**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

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

**CIVIL APPEAL NO. 371 OF 2019**

**NDARO BWIRE SONGORA ..... APPELLANT**

**VERSUS**

**MWINUKO SECONDARY SCHOOL ..... RESPONDENT**

**[Appeal from the Decision of the High Court of Tanzania (Labour Division) at Mwanza]**

**(Rumanyika, J.)**

**dated the 10th day of October, 2018**

**in**

**Labour Revision No. 94 of 2016**

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# JUDGMENT OF THE COURT

*5th & 8th December, 2022*

## LEVIRA, J.A.:

The appellant, Ndaro Bwire Songora is challenging the decision of the High Court of Tanzania, Labour Division at Mwanza (the High Court) in Revision No. 94 of 2016 dated 10th October, 2018. In the said decision, the High Court confirmed the decision of the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA / MZ / NYAM /377 /2015 of 7th October, 2016 setting aside an *ex parte* award which it had previously granted against the respondent on 4th April, 2016.

Briefly, the background of this matter is to the effect that the appellant was employed by the respondent as a school guard and had worked for her for about seven years. However, his employment was terminated allegedly with no reason. Aggrieved, he referred the dispute to the CMA for an order that he be reinstated or be paid compensation for unfair termination of his employment. When the matter was set for mediation, the respondent did not enter appearance. The appellant prayed for and was granted leave to proceed *ex parte* against the respondent. He gave his evidence and the mediator was convinced that the appellant was indeed an employee of the respondent and was unfairly terminated. Therefore, in the award, she ordered the respondent to reinstate the appellant from the date of termination without loss of remuneration.

Upon such *ex parte* ward, the appellant commenced execution proceedings which did not yield any fruit as the respondent surfaced and moved the CMA to set aside the same on the ground that, she was not aware of the dispute as there was no service on her until when she was served with a summons to show cause why the award should not be executed. The mediator set aside the *ex parte* award thereby allowing the matter to proceed *inter partes.*

The appellant was not satisfied with that decision and thus he lodged Labour Revision No. 94 of 2016 to the High Court. When the parties appeared before the learned Judge on 24th August, 2018, the appellant who appeared as the applicant therein was represented by Mr. Marwa Chacha Kisyeri as a personal representative. However, before the matter could proceed for hearing on merit, the learned Judge raised, *suo mottu,* the issue of the appellant's representation as he noticed that Mr. Kisyeri was not an advocate. He thus invited the parties to address him on whether Mr. Marwa Chacha Kisyeri had a right of audience or *locus standi* before the court. Having heard the parties' submissions, the learned Judge decided that Mr. Marwa Chacha Kisyeri being not an advocate had no right of audience and could not represent the appellant. He made a remark that the said finding was sufficient to dispose of the application but did not end up there. He proceeded to determine the merits of the application (revision) though he did not give the parties an opportunity to submit on the merits of the application. Finally, the learned judge did not find merit in the application as there was no proof of service to the respondent. According to him, it was proper for the CMA to set aside the *ex parte* award. He thus ordered the parties to go back to the CMA and proceed with hearing from where it ended before *ex parte* proof was ordered. The appellant was again not

satisfied and hence the current appeal. He has raised sixteen (16) grounds in the memorandum of appeal which for reasons to come to light shortly, we shall not reproduce them herein.

At the hearing of the appeal, the appellant appeared in person, unrepresented and at the outset abandoned the third and ninth grounds of appeal listed in the memorandum of appeal. On her side, the respondent had the services of Mr. Patrick Makinda Mahere, learned Senior State Attorney. We wish to remark at the onset that having thoroughly gone through the remaining grounds of appeal, we discovered that they revolve around two main complaints as follows:

1. *That the learned High Court Judge erred in law to hold that the appellant's personal representative had no right of audience contrary to the law.*
2. *That, the learned High Court Judge erred in law to determine the merits of the application without first hearing the parties.*

Submitting in respect of the first complaint, the appellant stated that the learned High Court Judge erred in law to hold that the appellant's personal representative had no right of audience (*locus standi*) before him. It was the appellant's argument that the impugned decision of the High Court denied him the right to be represented and it was contrary to the law as the learned Judge did not interpret properly

the provisions of the Labour Institutions Act, Cap. 300 R.E. 2019 (the LIA) to determine the issue he had raised.

On the second complaint, we have noted that the appellant is faulting the decision of the High Court for not considering **first,** that the respondent's application to set aside the CMA award was filed out of time. **Second,** that the respondent was aware of the proceedings at the CMA as he happened to appear there three times before the hearing date, but defaulted appearance subsequently. **Thirdly,** that the appellant was the employee of the respondent with a known income and not the employee of the Ilemela Municipal Council as alleged by the respondent during the hearing of the application to set aside the *ex parte* award and confirmed by the High Court while upholding the decision of the CMA setting aside the *ex parte* award. Thus, the appellant urged us to allow the appeal and grant all the reliefs sought in the memorandum of appeal.

In reply, Mr. Mahere supported the appeal though with slight difference from what was submitted by the appellant. He submitted in respect of the first complaint that, in terms of section 56 (b) of the LIA, a party to the proceedings before the Labour Court may appear in person or be represented by a personal representative of his or her own

choice. Therefore, the legal representative of the appellant one Marwa Chacha Kisyeri was right to represent the appellant. The learned Judge was therefore not justified to stop him from representing the appellant. As such, he said, the learned Judge denied the appellant the right to representation and to call another representative or to argue his case.

Mr. Mahere added that as Rule 43 (1) (a) and (b) of the Labour Court Rules, 2007 GN. No. 106 of 20O7, allows representation by personal representative of party's own choice subject to compliance of the notice requirement, the appellant having complied as such, it was wrong for the learned Judge to hold as he did that such a representative must be an advocate or a member of trade union. He thus contended further that, the learned Judge erred in deciding contrary to the law and denying the appellant's right to be represented; hence, injustice on the part of the appellant.

Submitting in respect of the second complaint, Mr. Mahere argued that, parties to the application which was placed before the learned Judge were not accorded a chance to address the court on the merits of the application. Surprisingly, the learned Judge determined the merits of the said application and rendered a ruling, something which he said, was wrong. He therefore, urged us to allow the appeal, nullify the

proceedings, quash the decision of the High Court and in lieu thereof, order for a retrial from the proceedings of 24th August, 2018 at page 20 of the record of appeal where the learned Judge raised *suo mottu* the issue of appellant's personal representative.

Having heard the parties' submissions and upon thorough perusal of the record of appeal and the appellant's complaints, the main issues calling for our determination are; whether it was proper for the High Court to hold that the appellant's personal representative had no right of audience before it; and, whether the learned High Court Judge was justified to determine the application on merit without first according the parties the right to address him. As noted above, when the matter was before the High Court, the learned Judge raised *suo mottu* the issue of the appellant's personal representative, one Marwa Chacha Kisyeri, who appeared to represent him before the court. Upon hearing the parties' submissions for and against that issue, the learned Judge decided that although section 56 of the LIA allows a party before the Labour Court to be represented by a personal representative of his own choice, that provision should be subjected to section 39 (1) of the Advocate Act, to see that the personal representative envisaged under the said section,

must be an advocate. This finding and holding by the High Court is what the appellant is challenging in the first complaint.

We wish to start by reproducing section 56 of the LIA; it reads:

> *"56. In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented by-*
>
> *(a) an official of a registered trade union or employers' organisation;*
>
> *(b)* ***a personal representative of the party's own choice****; or*
>
> *(c) an advocate."*
>
> [Emphasis added].

The above provision provides for a list of people who can represent a party before the Labour Court. As it can be observed, apart from an official of a registered trade union and an advocate, a personal representative of a party's own choice is also mentioned to be among those who may appear before the court. In our view, since the legislature mentioned in the list a personal representative separately from an advocate, it cannot be said that the intention was to categorise personal representative of a party in the group of advocates. It is trite that when the language of a statute is plain, the court need not go out

of its way and interpolate; as the courts must presume that, the legislature says in a statute what it means and means what it says as it was held in **CONNECTICUT NAT'L BANK V. GERMAIN**, 112 S. Ct. 1146, 1149 (1992) quoted in a number of Court's decision including, **Republic v. Mwesige Godfrey and Another**, Criminal Appeal, No. 355 of 2014 and **Geita Gold Mining Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 132 of 2017 (both unreported).

In the matter at hand, the language of the statute, in particular section 56 (b) of LIA as quoted above is very clear that a personal representative of a party's own choice is also allowed in the proceedings before the Labour Court. Therefore, we find that in the circumstances of this matter, the duty of interpretation did not arise and thus it was, with respect, wrong for the learned Judge to make reference to the provisions of section 39 of the Advocates Act, Cap. 341 R.E. 2002 to restrict representation in labour matters to qualified advocates and members of trade unions. This we say because, an advocate was already in the list together with personal representative. Had it been that a non-practising advocate or lawyer is not required to represent a party, the law ought to have expressly stated so.

We wish to state that we are quite aware of the provisions of Order III Rules 1 and 2 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) which provides as follows:

> *"1. Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court may,* ***except where otherwise expressly provided by any law for the time being in force****, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorised by him in that behalf:*
>
> *Provided that, any such appearance shall, if the court so directs, be made by the party in person.*
>
> *2. The recognised agents of parties by whom such appearances, applications and acts may be made or done are-*
>
> *(a) persons holding powers-of-attorney, authorising them to make appearances or applications and to do such acts on behalf of such parties;*
>
> *(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of*

> *the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts."* [Emphasis added].

As it can be observed, the above provision being of the main civil procedural legislation, provides for the list of persons who can represent a party in civil proceedings subject to express provisions of *any law for the time being in force* which may provide to the contrary. In the current matter, the LIA being a law in force provides for a provision where a personal representative may as well represent a party in a Labour Court. This means that it gives a wider right of being represented in case a party wishes to engage a personal representative who might not necessarily be an advocate or a member of any recognized trade unions as decided by the learned High Court Judge, otherwise section 56 (c) of the LIA would be redundant. It is therefore, our finding that Marwa Chacha Kisyeri, the appellant's personal representative had *locus standi* in terms of section 56 (b) of the LIA to represent the appellant and thus the learned High Court Judge erred to disqualify him. The appellant's first complaint is merited.

Having disposed of the first complaint, we need not be detained by the second complaint as we are firm that what followed after the decision that the personal legal representative had no *locus standi* became a nullity. We say so due to the main reason that, the Labour Revision No. 94 of 2016 was not heard on merit after the learned High Court Judge had raised, *suo mottu,* the issue of appellant's personal representative. The parties made their respective submissions in respect of the raised issue and the learned Judge retired to write a ruling. However, in his ruling, after disposing of the issue of the appellant's personal representative, the learned Judge went ahead to discuss the merits of the application and concluded that, it had no merit. The parties were not given an opportunity to address the court on the merits or otherwise of the application. This we say, was a procedural flaw which led to the miscarriage of justice on both sides, regardless whether or otherwise he could arrive at the same decision had he accorded the parties the right to be heard. In the circumstances, we equally find merit in the second complaint as parties were denied a fundamental right to be heard and the decision reached was nothing but a nullity, see: **Mbeya - Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported).

In upshot, we allow the appeal, set aside the ruling and drawn order of the High Court in Labour Revision No. 94 of 2016 and quash the proceedings from where the High Court raised *suo mottu* the issue of the appellant's personal representative and order that the revision be heard as scheduled by another Judge.

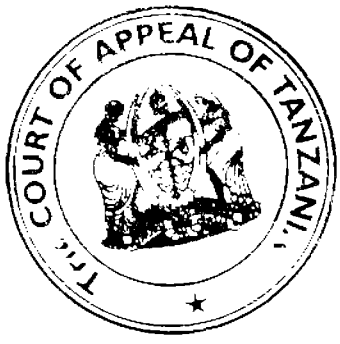
**DATED** at **MWAMZA** this 8th day of December, 2022.

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 the appellant in person and Mr. Patrick Muhere, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**