IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., MWANDAMBO, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 338/01 OF 2019

HASSAN MARUA ..... APPLICANT

VERSUS

TANZANIA CIGARETTE COMPANY LIMITED ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Lila, Ndika and Sehel, JJ.A.)

dated the 27th day of June, 2019
in
Civil Appeal No. 17 of 2008
.....

RULING OF THE COURT

13th July & 1st August, 2022

MWANDAMBO, J.A.:

We have deemed it felicitous to preface this ruling with an observation we made over 15 years ago in **Peter Ng'homango v. Gerson A.K. Mwanga and Another**, Civil Application No. 33 of 2002 (unreported) on at page 14 thus:-

> *'" It is no gainsaying that no judgment, however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment. But these errors would only justify a review of the Court's*

judgment if it is shown that the errors are obvious and patent."

Unsurprisingly, our judgment in Civil Appeal No. 17 of 2008 delivered on 27/06/2019 in favour of the respondent is not an exception. It did not satisfy the applicant who has now moved the Court under section 4(4) of the Appellate Jurisdiction Act and rule 66 (1) (a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") to review it with a view to ordering a rehearing of the appeal from which it has emanated.

The facts giving rise to the application are not in dispute. The applicant was an employee of the respondent until 5/10/2010 when he resigned from employment citing intolerable conduct of the respondent employer. The applicant's decision was preceded by "status change" from the post he held as Branch Manager in Iringa to Branch Supervisor in Shinyanga. Since he considered his resignation as being constructive termination under section 36(a) (ii) of the Employment and Labour Relations Act ("the ELRA"), he successfully challenged it before the CMA which made an award of compensation for 36 months' salaries and other incidents of the impugned termination.

The respondent's application for revision before the High Court (Labour Division) was unsuccessful resulting into the present. Mindful of

the limited nature of permissible grounds in appeals originating in the CMA, at the Court's prompting, the respondent's counsel abandoned some of the grounds of appeal before the commencement of hearing of the appeal. She did so in view of the fact that such grounds did not meet the threshold as grounds based on points of law permitted by section 57 of the Labour Institutions Act ("the Act"). The remaining grounds related to the challenge on the correctness of the finding made by the CMA and sustained by the High Court that the applicant was constructively terminated and the justification for the compensation awarded to the applicant involving payment of 36 months' salaries.

Having heard arguments for and against the remaining grounds of appeal, the Court concluded that, contrary to the finding made by the CMA and sustained by the High Court, the facts and documentary evidence established that the applicant had resigned from employment on his own accord and not from any intolerable conduct of the respondent which could have triggered a claim for unfair termination within the meaning of section 36(a) (ii) of the ELRA. It set aside the decision of the High Court which had concurred with the CMA that the applicant had been constructively terminated by the respondent.

The notice of motion raises four grounds of review predicated upon rule 66 (1) (a), (b), (c) and (d) of the Rules to wit; one, that the Court had no jurisdiction to entertain the appeal not based on points of law as required by section 57 of the Act; two, that the impugned decision is a nullity by reason of the Court determining the appeal based on facts and its own independent opinion outside its jurisdiction; three, that there is a manifest error on the face of the record for want of jurisdiction by reason of the Court quashing the award of the CMA based on its own analysis and findings of facts contrary to section 57 of the Act and; four, that the applicant was wrongly deprived of his right to be heard on the acceptance of the contents of the letter on status change and transfer to Shinyanga on which the Court's decision was based.

The applicant's affidavit has raised various matters in support of the application particularly paragraphs four to seven inclusive in which he amplifies the grounds to justify the Court's exercise of its power of review. In a nutshell, he makes averments to the effect that the respondent's grounds of appeal were based on facts and law which parties made their submissions on the circumstances behind his termination. He goes on to state that in its decision, the Court determined the grounds by reference to decided cases from South

African Courts relating to constructive termination and went ahead making extensive analysis of the evidence before making its own findings based on examination of the contents of exhibits tendered before the CMA. He avers further that in doing so, the Court shifted the burden of proof to the applicant without affording him the right to be heard on findings of the acceptance of the contents of the letter on Status Change and Transfer to Shinyanga; the basis of the decision of the Court.

The respondent resists the application through an affidavit in reply deponed to by Godson Kiliza, her Director of Legal Affairs and Company Secretary.

At the hearing of the application, the applicant was represented by Messrs Daimu Halfani and Mashaka Ngole, both learned advocates. The learned advocates had lodged their written submissions in support of the application. Ms. Blandina Kihampa, learned advocate, did alike for the respondent. She too had lodged her written submissions in reply. Whilst the learned advocates are at one with regard to the permissible grounds under which the Court can review its decision, they have parted ways on whether the grounds in this application are sufficient to warrant the Court's exercise of its power of review. The learned advocates for the

applicant have placed before the Court a litany of decided cases underscoring the purpose and scope of the power of review. The common denominator from the cases cited is that review is by no means a disguised appeal offering a disgruntled litigant a second chance to re-argue his case on the hope that he may get a favourable outcome. The cases of **Stella Temu v. Tanzania Revenue Authority**, Civil Appeal No. 173 of 2014, **Angela Amudo v. Secretary General East Africa Community**, Application No. 4 of 2015 – cited in **Golden Globe International Services & Another v. Millicom (Tanzania) N.V & Another,** Civil Application No. 195/ 01 of 2017, **Omary Makunja v. R**, Civil Application No. 22 of 2014 (all unreported) have been cited to reinforce the position.

Like in any other application for review, we are confronted with the issue whether the applicant has made out a case fit for the exercise of the power within the confines of the grounds set out in the notice of motion. It is common cause that ground one and two contending that the impugned decision is a nullity for lack of jurisdiction per rule 66(1) (c) and (d) respectively revolve around the same aspect and this is evident in the learned advocates' submissions. So is ground three premised on rule 66(1) (a) contending that there is manifest error on the face of the record on account of lack of jurisdiction in entertaining

an appeal which did not meet the threshold in section 57 of the Act. We find it convenient to deal with grounds one and two conjointly. Our determination of these grounds will have a direct bearing on ground three premised on rule 66(1) (a) of the Rules; existence of manifest error on the face of the record.

The gravamen of the applicant's submission in grounds one and two is that ground four in the appeal did not meet the threshold of a point of law and thus, the Court acted without jurisdiction in determining the appeal. The learned advocates cited various decisions from this Court and beyond jurisdiction on what constitutes a pure point of law fit for the Court's determination for the purposes of section 57 of the Act. They include; **Remigious Muganga v. Barrick Bulyanhulu Gold Mine,** Civil Appeal No. 47 of 2017, **Ladislaus S. Ngomela v. The Treasury Registrar & Attorney General**, Civil Appeal No. 66 of 2011, **Patrick Magologozi Mongela v. The Board of Trustees of the Public Service Social Security Fund**, Civil Appeal No. 342/18 of 2019, **Ndame Gamaya v. Luhendeseni Darushi** (As Administrator of the estate of the late Michael Mikanda), Civil Appeal No. 93 of 2017 (all unreported), **Gatirau Peter Munya v. Dickson Mwenda Kithini and 3 Others** [2014] eKLR (Supreme Court of Kenya), **Bracegirdle v. Oxley** (2) [1947] 1 All. ER 126, **Lubanga Jamada v. Dr. Delumba**

Edward, Civil Appeal No. 10 of 2011 (unreported - Court of Appeal of Uganda).

Armed with the above authorities, the learned advocates contend in their written and oral submissions that, the ground canvassed by the respondent on appeal did not meet the test of a pure point of law. It is their further submission that the determination of a ground of appeal based on a pure point of law does not require an appellate court analysing evidence short of which it ceases to be so. It was argued that the impugned decision is bad because it emanates from an appeal in which the Court overstepped its mandate by overindulging itself and examining the evidence which entailed reproducing the contents of exhibits and making independent analysis of the evidence before arriving at its own conclusion that the evidence on which the CMA relied in holding that the appellant was constructively terminated, did not support such a finding.

Whilst acknowledging the tests on what would constitute a point of law in **Atlas Copco Tanzania v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 167 of 2019 (unreported), Mr. Halfani could not hide his discontent against the third test which says that a point of law exists where a finding of fact is

unsupported by evidence or that it is so unreasonable or is perverse or so illegal that no reasonable tribunal would arrive at it. The learned advocates have contended that its application has the effect of placing the Court in the same position as a first appellate court which has the mandate to evaluate the evidence afresh and come to its own findings.

We heard Mr. Halfani advancing a novel point in his oral address on the extent to which the third test can apply. It was to the effect that should the Court find that the respondent's complaint in the appeal fell into the third test, it could not do anything about it but remit that question to the High Court for a proper evaluation. The learned advocate concluded on these two grounds that the Court had no jurisdiction to evaluate the evidence as it did and that rendered its decision a nullity and therefore amenable to review under rule 66 (1) (c) and (d) of the Rules. We did not take Mr. Halfani seriously on the proposition he advanced on the Court's power being satisfied that it was misplaced. This is so because, all things being equal, we have the mandate under section 4(2) of the AJA to step into the shoes of the High Court and do what it omitted to do.

Ms. Blandina Kihampa, learned advocate representing the respondent urged the Court to dismiss the application. In her

submissions in reply, the learned advocate argued that, contrary to the applicant's contention, the appeal, subject of the impugned judgment, involved a determination of the applicant's complaint based on unfair termination under section 36(a) (ii) of the ELRA on the correctness of the CMA's finding. She submitted that the issue before the Court in the impugned judgment was purely a point of law in terms of section 57 of the Act and hence, the Court had jurisdiction to entertain it. She cited the decisions in **Bracegirdle v. Oxley** (supra) and **M' Riungu and Others v. Republic** [1982 -88]1 KAR 360 to bolster her submissions that what was before the Court on appeal was, but a point of law.

The learned advocate was emphatic that the Court acted properly within its confines. It was the learned advocate's submission that the fact that the Court interfered with the finding of the CMA did not mean that it overstepped its mandate because all what it did was to determine whether the CMA's finding could be reasonably drawn from the facts and evidence.

With respect, we agree with the learned advocate. As alluded to earlier, the Court was alive to its limited jurisdiction in the light of section 57 of the Act. This explains why the learned advocate for the respondent was compelled to abandon the rest of the grounds which did

not pass the test of grounds based on points of law. We do not think the learned advocate is oblivious of the fact that constructive termination is one of the forms of termination of employment contracts governed by section 36 (a) (ii) of ELRA whose determination entails interpretation of it on the facts before the Court. This ground lacks merit and we dismiss it.

Having held that the Court had jurisdiction to entertain the appeal, the next question is whether in determining the appeal it dealt with matters of facts, subject of the second ground of review. The complaint here is that the Court overstepped its mandate by examining, analysing facts and evaluating evidence and arriving at its own findings thereby setting aside the finding made by the CMA and sustained by the High Court on the issue whether there was constructive termination.

According to the applicant's learned advocate, the only issue determined on appeal which resulted into quashing the CMA award was based on the Court's analysis of evidence rather than determining pure points of law.

The learned advocate for the respondent has taken exception to the applicant's contention. We respectfully agree with her on the distinction between applying the law to the evidence and evaluation of

the evidence with a view to arriving at the Court's own findings. That distinction was clearly made by the Supreme Court of Philippines in the case of **Republic v. Malabanan** G.R. No. 169067 October 632 SCRA 338,345 making reference to an earlier decision of the same court in **Leoncio v. De Vera** G.R No. 176842, 546 SCRA 180,184 to which the Supreme Court of Kenya made reference in **Gatirau Peter Munya v. Dickson Mwenda Kithinji and 3 others** (supra) at para 75 thus:

> *"....For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise, it is a question of fact."*

The Supreme Court of Kenya also referred to another decision from the Supreme Court of Philippines in **New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan;** G.R No. 161818(2008) on a similar issue in a petition for certiorari. The enabling provision required a

petition to raise only questions of law which must be distinctly set forth. That Court aptly stated:

> *"... We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. ..."*

It will be recalled that the above decisions and others were central to the formulation of the three tests in **Gatirau Peter Munya** (supra) adopted by this Court in **Atlas Copco Tanzania** (supra).

The impugned judgment will bear testimony that the applicant's complaint is misplaced. The Court dealt with the ground of appeal on the constructive termination which was determined in the light of the third test of what constitutes a point of law within the context of section 57 of the Act. The determination did not involve determining the

probative value of the evidence rather, testing the evidence on record to judicial scrutiny to see whether it supported the finding made by the CMA. As rightly argued by Ms. Kihampa, in doing so, the Court could not avoid to look at **Exhibit DW1A** and **Exhibit DW1B** to satisfy itself whether there was indeed a case justifying an affirmative finding that the applicant's termination was unfair on account of constructive termination.

We are mindful, and we have no doubt that Mr. Halfani will appreciate as Ms. Kihampa does, that points of law do not exist in a vacuum. That means that a determination of a point law cannot be divorced from the underlying facts which includes evidence on record. We cannot hazard a guess how could the Court determine that ground without relating it with the evidence on record to satisfy itself if the High Court and the CMA applied the law correctly to the facts and evidence before concluding as it did.

Although we did not have to say and indeed we were not obliged to say so, it is plain that we approached the matter mindful of our decision in **Atlas Copco Tanzania** (supra) which had referred to the decision of the Supreme Court of Kenya in **Gatirau Peter Munya** (supra) holding that:

> *" ... in considering " matters of law" an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction"*

Guided by the above, the Court found it inevitable to interfere with the finding on the status change of the applicant vide exhibits DW1A and DW1B that it constituted constructive termination. Having so done, we came to the conclusion that the CMA's finding sustained by the High Court was a result of a clear misapprehension of evidence. Reading the impugned judgment from page 18 through 23 reveals that the Court travelled at length on the application of section 36(a) (ii) of the ELRA and Rule 7(2) of The Employment and Labour Relations (Code of Good Practice) Regulations, 2007 (the Regulations) generally and how similar provisions have been interpreted from other jurisdictions, in particular, the Republic of South Africa before it applied them to the facts and the relevant evidence. The fact that we reproduced the contents of the exhibits did not amount to analysing and evaluating the probative value of such evidence as Mr. Halfani would suggest. As submitted by Ms. Kihampa, the scrutiny of these exhibits was limited to looking at their plain meaning bearing in mind that they were signed by the applicant.

The objective was to satisfy ourselves whether the facts and exhibits supported the findings of the CMA and the High Court. We might have been wrong in our conclusion and as it has been touted, apex courts are final not because they are infallible but they are infallible only because they are final. However, that is not the same as saying that the impugned decision is a nullity within the ambit of rule 66(1) (c) of the Rules. As we observed in the **Hon. Attorney General v. Mwahezi Mohamed (as administrator of the estate of the late Dolly Maria Eustace) & 3 others,** Civil Application No. 314/12 of 2020 (unreported), a decision is a nullity if it is so defective on its face that it is not the type of decision that its maker would have wished it to be or it cannot be given effect. The applicant has not convinced us to accept that the impugned decision falls into that category. From our examination of the notice of motion and the submissions, the applicant appears to be unsatisfied with the decision on its merits which falls outside the scope of review jurisdiction.

Next, we deal with the complaint predicated on rule 66 (1) (a) of the Rules; manifest error on the face of the record. The learned advocates advanced one main reason. They argued that quashing the concurrent findings of fact by the CMA and the High Court based on the Court's own analysis and findings of facts not based on points of law

contrary to section 57 of the Act, constituted a manifest error on the face of the record warranting a review. However, in view of our determination of the preceding grounds, a discussion on this ground has been rendered superfluous. The sole complaint in this ground has been adequately dealt with in our foregoing discussion. We are satisfied that the applicant has failed to place his ground within the scope of review under rule 66(1) (a) of the Rules and we reject it.

The fourth ground is predicated on rule 66(1) (b) of the Rules. It relates to wrongful deprivation of the right to be heard. The learned advocates have predicated their submissions on the Court's determination concerning the status change whereby it held that it did not amount to a disciplinary step. The learned advocates contended that the Court dealt with it upon its own examination of the contents of exhibit DW1 which was not argued before it but featured in the judgment as the sole decisive issue disposing of the appeal in the respondent's favour. Mr. Halfani argued in his oral address that, as the issue was not canvassed during the hearing of the appeal neither did the applicant anticipate that it will form the basis of the determination of the appeal, the Court wrongly deprived the applicant of his right to be heard. Our decision in **Jayantkumar Chandubhai Patel and 3 Others v. Attorney General & 2 Others**, Civil Application No. 160 of

2016 (unreported) was cited to reinforce the argument that where the Court unearths a decisive point post hearing deliberation, it has the duty to re-open the hearing instead of making a decision without hearing parties.

The learned advocate for the respondent submits otherwise. If we understood her correctly which we think we did, she argues that the issue of status change was central to the determination of the appeal in which both parties were heard during the hearing of the appeal. Taking her argument further, the learned advocate has contended that it was common cause before the CMA and the High Court that the applicant did not dispute signing the letter; status change transferring him to Shinyanga but he only disputed that he signed voluntarily.

Having examined the judgment, we respectfully agree with the learned advocate for the respondent that the complaint is farfetched. Page 13 of the impugned judgment outlines the submissions made by the respondent's advocate on the nature of the letter for status change and transfer to Shinyanga as Branch supervisor on the same terms and conditions of service. The discussion at pages 23 through 32 of the judgment shows clearly that the Court's determination was not a result of its own discovery of a decisive point post hearing as discussed in

Jayantkumar Chandubhai Patel and 3 Others v. Attorney General & 2 Others (supra) relied upon by the applicant's learned advocates. We find no semblance of merit in the ground but sheer dissatisfaction of the outcome. We reject it.

The upshot of the foregoing is that the applicant has not surmounted the hurdle in satisfying us to exercise our power of review in any of the grounds set out in the notice of motion. The application is patently wanting and we dismiss it. We shall make no order as to costs.

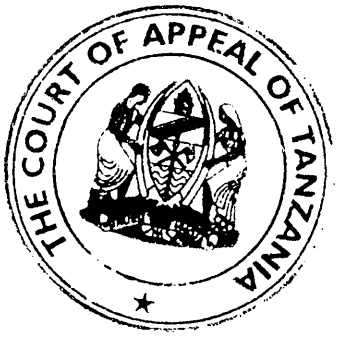
DATED at **DAR ES SALAAM** this 29th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 1st day of August, 2022 in the presence of Ms. Blandina Kihampa, learned counsel for the Respondent and also holding brief of Mr. Daimu Halfani, learned counsel for the Applicant, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL