

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT ARUSHA

REVISION APPLICATION NO. 102 OF 2021

(Originating from Labour Dispute No CMA/ARS/ARB/53/21)

AND BEYOND TRAVEL LIMITEDAPPLICANT

VERSUS

NEMES JOHN CHAMI RESPONDENT

JUDGMENT

28/7/2022 & 11/8/2022

KAMUZORA, J.

This application was brought under the provision of section 91(l)(a) (b), 91 (2)(b) and section 94(l)(b)(i) of the Employment and Labour Relations Act, (Cap 366 R.E 2019) and Rule 24(1) 24(2)(a)(b)(c)(d)(e) & (f), 24(3)(a)(b)(c)(d), and Rule 28(1)(b)(c)(d)(e) and 28(2) of the Labour Court Rules, G.N No. 106 of 2007. The Applicant in this application is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARB/53/21 dated 30/09/2021 and the ruling in application for condonation No. CMA/ARS/63/21 delivered on 15/03/2021.

The brief background of the matter as may be depicted from CMA records is such that, the Respondent herein lodged a complaint for unfair termination of his employment contract but since he was late to refer his claims at the CMA then he made an application for condonation which was granted and then the CMA proceeded to determine the merit of the main application for unfair termination. The CMA ruled out that the Respondent was unfairly terminated from his employment contract and awarded the Respondent 30 months compensation to the tune of Tshs. 20,400,000, severance pay to the tune of Tshs. 1,830,000/=, leave Tshs. 680,000/, notice Tshs. 680,000/ making it a total of Tshs. 23,590,769/=and a certificate of service. The Applicant was aggrieved by the said decision hence preferred this current application on the following grounds: -

- i) That, the grant of orders for condonation was illegally, unlawfully and improper procured.*
- ii) That, the Honourable arbitrator erred in law and in fact by failure to record and analyse properly the evidence which were before him and jumped into the wrong conclusion that the Applicant was harsh in terminating the Respondent.*
- iii) That, the Honourable arbitrator erred in law and in fact by failure to analyse the evidence of the employer that the seriousness of the misconduct on offence of being under influence of alcohol or drugs*

or consuming alcohol or drugs whilst at work or on duty amounts to gross misconduct which can lead to termination of employment.

iv) That, the Honourable arbitrator erred in law and in fact by not exercising his powers judicially by granting the employee excessive compensation (30 months salary) without taking in to consideration that the employer had a valid reason and termination was in accordance with fair procedure.

v) That, the Honourable arbitrator erred in law and in fact by granting notice pay which the same has already been paid by the employer.

vi) That, the Honourable arbitrator erred in law and in fact by granting severance pay whilst the employer was fairly terminated on grounds of misconduct of which the Honourable Arbitrator acknowledge admitted being under influence of alcohol.

vii) That, the Honourable arbitrator erred in law and in fact by holding that there are procedures under the code of conduct GN. 42 of 2007 dealing with termination of employment under alcoholism and drugs that the employer must treat a person under counselling and recovery measures without providing the provision guiding the same.

viii) That, the award does not reflect the proceedings of the case.

Hearing of the revision application was by way of written submissions to which both parties complied to the scheduling order. As a matter of legal representation, the Applicant was represented by Mr. Erick Balthazar Kimaro, learned advocate and the Respondent enjoyed the service of Mr. Richard Evance Manyota, learned advocate.

Submitting in support of the Application the counsel for the Applicant jointly argued grounds two and three while the rest of the grounds were argued separately. On the first ground Mr. Kimaro submitted that, the order for condonation at the CMA was granted illegally as the Respondent did not account for the delay for more than 2 years and 3 months as requires in various cases including **Ramadhani J Kihwani Vs. Tazara**, Civil Application No. 401/18 CAT at DSM (Unreported). That, the reasons adduced by the Respondent for the delay was due to the efforts of following his dues from the employer. Mr. Kimaro was of the view that, such a reason was not a sufficient cause for the grant of extension of time and in support his view he cited the case of **Philipo Katembo Gwandumi Vs Tanzania Forest Service Agent and another**, Revision No. 891/2019 HC at DSM, **Elfazi Nyatega & 3others vs Caspian Mining Ltd**, Civil Application No. 44 of 2017 CAT(Unreported) which was cited in approval in the case of **Kowe Malegeri Vs Airwings Secondary School**, Revision Application No. 61 of 2019 HC at Dar es Salaam (Unreported), the case of **Barclays Bank Tanzania Limited Vs. Philicia Hussein Mchemi**, Civil Application No. 19 of 2016 CAT (Unreported) and the book by

Takwani Civil Procedure with Limitation Act, 1963, 7th Edition Eastern Book Company at Page 782.

For the second and third grounds, the Applicant's counsel submitted that, it is on record that the Respondent was not harshly terminated from his employment contract as there was a reason for termination and the procedure for termination was followed. That, the reason for termination was due to drunkenness and undermining the instructions of the senior manager. In support of this point he cited Rule 12(1)(2) and (3) of the Employment and Labour Relations (Code of Good Conduct Practices) GN No 42 of 2007 and insisted that the procedures for termination were followed.

The counsel also submitted for the fourth ground that, the arbitrator erred in granting the Respondent excessive compensation of 30 months' salary with other terminal benefits while there was a valid reason for termination and the procedure for the termination was followed. To buttress his submission, he cited the case of **Felician Rutwaza Vs World Vision Tanzania**, Civil Appeal No 213 of 2019 CAT (Unreported) and section 3(a) of the Employment and Labour Relations Act (Cap 366 R.E 2019).

As for the fifth and sixth grounds, the counsel submitted that, the Arbitrator granted the notice pay while the same was already paid as evidenced by Exhibit D6. That, the arbitrator erred by holding that there are procedures under the Code of Good Practice GN. No 42/2007 which deals with termination of employment under alcoholism and drugs without providing for the said provision.

In concluding, the Applicant's counsel argued that, the CMA award did not reflect the proceedings of the case as the evidence of the Applicant's witness at the CMA shows that the Respondent attended the meeting while he was drunk and disobeyed all the orders of the general manager. Basing on the above submissions, the Applicant prays that the arbitrators ruling and the award be revised and set aside.

Contesting the application and responding to issue of condonation Mr. Manyota submitted that, the Applicant did not file a revision against the said order hence bringing it at this stage is an afterthought. On the cases cited by the Applicant Mr. Manyota claimed that the same are irrelevant to the current application.

Submitting on grounds two and three Mr. Manyota argued that, there was no any evidence showing that the Respondent was under any influence of alcohol or drugs whilst at work amounting to gross

misconduct. As for the case of **SBC Tanzania Ltd vs Nicas Gilbert Kavella** the counsel for the Respondent claimed that, it is irrelevant as in that case there was proof to the effect that the Respondent was drunk while under the present case the Applicant failed to prove that the Respondent was under any influence of anything. The counsel insisted that, the Respondent was harshly terminated from his employment with no any justifiable ground for termination.

As for grounds four and five, the counsel for the Respondent submitted that, there was no any justifiable and legitimate ground for termination of the Respondent employment hence the compensation could not be reduced as so claimed by the Applicant. As for the issue of notice he submitted that, there was no any proof that the Respondent was paid notice. That, exhibit D6 contains terminal benefit that the Applicant intended to pay to the Respondent but the same was not done hence the arbitrator awarded the same. Regarding the reason for the procedure on allegation of alcoholism, the counsel for the Respondent submitted that, there was no proof that the Respondent was under the influence of alcohol.

In a brief rejoinder by the Applicant's counsel reiterated his submission in chief and added that, it is a trite law under section 50 of

the Labour Court Rules GN. No. 106 of 2007 that, a party to any application cannot file an appeal, review or revision on an interlocutory order if the same does not finally determine the matter. On the issue of evaluation of evidence, he stated that, there was no proper evaluation of evidence. That, the CMA at page 4 of its award conceded that the Respondent was under the influence of alcohol whilst at work hence a misconduct and a valid reason for termination.

Regarding the payment of notice he submitted that, the same was already paid to the Respondent as per exhibit D6. Regarding the procedure for allegation of alcoholism he stated that, there is no such a procedure under the Employment and Labour Relation Act. That, it is the submission by the Applicant that the award does not reflect the proceedings.

From the CMA records, the present application and submissions for and against the application, there is no dispute that the Respondent was an employee of the Applicant. It is also clear that, the Respondent's employment was terminated on 1st October, 2018. He applied for extension of time to lodge a complaint to the CMA and he was granted condonation order and thereafter, filed a complaint for unfair termination. The CMA made its reasoning that, the procedure for

termination of employment under alcoholism or other drugs was not followed as it was the first offence for the Respondent hence unlawful termination to the Respondent. The matter for the determination before this court is whether, the condonation order was lawfully made and whether, the arbitrator was correct to hold that the Respondent was unlawfully terminated from his employment contract.

Starting with the order for condonation that was issued to the Respondent as per the ruling in Application for Condonation No. CMA/ARS/63/21, the counsel for the applicant argued that, the order was improperly made. It is the claim by the Respondent that, since the Applicant has not preferred a revision application challenging the said order then the same cannot be brought at this stage.

I do not agree with the Respondent suggestion that the condonation order was to be challenged by way of revision. Looking at Rule 50 of the Labour Court Rules, GN. No. 106 of 2007 it provides that, no appeal, review or revision shall lie on interlocutory or incidental decision or orders unless such decision has the effect of finally determining the dispute. The condonation order issued by the CMA in Condonation No. CMA/ARS/63/21 has no effect of finalising the matter between the parties hence there is no way a revision could have been

preferred therefrom. In short, the grant of condonation order did not determine the parties' rights in its finality but the question that follows is whether the arbitrator exercised his discretionary powers judiciously in granting the Respondent a condonation order.

I understand that the grant or refusal to grant extension of time is within discretion of the court, the discretion which however must be exercised judiciously. In **Mbogo Vs. Shah [1968]** EA 93, certain factors were highlighted to assist the court in deciding to either grant or refuse to grant extension of time. It was held that,

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay/ whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended".

As far as the record of the CMA states on CMA F2, the Respondent made an application for the extension of time at the CMA and the degree of lateness was for the period of 26 months. Under the affidavit filed by the Respondent in support of the application the reasons adduced for the delay in referring of the matter to the CMA in paragraphs 4, 5 and 6 were the fruitless efforts made by the Respondent to claim his entitlements from the Applicant. There is no

explanation of the effort he was doing that led to the delay and this was also acknowledged by the CMA. However, the CMA by referring Rule 10 of GN. No. 64 of 2007 used its discretion in granting the application on account that, there was overwhelming chances of success by the Respondent herein and the Applicant herein was not likely to be prejudiced. It is unfortunate that the CMA did not discuss the reason for delay and the length of delay if at all they were justifiable. It was well held in the case of **Mbondo Vs. Shah** (1968) EA which was also referred to by the CMA that, in granting extension of time all factors must be taken into consideration including; the length of delay, reason for the delay, whether there was arguable case on appeal or revision and the degree of prejudice another party is likely to suffer if time extended.

This court being faced with similar situation in **John Christopher Haule and 4 others Vs. Wilderness Trails Ltd t/a Karama Lodge**, Labour Revision No. 174 of 2017, page HC at Arusha, where the Applicant in that application delayed in lodging the application and alleged that the delay was because he was busy making follow ups to the employer. My brother Gwae J, disregarded the explanation on

fruitless follow ups by the Applicant which was not supported by evidence.

In an application for extension of time before the CMA the Applicant (the Respondent herein) made an empty explanation that he was making follow ups to the employer for payment of his terminal benefits. As it was held by Mwambegele. J, in **Ramadhani J. Khwani** (supra), there was a need for the Applicant in an application for extension of time to justify his follow ups allegations with evidence. The same was not done in this matter hence there was no justification for the delay which could trigger the CMA to grant an application for extension of time.

It is in record as well depicted by the CMA that, the Respondent was terminated on 1st October 2018 and filed an application for condonation and a dispute before the CMA on 15th February 2021. This is a delay of more than two years which to me is very unreasonable unless accounted for. It is on record and specific under the Applicant's affidavit the Respondent did not account for each day of the delay and still the CMA issued a condonation order by extending time to file a complaint. In my view the CMA was wrong in granting the extension of time while no reasonable grounds were established for the delay. The

argument that there was chances of success and no prejudice to the other party was in itself not enough to warrant the grant of extension of time unless well explained and proved as to what the Respondent was doing for two years which made him not to take legal action.

It must be noted that, if the time limit is set for the institution of a certain matter, then the same must be adhered to and in case of a delay then the same must be accounted for as it was held in the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No 3 of 2007 (Unreported) where it was held that,

"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps has to be taken."



Bearing in mind that the Respondent did not explain about the whole period of delay, I join hands with the Applicant's counsel and I subscribe from the authorities cited by the counsel for the Applicant to conclude that, the order for condonation was improperly made by the CMA.

With the above findings and since the Respondent was unable to adduce sufficient reasons for the delay and to account for each day of the delay at the CMA then, the condonation order is hereby quashed

and set aside. Since there is no any valid order extending time for the Respondent to institute a complaint at the CMA then the proceedings and award in Labour Dispute No. CMA/ARS/ARB/53/21 has no legal legs to stand and the same are quashed and set aside.

In the upshot, the revision application is full of merit and its hereby allowed. The nature of dispute being labour matter, no order as to costs is made.

DATED at ARUSHA this 11th day of August, 2022.

 
D.C. KAMUZORA
JUDGE