IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 382 OF 2019

TANZANIA DISTILLERS LIMITED.....APPELLANT

VERSUS

BENNETSON MISHOSHO .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Arufani, J)

Dated the 19th day of September, 2019
in

Revision No. 506 OF 2018

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JUDGMENT OF THE COURT

28th October & 23rd November, 2022

RUMANYIKA, J.A.:

On 19/09/2019, the High Court of Tanzania (Arufan, J), upheld the decision and award dated 21/04/2017 of the Commission for Mediation and Arbitration of Dar es Salaam at Dar es Salaam (the CMA) dismissing the appellant's appeal. The appellant still believes that the termination of the respondent was substantively and procedurally fair. She is before us with five points of grievance which are reproduced as under:

1. *The Honourable Revisional Court Judge erred in law for failure to hold that transferring of files from one Arbitrator*

to another without informing the parties is both procedural irregularity and prejudicial to the parties.

2. *The Honourable Revisionai Court Judge erred in law for failure to hold that attempt to theft amount to fair reason for termination.*

3. *The Honourable Revisional Court Judge erred in law for failure to determine that the Commission's Award was illegal in the sense that the Honourable Arbitrator framed and decide her own issue without availing parties opportunity to be heard.*

4. *The Honourable Revisional Court Judge erred in both facts and law in holding that there was no evidence which was tendered or presented to prove the Respondent's attempted theft.*

5. *The Honourable Revisional Court Judge erred in law by failure to note procedural irregularity occasioned for Mediation and Arbitration that, the respondent had filled additional list of documents without filling list of documents to be relied by her.*

A brief historical background to this appeal reads as follows: The respondent herein was employed by the appellant on 16/07/2008 in the capacity of laboratory technician. He enjoyed her employment until on 04/03/2014. He was terminated for the charge of an attempt to steal 1,200 litres of spirit, the raw material for making distilleries. He was not

satisfied. He successfully challenged that termination on account of substance and procedure for being unfair and sought to be reinstated without any loss of benefits and won the battle before the CMA. He emerged a winner in a subsequent Revision No. 506 of 2018 lodged by the appellant before the High Court at Dar es Salaam. Being aggrieved, the appellant has preferred this appeal on the grounds indicated above.

It was alleged that on 14/01/2014, while supervising offloading of the said raw material, with intent to defraud, the respondent permitted a partly offloaded truck to leave the compound with some 1,200 liters of the spirit. However, that plot aborted as the security guards intercepted the trick at the outlet gate. To answer this, the driver of that truck stated that it is one Neema Kessy, one of the appellant's personnel who let him to drive aside to pave way for the focal lift at work. However, a day later, the respondent was suspended and summoned before the Displinary Committee for the charge of attempted stealing and subsequently terminated. This was 4th March, 2014. However, as alluded to before, the CMA set aside the termination and ordered the respondent's reinstatement without loss of remuneration.

At the hearing on 28/10/2022, the appellant was represented by

Messrs. Gilbert Mushi and George Ambrose Shayo, learned counsel. The respondent had the services of Mr. Evance R. Nzowa, also learned counsel.

Before the commencement of the hearing, Mr. George dropped grounds 2, 4 and 5 of the appeal as they were factual, not points of law to meet the requirement of section 57 of the Labor Institutions Act, Cap 300 R.E.2019. There, remained ground numbers 1 and 3.

He adopted the written submission, pursuant to rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) filed on 23/10/2022 in support of the appeal.

For ground number one, Mr. George contended that, as appears at page 115 of the record of appeal, the case changed the hands of the arbitrators who are Faraja and Batenga, without requisite notice to the parties provided under section 88 (2) (a) - (c) of the ELRA and that omission, he argued, prejudiced the parties as it was fatal and vitiated the proceedings. More so, he further contended, when the predecessor arbitrator had heard and recorded evidence of the first three witnesses. On that basis, he doubted the impartiality and integrity of Batenga, the successor arbitrator. To support his point, he urged us to take inspiration from an unreported decision of the High Court sitting at Musoma in **Mwita**

Marwa Chacha v. Samwel Suleiman Mwita and Nyankungu Village Council, Land Appeal No. 48 of 2019 and our unreported decision in **National Microfinance Bank PLC v. Mary Rwabizi t/a Amuga Enterprises**, Civil Appeal No. 296 of 201.

However, being probed by the Court, Mr. George did not demonstrate as how the appellant was prejudiced by the alleged improper succession of the arbitrators, besides being speculative in our view, he zealously stressed that the improper transfer of the case contravened section 88 (2) (a) - (c) of the ELRA. This omission, he argued, was irregular, it shook the succeeding arbitrator's integrity and vitiated the proceedings.

He further faulted the arbitrator in succession for having *suo motu* embarked on the appellant's failure to produce a Code of Conduct to establish the offence of attempted stealing allegedly committed by the respondent. He believed this resulted into misapprehension of the evidence on the part of the arbitrator as the latter took over the partly heard case improperly.

As regards the 3rd ground of appeal, which we consider it to be a replica of what Mr. Mushi had submitted on the preceding ground of appeal, he contended that by raising the issue of Code of Conduct *suo*

motu to found the impugned award, the successor considered the extraneous factor which was uncalled for in the circumstances as it denied the parties right of a fair hearing.

To wind up, Mr. Gilbert sought and obtained indulgence of the Court to argue an additional ground of appeal on unsworn evidence to found the impugned award which Mr. Nzowa did not object. That, as appearing at pages 97 and 102 of the record of appeal, PW1, Thomas Munema, a Christian, gave unsworn evidence. This was argued to be an omission rendering that evidence to have no evidential value but the CMA acted on it to found the award. He urged us to follow the Court's long established legal principle to expunge the improperly recorded evidence, nullify the proceedings affected and quash the subsequent award.

In reply, Mr. Nzowa adopted written submissions filed on 14/02/2020 under rule 106 (1) (2) (a) - (d) of the Rules and contended that the High Court judge was right as there is no basis upon which to fault him.

About the first ground of appeal, he argued that the parties were dully advised on the appointment of the arbitrator in succession as required under section 88 (2) (a) - (c) of the Employment and Labour Relations Act No.6 of 2004 (the Act) and that, the alleged

misapprehension of the evidence caused by that succession of the case between the arbitrators is neither here nor there.

On the 3rd ground of appeal, Mr. Nzowa contended that there is nothing on record to show that the appellant's failure to present the Code of Conduct founded the impugned award. Rather, he submitted, it is because of lacking evidence to prove the offence of attempted stealing of the said 1,200 liters of spirit, to substantiate the charged disciplinary offence.

As regards the additional ground of appeal which is about the witnesses' unsworn evidence and its legal effects, Mr. Nzowa left it to the Court to decide as it would deem appropriate.

Rejoining, on the first ground of appeal about the case improperly changing the hands of the arbitrators, Mr. Mushi contended that the parties might know the respective arbitrator assigned the case through two ways: **one**, from the cause list appended on the CMA's notice board and **two,** a notice of hearing being served on them, but in the present case they were either way not notified.

We have read the counsel's written and oral submissions for and against the appeal, authorities cited and the record of appeal. The issues for our consideration are: **one**, whether the succession of the arbitrators

vitiated the conduct of the arbitration; **two**, the propriety or otherwise of the unsworn evidence of witnesses during arbitration and; **three**, whether the termination of the respondent was substantively/procedurally unfair.

It is undeniable fact that the dispute giving rise to the present appeal took off on 04/11/2015 before Faraja, arbitrator, and then Batenga took over the proceedings on 13/10/2016 and concluded the hearing of the dispute on 16/11/2016. There is no gainsaying that the transfer of the case was informal. No reasons for that transfer were given much as there was no transfer order made to that effect as required in ordinary courts.

With regard to ground one of appeal we wish to begin stating that, the manner and conduct of proceedings in arbitration are regulated under Parts V and VI of the Labour Institutions (Mediation and Arbitration) Rules, G.N 64 of 2007 and section 88 (4) (a) and (b) of the ELRA. The position of law is that, upon the CMA appointing an arbitrator who determines time, date and place of the arbitration, it is required to appropriately determine the dispute fairly, expeditiously and substantively with the minimum of legal formalities. This is also embraced under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, where the courts are enjoined to observe substantive justice without being unduly tied with legal technicalities and this is what necessitated the enactment

of section 3A (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2022, on the Overriding Objective Principle. Unlike in the CMA where there is no requirement of formal assignment of cases and succession of arbitrators, in ordinary courts other than the Court, assignment of cases and succession of magistrates is both administratively and mandatorily codified. See- Order IV rule 3 of the Civil Procedure Code, Cap 33 R.E. 2002. The provisions of section 256A (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 apply for resident magistrates exercising extended jurisdiction. As regards the Court, the power to assign cases is vested with The Chief Justice. **See- Elia Kasalile and 17 Others v. Institute of Social Work**, Civil Application No. 187/18 of 2018. This means that, the position in the CMA is similar with one applicable in some other jurisdictions on arbitration. For instance, in South Africa, section 138(1) of the Labour Relations Act No. 66 of 1995 gives arbitrators discretion to determine the form in which to conduct arbitration which need not be in the same manner as in ordinary court. As such, when, for one reason or the other, an arbitrator is unable to complete the arbitration, as is the case, another arbitrator will take over the proceedings upon being so appointed by the CMA.

It follows therefore that, in the absence of any law prescribing the modality on succession of cases, to embrace the precribed modality

applicable in ordinary courts is but overstretching which was not intended by the Legislature. Stressing on the duty of the courts to strictly adhere to unambiguous legislations, on different occasions, including **The Republic v. Mwesige Geofrey and Another**, Criminal Appeal No. 355 of 2014 (unreported), the Court held that:

> *"...it is axiomatic that when the words of a statute are unambiguous, "judicial inquiry is complete". There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation".*

In saying so, we quoted as follows:

> *"Courts must presume that a legislature says in statute what it means and means in a statute what it says there".* **CONNECTCUT NAT'L BANK V. GERMAIN,** 112 S. Ct. 1149 (1992).

Similarly, as put by Avtar Singh And Harpreet Kaur, *in the book*: Introduction to Interpretation of Statutes, Fourth Edition. That:

> *"Whenever the question arises as to the meaning of a certain provision in a statute, it is proper and legitimate to read that provision in its context. This means that the statute must be read as a whole".*

It is noteworthy that ordinary courts' procedures which, at times, are technical and cumbersome do not apply in arbitration. Otherwise, the Legislature would not have, in express terms enacted the provisions of section 88 (4) (a) and (b) of the ELRA to guide the conduct and the manner of presiding over arbitration of employment disputes. The alleged improper succession of the arbitrators to vitiate the impugned proceedings and award therefore, should not have been raised and we are satisfied that the succession of the arbitrators was in fact normal, regular and proper. Ground one of appeal is dismissed much as the first issue is answered in the negative.

As regards ground three of appeal which is about the arbitrator condemning the appellant for failure to produce a copy of the Code of Conduct without hearing the parties, with respect, we subscribe to Mr. Nzowa's argument that the arbitrator raised that point in passing, as he did not use it to found the impugned award. For more clarity, the relevant part of it is at page 148 of the record of appeal which reads thus:

> *...ni rai ya Tume kuwa tuhuma ya kusudio la wizi dhidi ya mlalamikaji haikuthibitishwa...hivyo ni dhahiri kuwa alimuachisha kazi isivyo halali...*

Confirming the CMA's reasons, on revision, the High Court Judge stated as appearing at page 246 of the record of appeal that:

The court has found that, despite the fact that the Arbitrator found the Code of Conduct of the applicant was not tendered before the Commission but that was not the reason used by the Arbitrator to fault termination of employment of the respondent. The reason for faulting termination...as features at page 10 of the award that, the allegation of attempted theft...was not proved.

On our part, we have no reasons to fault the High Court Judge and thus ground three of appeal is also dismissed.

As for the additional ground of appeal which gave rise to the second issue, about unsworn evidence, Mr. Mushi argued it to be an omission which vitiated the impugned award because the unsworn account acted upon to found the award had no evidential value. It is glaring from the hand written script of the proceedings of the CMA, also, as appearing at pages 81-115 of the record of appeal that Desidery Nzyungu and Thomas Munema, DW1 and DW2 respectively, are Christians and gave sworn evidence. Nuru Nassoro, DW3, a Muslim affirmed. However, the respondent, PW1 did not swear before he testified on 16/11/2016. However, like it happened to the other three witnesses, though unsworn, PW1's evidence was tested through cross examination. It is not Mr. Mushi's contention as said above, that, the omission prejudiced the parties

and how, or, as alleged, caused the Arbitrator's failure to comprehend the PW1's unsworn evidence. However, as applies to the present proceedings, and this is the current position of the law, examining witnesses on oath is a mandatory requirement prescribed under rule 25 (1) of the Labour Institutions (Mediation and Arbitration) Guidelines, GN of 2007 (the guidelines) which reads: "The parties **shall** attempt to prove their respective cases through evidence ***and witnesses shall testify under oath...***", (Emphasis added). The violation of the above mandatory provisions therefore, vitiated the respective proceedings as it prejudiced the parties' case. The Court so pronounced itself on different occasions. See- **Nestory Simchimba v. Republic,** Criminal Appeal No. 454 of 2017, **Hamis Chuma @ Hando Mhoja and Another v. Republic,** Criminal Appeal No. 371 of 2015 and **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase,** Civil Appeal No. 257 of 2020 (all unreported).

However, given the current magnitude of the problem and realities on the ground, we are constrained to hold that though irregular, the PW1's unsworn evidence is curable because it did not materially prejudice the appellant, therefore, with some limitations we do what we did previously in a number of cases including **Tumaini Jonas v. Republic**, Criminal Appeal No. 337 of 2020 (unreported).

Applying the above legal proposition to this case, we are settled in our mind that the unsworn evidence of PW1 did not materially prejudice the appellant to vitiate the proceedings, nor was Mr. Mushi's contention that had PW1 given sworn evidence, the arbitrator would have arrived at a decision other than the impugned one. As we are holding as above noted, we are aware of our previous decisions in a number of cases including **Nestory Simchimba** (supra), **Hamis Chuma** (supra).

Considering the prevailing circumstances of that time, in an unreported **Boniface Mathew Malyango and Another v. The Republic**, Criminal Appeal No. 358 of 2008, we decided differently. It happened that some criminal appeals before the High Court were struck out due to the notices initiating them under section 361 (1) (a) of the Criminal Procedure Act, Cap.85 R.E.2002 were wrongly filed in the High Court instead of the trial District Courts which rendered them incurably defective and struck out. However, in **Boniface Mathew Malyango** (supra), the Court, for interest of justice, being alive to the present needs, and in the wake of the Overriding Objective Principle, it stated that:

> *"... the High Court is seized with jurisdiction when a notice of intention to appeal is filed within ten days. To use the words of the Court of Appeal of Kenya in SALAMA BEACH HOTEL*

LIMITED...(supra), ***by filing their notices of appeal in the High Court instead of the subordinate court, was a "deviation and lapse in formalities" which in our reckoning does not go to the root of the jurisdiction of the High Court...Interest of just, expeditious, proportionate and affordable resolution of this appeal oblige us to determine that the notices of intention to appeal to the High Court ...have properly moved the first appellate court to hear the appeal...*** (Emphasis added)."

We fully subscribe to the above legal proposition. As we are desirous of resolving employment cases and appeals which are already in courts facing the predicament surrounding unsworn evidence and those filed six months from the date of this judgment, which we set as the grace period, we are satisfied that the above alleged irregularity, the unsworn evidence is curable.

This might not be the first occasion for the Court to take a similar action by suspending the procedural provisions of the law and set grace period therefor where, in its considered opinion, the substantive justice is at stake, seriously threatened by procedural technicalities. For instance, about how and where should the notices of appeal be titled and filed, the

Court gave the new positions in **Farijala Shabani Hussein and Another v. Republic,** Criminal Appeal No. 274 of 2012 and **Republic v. Mwesige Geofrey**, Criminal Appeal No. 355 of 2014 (both unreported) respectively. In the former case, numerous appeals were struck out for being incompetent as the respective notices of appeal were mistitled-In the High Court, instead of-In the District Court. Whereas, in **Mwesige Geofrey** (supra) the notices of appeal were filed in the High Court instead of being filed in the trial District Court as required under section 361 (1) of the CPA. We suspended operation of those provisions of the law and gave a grace period of six months from the date of the decision. Just as, for similar reasons, in **Farijala Shaban** (supra) we suspended the operation of section 361 (1) (a) and set the same grace period.

Applying that reasoning and proposition to the present appeal, we are confident to hold that ours are courts of law and justice. They are not courts of the users nor they are the judicial officers', who, be it for the reason of human error or some other reasons might offend against the respective procedural laws. We have the obligation to assure the public of a smooth operation of the laws for dispensation of substantive justice. That said, we are happily inclined to adopt the qualities of an ideal judicial mind as opined by Samatta (Rtd Chief Justice) in his work- Uhuru wa Mahakama na- Nyota Publishers Ltd 2013. In that book, he appreciated

the words of wisdom of the Supreme Court of India in **Ashok Kumar and Another vs. State of V.P and Others** [1997] 3 SCR 269-309, that a judge must be:

> *...**endowed with** legislator's wisdom, historian's search for truth, prophet's vision, **capacity to respond to the needs of the present, resilience to cope with the demands of the future and decide objectively** disengaging himself/herself from every personal influence or predilections...* (Emphasis added).

Lastly, it is about the third issue. From the above discussion and without more, it is now clear that the respondent's termination was substantively and procedurally unfair. The additional ground of appeal is also dismissed.

In conclusion, the entire appeal is devoid of merits and we dismiss it. Having declined to accept Mr. Mushi's invitation to discount the said irregularly recorded proceedings and unsworn evidence of PW1 and having considered that the position we have just taken is quite new to the cases filed before, and for timely resolution of employment disputes, we hereby suspend the requirement and operation of rule 25 (1) of the guidelines for six months as grace period from the delivery of this

judgment. That requirement shall apply in cases filed thereafter, for avoidance of doubt. Consequently, the appeal is entirely dismissed.

We make no order as to costs because the appeal arises from a labour dispute where ordinarily we award no costs. It so ordered.

DATED at **DAR ES SALAAM** this 21st day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 23rd day of November, 2022 in the presence of Mr. Gilbert Mushi, learned counsel for the Appellant and also holding brief for Mr. Venance Nzowa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL