, she gave it to another employee in another department responsible for dispatch. The suggestion carried in that testimony is that the alteration on the cheque inserting a bigger figure could have been done by another person after it left her hands.

However, the CMA took the view that by preparing the cheque in a way that left room for altering it, the appellant did not diligently carry out her duties. It concluded that the termination was substantively and procedurally fair. As alluded to earlier, on revision preferred by the present applicant, the High Court was also satisfied that the termination was fair in both respects, and that decision is the subject of this application for revision.

Warry that the manner by which the applicant has sought to challenge the decision of the High Court before us is rather unconventional, we invited the learned counsel to include in their respective addresses to us, submissions on whether the application is properly before us.

Submitting, Mr. Mayenga was of the view that since section 57 of the Labour Institutions Act Cap 300 R.E. 2002 (the LIA) limits appeals to this Court to matters raising points of law, a party seeking to challenge a decision of the High Court on points of facts may only approach us by way of a revision. The learned counsel cited our unreported decision in the case of **Muhimbili National Hospital v. Constantine Victor John**, Civil Application No. 44 of 2013 as being the basis for the applicant taking that route. He also referred to **Felix Lendita v. Michael Longido,** Civil Application No. 312/17 of 2017 and **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma Duwasa**, Civil Appeal No. 343 of 2019 (both unreported). The two cases support the position that revision may be resorted to where an appeal is barred.

When counsel's attention was drawn to some of the grounds such as grounds 4 and 8 cited in support of the application, he conceded that they raise points of law, and mixed point of law and fact, respectively. He insisted however, that most of the grounds are factual, making the course taken, justified. When we asked counsel to address us on what could have been the intention of the legislature in enacting section 57 of the ILA, he responded that appeals are a creature of the statute. The

learned counsel cited the book of **Civil Procedure**, C. K. Takwani 7th Edition in which the learned author describes circumstances under which revision may be resorted to.

On the merits of the application, Mr. Mayenga simply adopted the supporting affidavit and the written submissions, with nothing to add.

Mr. Nyoni's address on the issue whether the application is properly before us or not, was that a revision is not an alternative to an appeal. He cited the case of **Tanzania Teachers Union v. The Chief Secretary,** Civil Appeal No. 96 of 2012 and; **Fatma Hussein Shariff v. Alikhan Abdallah, (As administrator of the Estate of Sauda Abdallah & 3 Others,** Civil Application No. 536/17 of 2017 (unreported), to support that position.

The learned Principal State Attorney appreciated our decision in **Muhimbili National Hospital** (supra), but argued that it is of no assistance to the applicant whose counsel has conceded that some of the grounds cited in support of the application, raise points of law. Mr. Nyoni mentioned other grounds that, in his view, raise points of law, as being ground 1, 2, 4, 5, and 6, and submitted that on the basis of those grounds the applicant could have lodged an appeal. He sought to distinguish the case of **Felix Lendita** (supra) as being of no assistance

to the applicant and the **Takwani** book as being too general to be of any relevance in labour issues.

Finally, Mr. Nyoni submitted that the rationale behind the enactment of section 57 of LIA was to filter matters of fact from finding their way to the Court.

Having heard the arguments for and against this application, we begin our deliberations by observing that, this is not the first time we are being called upon to walk along the path taken in **Muhimbili National Hospital** (supra). We received a similar invitation in **Patrick Magologozi Mongella v. The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 342/18 of 2019 (unreported), recently. In its deliberations in **Patrick Magologozi Mongella** (supra), the Court considered the case of **Muhimbili National Hospital** (supra), then made the following pertinent observation regarding the decision in that case: -

> *"However, in that decision, we did not specifically Interrogate and determine whether it is within the ambit and parameters of the Court's revisional jurisdiction to re-assess or re-appreciate the evidence on record so as to come up with its own findings".*

After discussing principles of revision by citing domestic and foreign decisions, the Court took the view that its revisional powers are limited and do not stretch to the power to re-assess and re-appreciate the evidence. Rather, it stated, in revision the Court plays a superintendence role over the courts below. Inspired by an Indian decision, the court concluded: -

> *"Following the principle in **Hindustan Petroleum Corporation Ltd** (supra), we hold without any hesitation that the Court can only re-appreciate the evidence in the course of discharging its revisional jurisdiction in scenarios raising points of law including the following: **one**, determining whether a finding of fact recorded by the High Court (or Labour Court) is according to law and does not suffer from any error of law. **Two**, whether a finding of fact is perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misleading of the evidence or is grossly erroneous. We would stress that at the core of these scenarios are points of law, not matters of fact".*

In this case the applicant is asking us to re-assess and re-appreciate the evidence and make our own findings. However, in line

with our decision in **Patrick Magologozi Mongella** (supra), and the conclusion reproduced above, we decline the invitation, because that is not what the powers of revision are intended for.

Secondly, we are tempted to agree with Mr. Nyoni, that section 57 of the LIA was meant to limit the scope of appeals to this Court, for a reason. Employment disputes go through two stages, mediation and arbitration, before they reach the High Court. This means that the Court deals with employment causes at the fourth stage, so it is easy to see the wisdom of the legislature in limiting the scope of the intervention at this stage. We do not see how the same legislature could have intended that the provision of section 57 of ILA be circumvented by invoking the Court's revisional jurisdiction to re-assess the evidence.

In addition, it is not irrelevant to note that even section 91 (2) of the ELRA which vests the High Court Labour Division with powers of revision, is restrictive in that it empowers that court to set aside an award on prescribed grounds. It provides: -

> *" The Labour Court may set aside an arbitration award made under this Act on grounds that-*
>
> *(a) There was a misconduct on the part of the arbitrator;*

(b) The award was improperly procured;

(c) The award is unlawful, illogical or irrational".

We are of the view that if the arbitration award cannot be set aside but on those specific grounds in terms of section 91 (2) of the ELRA, and an appeal lies only on points of law as per section 57 of ILA, there is no justification for seeking to challenge factual findings at this stage by way of revision.

Lastly, assuming, for the sake of discussion, that we have the power to re-assess and re-appraise the evidence, we need to take a look at the grounds of application in order to determine if they are indeed factual as to qualify as exception to section 57 of ILA.

Having abandoned grounds 3 and 9, Mr. Mayenga conceded that grounds 4 and 8 are not purely evidential, and we readily agree with him. Mr. Nyoni suggested that grounds 1, 2, 5 and 6 are also not factual. We have no hesitation in going along with the learned Principal State Attorney as far as ground 5 is concerned because, tested against the factors set down in the case of **CMA – CGM Tanzania Limited v. Justine Baruti,** Civil Appeal No. 23 of 2020, cited in **Patrick Magologozi Mongella** (supra), it raises a point that is not purely

factual. So, we wish to draw our conclusion from grounds 4, 5 and 8 even without discussing the rest of the grounds.

In the case of **Patrick Magologozi Mongella** (supra), we wondered why the applicant had not opted for an appeal by raising the grounds that were on points of law. We ask the same question here. This is because it is an established principle of law that revision is not an alternative to an appeal as earlier argued by Mr. Nyoni. In **Transport Equipment Ltd v. Devram P. Valambhia,** [1995] T.L.R 161 the Court was categorical that: -

> *"The appellate jurisdiction and the revisional jurisdiction of this Court are, in most case, mutually exclusive. If there is a right of appeal then that has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of this Court. The fact that a person through his own fault has forfeited that right cannot, in our view, be exceptional circumstance".*

Similarly, in this case we think the applicant has foregone her right to appeal the decision of the High Court by using, at least three grounds, that is grounds 4, 5 and 8 raised in the notice of motion. She

has left upon us to pick which grounds to deal with under revision and which ones to leave out. That is not the ideal way to invoke the Court's jurisdiction.

In view of our discussion of the matter, it is our conclusion that this application is misconceived. Accordingly, we strike it out. As the application arises from a labour dispute, we make no order for costs.

DATED at **DAR ES SALAAM** this 16th day of May, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 19th day of May, 2022 in the presence of Ms. Doreen Mhina, learned State Attorney for the Respondent also holding brief of Mr. Sylvatus Mayenga, learned counsel for the Applicant, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL