

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(LABOUR DIVISION)**

AT SHINYANGA

LABOUR REVISION NO. 15 OF 2019

*(Revision against Commission for Mediation and Arbitration award in Labour
Decision No. CMA/SHY/71/2019 dated 30/5/2019 by
Hon. M.A.D Kiwara- Arbitrator)*

BULYANHULU GOLD MINES LTDAPPLICANT

VERSUS

EMMANUEL JOSEPH DEMAY..... 1ST RESPONDENT

JOYCE MTAKI.....2ND RESPONDENT

JUDGMENT

Date of the last Order: 11th June, 2020

Date of the Judgement: 17th July, 2020

MKWIZU,J.:

Respondents were employee of the applicant until when their employment contracts were terminated on medical ground. Uncomfortable with the employer's decision of termination, respondents referred the matter to the Commission for Mediation and Arbitration Shinyanga claiming for reinstatement. This time, respondent were late therefore filed along with their CMA Form No 1, application for condonation applying for enlargement of time to file their dispute out of time.

Instead of condoning the dispute first before going to the merits of the dispute presented, the Commission for Mediation and Arbitration went direct to hearing and determining the labour dispute which was in fact out of time leaving in pendency the application for condonation. Aggrieved by that procedure and the decisions thereon, the applicant has now come to this court for intervention via revision.

The application is by way of a chamber summons made under section 91 (1) (a) and (b), 2 (b) and (c), 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, Rules 24 (1) (2) and (3) and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, 2007, apply for Revision of the Award by the Commission for Mediation and Arbitration in Labour Dispute No. CMA/SHY/71/2019. The Notice of application is being supported by an affidavit sworn by the Applicants' counsel, Mr. Geoffrey Kange. The Respondents contest the Application, hence the joint counter affidavit sworn by both respondents on 2nd August, 2019.

Two issues were raised by the applicant in the supporting affidavit.

- 1. Whether it was proper for the arbitrator to proceed with the hearing of the main dispute ex parte without disposing of the application for condonation.*
- 2. If the first issue is disposed of in affirmative, whether it was proper for the arbitrator to award each respondent 12 months salaries and other terminal benefits as compensation for unfair termination under the circumstances of the dispute.*

Applicant's advocate, Mr. Geoffrey Kange, contended that the CMA was wrong in determining the main dispute without condoning the application first. By so doing, insisted Mr. Kange, the CMA went on hearing and determining the dispute which was filed outside the prescribed time.

In an alternative ground, Mr. Kange argued that, the arbitrator erred in awarding the respondents 12 months compensation without any evidence tendered to prove the claim. He said, respondent failed to prove that they were unfairly terminated and therefore the arbitrator had no justification to award what she awarded in her decision.

On his part 1st respondent submitted that, they filed their dispute together with an application for condonation which they duly served on the applicant. On how the arbitrator handled the matter, he said, he is a lay person, therefore does not know what exactly the arbitrator was supposed to do. He however, of the suggestion that if the records are to the effect that their application for condonation was not granted, then the arbitrator went wrong.

On the second issue which was argued in the alternative, 1st respondent said, they did present their claim at the CMA and proved the same that is why they were awarded compensation.

2nd respondent supported the CMA's award, she said, they presented their claim at the CMA, served the applicant and the matter proceeded to the hearing where by the CMA at the end found in their favour.

In his short rejoinder, Mr Kange reiterated his earlier submissions.

Having scrutinized the affidavits for and against the application, the records and the parties submissions, I think the issue for this court's determination

is whether the arbitrator erred in determining the respondents dispute which was time barred without first condoning the same.

Rule 10 GN No. 64/2007 provides that and I quote: -

"Rule 10 (1) Dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty (30) days from the date of termination within or the date that the employer made a final decision or uphold the decision to terminate.

(2) All other disputes must be referred to the Commission within sixty (60) days from the date when the dispute arised."

At the CMA, 1st and 2nd respondents filed separate CMA FORM NO 1 on 8th April, 2019 where they indicted at page 55 (PART 3) of the said form that the dispute arose on 20th December, 2018, they all, on the same date filed an application for condonation , CMA Form No 2 made under regulation 34 (1) specifying that the dispute was filed 2 months and 26 days outside the prescribed time. The forms were initially assigned two separate numbers that is CMA/SHY/71/2019 and CMA/SHY/72/2019 for the 1st and 2nd respondent

respectively. Later, the disputes were consolidated and determined as Labour dispute No. CMA/SHY/71/2019.

On 22/5/2019, only respondents entered appearance at the CMA. Applicant defaulted appearance. The arbitrator, on that ground proceeded hearing the respondents *ex parte*. Here is the arbitrator's order:

"AMRI: Shauri linasikilizwa upande mmoja ili pande za mgogoro waweze kupata haki yao kwa mujibu wa kifungu cha 87 (3) (b) cha sharia ya Ajira na Mahusiano kazini

*Magreth Kiwara
Signature
Msuluhishi"*

After the above order, the arbitrator determined the respondents on their main dispute on the same date followed by an award issued seven days later on 30/5/2019. As alluded to above, this dispute was filed outside the time limit. The respondent's themselves had indicated so in their application for condonation. Unfortunately, the Arbitrator bothered not to entertain and grant application for condonation. As it is, the respondent's application for condonation remained undetermined to today.

Given the facts above, it is obvious that the respondents dispute was time barred. It was heard without condonation. The arbitrator was therefore, in error. She ought to have determined an application for condonation first before she could proceed to determine the main application, as a result, the arbitrator heard and determined respondents dispute which was time barred.

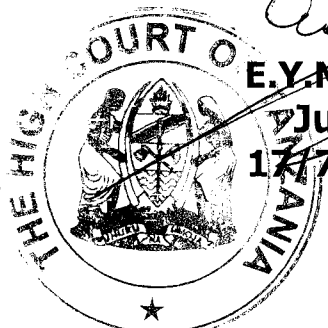

For the above discussed reasons, the CMA's proceeding is hereby revised, quash the proceedings and the order thereto. Because the applicant had filed their application for condonation which remained undetermined, the records is hereby remitted back to the CMA to have the application for condonation determined first before the main application.

Order accordingly.

DATED at **SHINYANGA**, this 17th day of July, 2020


E.Y. Mkwizu
Judge
17/7/2020

Court: Right of appeal explained to the parties.



E.Y. Mkwizu
Judge
17/7/2020