IN THE HIGH COURT OF TANZANIA

HIGH COURT LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 224 OF 2013

BETWEEN

STEPHEN MAKUNGU & 11 OTHERS ..... APPLICANTS

VERSUS

A/S NOREMCO ..... RESPONDENT

(ORIGINAL/CMA/KZ/U. 10/MG/02/2007)

JUDGMENT

19/03/2014 & 09/06/2014

Mipawa, J.

The applicants namely Stephen Makungu and 11 others have filed the present revision in this court under Section 91 and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 and Rules 24 (1) and (3) 28 (1) of the Labour Court Rules GN No. 106 of 2007 in the notice of application the applicants has pleaded:-

> *That this honourable court be pleased to call for and examine the proceedings and subsequent rulings of the Commission for Mediation and Arbitration at Dar es Salaam on 08/06/2011 and 04/04/2012 in Labour Dispute No. KZ/U. 10/MG/02/07 and be satisfied as to the legality correctness and appropriateness of its decision made therein.*
> *That this honourable court be pleased to revised (sic) the ruling and order of the commission mentioned in (1) above and issue appropriate remedial order as it deems proper in the interest of justice.*
> *Cost for this application.*

The application was supported by an affidavit of applicants jointly signed. In the affidavit the main point appears at paragraph 10 which says that:-

> *.....[The CMA] in its rulings and orders dated 08/06/2011 and 04/04/2012 the CMA refused to entertain the dispute on the grounds that it lacked jurisdiction.... that they have been seeking justice for the past 10 years and two of our colleagues have passed away in the course of seeking justice but to no avail.....*

In the hearing of this revision the applicants were represented by Mr. Nyangasa personal representative of party's own choice while the respondent enjoyed the service of Koyugi learned counsel. Arguing in support of the application for revision Mr. Nyangasa submitted ***viva voce*** that the applicants opened a case in the High Court of Tanzania main registry at Dar es Salaam in the year 2000 where they claimed to be paid their severance allowances and other benefits including transport allowance back to their respective homes etc. The applicants however were told by the High Court to follow the current legislation on labour matters and thence it concluded that it had no jurisdiction to proceed with the applicants case and it ordered them (applicants) to table their claims in a proper forum. The High Court therefore struck off their case that was in the year 2006 October 5th as per ruling in Civil Case No. 316 of 2002 **Stephen Makungu and 16 Others NOREMCO** High Court of Tanzania per Oriyo, J. [as she then was]. Mr. Nyangasa submitted that the learned arbitrator did not follow the procedure in striking off the case and wrongly removed it. He said that the law does not say of the limitation

when the labour commissioner is allowed to refer disputes in the Commission for Mediation and Arbitration and hence they had all the rights before the CMA to be heard and they come now challenging the ruling of the CMA styled "*uamuzi mdogo*" as wrongly and illegally procured.

Mr. Koyugi learned counsel for the respondent on the other hand submitted in reply ***viva voce*** that the applicants are challenging the decision of the CMA which ruled that the commission did not have jurisdiction to hear the matter because when the new labour laws have started this dispute was not before the commissioner. He contended that the present dispute emanates from the old repealed labour laws and according to paragraph 13 of the 3rd Schedule of Act No. 6 of 2004 the Employment and Labour Relations Act as amended by Section 42 of the Written Law Miscellaneous Amendment Act No. 2 of 2010 the commission has no jurisdiction to hear matters which were not pending (?) before the commissioner before the operation of the new labour laws.

The new labour laws, he submitted started to operate on 20th December, 2006 by GN No. 1 of 2007. He said that the affidavit of the applicants especially at paragraph six state that the applicants sent the matter to the Labour Commissioner on 02/07/2007 and at that time the new labour laws had started to operate and that in view of the third schedule paragraph 13, the dispute brought by the Labour

Commissioner to the CMA after the use of new labour laws is incompetent before the commissioner as well as before the CMA because it is time barred.

The last point of argument by counsel for the respondent was that:-

> *.....Under old labour laws when this dispute arose, the applicants were supposed to report the dispute at a trade union which union could sent the same to the Labour Commissioner and the Labour Commissioner to sent it to the commission as per Sections 4 (2) (3) and 6 (1) of the Industrial Court Act Cap. 60 RE 2002.....*

The counsel concluded that the applicants did not have the mandate to sent the dispute to the Labour Commissioner direct. Hence the dispute which was sent to the Labour Commissioner was not proper "*ulikuwa batili*". Therefore the arbitrator's holding that **CMA did not have jurisdiction on the matter because it was not among the dispute (s) which were pending before the commissioner when the new labour laws started**. In rejoinder Mr. Nyangasa submitted that as a matter of law, the issue of reporting to trade union through old laws was out dated and that the applicants had the right to report the matter before the commissioner. The arbitrator therefore arred in dismissing the dispute before him.

Now having heard both sides ***in ex-abandunt cautela*** (with eyes of caution) the nagging question to be asked here is as follows:-

> *Whether or not the Commission for Mediation and Arbitration did not have jurisdiction to entertain the matter*

because it was not among the disputes which were pending before the commissioner when the new labour law started.

The new labour laws came into operation in December 20, 2006 when the present matter indeed was not before the commissioner at that time, the reason was that the matter was filed by the applicants in the High Court of Tanzania Dar es Salaam Registry in the year 2000 just after the applicants were terminated on the 26th October, 2000. The High Court of Tanzania Urio, J. [as she then was] Ruled on 5th October 2006 that the applicants case was not in a proper forum and hence she struck it for want of jurisdiction. It has to be noted that the applicant's case was in the "corridors" of the High Court for five years ie. from 2000 when it was filed to 2006 when the High Court realized that it could not proceed with the matter and therefore advised the applicants to go to the proper forum. In five years the case was in the "shelves" of the High Court which received the labour matter purporting to have jurisdiction and at the end of the five years in its custody rejected the case, the omission or the delay of the case in the High Court for five years cannot be "caused by the applicants". Had the High Court decided their matter earlier the applicants could have sent the matter to the commissioner earlier before the coming into force of the new labour laws and it could have been among the disputes which were pending before the labour commissioner before the operation of the new labour laws in December 20, 2006 and in view of the paragraph 13 of the 3rd Schedule of the (ELRA) Employment and Labour Relations Act No. 6 of 2004 as amended by

Section 42 of the Written Law Miscellaneous Amendment Act No. 2 of 2010 the commission could have jurisdiction. The applicants, the records shows that they were 'thrown out of the High Court corridors" in October 2006 and filed or sent their matter to the Commissioner for Labour on 02/07/2007 and according to Mr. Koyugi counsel for respondents:-

> *.....That time the new labour laws were or had started to operate. In view of paragraph 13 the dispute brought by the Labour Commissioner to CMA after the use of new labour laws is incompetent before the commissioner as well as before the CMA because it was time barred.....*[1]

Now it should be noted ***in primo loco*** [in the first instance] that the applicant's case was delayed by the wrong forum "The High Court" for five years from 2001 - 2006 and had the High Court realized in the "early morning" that it did not have jurisdiction then the case of the applicant could have been not time barred to be one of the disputes pending before the Labour Commissioner before the operation of the new labour laws in December 20, 2006. However at "sunset" the High Court realized that it had no jurisdiction to entertain the dispute and that was in October 2006 two months before the coming into operation of the new labour laws in December 20, 2006. Indeed the parties (applicants) went to the High Court in the year 2001 to seek their rights, why then did the High Court decided the matter after five years ie. in October, 2006 that it lacked jurisdiction

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1. Record: Proceedings in Labour Revision No. 224/2013 Stephen Makungu and 11 Others V. NOREMCO

why the High Court not decided the matter in say 2001, 2002, 2003,2004 or 2005 when the operation of the new labour law had not started? In my view as I have said earlier that this matter could have been in the shelves of the Commissioner for Labour had the matter not been delayed by the High Court for five years (from 2001 - 2006) when the new labour laws started in December 20, 2006. It was wrong to punish the applicants that they were netted in the web of limitation of time ie. time barred.

It could also have been difficult for the applicants to revert back to the trade union to report the dispute after being terminated in the year 2000, while the matter was delayed in the High Court for five years. It was proper therefore for the High Court Labour Division to order the Labour Commissioner to deal with the matter in accordance with Section 86 of Act No. 6 of 2004. The applicants were fighting for their rights in the High Court diligently and with all strength. They cannot be punished by the act of the High Court holding their case for five years otherwise their matter could have been referred to the Labour Commissioner, between 2001 - 2006 before the operation of the new labour laws and it could have been in the shelves of the Labour Commissioner pending before the operation of the new labour laws. In **D.T. Dobie [Tanzania] V. Phatom Modern Transport [1985] Ltd**. Civil Application No. 141 of 2001 Court of Appeal of

Tanzania quoting with approval the case of **Cropper V. Smith** [1884] 26 CL D 700 at page 710 held that:-

> *.....It is a weli established principle that the objects of courts is to decide the rights of the parties and not to punish them for mistakes they made in conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which if not fraudlent or intended to over reach, the court ought to correct, if it can be done without injustice to the other party. Court do not exist for the sake of discipline but for the sake of deciding matters in controversy.....*

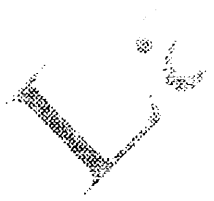
In my view, I think rightly that the Labour Court in its ruling of 23/11/2010 found it prudent to refer the matter back to the Labour Commissioner in order to deal with it according to Section 86 of the Employment and Labour Relations Act No. 6 of 2004 because the dispute **was not among the disputes pending before the Industrial Court**, before the operation of the new labour laws. The aim of the court was not to punish the applicants for the conduct of their case ie. filing in the court wrongly as it was not among the disputes which were pending before the "defunct industrial court" it was when the labour commissioner complied with the order of the court and dealt with the matter by referring it to the [CMA] Commission for Mediation and Arbitration. It was therefore wrong for the CMA to throw out the dispute for lack of jurisdiction under the pretext that "**it was not among the disputes which were pending before the Labour Commissioner before the coming into force of the new labour laws**" while it was [the CMA] aware that the dispute was delayed in the High Court for five years from

2001 -2006 by the High Court itself at the time when the dispute was supposed to be before the Labour Commissioner. It is true that the applicants made a mistake of filing the case in the High Court of Tanzania rather than in the Industrial Court but the act was not done fraudlent or with undue diligence. The High Court delayed the dispute, in its shelves between 2001 - 2006. Therefore since the dispute was in the wrong forum for five years to wit; in the High Court of Tanzania rather than being before the Labour Commissioner or the Industrial **Court then it could be deemed to have been pending before the commissioner for all that period the dispute was before the wrong forum delayed** at no apparent reasons by the said wrong forum. **I would interprete like that as above stated for the sake of achieving social justice** championed by the labour courts because as rightly pointed out by Professor Ahmadullah Khan [Ph. D]. In his book titled "**Commentary on Labour and Industrial Law**" new edition Asia Law House Hyderabad P. 4 that:-

> *Precisely.... the proceedings before labour courts is not hampered by the strict rules of common law and therefore certain procedural laws like laws of Evidence, or CPC are not applicable to such proceedings. In fact, in most of the cases, Industrial Courts are competent to adopt any procedure which in their opinion would help courts to come to a just and fair conclusion. In view of the foregoing discussion, it can fairly be discerned that **labour law is unique in its origin, humane in its purpose, pious in its theory and liberal in its application and interpretation**.....*[2]
> *[Emphasis mine].*

2. Ahmadullah Khan "Commentary on Labour Law and Industrial Law New Ed. Page 4

It is argued therefore that the new branch of labour law is marked with unique feature of its own and has assumed an altogether different characteristic which is not usually, found in the old theories of law and therefore if it is inevitable **in the interest of social justice and public interest** courts while adjudicating industrial disputes are not only free but expected to do so. **Social justice** should be championed always by the instruments dealing with labour matters and disputes because **social justice is justice according to social interest and social justice is designed to undo the injustice of unequal birth and opportunity.** Defining the conceipt of social justice the learned author and professor of law at the University of Allahabad Surya Narayan Misra in his book tilled **an Introduction to Labour and Industrial Laws**. 14th edition Central Law Publications Darbhanga, Allahabad righty said at page 10 that:-



> *.....The concept of social justice is not narrow or limited to a particular branch of legislation or adjudication although it is more prominent and conspicuous in industrial legislation and adjudication..... social justice is different from legal justice...the difference is not of objective but **aim at dispensing justice**. The difference is due two reasons:-*
>
> *(i) Social justice aims at doing justice between classes of society, and not between individual,*
>
> *(ii) The method which it adopts is unorthodox compared to the methods of municipal law. Justice dispensed according to the law of master and servant, based upon the principle of absolute freedom of contract and doctrine of **laissez faire**, is legal justice. **Social justice is something more than mere justice**, it is a philosophy super imposed upon the legal systems.....*[3]

3. Surya Narayan Misra "an introduction to Labour and Industrial Laws" 14th Ed. Allahabad, page 10

In view of the foregone, I proceed to hold that the ruling of the CMA that it lacked jurisdiction to entertained the dispute that was before it on the table is revised and set aside the CMA has jurisdiction to hear the dispute of the applicants. I order the CMA to proceed with the hearing of the dispute before another arbitrator of competent jurisdiction. Revision succeeds in the event and that the CMA award is quashed and revised accordingly.

I.S. Mipawa
JUDGE
09/06/2014

Further right of appeal is explained to the aggrieved party.

I.S. Mipawa
JUDGE
09/06/2014

Appearance:-

1. Applicant: Present Mr. Abeid, Mr. Nyangasa, Personal Representative of the party's own choice.
2. Respondent: Mr. Koyugi, Advocate - Present

Court: Judgment is read in the presence of both parties as shown in the appearance above.

I.S. Mipawa
JUDGE
09/06/2014