IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 227 OF 2020

I-TECH TANZANIA.....APPELLANT

VERSUS

MONICA HOSEA MACHA..... RESPONDENT

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

(Muruke, J.)

dated 31st day of March, 2020

in

Revision No. 411 of 2018

.....

JUDGMENT OF THE COURT

5th & 23rd May, 2023

MUGASHA, J.A.:

The respondent, Monica Hosea Macha was on 9/11/2000 employed as a Finance Director by the appellant, I-Tech International Tanzania up to when she was terminated on 6/12/2012. The employment was on contractual basis for a period of one year ending on 8/11/2010. However, on 1/4/2011, the contract was renewed for indefinite term and the respondent who continued to serve as Finance Director, was given additional tasks such as, supervision, training development and capacity building of the entire I-Tech Finance team. Later, around 17/11/2011, the appellant's country fiscal lead person of

the appellant conducted a review and discovered financial irregularities on the management of finances which is alleged to have occasioned loss of funds. This was brought to the attention of the respondent who assigned a Finance Officer Ms. Juliana Mlawi to follow up the matter but the assigned Finance Officer took no action and yet, the respondent is alleged to have proceeded on a two-week vacation without reporting the matter to the country Director.

Then, the appellant engaged Price Waterhouse Coopers (PWC) who conducted a forensic investigation into the alleged financial irregularities and a loss of TZS. 33,400,000 was unearthed on grounds of theft of cash money; forgery, false accounting and other irregularities. Subsequently, the respondent was subjected to disciplinary proceedings and hence her employment was terminated. She was paid one-month salary in lieu of notice, outstanding leave and given a certificate of service. Aggrieved, she unsuccessfully filed an employment dispute at the Commission for Mediation and Arbitration (the CMA) on the ground that she was unfairly terminated from the employment.

Unamused, the respondent filed an application for Revision before the Labour Court seeking to have the award of the CMA reversed. Before the Labour Court the CMA file could not be traced and an officer from the CMA, besides deposing that the arbitration was presided over

by Ms. Grace Massawe, threw blame to the Registrar intimating that the respective file was forwarded to the High Court. In the wake of the missing records, the High Court Judge summoned parties to address her on the way forward. Although parties had submitted to the High Court that the best way was to reconstruct the CMA file, none of the parties made any submission before the Judge as to how the lost CMA proceedings could be traced so as to be included in the reconstruction of the CMA record. Until when the learned Labour Court Judge composed the impugned decision, none of the parties had attempted to bring to light any clue relating to the CMA proceedings being found. In the circumstances, the learned High Court Judge exercised revisional jurisdiction and opted to quash and set aside the CMA proceedings and its award with an order that the arbitration be conducted afresh within sixty (60) days. This was three years ago, that is on 31/3/2020.

It is against the said backdrop; the appellant has knocked the doors of the Court seeking to impugn the decision of the High Court on grounds that:

1. The Honourable Judge erred in law by ordering retrial of the dispute at the CMA in absence of a finding that the original trial was illegal or defective.

2. In the alternative and without prejudice to the foregoing ground, even if there was finding that the original trial was illegal or defective, the Honourable Judge erred in law by ordering retrial before taking into consideration whether ordering retrial will not cause an injustice to the parties.

3. The Honourable Judge erred in law by failing to order the reconstruction of the case file.

At the hearing, the appellant had the services of Ms. Samah Salah, learned counsel whereas the respondent appeared in person unrepresented. Parties adopted earlier on filed written submissions containing arguments for and against the appeal.

In arguing the appeal, it was the appellant's submission that, although ordering a retrial is the discretion of the court, it can only be exercised where the original trial is illegal or defective and consideration should be whether the order will cause justice. To bolster the argument, cases cited to us are **AHMED ALI DHARAMSI SUMAR VS REPUBLIC** (1964) E.A. 481**; SALIM MUHSIN VS SALIM BIN MOHAMED & OTHER** (1950) 17 EACA 128 and **FATEHALI MANJI VS REPUBLIC** (1966) E.A. 343.

It was further argued that a retrial was concluded without investigating the circumstances surrounding the loss of the case file and due regard to injustice to be caused to any of the parties. In the alternative, it was submitted that had the Court tried to hold the scales of justice evenly, it would have ordered a reconstruction of the record like it was in the case in **ROBERT MADOLOLYO VS REPUBLIC,** Criminal Appeal No. 486 of 2015 (unreported). With this submission, the appellant urged the court to allow the appeal and order the reconstruction of the lost record. Upon being probed if the trial proceedings were located, besides responding that the proceedings of the CMA were still missing, yet, Ms. Salah was of the viewed that the same is not a bar to the revision before the High Court and the current appeal, arguing that, what transpired at the CMA can be discerned in the arbitrator's deposition on how the arbitration was conducted and the award which makes reference to the exhibits tendered at the trial. When asked as to practicability of the High Court invoking revisional jurisdiction to determine the grounds which seem to attack what transpired during the arbitration *vis some vis* the award, she was adamant and insisted that the matter can be resolved without the CMA trial proceedings. We found this wanting and we shall give our explanation at a later stage of this judgment.

On the other hand, the respondent opposed the appeal arguing that without the CMA proceedings, the High Court was not in a position to determine if the trial was illegal or defective and thus a retrial order was the best option in the circumstances.

In the present appeal, the appellant's complaint is basically that a retrial order is not proper in the absence of the finding that the original trial was illegal and defective, and that, such a retrial order was arrived at without considering that it will cause injustice to the parties. Having considered the contending submissions, the record of appeal and the grounds of appeal, the crucial issue for our determination is the propriety or otherwise of the retrial order.

It is not in dispute that the trial proceedings of the CMA went missing as acknowledged by both parties. However, they locked horns on the path followed by the High Court in ordering a retrial. While the respondent was comfortable with the retrial order, this was diametrically opposed by the appellant who viewed that the best option was to have the record reconstruction so as not to prejudice the parties and cause injustice.

We are aware that, in terms of section 94 (1) (b) of the Employment and Labour Relations Act [CAP 366 R.E. 2019], the Labour Court is clothed with among others, jurisdiction to revise the decisions of

the arbitrator originating from the CMA. The purpose of revision which is done by a superior court, is to enable that court to examine the record of the lower court in order to ascertain the legality, propriety and correctness of any finding, order or any decision made thereon and as to the regularity of the proceedings of the lower court. In our jurisdiction, this is the gist of the statutory provisions which mandate courts to invoke revisional powers on the decisions of the lower courts. (See section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019]; section 30 of the Magistrate's Courts Act [CAP 11 R.E. 2019]. Moreover, in the exercise of revisional jurisdiction, the upper court may as well reverse the decision of the lower court or tribunal. In this regard, was it in order for the High Court to invoke its revisional jurisdiction without being seized with the entire record of what transpired in the lower court or tribunal. We do not think so and we shall give our explanation.

Commencing with what transpired at the High Court, at page 196 of the record of appeal, it is evident that the High Court was moved to revise the award of the CMA on among others, the ground that the award was illegally procured because the arbitrator did not consider the evidence exhibited during arbitration and instead, relied mainly on the evidence tendered by the appellant. This was echoed in the affidavit accompanying the Revision application whereby the respondent deposed

on inter alia, the following: **one**, besides the arbitrator not considering 28 exhibits, she relied on an Audit Report which was not availed to her; **two,** no evidence was adduced to prove the alleged loss, be it at the disciplinary committee or the CMA; **three;** the CMA ignored the respondent's evidence to improve the finance department by introducing a financial manual and **four**, the arbitrator's failure to consider that the termination was effected by the Management without any recommendation from the Disciplinary Committee.

A burning question here is that, how could the High Court ascertain if the award was procured illegally and if the respondent's evidence was not considered. Put in other words, without the CMA proceedings, was there any material to be examined and revised in order to determine the legality, propriety and correctness of the award and the respective proceedings? We agree with Ms. Salah that the reconstruction of the record was possible and that was to be performed by the court, the parties and the CMA. However, the purpose of the reconstruction is to ensure that what transpired at the lower court or tribunal is reassembled so as to enable the upper court to determine an appeal or invoke its revisional jurisdiction as it is the case here so as to determine the rights of a person who is challenging the award of the CMA.

It is glaring on the record that; the High Court was not capacitated to invoke its revisional jurisdiction because it was not seized with the arbitration proceedings before the CMA. We do not agree with Ms. Salah's proposition on having the record reconstructed relying on the arbitrator's deposition on how she conducted the arbitration and the award which makes reference to the 28 exhibits. To do so is tantamount to condoning anarchy which will ultimately rock our justice delivery system if instead of banking on what transpired in the court/tribunal below as per the record, adjudicators be allowed to make deposition as to how the trial or arbitration was conducted. The Court was faced with akin situation in the case of **SIMPLISIUS FELIX KIJUU ISSAKA VS THE NATIONAL BANK OF COMMERCE,** Civil Appeal No. 74 of 2010 (unreported). In the said matter, Ms. Salah who happened to be the respondent's counsel had raised a preliminary objection challenging the competence of the appeal on ground that it was missing vital documents and she urged the Court to strike out the appeal. Although the appellant's counsel did not oppose the point of objection raised, he was of the view that, the missing documents are not crucial for the determination of the appeal. The Court said:

> *"With due respect to Mr. Tulyamwesiga we are unable to see any rule in the Rules* ***which allows a party to an appeal to choose and***

> ***pick as to what document should be included in the record of appeal.*** *The powers to do so are vested upon the Justice or Registrar of the High Court or Tribunal upon an application by a party to an appeal."*

[Emphasis supplied]

Similarly, in the case of **TUBONE MWAMBETA VERSUS MBEYA CITY COUNCIL,** Civil Appeal No.287 of 2017 (unreported). apart from the opinions of the assessors were not included in the record of appeal and the proceedings of the Tribunal did not reflect if the Chairman had invited the assessors to give their opinions before composing the judgment. However, the learned counsel was of the view that, since the Chairman had indicated in the Judgment to have agreed with the opinions of the assessors, the Court should assume and believe that, section 23 (2) of the Land Disputes Courts Act [**CAP 216 RE. 2019**] was complied with. The Court relied on the earlier case of **AMEIR MBARAK AND AZANIA BANK CORP LTD VS EDGAR KAHWILI**, Civil Appeal No. 154 of 2015 (unreported) whereby the Court articulated the consequences of not having the opinions of the assessors as follows:

> *"Therefore in our considered view,* ***it is unsafe to assume the opinion of the assessor***

> ***which is not on the record by merely reading the acknowledgement of the Chairman in the judgment.*** *In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity".*

In the light of the bolded expressions in the above earlier decided cases, since what transpired before the CMA can only be found in the arbitration proceedings, it cannot be substituted with what is reflected in the award or the deposition of the arbitrator as suggested by Ms. Salah. That said, we are satisfied that the learned High Court Judge followed a correct path to order a retrial because without the arbitration proceedings in question, there was nothing to be examined so as to determine the propriety, legality and regularity of the award *vis a vis* the complaint that the award was illegally procured and not backed by the evidence contained in the CMA proceedings.

The appellant's complaint that a retrial order was erroneous in the absence of a finding that the trial was defective, is wanting and not feasible. We say so because, without the CMA proceedings, there was no basis and material upon which the High Court could have determined that the trial was defective. Apparently, the appellant's counsel relied on

a number of decisions in criminal appeals in which efforts to reconstruct the record were futile. While it is true that where the record is missing the initial remedy is reconstructing the record, every case should invariably be determined on the basis of its special or rather peculiar circumstances including the appellant remaining behind bars for so long; the convict not being responsible on circumstances surrounding the loss of the record so as not to benefit from own mischief or illegality and lastly that, consideration should be whether, a retrial will serve the better interests. See: **ROBERT MADOLOLYO VS REPUBLIC** (supra); **MARUNA PAPAI VS REPUBLIC**, Criminal Appeal No. 104 of 2011; **WAMBURA KIGINGA VS REPUBLIC,** Criminal Appeal No. 301 of 2018 and **SAIDI SALUM @ KIWINDU VS REPUBLIC**, Criminal Appeal No. 190 of 2017 (all unreported). However, although before making a retrial order it is paramount to consider interests of justice, none of the circumstances in the cases cited to us by the appellant's counsel are similar to what obtains in the present case whereby, in the wake of missing arbitration proceedings, the award is impugned by the respondent and the fate of the parties in the employment dispute is yet to be determined by the High Court. Thus, had the High Court attempted to determine the merits of the revision without the CMA

proceedings, obviously, it would have embarked on a nullity and the appellant was bound to challenge such a determination.

Yet, as to the propriety of the retrial order, the Court had the occasion of determining the fate of second appeal in the absence of the entire proceedings of the High Court in the case of **SAIDI SALUM @ KIWINDU VS REPUBLIC** (supra). In that case, although the committal warrant showed that the sentence was enhanced to life imprisonment, whereas the judgment of the High Court was missing, the Court could not act on the unknown to exercise its appellate jurisdiction. Thus, the Court proceeded to annul the purported High Court decision and orders enhancing the jail term to thirty years with an order that the first appeal be reheard by the High Court. This is applicable with equal force to the present case whereby the arbitration proceedings are missing while the award remains to be challenged.

On account of what we have endeavoured to discuss, we are satisfied that, in the wake of missing arbitration proceedings, the learned High Court Judge exercised her discretion judiciously to order a retrial having considered the best interests to be paramount and no injustice was caused to any party. Thus, we do not find any cogent reason to interfere or vary the High Court decision and consequently, we find the appeal not merited and it is hereby dismissed in its entirety.

Parties are directed to comply with the order of the High Court on the expedited retrial before the CMA.

DATED at **DAR ES SALAAM** this 19th day of May, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of May, 2022 in the presence of Ms. Lilian Mawalla, learned counsel for the Appellant and Mr. Sami Katerega who represented the Respondent, is hereby certified as a true copy of original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL