IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA J.A.)

CONSOLIDATED CIVIL APPEAL NO. 619 OF 2022 & 13 OF 2023

ERASTUS VICENT MTUI ..... APPELLANT

VERSUS

COCA COLA KWANZA LIMITED ..... RESPONDENT

(Appeal arising from the judgment and decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Maghimbi, J.)

dated the 7th day of November, 2022
in
Labour Revision No. 220 of 2022

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JUDGMENT OF THE COURT

16th & 23rd February, 2024

MWANDAMBO, J.A.:

Both the appellant Erastus Vicent Mtui and respondent Coca Cola Kwanza Limited were aggrieved by the decision of the High Court (Labour Division) which set aside the award of the Commission for Mediation and Arbitration (the CMA) for Kinondoni in Civil Revision No. 220 of 2022. Each lodged a notice of appeal against the said decision and subsequently instituted separate appeals. The respondent's notice preceded the appellant's but the latter instituted Civil Appeal No. 619 of 2022 on 30

December 2022 ahead of the respondent's Civil Appeal No. 13 of 2023 instituted on 16 January 2023.

The facts giving rise to the appeals are fairly simple. On 10th August 2011 the respondent employed the appellant in the post of Finance Manager under a two years' fixed term contract admitted at the CMA as exhibit A1. Subsequently, the appellant was assigned another role as Country PAC Manager vide letter dated 24th August 2012 (exhibit A2) before being appointed as Director of Finance with new responsibilities and remuneration, change of reporting relationship within the respondent's business organisation. In the course of the contract under the new roles set out in exhibit A3, a labour dispute arose between the appellant and respondent which culminated into a disciplinary hearing involving two charges involving gross misconduct. After the disciplinary hearing, the appellant was found to be guilty of the charges. He was, in consequence, terminated on 9th April, 2022 for gross misconduct.

Dissatisfied, the appellant challenged the termination before the CMA claiming that the termination was unfair both substantively and procedurally for which he prayed for several reliefs, amongst others, compensation by way of salaries up to his retirement amounting to TZS 6,547,094,400.00. Ancillary to the claim for unfair termination, the appellant asked the CMA

TZS 2,000,000,000.00 as general damages for the alleged harassment and humiliation.

Before the commencement of hearing, the CMA framed four issues arising from the referral form; CMA form No. 1 and followed by the parties' opening statements for determination of the dispute. The first of the issues was whether the termination of employment was procedurally and substantively unfair. The second and third issues related to the claim involving harassment and humiliation and finally, the reliefs. At the end of the hearing, the CMA was satisfied that the respondent had failed to discharge her burden of proof that the termination was fair both procedurally and substantively. On the other hand, it (the CMA) determined the second issue negatively that is, the claims for harassment and humiliation was not time barred. As to the third issue, the CMA found the appellant to have sufficiently proved that the respondent harassed and humiliated him. Having so found, the CMA awarded the appellant compensation for unfair termination in the sum of TZS 5,776,848,000.00 equivalent to 180 monthly salaries plus one month's salary and TZS 1,000,000,000.00 general damages for harassment and humiliation.

Not surprising, the respondent preferred an application for revision predicated upon, amongst others, section 91 (1) (a) and (b) of the

Employment and Labour Relation Act (the Act) and Labour Court Rules, GN. No. 106 of 2007. In terms of the affidavit supporting the application, the respondent sought to challenge the CMA award not only against its findings on the unfairness of the termination but also its failure to evaluate evidence properly that the appellant had no permanent and pensionable employment contract rather as fixed term contract. Para 12 of the affidavit contained a statement of legal issues from the facts. The first three main issues were directed at asking the Revisional court to investigate whether the CMA failed to evaluate evidence before it that the appellant had no permanent and pensionable employment contract. Flowing from the forgoing, the Revisional court was invited to determine whether the CMA had jurisdiction to entertain a dispute on the unfairness of the employment under a contract which was, by its nature, a fixed term contract and make an award of compensation for unfair termination.

In the alternative, the respondent invited the revisional court to determine two issues; the correctness of the findings on the unfairness of the termination and the resultant compensation of 180 months' salaries which was too excessive. The appellant opposed the application for being founded on baseless grounds.

Hearing of the application was by way of written submissions. It is significant that, the appellants' written submissions in reply protested against the respondent's introduction of a new issue on the nature of the contract which was not among the issues before the CMA. In any case, it was argued that, the appellant's fixed term contract changed to a permanent and pensionable contract and so the CMA properly dealt with the dispute founded on unfairness of the termination and hence the resultant award.

In its judgment, the High Court found merit in the respondent's contention on the nature of the contract considering that, according to exhibit A1, the appellant had a fixed term contract governed by section 14 (1) (a) of the Act reserved for professionals and managerial cadre. Having so reasoned, the learned judge held that the two subsequent appointments to other positions vide exhibits A2 and A3 did not alter the nature of the contract in exhibit A1 except for the duration of the service from 2 to 3 years. The learned judge found support from rule 4 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, on the renewal of fixed term contracts by default where an employee continues to work for the same employer after expiry of the fixed term. She took the view that the appellant's last contract before termination took

place, was automatically renewed from 1 November to 31 October 2023. That means, the appellant had 30 months and 21 days before his contract was terminated on 9th April 2021. From that finding, the High Court took the view that the appellant could not be awarded damages under unspecified period of contract. Nevertheless, the High Court rejected the respondent's argument on the jurisdiction of the CMA determining unfairness of the termination rather than breach of contract. It reasoned that the manner in which the letters subsequent to exhibit A1 were crafted was not free from either of the interpretations and so, the CMA could not be faulted for entertaining and determining the dispute in the manner it did.

Having so held, the learned judge quashed the CMA award for compensation based on unfairness of the termination and substituted it with compensation for the unexpired term of the contract, TZS 1,018,436,906.67 equivalent to 30 months' and 21 days salaries. It also set aside the award of TZS 1,000,000,000.00 general damages for being unsubstantiated.

The appellant challenged the decision of the High Court on five grounds. However, as it will become apparent later, the determination of the appeal turns on ground one which faults the High Court for entertaining a new issue which was not one of the issues for determination before the CMA.

On the other hand, the respondent; the appellant in Civil Appeal No. 13 of 2023 faults the impugned decision on two grounds. It is contended in ground one that the reliefs awarded by the High Court were not in accordance with the law. Ground two is directed against the alleged failure by the High Court to evaluate the evidence properly on the duration of the fixed term contract arriving at a wrong conclusion that it was three years.

The learned counsel for the parties filed their respective written submissions in both appeals in support and reply. Mr. Frank Mwalongo, learned advocate from Apex Attorneys filed written submissions for Erastus Vicent Mtui in Civil Appeal No. 619 of 2022 ("the former appeal"). He did alike in reply in Civil Appeal No. 13 of 2023 ("the latter appeal"). On the adversary side, Messrs. Daniel Haule Ngudungi and Alex Gaithan Mgongolwa, both learned advocates filed submissions in reply in the former appeal for Coca Cola Kwanza Limited and submissions in support of the latter appeal.

Considering that both appeals emanate from the same decision, it became necessary to fix them for hearing on the same date and before the same panel with a view to consolidating them. Before us on 16 February 2024, Messrs Frank Mwalongo and Mohamed Muya learned advocates represented the appellant in the former appeal and respondent in second

appeal. Messrs. Daniel Haule Ngudungi and Kalaghe Rashid, learned advocate represented Coca Cola Kwanza Limited in both appeals. By reason of the learned counsel's joint prayer, we made an order under rule 110 of the Tanzania Court of Appeal Rules, 2009 (the Rules) consolidating Civil Appeal No. 13 of 2023 with the instant appeal but ordered hearing of the appeals one after the other. With the foregoing in mind, we shall turn our attention to the determination of the grounds in Civil Appeal No. 619 of 2022 before dealing with the latter appeal.

The complaint in ground one is against the determination of the ground of revision of the CMA award outside the issues framed and determined by the arbitrator. Culled from his long submissions, Mr. Mwalongo brought to the fore two main issues faulting the impugned decision. The first relates to the parameters from which a party aggrieved by CMA award can challenge it that is to say; whether such an aggrieved party can challenge the award on grounds not borne out of the findings on issues considered and determined by the CMA. The second is against the failure by the High Court to consider submissions pretesting the introduction of a new issue at the stage of revision.

Mr. Mwalongo pointed out that the nature of the dispute before the CMA was unfairness of the appellant's termination as evident from the CMA

Form No. 1, equivalent to a pleading in civil litigation. The learned advocate submitted that there was no dispute on the nature of the appellant's contract and the consequences of its termination and pointed out that; **one**, the appellant's case was founded on unfair termination and not breach of contract and the determination of the dispute followed the procedure prescribed under section 39 of the Act. That route entailed the respondent who had the burden of proof led evidence to justify fairness of the termination without reference to breach of contract, **two**, no objection was raised against the CMA's jurisdiction to entertain the dispute based on unfairness of termination instead of breach of a specific term contract, and, after the closure of the respondent's case, the appellant led evidence based on unfairness of the termination rather than breach of contract, **three**, the fact that the appellant answered some questions in cross-examination touching on the nature of his contract did not amount to addition of an issue for the CMA's determination.

On the basis of the above, counsel faulted the learned judge for proceeding with revision on a new issue which she treated as central to the revision regardless of the fact that it was neither an issue before the CMA nor did the arbitrator make any determination on it based on evidence before him. It was contended thus that, the learned judge arrived at an

erroneous conclusion and ultimately quashing the CMA award. In the premises, Mr. Mwalongo urged that, since the dispute before CMA was based on unfairness of the termination on which was subject of the first of the issues agreed, any challenge of the award ought to have been confined to the issues framed and the evidence thereon against the arbitrator's determination.

From the foregoing arguments, Mr. Mwalongo took the view that the appellant was, in consequence, denied right to a fair hearing regarding the nature of his contract in contravention of article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). Advancing his client's further grievances, the learned advocate argued that, although he protested against the introduction and consideration of the new issue in the submissions in reply before the High Court, the learned judge proceeded as she did without addressing the objection neither did she consider his submissions in the judgment. In support of his argument against the new issue, counsel referred to our decisions particularly in **James Funke Ngwagilo v. The Attorney General** [2004] T.L.R. 161 for the proposition that courts have to confine themselves to the pleadings and on the issues framed. He also sought reliance from the Court's decision in **Hotel Travertine Limited v. National Bank of Commerce Limited**

and 2 Others [2006] T.L.R 113 to argue that, an appellate court should not allow matters not taken or pleaded in the court below to be raised in appeals. He thus urged the Court to allow the first ground of appeal resulting in setting aside the impugned decision and restoring the CMA's award. Prompted by the Court, Mr. Mwalongo ruled out the possibility of remitting the matter to the High Court for determination of other grounds raised in the alternative.

Mr. Ngudungi who addressed the Court for the respondent also stood by the written submissions in reply. Like Mr. Mwalongo, he had a few aspects to clarify including issues raised by the Court. Essentially, the learned advocate's submissions both written and oral, were largely to downplay the appellant's submissions as baseless. The learned advocate began with a general argument that the appellant's contract was for a specific term and never changed at any time regardless of the subsequent status change and promotions to new positions.

Arising from the foregoing, it was argued that, contrary to the appellant's submissions, the nature of the contract was not a new issue since it was raised during hearing when the appellant (CW1) was responding to questions in cross-examination as evident at pages 188-190 of the record of appeal and so the dispute based on unfair termination was untenable

before the CMA. Consequently, it was vehemently argued that, whether or not there was an issue on the nature of the appellant's contract before the CMA, the respondent was correct in raising a ground on the tenability of the dispute based on unfairness of the termination instead of breach of contract resulting in a wrong award for compensation. In the premises, the learned counsel contended that the High Court was right in considering and determining the issue guided by the grounds in the application for revision. The learned advocate urged the Court to dismiss this ground for being baseless. At the Court's prompting, Mr. Ngudungi was not forthright on the consequences of the of the CMA's award if we were to quash the decision of the High Court as urged by the appellant's counsel. He was confident that the High Court was correct in its decision and so the Court should dismiss ground one for lacking in merit. So much for Counsel's submissions in ground one, which takes us to a discussion and determination on it.

We propose to begin with the obvious, that is, there is no dispute that the main issue for the CMA's determination was on the unfairness of the termination. The second and third issues related to a claim based on harassment and humiliation on which appellant had a burden of proof.

Mr. Mwalongo submitted, and, to the best of our recollection, there was no contrary view from the respondent's advocates that, the pleadings

before the CMA are constituted by CMA Form No. 1 which contains, amongst others, nature of the dispute referred by a claimant. In this case, CMA Form No. 1 indicated that the nature of the dispute or the cause of action was unfair termination. It is common cause that, in his opening statement, the appellant prefaced it with a background to his employment from a fixed term contract which, according to him, changed to a permanent and pensionable one. As the dispute was based on unfairness of termination, the respondent had the right to begin her opening statement by virtue of rule 24 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G. N. No. 67 of 2007, (the 'Guidelines').

It is glaring from the opening statement at pages 767 to 771 of the record of appeal, the respondent made a fleeting reference to the appellant's contract of employment as a fixed term. A large part of the statement focused on the reason for the termination; gross misconduct after conducting a disciplinary hearing. In terms of rule 24 (4) of the guidelines, issues are drawn after the closure of the opening statements which is what took place before the CMA as evident from page 55 and 57 of the record whereby, initially 3 issues were framed followed by an additional issue at the respondent's instance on the tenability of the claim on harassment and humiliation on account of time bar.

As, the appellant's case was founded on the alleged unfair termination, the respondent had a burden to prove that it was fair. There is no dispute that this is what took place before the CMA as can be seen from page 57 to 149 of the record of appeal followed by the appellant's evidence before closing his case. Flowing from that, parties gave evidence to prove their respective cases and made their closing arguments in terms of rule 26 (3) of the Guidelines based on the issues framed. In accordance with rule 27 (3) of the Guidelines, the arbitrator has to make an award containing among others, the issues in dispute. Page 563 of the record of appeal reflects the issues in dispute. The first of such issues is dedicated to unfairness of the termination.

From the foregoing background, we agree with Mr. Mwalongo and there can be no doubt that the nature of the appellant's contract, specific or otherwise was not one of the issues before the CMA. Indeed, the respondent's argument is defeated by her own letter of termination (exhibit D9) appearing at page 489 and 490 of the record of appeal. It is glaring from that letter that the appellant was terminated for gross misconduct following a disciplinary hearing. Had it been otherwise, it is not clear to us why the respondent opted to conduct a disciplinary hearing for the alleged

misconduct when she could have terminated it without resorting to that procedure applicable to contracts for unspecified period.

It is settled law from decided cases including **James Funke Ngwagilo** (supra) cited to us by Mr. Mwalongo, trial must be confined to the pleadings and issues framed. However, there is an exception to that rule. A trial court can determine an unframed issue where parties were aware of it, led evidence thereon and left it to the court for its determination. See for instance: **Agro Industries Ltd v. Attorney General** [1994] T.L.R. 43 where it was held that a court may decide on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision provided the parties were heard on them. However, that is not the case in the instant appeal. Whether or not the contract was for a specific term was not an issue which both parties were aware gave evidence on it but left it to the arbitrator's decision. Put it differently, parties never intended it to be an issue. Had it been so, the respondent could have raised it in the opening statement and led evidence on it or raised an objection to the CMA's jurisdiction. Since this was not the case, the CMA had no business in considering and determining a non-issue regardless of the fleeting reference to the nature of the contract in the respondent's

opening statement and the appellant's answer to questions put to him in cross-examination.

The foregoing takes us to the parameters of challenge of the award by way of revision before the High Court. It is axiomatic that, like trial courts, the arbitrators' duty at the CMA is to search for truth from the facts, issues and evidence before them. It is equally true that appellate and revisional courts are concerned with search for errors from the trial. In terms of section 91 (2) (a) and (b) of the Act, the High Court has power to set aside the arbitrator's award if it is satisfied that; either there was misconduct on the part of the arbitrator or the award was improperly procured. Although the respondent predicated her application upon section 91 (2) of the Act, she never prosecuted it in any of those grounds.

On the other hand, the High Court has power to revise an award under rule 28 (1) of the Labour Courts Rules on grounds, *inter alia*, where the CMA appears to have exercised its jurisdiction illegally or with material illegality vide rule 28 (1) (c) or on account of an error material to the merits of the subject matter involving injustice in terms of rule 28 (1) (d). The application for revision was predicated upon rule 28 (1) (c), (d) and (e) of the Labour Courts Rules. The challenge on the new issue complained of appears to have been predicated on rule 28 (1) (c) of the Labour Courts Rules.

Through that rule, the respondent intended to claim that the CMA exercised its jurisdiction illegally by entertaining a dispute which fell outside the ambit of section 36 of the Act. However, as stated earlier on, there was no issue regarding the nature of the appellant's contract as a specific contract not amenable to challenge for unfair termination. That being the case, it was not open to the respondent to move the High Court to revise the award on that ground because the CMA properly exercised its jurisdiction by determining the dispute founded on unfairness of termination.

In view of the foregoing, we are unable to appreciate the basis of the learned judge's finding that the issue in controversy related to breach of contract rather than unfairness of its termination by reference to exhibit A1. In our view, that exhibit was not tendered to prove that the appellant had a specific term contract and so the dispute was not one on the unfairness of its termination. As there was no such issue involving the nature of the contract, we endorse Mr. Mwalongo's submission that the learned judge strayed into an error in considering a new ground not borne out of the issues before the CMA. At best, the respondent's challenge on that ground was an afterthought, so to speak.

Consistent with our decisions in **James Funke Ngwagilo** (supra), **Hotel Travertine** (supra) and **Elisa Mosses Msaki v. Yesaya Ngateu**

Matee [1990] T.L.R. 90, an appellate court including a revisional court as it were, is precluded from entertaining grounds not decided by a lower court or tribunal. It is significant that, though the appellant's advocates objected against the new ground, the High Court proceeded to determine it anyway, without addressing itself on the appellant's objection by overruling it on reasons to be stated. With respect, apart from a general assertion by Mr. Ngudungi that the High Court considered the appellant's protest, the judgment is conspicuously silent on that aspect. We reiterate here what we said in **Tanzania Breweries Limited v. Anthony Nyingi,** Civil Appeal No. 119 of 2014 (unreported), that the court has a duty to address parties' arguments in its judgment. That means, if the court accepts or rejects an argument, it must demonstrate that it has considered it and set out reasons for its rejection or acceptance lest it is held to be arbitrary.

Arising from the foregoing discussion, proceeding with the determination of the new issue amidst appellant's objection was, with respect, arbitrary the more so when its decision on the application for revision was solely on the said ground. Consequently, we find merit in ground one of the appellant's appeal and allow it. Having so held, we find no need to consider the remaining grounds which were dependent on the Court's determination of ground one.

The net effect of our holding is to quash the decision of the High Court as we hereby do. Going forward, we do not subscribe to Mr. Mwalongo's invitation to sustain CMA's award. It is our firm view that interest of justice warrants remitting the matter to the High Court for determination of other grounds in the application for revision. That has become necessary because the respondent had other grounds for challenging the CMA's award on its finding on the unfairness of the termination as well as the reliefs granted as can be seen at pages 28, 29 and 30 of the record of appeal. That will be sufficient to dispose of Civil Appeal No. 619 of 2022 which takes us to Civil Appeal No. 13 of 2023.

As seen earlier, the appeal is predicated on two grounds both arising from the decision of the High Court on a new ground which we have held to have been wrongly entertained and determined shortly. Since there is no longer any decision from which the two grounds could be made, for all intents and purposes, the appeal now becomes superfluous as it were. It being superfluous, we strike it out.

That said, we allow Civil Appeal No. 619 of 2022 to the extent indicated and strike out Civil Appeal No. 13 of 2023. In the exercise of the Court's power under rule 38 of the Rules, we remit the proceedings to the

High Court, Labour Division before another judge for determination of the application for revision on the remaining grounds as shown above.

Since the appeals emanate from a labour dispute from which costs are not usually awarded, each party shall bear own costs.

DATED at **DAR ES SALAAM** this 22nd day of February, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Mohamed Muya, learned Counsel for the Appellant, Mr. Daniel Ngudungi and Mr. Kalaghe H. Rashid, both learned Counsels for the Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL