

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION NO. 59 OF 2020

(Originating from Commissioner for mediation and Arbitration Application No.
CMA/ARS/ARB/628/2016)

IDD ATHUMANI ----- APPLICANT

VERSUS

A TO Z TEXTILE MILLS LTD ----- RESPONDENT

JUDGMENT

23/09/2021 & 11/11/2021

MZUNA, J.:

This is an application for revision of an award issued by the Commission for Mediation and Arbitration (the CMA). The application has been preferred by **Idd Athumani**, the applicant herein who is ably represented by Mr. Elibariki Maeda, the learned counsel. The application is strongly opposed by **A to Z Textile Mills Ltd**, the respondent herein who was represented by Mr. Kelvin Kwagila, also the learned counsel.

A brief background of this matter is that the applicant lodged a complaint before the CMA, allegedly that he was unfairly termination. The CMA after hearing both parties found that the applicant was unfairly terminated. The respondent was accordingly ordered to pay some

terminal benefits like one month notice equals to Tsh 180,000/= and 12 months' salaries equals to Tsh 2,160,000/=.

Aggrieved by the award, the applicant is now moving this court to revise the award issued by the CMA instead should be awarded the unpaid salaries of 52 months.

The application has been made by way of a chamber summons supported by an affidavit sworn by the applicant himself. The respondent contested the application by a counter affidavit sworn by Salha Ally the Human resource Manager of the respondent. Hearing of the application proceeded by way of written submissions.

The main issue calling for this court's determination is whether, the applicant is entitled to the unpaid salaries of 52 months.

Submitting in support of the application, Mr Maeda argued that, the applicant claimed under the CMA Form No 1 among other things that the respondent did not pay the salaries of the applicant from the time the applicant was arrested, charged until the time the applicant was terminated from his employment.

He further submitted that the CMA found the termination to be unfair as it did not follow the procedure of termination as provided for under the law. The learned counsel referred to Rule 27(5) of the

Employment and Labour Relations (Code of Good practice) 2007, G.N No. 42 of 2007 (herein after GN 42 of 2007) to emphasis a point that once an employee is charged with a criminal offence, he may be suspended from work on payment of full remuneration pending final determination by the court and any appeal thereto.

Mr. Maeda contended that since the respondent did not want the applicant back to work till the determination of the criminal case against him then he ought to pay him his full remuneration.

Contesting the application, Mr. Kwagila submitted that, prior to the hearing of the case at the CMA parties framed issues for the determination and among the framed issues the claim for unpaid salaries of 52 months was not among the framed issues. He further rebuffed the mode adopted by Mr. Maeda to introduce some facts or new evidence during submissions which is wrong.

That, this court cannot determine new issues which were not heard and determined at the CMA. The learned counsel cited the case of **Hubert Remmy Lyoba v K.K Security (T) Ltd**, Revision Application No. 24/2015 HC Labour Division at Mwanza found in Labour Court Case Digest, Part II 2015, editor, Cornel K Mtaki (Dr) Reported Case No. 168.

Mr. Kwagila argued that, the mere allegation by the applicant in CMA Form No. 1 that the applicant is entitled to the payment of unpaid salaries of 52 months is without any legal justification and with no any supporting documentary evidence. In light of the cited rule 27(5) (supra) he submitted that it is inapplicable since the applicant has failed to prove that he was suspended from work by the respondent. He urged this court to regard that instead should be mindful of the fact that each case must come to an end for the spirit of promoting economic development and efficiency. The learned counsel cited the case of **Upendo Masawe Uri v The Small Things**, Labour Revision No. 22 of 2020(Unreported).

In brief rejoinder Mr. Maeda submitted that, the arbitrator did not touch about the issue of the unpaid salaried but rather he touched on the unfair termination and terminal benefits.

He also re-joined that; the unpaid salaries are not new issues as they were claimed at the CMA F 1, After being condoned in Revision No 23/2017 between parties herein.

I have given a considerable weight to the submissions made by both counsels in respect of this application. The question is, was the issue of payment of salaries during the pendency of a criminal matter or as the case may be, a ground dealt with at the CMA?

The CMA acting under Section 39 of the Employment and Labour Relations Act No 6/2004 (ELRA) found that there was an "unfair termination of an employee by an employer" after the employer, in our case the respondent failed to prove that the termination was "fair." The applicant is saying there was a contravention of the labour laws otherwise than unfair termination, the burden which is placed on the employee under section 60(2) of the Labour Institutions Act, Act No 7 of 2004 (Cap. 300 RE 2019) which states that,"

60 (2) In any civil proceedings concerning a contravention of a labour law-

- (a) the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subsection (1)(b) apply; and*
- (b) the party who is alleged to have engaged in the conduct in question shall then prove that the conduct does not constitute a contravention.*

This is the correct provision governing the issue under consideration because the dispute is not under the claim of unfair termination but rather on the unpaid salaries.

My close reading from the CMA Form No 1 the applicant claimed for unfair termination as well as unpaid salaries of 52 months. It is noteworthy that issue of unpaid salaries was not resolved by the CMA. It

was also not one among the framed issues for the unpaid salaries of 52 months.

Mr. Kwagila is of the view that the Labour Court has no powers to entertain new issues which were not heard and or determined by the CMA citing the case of **Hubert Remmy Lyoba v KK security (T) Ltd** (supra). I am aware and courts have held time without number that "*As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal.*"

(See, **Hotel Travertine Limited and 2 Others v. National Bank of Commerce Limited** [2006] TLR 133)

From the above holding, I tend to agree with Mr. Kwagilwa, the learned counsel that that issue was not dealt with though pleaded under the CMA form 1. The CMA F1 forms part of the court record which however must be proved in evidence. The record shows, all parties argued and submitted for and against it in their opening statements as well as their closing submissions at the CMA. Nevertheless, the applicant said nothing on it when he testified as DW1. That would have covered the 3rd issue concerning the reliefs to which parties were entitled to (if any). Submission is only summary of facts and legal issues not evidence in law.

I am aware that this court as the first appellate court has mandate to re-evaluate the evidence on record and come to its own finding. See the case of **Kaimu Said v. Republic**, Criminal Appeal No 391/2019 which cited with approval the case of **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 (unreported) where it was categorically stated that: -

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."

Although the above cited case is on a criminal case, all the same, the underlying principle contained therein applies to both civil and criminal cases.

After my evaluation of the evidence on record, it is evident that, at the CMA the applicant apart from what is stated under the CMA F.1, did not prove the fact that he was entitled for the unpaid 52 months salaries let alone the salary which he was paid for each month. Even the month of his suspension was not proved. The respondent alleged he only absconded from work after detecting the theft. The applicant was duty bound to prove such claims by virtue of section 60(2) of the Labour Institution Act (supra).

That being the case, I find that the claim for unpaid salaries is basically based on mere speculation and imagination having no tangible and credible evidence. It was not proved as per the evidence on record. The CMA was correct in law to award the applicant 12 months salaries under section 40 (1) (c) of the Employment and Labour Relations Act, Act No 6/2004 after finding that termination was unfair.

This revision is therefore devoid of merit and is hereby dismissed with no order as to costs.

Order accordingly.



M. G. MZUNA,

JUDGE.

11/11/2021