

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVIEW APPLICATION NO. 01 OF 2019

(c/f. High Court of the United Republic of Tanzania (labour division) at

Moshi – revision no. 27 of 2017 and Labour dispute number

CMA/M/77/2014 of the Commissions for

Meditation and arbitration for Kilimanjaro at Moshi)

1. EXPEDITO NGAKONGWA

2. ROSE SALAKANA (*as legal personal*

Representative of Herman H. Paul) APPLICANTS

VERSUS

ORYX OIL COMPANY LIMITED.....RESPONDENT

RULING

8/01/2020, 06/03/2020

MWENEMPAZI, J.

The applicant have filed a Memorandum of Review under section 94(1) (e) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 27(7) of the Labour Court Rules, 2007, G.N. No. 106 of 2007, seeking an Order of the Court reviewing the Ruling and Order of the Court in the Labour Revision No. 27 of 2017(Hon. Fikirini, J) dated 4th December, 2018. The applicant raised five grounds of review which grounds, namely: -

1. There is an apparent error on the face of the record;
2. There is an apparent error on the ruling that the findings of the trial Court are not reflected on the final holding (Conclusion);
3. The trial Court erred in law by providing an alternative conclusion and not substituting the same to the revised award;
4. The drawn order does not tally with the ruling of the Court;
5. The copy of the ruling and drawn order were served to Applicants on the 7th day of January, 2019.

With the grounds listed above, the applicants pray that the Honourable Court allow the review and order the following.

- (a) Set aside the ruling and drawn order emanated from the High Court of Tanzania (Labour Division) at Moshi-Labour Revision No. 27 of 2017.
- (b) Sustain the award of the Labour Dispute Number CMA/M/77/2014 of the Commission for Mediation and Arbitration for Kilimanjaro at Moshi.
- (c) The ruling and drawn order emanated from the High Court of Tanzania (Labour Division) at Moshi- Labour Revision No. 27 of 2017 be corrected to provide the remedies for unfair termination in alternative.

IN THE ALTERNATIVE TO THE PRAYERS ABOVE:

- (d) Amendment (*be made*) to the drawn order emanated from the High Court of Tanzania (Labour Division) at Moshi-Labour

Revision No. 27 of 2017 to tally with the ruling of the Revision of the High Court of Tanzania (Labour Division) at Moshi- Labour Revision No.27 of 2017

The applicants are being served by Patrick Paul, Learned Advocate and the Respondent is being represented Wilbard J. Massawe, Advocate. Parties prayed for leave to argue the application by way of written submission. Leave was granted to them on the 23rd October, 2019 and the schedule was set. With a minor change on the schedule, taking into account the circumstances obtaining, a rescheduling order was issued on the 8th January, 2020 and they duly complied.

In the written submission in chief, counsel for the applicant prayed that he submits on all four grounds of review as one and reframed the ground of review to read as follows:

"(there is) an apparent error on the face of the record as the drawn order does not tally to the ruling."

The counsel for the applicant submitted that the impugned ruling was delivered by the Honourable Madam Judge P.S. Fikirini who was later shifted to another registry of the High Court of Tanzania and succeeded by Honourable Justice Twaib. (I would add to that, Honourable Justice F.A. Twaibu has also shifted to another station. I have taken over the role to preside over the matter).

The applicant has submitted that the gist of the ruling and summary of the remedies awarded by the High Court in Revision are contained in the second paragraph of page 14 of the Ruling, which reads: -

*"The CMA was thus correct that the respondents were unfairly retrenched albeit for a different reason, as explained above. In that regard **I find them deserve to be remedied as provided under section 40(1)(a) or (b) of the ELRA.** And in the event, these two fails, **then they be compensated as illustrated under section 40(3) of the ELRA.**"*

The summaries of the remedies awarded by the High Court ruling in Revision No. 27 of 2017 ought to be reflected in the drawn order. However, the drawn order reads: -

"THIS COURT ORDERS THAT: -

- i. The decision and orders of CMA are quashed and set aside.*
- ii. Application allowed.*
- iii. Each party bear own costs.*

IT IS SO ORDERED..."

From the above the remedies awarded by the High Court ruling in Revision No. 27 of 2017 as contained in the second paragraph of page 14 of the ruling are nowhere reflected in the drawn order extracted from the said ruling. The counsel for the applicant has submitted that the Orders that the Respondents(Applicants herein) deserve to be remedied as provided under section 40(1) (a) or (b) of the ELRA; and in the event these two fail, then they be compensated as illustrated under section 40(3) of the ELRA should have been inserted in the said drawn order. Since the drawn order is extracted from the ruling, and therefore the former should reflect the latter; failure of having the drawn order reflecting the ruling is an apparent error on the face of the record.

The counsel for the applicant has suggested remedies to the alleged anomaly which is also a prayer, that the applicants were unlawfully retrenched on November, 2013 and the CMA delivered the award on June, 2015. That counts to nineteen (19) months period. Also, from retrenchment date to the dated fixed for mention before ruling of this application, December, 2019 it will be seventy-three (73) months since the unlawful retrenchment. Furthermore, the CMA awarded sixty (60) months' salary compensation as per section 40(1)(c). The ruling sought to be reviewed has not faulted the remedies awarded by CMA rather it found the applicants were unlawfully retrenched but on a different ground. Therefore, the remedies as awarded by the CMA stand undisturbed. He therefore prays for the court order as follows:

- i. The application for review is allowed.
- ii. The drawn orders of the High court of Tanzania at Moshi -Labour Revision No. 27 of 2017 are quashed and set aside.
- iii. The respondent to compensated the Applicants amount equals to nineteen (19) months period salary.
- iv. Applicants be paid sixty (60) months salary compensation as per section 40(1) (c) of ELRA.

In reply to the submission by the respondent's counsel, Mr. Wilbard Masawe, has argued that the submission by the applicant's counsel hinges on paragraph 14(I believe he meant second paragraph at page 14) of the typed ruling whereby after quoting it, the counsel for the applicant proceeded to preface the matter by stating that the High court in the revision did not in any manner whatsoever disturb the findings of the CMA and that it rather affirmed them, on different grounds. In his opinion the counsel for

the applicant has read (the second paragraph) page 14 in isolation to the rest of the findings of the court. The counsel for the respondent has further submitted that at page 13 of the ruling the Honourable Judge summed up the findings of the court whereas at page 14 second paragraph was rather an obiter dictum. The counsel for the respondent has quoted the third paragraph at page 13. He has, however stated it as paragraph 13 which brought me difficulties in understanding his submission, I will also quote for clarity to the other points which I will need to raise, the same reads:

"...logically if the CMA agreed that Oryx Gas (T) Limited was not the Respondents Employer, as argued by Mr. Massawe, the position which I am subscribed to, then she was required to come with a different conclusion. The conclusion that, the retrenchment carried was null and void as Oryx Gas(T) Ltd has no legal right to deal with the Respondents as indicated. And would have proceeded to order that the Respondents' employment with Oryx Oil Company Limited still stood. This was to be followed by annulling the proceedings, and advise, if need be, follow the proper procedures as provided under the law."

The counsel has further submitted that the court's findings wanting in correction as per the Applicants that *the CMA was thus correct that the respondents were unfairly retrenched albeit for a different reason, as explained above*. The phrase 'explained above' is no doubt, making reference to page 12 of the ruling. That is the reasons explained why the findings of the CMA were correct. The persons complained of having retrenched the applicants was not their employer.

It is the submission of the respondent that the remedies for unfair termination can only be claimed from an employer. Thus, the lower tribunal findings that the person complained of as employer was not in fact an employer, it ought to have nullified the proceedings and order that the procedures be followed by the true employer. This was, in courts view, an irregularity which vitiated the proceedings of the CMA hence leading to its ultimate nullification.

In the opinion of the counsel for the respondent the application has no merit and also the orders sought could best be sought if the applicant had opted for an appeal instead of a review. The scope of this court is narrow when the matter is one of review.

From the memorandum of review the prayers sought by the applicant are as follows, I quote:

"Wherefore the applicants pray the Honourable court to allow the review and order of the following: -

- (a) set aside the ruling and drawn order emanated from the High court of Tanzania (Labour Division) at Moshi-Labour Revision No. 27 of 2017*
- (b) sustain the award of the Labour Dispute Number CMA/M/77/2014 of the Commission for Mediation and Arbitration for Kilimanjaro at Moshi.*
- (c) The Ruling and drawn order emanated from the High Court of Tanzania (Labour Division) at Moshi- Labour Revision*

No. 27 of 2017 be corrected to provide the remedies for unfair termination in alternative.

IN THE ALTERNATIVE TO THE PRAYER ABOVE:

(d) Amendment to the drawn order emanated from the High Court of Tanzania (Labour Division) at Moshi-Labour Revision No. 27 of 2017 to tally with the ruling of the Revision in the High court of Tanzania (labour Division) at Moshi -Labour Revision No. 27 of 2017"

It is the argument of the counsel for the Respondent that the prayers in the memorandum of review do not indicate that the applicant is seeking for correction of an error apparent on the face of the record but rather inviting this court to seat as an appellate court on its own decision. The Respondent has argued further that if the court will set aside the Ruling and drawn order emanating from the Labour Revision No. 27 of 2017 and sustain the award of Labour dispute No. CMA/M/77/2014, it is doing so as an appellate Court.

I have read the record; the ruling of the court sought to be reviewed and submissions of the parties. Without taking much time to repeat what has been stated, I would succinctly and generally say that the applicant has a view that the drawn order does not tally to the findings of the court and that is the error on the face of the record he is inviting the court to rectify. However, going by the prayers made in the memorandum of review and also the submission by the counsel for the appellant, I think the applicant have missed the point from the impugned ruling of this court.

As submitted by the Counsel for the Respondent, the findings of the court in the ruling refers for explanation at page 12 of the ruling. That, the applicants were employees of Oryx Oil Company Ltd and at no time they had been employees of Oryx Gas (T) Ltd; and that it is undisputed fact that Oryx Oil Company Ltd and Oryx Gas(T) Company Ltd are two separate legal entities. Hence, there was an irregularity that the person complained of having retrenched the Applicants was not their employer. On this reason, the application for revision was allowed. Had it been that the CMA was correct in that their employer is the one who had retrenched the applicants, the court would not have proceeded to quash and set aside the decision of the Commission for Mediation and Arbitration at Moshi in Labour Dispute No. MOS/CMA/77/2014. In that account, the decision of the CMA cannot be said to have been left undisturbed as argued by the counsel for the applicants.

On another front, the counsel for the Respondent has submitted that the application was for review, however the applicants' prayers have been made as if it is an appeal. In his opinion, the application has no merit and also the orders sought could best be sought if the applicant had opted for an appeal instead of a review. The counsel has cited the case of **Joshua Maswi & 145 Others v. B.P. Tanzania Limited, Labour Division, DSM, Misc. Appl. No. 60 of 2013**, Rweyemamu, J stated, that:

"The Court's powers for review are set out under rule 27 of the Labour Court Rules, GN. 106 of 2009."

Rule 27(2)(b) of the Labour Court Rules, 2007, G.N. No. 106 of 2007 provides that:

"Any person considering himself aggrieved by a judgement, decree or order from which-

(a)....

(b) no appeal is allowed, and who, from the discovery of any new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgement or decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the judgement, decree or order made against him, may apply for a review of the judgement, decree or order to the court."

In the quoted provision it is clear that a person may apply for review if **(one)** he has discovered any new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgement was passed or **(two)** if there is a mistake or error apparent on the face of the record or **(three)** any sufficient reason.

In this application the counsel for the applicant after quoting the second paragraph at page 14 has submitted that this court never disturbed the decision of the CMA. For that matter he has made prayers for orders to set aside the ruling and drawn order of this Court in Labour Revision No. 27

of 2017, sustain the award of the Labour Dispute No. CMA/M/77/2014 of the Commission for Mediation and Arbitration for Kilimanjaro at Moshi, the Ruling and drawn order in Labour Revision No. 27 of 2017 be corrected to provide the remedies for unfair termination in alternative or amendment of the drawn order emanating from the Ruling in Labour Revision No. 27 of 2017 be effected to tally with the ruling.

I do agree to the submission by the counsel for the Respondent that the application has been made to invite the court to review its Ruling and drawn order but in essence it is an appeal in disguise. The effect of the orders sought, if issued will amount to turning this court to an appellate court. Though the counsel for the applicant has, in the submission, summed up the grounds of appeal to read as ***"an apparent error on the face of record as the drawn order does not tally to the ruling"***; the same is still wanting. It was defined in the case of ***Omari Mussa@ Selemani @Akwishi and two others vs. Republic, Consolidated Criminal Application NO. 117, 118 &119/07/of 2018*** Court of Appeal of Tanzania at Mtwara that

"as to what constitutes a manifest error.... to mean an obvious and patent mistake which upon reading, will not involve a long-drawn process to come to a conclusion that there is an error."

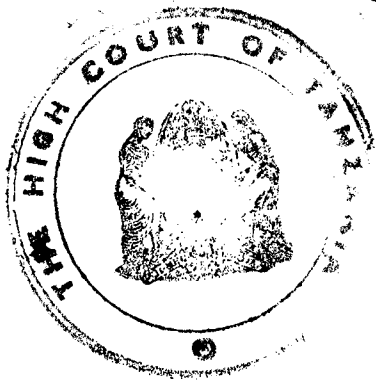
It was held in the same referred case that


"going along with the applicant's arguments would be tantamount to the court sitting as an appellate court from its own decisions which is not what review is all about under our law."

In the Labour Revision No. 27 of 2017 the Application for Revision was allowed and the decision of the CMA was quashed and set aside. If the prayers in this application, be it those in the memorandum of review or those stated in the submission, are allowed the court will be turning itself into an appellate court to its own decision. In my view, the Ruling and the drawn order extracted from it are compatible and there is no error to warrant any correction. The applicants if they wanted to change the results, they should have opted for an appeal to the higher court instead of this application for review.

For the reasons stated the application is dismissed in its entirety. As this is a labour matter no order is issued in regard to cost.

It is ordered accordingly.




T. MWENEMPAZI
JUDGE
6/03/2020