THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

APPLICATION FOR LABOUR REVISION NO. 05 OF 2016

(Arising from trade dispute No. CMA/LIN/LD/16/2016 of Lindi at Lindi)

HASANI SAIDI CHONGA................................... APPLICANT

VERSUS

YASINI MOHAMEDI MNENGELEA.................. RESPONDENT

JUDGEMENT

Hearing date on: 26/6/2020

Judgment date on: 30/6/2020

NGWEMBE, J:

The applicant herein was aggrieved with the decision of the Commission for mediation and Arbitration for Lindi (CMA) in Trade Dispute No. CMA/LIN/LD/16/2016. Thus, knocked the doors of this court seeking revision of the aforesaid decision of CMA. In support of his application, the Applicant raised a good number of grounds calling for this court's determination.

Upon both parties filing their pleadings and following the outbreak of pandemic disease of COVIC- 19, this court proceeded to order the disputants to file written arguments which both complied with the scheduled order.

The applicant submitted quite strongly, that on 14th day of august, 2014, the applicant entered into a day work agreement with the respondent to drive his car, make Toyota Hiace, bearing registration number T 303 DAA. One of the condition of their agreement was that, the respondent shall deliver to the applicant a total amount of TZS 50,000/= in every working day and the surplus will be taken by him. Surprisingly, on 20th day of May 2016, the respondent referred a Labour dispute to the Commission for Mediation and Arbitration "CMA" at Lindi alleging that he was unlawfully terminated from employment contrary to what they agreed.

He added further that, on 16th day of September, 2016 the CMA decided the matter in favor of the respondent and held that the respondent was unlawfully terminated, and ordered the applicant to pay the respondent a total sum of TZS 7,427,692/=including his salaries from 4th August 2014 to May 2016, payment of daily allowances of TZS. 15,000/= including payment of National Social Security Fund. All payments were ordered to be complied within 14 days from the day of the award.

Thus, the applicant prayed before this honourable court to revise the proceedings, setting aside the award, ordering the respondent to return at

his work place and the respondent to be condemned to pay all costs of this application.

The applicant equally raised and argued quite strongly, on the right to be heard (*Audi alteram partem*). That parties were not given opportunities to be heard by CMA, instead they only filed opening statements *(Maelezo ya Awali).* Also argued that after filing such opening statements, the Arbitrator proceeded to write judgement without affording them right to be heard on the dispute.

To support his argument, the applicant referred this court to Rule 19 of the Labour Institutions (Mediation and Arbitration) Rules of 2007 (GN No. 64) and Rule 22 (1) & (2) of the Labour Institutions (Mediation and Arbitration Guidelines) (GN No. 67) that after all proceedings the commission must give parties an opportunity to be heard. Likewise, in this case parties were neither notified to come for the hearing and nor hearing was ever conducted.

Further, referred this court to article 13 (6) (a) of the Constitution of the United Republic of Tanzania, and in the cases of **DPP Vs. Shabani Donasian and 10 others, Criminal Appeal No. 196 of 2017; DPP Vs. Abdul Ismail [1993] TLR 193**; **Mbeya-Rukwa Autopart Ltd Vs. Jeshina George Mwakyoma [2003] TLR 251**, where in all cases the court held that failure to observe principles of natural justice such decision is *void abinitio* with no legal effect.

Since there was no hearing, then the respondent failed to establish and prove his claim against the appellant and what was decided by the Arbitrator was unlawful, null and void.

In reply, the respondent argued rhetorically, that he was employed by the applicant to drive his Motor Vehicle Make Toyota Model Hiace with registration No. T 303 DAA. Whereby the respondent was given a contract of employment with unspecified period, hence he was a permanent employee. However, he was terminated from such permanent employment. The question is whether that termination was procedurally fair as required by Section 37 (2) (a) (b) and (c) of the Employment and Labour Relation Act. Having cited those sections and rules, the respondent asked this court to nullify this application and confirm the decision of CMA and order the applicant to comply with the Tribunal's decision.

At this stage this court is dealing with what was adduced and recorded in the CMA. We do not advance new evidences, but analysis of what CMA recorded and, if at all, faulted any legal procedure as aforesaid.

I have painfully, perused the records of CMA with a view to understand if at all CMA conducted trial as required by labour laws and its rules. Unfortunate I have failed to find any proceedings recorded by CMA and that parties were not heard, thus, faulted the basic principles of natural justice. The claimant/respondent, failed to be heard, thus failed to establish and prove his complaint against the applicant. Even the applicant

was not given any right whatsoever, to respond on what the respondent alleged before CMA.

In the case of **Amina Ramadhani Vs. Staywell Apartment Limited, Labour Rev. No. 46 of 2016** (unreported); and in the case of **Abbas Sherally and Another Vs. Abdalah Sultan Haji Mohamed Faraz boy,** Civil Application No. 33 of 2002 (unreported) the court held:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be breach of principles of natural justice"*

Similar to this application at hand, the proceedings of the trial tribunal did not comply with this mandatory requirement of the law by inviting the disputants to address CMA on their complaint but unfortunate there is nowhere in the proceedings of CMA that parties were given opportunity to be head.

Undoubtedly, court judgement or tribunal's decision, must strictly base on the evidence recorded during trial and not on outside evidences, however acquired. Always judgement should not go outside the record and base his findings on matters within his personal knowledge. The case of **Hamis**

Rajabu Dibagula Vs. R, [2004] TLR. 196 the Court of Appeal clearly explained the same position as quoted hereunder:-

> *"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. A good judgement is clear, systematic and straight forward. Every judgement should state the fact of the case, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reason which justify the finding. It should state sufficiently particulars to enable a court of appeal to know what facts are found and how"*

A good judgement must be clear, systematic and straight forward. Every judgement should state facts of the case, analysis of those facts by reference to a particular evidence adduced during trial, and give sufficiently and plainly the reasons which justify the findings of the court. This position was likewise, pronounced by the Court of Appeal in the case of **Mkulima Mbagala Vs. R Criminal Appeal No. 267 of 2006,**

> *"For a judgement of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to*

find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at".

In this application, unfortunate, nowhere is stated that parties were given right to be heard and the whole judgement of CMA was based on opening statements of the disputants. Thus, faulting the whole process of justice and denying the disputants their right to be heard.

In this revision, even if I may proceed to determine other grounds raised by the applicant, obvious such exercise will result into futility because the foundation of justice that is, right to be heard, was faulted by CMA.

May be for academic purpose, I may briefly proceed a bit more to analyse other grounds as raised by the applicant and responded by the respondent. The labour laws, place evidential burden of proof on fair termination at the shoulder of the Employer. The Employer has statutory duty to prove that termination was fair both procedurally and substantively. That reasons for termination was a fair reason; and that the employment was terminated in accordance with fair procedure.

However, in our case at hand the applicant disputed that he did not terminate the respondent from his employment. Therefore, the burden shifted from the applicant to the respondent to prove that he was unfairly terminated. This is provided for in section 60 (2) (a) of the Labour

Institution Act No. 7 of 2004. The respondent was required to prove that he was unfairly terminated by the applicant. Under section 110, section 111 and section 112 of the Evidence Act, requires whoever alleges has a duty to prove it. Thus, the respondent had a duty to prove that he was terminated from employment.

Applicant further complained that, the Arbitrator was wrongly ordered him to pay the respondent his pension, while the respondent was not a member of NSSF. I have no doubt, every employer has a statutory duty to make sure that his employee (s) is registered in a social security fund, and remits his contributions monthly. However this rights is not an automatic right, a complainant had a duty to prove that he was a member of a Social Security Fund (NSSF). In this application the respondent before CMA did not even prove that he was a member of NSSF. How could CMA make such order as it did? Section 112 of the Evidence Act put burden on a person who alleges an existence of a certain fact. The section is quoted hereunder:-

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any other person"*

The respondent did not tender any document to prove that he was a member of NSSF to satisfy the Tribunal that he was a member. In the case of **Anyimwile Mwasaga & 17 Others Vs. Mbeya Cement Company Ltd, Labour Complaint No. 02 of 2017,** the court held:-

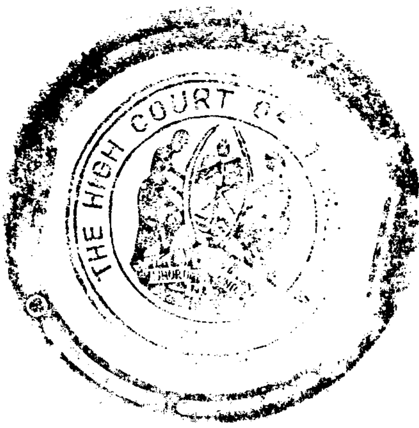
"To my opinion it was the burden of the complainants to prove that they were permanent employees of the respondent and that they were in service when the agreement came into place as it has date, no date of termination, but to my opinion no piece of evidence attempted to prove that fact"

Thus, the respondent did not prove if he was a member of NSSF.

Having so said and for the reasons so stated, the arbitrator abdicated his duty to hear the disputants as required by the dictates of labour laws. As I have already said, the complaint was not heard and parties were not heard in accordance to the principles of natural justice. Once there is a breach of principles of natural justice especially, right to be heard, obvious the whole subsequent proceedings and decisions become nullity. I accordingly, nullify the whole proceedings and judgement of CMA. Whoever, intends between the disputants may institute a fresh complaint before another Arbitrator. No order as to costs.

I accordingly order.

Dated at MTWARA this 30th day of June, 2020.



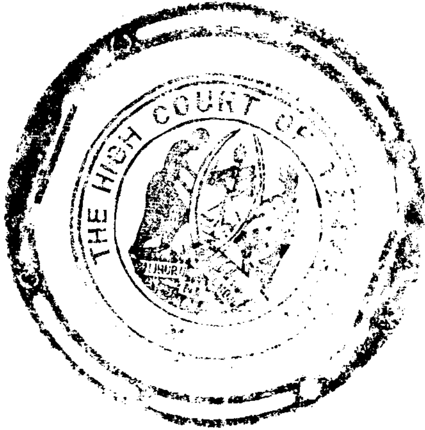
P.J. NGWEMBE

JUDGE

30/6/2020

Court: Judgement is delivered at Mtwara in Chambers on this 30th day of June, 2020, in the presence of the Applicant and Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

30/06/2020