IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J. A., LEVIRA, J.A And KAIRO, J.A.)

CIVIL APPEAL NO. 269 OF 2019

GEITA GOLD MINING LIMITED ..... APPELLANT

VERSUS

SWEETBERT HURBERT ..... RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania (Labour Division) Mwanza District Registry at Mwanza)

(Matupa, J.)

Dated the 28th day of September, 2018
in
Labour Revision No. 109 of 2018

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JUDGMENT OF THE COURT

2nd & 8th December, 2022

LILA, J.A:

The respondent Sweetbert Hurbert was dissatisfied with the termination of his contract of employment by the appellant on 10/2/2016. That was after the Managing Director of the appellant company had reversed the finding of the Chairman of the Disciplinary Committee held on 9/9/2015 which had preferred a Comprehensive Final Written Warning upon finding him guilty of attempted theft of gold nuggets. The appellant was employed as Fitter Mechanics and Boiler

Maker. He referred the labour dispute to the Commission for Mediation and Arbitration (the CMA) challenging his termination on grounds of unfair and invalid reasons of termination and unfair procedure of termination. He claimed for compensation for unfair termination, severance payment, certificate of service and other statutory rights the CMA would deem fit to grant. After hearing both sides, the CMA found in favour of the respondent and awarded him payment of 38 months remuneration as compensation for unfair termination and bad motive, severance payment of 11 years. In addition, the appellant was ordered to issue to the respondent a clean certificate of service.

The appellant was apparently aggrieved and preferred a revision application before the High Court (Labour Division) christened as Revision No. 109 of 2016. The situation exacerbated on the part of the appellant for in its ruling, the High Court (Matupa, J.) acting in terms of section 40 of the Employment and Labour Relations Act (the ELRA) overturned the order of termination and ordered reinstatement of the respondent to his employment and in the event the appellant is not ready to reinstate him, then she should pay the respondent all the entitlements outlined under section 40(2) of the ELRA. The High Court further ordered the appellant to pay the respondent his salaries for the

whole period since he was terminated in terms of section 40 of the ELRA.

As would be expected, the High Court decision triggered further grievances from the appellant as exhibited in the four grounds of appeal. It is wholly unnecessary to recite them herein on account of the course taken during the hearing of the appeal and the reason for which the appeal turns out as shall be apparent soon.

At the hearing of the appeal Mr. Ruben Sadick Robert, learned counsel, appeared for the appellant whereas Mr. Erick Mutta, also learned counsel, represented the respondent who was also present in Court.

Mr. Robert was first to take the floor but not for the hearing of the appeal. He brought to the attention of the Court the manner the Court's order dated 11/7/2022 had been complied with. In that order the Court granted leave to the appellant to lodge a supplementary record incorporating a missing ruling on the admissibility of the CCTV footage (flash disc – exhibit D1), the admission of which was objected to by the respondent's counsel Mr. Matiku. He explained that by way of a letter dated 11/7/2022 followed by a reminder letter dated 19/7/2022, he asked the Honourable Arbitrator In-Charge to avail him with the ruling

which resulted in the admission of exhibit D1 and a response from the CMA through a letter dated 28/7/2022 was to the effect that they could not find it. He impressed to the Court that the Court had, on 11/7/2022, appreciated it to be a crucial document in the just determination of the appeal such that it raised *suo motu* the issue of its absence on the record and, to ensure it is made available, it granted leave for it to be included in the record of appeal through lodging a supplementary record of appeal. Aligning with the Court, he also expressed his view that it is important that the reasoning of the CMA in admitting exhibit D1 be availed to the Court so as to satisfy itself if it was properly admitted into evidence as it was heavily relied on by the CMA in its award. Since the CMA had made it clear that it could not find it, then the Court should take it that it is completely missing. As a way forward, he beseeched the Court to nullify the proceedings of the CMA, the award and the proceedings and the ruling of the High Court on revision and direct that the record of the CMA be remitted for it to hear and determine the dispute afresh, the course he claimed the Court adopted in similar situations. Much as his research could not bear fruits in securing a civil case decision, his eyes landed on the unreported Criminal Appeal No. 405 of 2018 between **Yusuph Mbululo and the Republic** which he

sought to rely on as an illustration of a situation where upon a crucial document being found missing, the Court may, upon a definitive declaration as did the CMA, order a retrial of the case. In that case, he explained its relevance to the present case, the Court was faced with a situation that the notice of appeal was misplaced or it was lost. He urged the Court to follow suit in the present case.

Responding to the prayer by Mr. Robert, Mr. Mutta was brief but focused. He distinguished the situation which obtained in the case of **Yusuph Mbululo vs Republic** (supra) and the present case stating that in that case the notice of appeal existed but went missing which is different in the present case where the ruling was not completely rendered to the parties despite repeated adjournments. While referring to pages 170 to 171 of the record, he contended that the submissions or arguments of the parties regarding the objection to have exhibit D1 admitted as exhibit are there on the record hence it is proper and just if the record of the CMA is returned for it to deliver the ruling which is yet to be delivered to date. He impressed the Court that it was irregular for the CMA to proceed with the determination of the dispute without the ruling being delivered hence the proceedings of the CMA after the order that the ruling was to be delivered and the consequential award are a

nullity as well as the proceedings and decision of the High Court on revision.

In his brief rejoinder, Mr. Robert expressed his reservation in the event the Court retains part of the proceedings of the CMA that the Arbitrator who presided over the dispute may not still be there hence pose a difficult to the successor Arbitrator in composing the ruling hence occasion an injustice to the parties. He maintained his proposal that the proceedings and award by the CMA and the proceedings and ruling by the High Court be nullified and an order be made for the dispute to be heard afresh.

In view of the submissions by the learned counsel, it appears that they are in agreement that exhibit D1 was heavily relied on by the CMA in arriving at its award. It therefore follows that the ruling on its admissibility is equally crucial. We entirely agree with them and we would add that it was also relied on by both the Disciplinary Committee and the Managing Director in the determination of the respondent's guilt with the accusation raised and the ultimate termination of his contract of employment. But the question we ask ourselves is whether its absence is sufficient cause to nullify all the proceedings of both the CMA and the High Court and, respectively, their award and ruling and order a retrial?

We are compelled to pose that issue for we are alive of the established principles that such course is taken under special circumstances such as where the trial is either illegal or defective or where the interest of justice so requires [see **Fatehali Manji versus The Republic** (1966) E.A. 343 and **Shabani Madebe versus Republic**, Criminal Appeal No. 72 of 2002 (unreported) citing the cases of **Rex versus Vashanjee Liladhar Dossani** Vol. 13 EACA 150 and **Merali and Others versus Republic** (1971) HCD n. 145]. Although pronounced in criminal cases, the principles equally apply in civil cases.

There is no gainsaying that the learned counsel for the parties are at one that the ruling is patently not in the record of appeal. But they differ on how it should be treated; is it missing or it was completely not delivered. We should answer this question first. We consider this issue to be pertinent as it shall determine the way forward.

The record bears out clearly at pages 170 to 171 of the record that the CCTV footage was a subject of objection on its admissibility as exhibit before the CMA on 2/8/2016 when Witness No. 1 for the appellant (then respondent) one Joseph Kalungwana, the investigator of the matter, testified before the CMA and sought to tender as exhibit the CCTV clip or footage which allegedly showed who dropped the nuggets

of gold in an attempt to steal, the subject of the respondent's disciplinary action before the Disciplinary Committee. That prayer was not earnestly received by Mr. Matiku, learned advocate who acted for the respondent (then applicant). His objection was, briefly, grounded on the competence of Mr. Joseph Kalungwana to tender it he being neither the author of it nor the one who swore an affidavit on how it was extracted in terms of the Electronic Transaction Act, 2015. The objection was resisted by Ms. Upendo Mbaga, learned advocate who acted for the respondent (now appellant) that Mr. Joseph Kalungwana being the investigator had interest on it as he conducted an identification parade which led to the identification of the respondent (then complainant/applicant) and also, as a witness, was sworn to testify hence was competent to tender it.

Upon the above legal wrangle, the record further reveals at page 171 that the presiding Arbitrator (Mr. Valensi Wambali), reserved the delivery of the ruling to 3/8/2016 at 1:30 p.m. Unfortunately, it was not delivered on that date as was scheduled on account of the respondent's counsel being indisposed and was again adjourned till 15/9/2016 at 8:30. Came that day, in the presence of counsel of both

sides who were ready to receive the ruling, instead of delivering the ruling, it was recorded by the Arbitrator that:

> *"Order: The document is admitted and we proceed with evidence and marked as Exh D1 (Flash disk)"*

Thereafter, Ms. Mbaga proceeded to examine Mr. Joseph Kalungwana to the conclusion of his testimony. He was followed by Joseph Mugile (witness No. 2) after which the appellant's case was closed. The respondent was the sole witnesses on his side.

It stems out vividly from the record that no ruling was ever delivered by the CMA. We accordingly agree with Mr. Mutta that, as the record stands, the CMA is yet to deliver the ruling to date. The order that the CCTV footage (flash disc) was admitted was made arbitrarily. It is therefore not a simple matter that the ruling is missing from the record for which the remedy would be to direct due diligence be made to trace it and upon failure a definitive declaration be made so as to pave way for other remedies to take course [see **Yusuph Mbululo versus Republic** (supra)]. We are saying so deliberately. Even the learned counsel of the parties admitted that there was no indication in the record of appeal that the ruling was delivered. We have held so

deliberately and without demur because it is an established practice that once a ruling or judgment is delivered the court indicates so on the record and before whom it is delivered.

Failure to deliver the ruling, as the learned counsel of the parties concurred, denied them and the parties the right to know the reasoning of the CMA in admitting the flash disc as exhibit. The reasoning would also enable the Court, in the event of an appeal, to inquire on the propriety of its admission and hence its evidential value. The question, we restate, the Court is confronted with is whether we could redress the injustice by nullifying all the proceedings and the award by the CMA and ordering a retrial.

In our considered view and with unfeigned respect to the appellant's counsel we have found no legal basis of nullifying all the proceedings of the CMA and the High Court. It is plain on the record that the mishap began with the failure to deliver the ruling which even the CMA has informed the court that they could not locate it. So, it is not a matter of the ruling missing from the record, being misplaced or being lost. The cited case of **Yusufu Mbululo vs The Republic** (supra) cannot apply in the circumstances of this case as it concerned a

misplacement or loss of the notice of appeal which was lodged in court so as to initiate the appeal to the Court.

With a serious note we wish to express our discontent with the habit of certain trial magistrates or judges proceeding with trial without determining objections by delivering the ruling as and when the objections are raised so as to let the parties know the fate of the objection and thereby arrange their case properly in line or in accordance with the contents of the ruling. By doing what he did, the Arbitrator denied the parties the right to know the reasons for admitting exhibit D1 hence arrange on how further to proceed with the hearing of the dispute. That was unfair. As such, it was improper for the CMA to proceed with the determination of dispute. The subsequent proceedings and award by the CMA as well as the proceedings and ruling of the High Court in the revision application were therefore invalid.

In the final analysis, given that the arguments by the parties on the admissibility of exhibit D1 are on the record of appeal, we agree with Mr. Mutta that to correct the irregularity, it is appropriate to remit the record of the CMA for it to compose and deliver the ruling. We invoke our powers of revision bestowed to the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 to nullify and

quash the proceedings of the CMA from 15/9/2016 onwards, the Award, the High Court proceedings in Labour Revision No. 109 of 2018 and the consequential ruling and orders. We accordingly order that the record of the CMA be remitted back for it to compose the ruling and deliver it to the parties as it had scheduled and thereafter proceed with the hearing and determination of the dispute according to law.

This being a labour matter we make no order for costs.

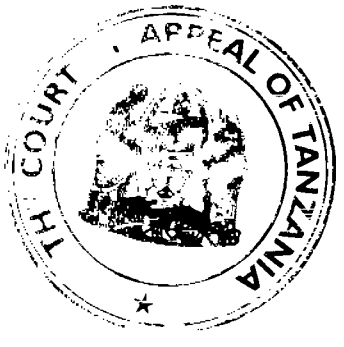
DATED at **MWANZA** this 7th day of December, 2022.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 8th day of December, 2022 in the presence of Mr. Sekundi B. Sekundi holding brief for Mr. Robert Ruben, learned counsel for the appellant and Mr. Erick Mutta, learned counsel for the respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL