IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWAMBEGELE, J.A., LEVIRA, J. A. And RUMANYIKA, J.A.)
CIVIL APPLICATION NO. 198/18 OF 2021
JANE KASAMBALA.....APPLICANT
VERSUS
NATIONAL BANK OF COMMERCE LIMITED.....RESPONDENT
[Arising from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam]
(Mwipopo, J.)
dated the 5th day of March, 2021
in
Consolidated Labour Revision Nos. 891 and 933 of 2018

.....

RULING OF THE COURT

25th August & 6th September, 2022

LEVIRA, J.A.:

The applicant, Jane Kasambala has moved the Court by way of notice of motion preferred under section 4 (3) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA) and Rules 65 (1), (2), (3), (4) and (7); 48 (1) and (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to call for, and examine the record of proceedings and revise the decision of the High Court of Tanzania, Labour Division (Mwaipopo J.), dated 5th March, 2021 in Consolidated Labour Revision Nos. 891 and 933 of 2018. The impugned decision partly varied the decision of the Commission for Mediation and Arbitration (the CMA) of Dar es Salaam in favour of the respondent. The applicant was aggrieved and thus lodged the present application for the purpose stated above. The notice of motion contains three grounds, and

it is supported by the applicant's affidavit. However, the application is resisted by the respondent who filed the reply written submissions to the applicant's written submissions in support of the application. As intimated above, the application is based on three grounds, but during hearing, Mr. Makaki Masatu learned advocate who appeared for the applicant in assistance of Mr. Martin Mdoe, also learned advocate abandoned the third ground and thus making the grounds of this application to remain only two as follows:

1. That, the High Court erred in law and fact in holding that the respondent had fair reason for terminating the applicant.
2. That, the High Court erred in law and in fact in not deciding all issues raised in the pleadings.

Briefly, the applicant was an employee of the respondent from 13th September, 1983 as a Customer Service Experience Officer but her employment was terminated on 21st October, 2016 on allegation of gross negligence and mishandling of customer's documents. She was aggrieved by the termination and thus referred the matter to the CMA seeking reinstatement without loss of remuneration. Having considered the matter, the CMA found that the applicant's termination was substantively fair but procedurally unfair and thus ordered the respondent to compensate her with twelve (12) months' salaries. Both

the applicant and the respondent were aggrieved by the CMA award. As a result, each of them filed Revision Applications to the High Court to challenge the said award, that was, Revision Nos. 891 and 933 of 2018. The High Court consolidated those two applications, heard them together and finally made its decision on 5th March, 2021 in which the CMA award to the applicant was reduced from twelve (12) to six (6) months' salaries as compensation for unfair termination. Again, the applicant was aggrieved and thus on 29th March, 2021, she lodged the notice of appeal with intention to challenge the decision of the High Court. Later, the applicant withdrew the notice of appeal on account that she was challenging factual issues contrary to section 57 of the Labour Institutions Act, [Cap 300 R.E. 2019] (the LIA) and in lieu thereof, she lodged the present application.

Before hearing of the application in earnest could take place, the Court engaged counsel for the parties in a brief dialogue regarding the propriety or otherwise of the application at hand on account of whether it was proper for the applicant to challenge the decision of the High Court by way of revision.

Mr. Masatu submitted that the application is properly before the Court as the same intends to challenge the findings of facts made by the High Court in the impugned decision. He referred us to section 57 of

the LIA which provides that appeals to the Court must be on point(s) of law and thus, appeals on points of facts are blocked. It was his argument that since the applicant was aggrieved by the findings on the points of facts, the only avenue for him to challenge them before the Court is by way of revision. He supported his argument with the decision of the Court in **Muhimbili National Hospital v. Costantine Victor John**, Civil Application No. 44 of 2013 (unreported), where the Court stated that a party in proceedings in the High Court may invoke its revisional powers in matters which are not appealable. Basing on that decision, he concluded that the application is properly before the Court notwithstanding the fact that, the grounds presented for our determination contain both points of law and facts. He expounded further his position by stating that since the applicant intends to challenge factual issues as well, then the application for revision is appropriate. He urged us to find so and proceed to entertain this application on merits.

In reply, Ms. Josephine Safiel, the learned counsel who appeared for the respondent submitted that the application is not properly before the Court because the applicant ought to have appealed on points of law against the impugned decision. She further submitted that the question of law on appeal incudes also a question of failure to evaluate evidence

as it was decided in the case of **National Microfinance Bank Ltd (NMB) v. Neema Akeyo**, Civil Appeal No. 511 of 2020 (unreported).

According to her, the question of law as in the current matter cannot be determined without evaluation of evidence and in that case, the applicant who intends to challenge both points of law and facts was supposed to come before the Court by way of appeal as opposed to revision. Finally, she prayed for the application to be struck out for being incompetent and improperly before the Court.

Having heard the arguments by both sides on the propriety or otherwise of the present application, we premised our deliberations on the provisions of the law under which the application is brought. We intimated above that the application is preferred among other provisions under section 4 (3) of the AJA and Rule 65 of the Rules. Those provisions call upon the Court to determine the correctness, legality or propriety of any finding, order or decision and the regularity of any proceedings of the High Court. Conveniently, by so doing, the Court does not sit on revision to re-evaluate the evidence so as to determine whether or not the decision reached upon is correct or otherwise as the revisional power of the Court cannot be applied as an alternative to appeal. Instead, section 4(3) of AJA provides on how the Court should exercise its revisional powers in the following terms:

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court* ***for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon*** *and as to the regularity of any proceedings of the High Court".* [Emphasis is added].

The law is settled, that if there is a right of appeal then that right has to be pursued except for sufficient reason(s) amounting to exceptional circumstances – see **Transport Equipment LTD v. Devram P. Valambia** [1995] T.L.R. 161. Nonetheless, appeals to the Court from a decision of the Labour Court like in the present matter, lies on a point of law only in terms of section 57 of the LIA. For clarity the said provision stipulates that:

> *"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."*

We wish to restate the rationale behind the position of the law under Section 57 of ILA which the Court set in **Regina Moshi v. The**

Board of Trustees of the national Social Security Funds (NSSF), Civil Application No.457/18 of 2019 (unreported) hereunder:

> *".... 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 LIA be circumvented by invoking the court's revisionai jurisdiction to re-assess the evidence."*** [Emphasis added].

See also: **Patrick Magologozi Mongella v. The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 342/18 of 2019 (unreported).

With that position in our mind, we now move to consider whether the grounds of application presented before us qualify the verge to deserve the Court's attention. We note that, both counsel for the parties were at one, that the two grounds of revision are of mixed law

and facts. However, they parted ways on the course taken by the applicant in the sense that, while the counsel for the applicant argued that it was proper for the applicant to bring forth the matter by way of revision, to the contrary, the counsel for the respondent was firm that the proper course for the applicant to take was to appeal against the impugned decision of the High Court as the applicant was a party to the proceedings subject of the present application. Our quick screening of the record before us reveals that, the grounds of revision presented by the applicant were also raised before the High Court and dealt with in the Consolidated Revision Nos. 891 and 933 of 2018 subject of the present application. Apart from that, they raise points of law which in terms of section 57 of the LIA, are appealable. This is due to obvious reason that the first ground invites the Court to evaluate the evidence on the reason(s) for termination of the applicant so as to rule out whether or not the termination was fair.

In the second ground, the main complaint is that the High Court did not determine all the issues raised in the pleadings and thus it erred in law and fact. At page 505 of the record of the application, this ground was raised and its determination was made at pages 513-514 of the record where it was held: "All the matters were addressed and determined when the CMA determined the respective issues." In the

circumstances, the applicant ought to have appealed against that decision as it raised a question of law instead of treating it as a special circumstance justifying revision by the Court. In **National Microfinance Bank Ltd (NMB)** (supra) the Court interpreted what entails the 'question of law' and quoted the decision of the Supreme Court of Kenya in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & Three Others** [2014] eKLR, which defined the phrase "question of law" among other interpretations as follows:

> *"... 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."*

Therefore, we agree with Ms. Safiel that the grounds of revision advanced by the applicant are points of law involving issues requiring deliberations leading to re-evaluation and consideration of the evidence or factual matters and thus appealable.

Besides, it is our observation that the applicant has not advanced any special circumstance for the Court to invoke its revisional powers to deal with the present matter. With respect, we further observe that circumstances in the case of **Muhimbili National Hospital** (supra) cited to us by the counsel for the applicant to support the application are

distinguishable from the circumstances in the present matter. We therefore decline the extended invitation by Mr. Masatu that we should find that the application is properly before the Court. It is our finding and we hold that the grounds presented before us for determination raise points of law which in terms of section 57 of the LIA are appealable. Therefore, since the applicant has the right to appeal, she ought not to have come by way of revision as revision is not an alternative to appeal.

In view of what we have endeavoured to discuss above, we are satisfied that this application is misconceived. We therefore strike it out with no order as to costs, as the application arises from a labour dispute.

DATED at **DAR ES SALAAM** this 1st day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 6th day of September, 2022 in the presence of Mr. Martin Mdoe, learned counsel for the applicant, also holding brief for Ms. Josephine Safiel, learned counsel for the respondent, is hereby certified as a true copy of original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL