IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LABOUR REVISION APPLICATION No. 19 OF 2021

(Arising from the Commission for Mediation and Arbitration in Labour Dispute No. CMA/MUS/SER/175 & 176 of 2016)

TRUSTEES OF THE TANZANIA NATIONAL PARKS ..... **APPLICANT**

Versus

ERNATUS I. ARON ..... **RESPONDENT**

RULING

15.02.2022 & 24.02.2022

F.H. Mtulya, J.:

A labour revision was registered in this court praying for four replies from four (4) issues registered at paragraph 23 (a) – (d) of the affidavit duly sworn by Mr. Richard Patrick Kafwita, Principal Human Resources Officer of the Tanzania National Parks. The four (4) questions were filed in this court following determination of the **Commission for Mediation and Arbitration** (the Commission) in **Labour Dispute No. CMA/MUS/SER/175 & 176 of 2016** (the dispute) delivered on 2nd August 2021 by Soleka, H., Arbitrator, which decided in favour of the Mr. Ernatus I. Aron (the respondent).

The reasoning of the Commission is found at page 13 of the decision that: *taratibu wakati wa kusitisha ajira ya malalamikaji hazikuzingatiwa...kwa kuwa mwenyekiti wa Kamati ya nidhamu*

aliendelea na kikao ili hali mlalamikiwa ametoa taarifa ya kutohudhuria katika kikao cha nidhamu. Hivyo basi, maamuzi yeyote yatakayofanyika kwa kuvunja hali ya kusikilizwa ni batili. Ni wazi kwamba mlalamikaji alinyimwa haki yake ya kusikilizwa kama Katiba inavyoeleza.

The decision of the Commission was supported by article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and a large family of precedents in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251, **Darsh Industries Limited v. Mount Meru Millers Limited**, Civil Application No. 144 of 2015, **National Microfinance Bank v. Rose Laizer**, Revision No. 123 of 2014, and **Abbas Sherally & Another v. Abdul S.H.M. Faza Iboy**, Civil Application No. 33 of 2002.

The cited provision of the Constitution and precedents are related to the right to be heard as part of fundamental right. The position of the law has been that the right to be heard is so basic that a decision which is arrived in violation of it will be nullified. The Commission after such finding, it ordered re-engagement of the respondent as displayed at page 14 of the decision that: *kwa kuwa mlalamikaji amenyang'anywa haki ya kufanya kazi naamuru*

mlalamikiwa amwajiri upya mlalamikaji (re-engage) kwa mujibu wa kifungu cha 40 (1) (c) cha Sheria ya Ajira Na. 6/2004.

This thinking of the Commission aggrieved the applicant hence approached this court in contest and raised the said four issues, which in brief, are: first, whether it was proper for the Commission to deal with issues of re-engagement; second, whether the respondent was estopped from denying his own documentary evidence of CMA F.1; third, whether the evidence of DW1 and DW2 were not credible; and finally, whether decline to attend disciplinary hearing without justification hinders hearing process to proceed.

In order to persuade this court in favour of the applicant, the applicant invited the legal services of Mr. Samwel Ochina whereas the respondent appeared in person without any legal representation. Mr. Ochina was the first to take the floor and declined to go directly to the issues but introduced new complaint to the surprise of this court and the respondent which impliedly protested filing of the complaint by the respondent at the Commission.

Submitting on his complaint, Mr. Ochina argued that the dispute was already determined by this court in **Revision No. 10 of 2015** and His Lordship Mipawa, J., on 1st of September 2015, struck out the Revision and stated that: *no automatic leave to file as this is the*

second time the applicants sleeping on their rights and bearing in mind that vigilantibus non dormientibus jura subveniunt [rights are not intended for people who sleep, but for those who are awake], thus the mercy of this court docks.

In his opinion, Mr. Ochina thinks that the suit was determined to the finality in this court hence the present Revision is incompetent and improperly before this court. This complaint received a quick response from the respondent who argued that the previous decision of the this court in **Revision No. 10 of 2015** determined issues of points of preliminary objection to the finality, but not substantive matters which is the subject of the present Revision.

I perused the decision of this court in **Revision No. 10 of 2015** determined on 1st of September 2015 and think the matter should not detain this court. In that decision, this court at the very first page stated that: *this is a ruling in respect of the preliminary objections raised by the respondent Tanzania National Parks against the application for revision of CMA Award filed by the applicants.* The raised points of objection were printed at page 2 of the ruling, namely, in brief, that: the court is not properly moved for want of proper citation of the provision; second, the application is time barred; and third, non-endorsement.

This court at page 6, 7 and 8 of the ruling decided that: first, non-citation of the section in the application is not fatal; second, the preliminary objection on time limit is dismissed; and finally the court stated that non-endorsement of documents makes the application incompetent and upheld the final preliminary objection and struck out the application for want of competence on endorsement.

It is unfortunate for learned counsel Mr. Ochina to raise the issues again in this court while well aware of the decision and meaning of struck out orders emanated from courts for want of competence of applications. In any case, pretending unaware of insertion of section 3A & 3B of the **Civil Procedure Code** [Cap. 20 R.E. 2002] (the Code) via **Written Laws (Miscellaneous Amendment) Act, No. 3 of 2018** on the principle of overriding objective that requires courts to deal with cases justly and consider substantive justice, and the duty of advocates to cherish the objective, Mr. Ochina is just displaying inflexibility in adherence of the principle.

The principle has already received judicial practice and it is generally accepted that parties in disputes brought before our courts to focus on substantive justice. There is currently plenty of precedents of this court and Court of Appeal on the subject (see:

Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017). In any case, the same complaint on jurisdiction of the Commission was filed by Mr. Ochina in the Commission and was resolved in favour of the respondent on 17th August 2018 by Hon. Arbitrator O. Mwebuga.

With regard to the issues which were brought before the Commission, Mr. Ochina submitted that the Commission ordered re-engagement whereas the responded approached the Commission for re-instatement as per **Commission Application Form Number One** (the Form) hence the decision of the Commission be set aside for want of illegality. The submission was supported by the respondent contending that the wrong can be cured in this court in substituting the order to re-instatement. I perused the record of this application and read page 5 of the Form which was filed by the respondent at the Commission on 8th July 2016, and initiated the present proceedings and found that it is correct that the respondent applied for re-instatement and granted re-engagement without any consultation of

the parties to enjoy the right to be heard. In law, the consequences are obvious hence this ground is upheld.

On the second issue, Mr. Ochina submitted that at page 7 and 8 of the Form, the respondent alleged that he was not at his working station upon leave of the applicant, whereas at the Commission in the Form he stated that he was at working station. The respondent on his part submitted that the words in the Form must be read as they are and not in interpretation of Mr. Ochina. To his opinion, the respondent argued that he has never admitted absence from work, but used the word *allegation* and in *Swahili* is termed as *tuhuma* hence allegation of absence from work are fake as he was enjoying his leave for studies. I checked page 7 in the Form and I found the following words: **TUHUMA ZA KUTOONEKANA KAZINI BILA TAARIFA INGAWA MWAJIRI WANGU ALIKUWA NA TAARIFA ZA MIMI KUTOONEKANA KAZINI**. It is fortunate that the allegations are in *Swahili* language and both Mr. Ochina and the respondent know how to read, write and speak *Swahili* in a standard require by a *Swahili* speakers. This court cannot be invited to interpret the plain and unambiguous word *tuhuma*. This ground therefore fails for want of good reasons to interpret the word *tuhuma*.

With regard to issue number three and four, Mr. Ochina and the respondent submitted on the evidences which were registered in the Disciplinary Committee and Commissions with regard to termination of the applicant. According to Mr. Ochina the totality of evidences registered at the Disciplinary Committee and Commission the record displays that the respondent was not present at his working station in a more than three (3) days which amounts to termination from work hence the applicant was properly terminated from his employment. Mr. Ochina submitted further that the respondent had declined to register his presence in the Disciplinary Committee and approached the Tribunal without Commission's Form Number 2 which shows exhaustion of available remedies in the Committee and gives the respondent go ahead to the Commission.

In reply of the submission, the respondent submitted that he notified his employer by a letter on the study leave and there are evidences on record which shows the employer admits the same. On declining to appear before the Commission, the respondent contended that he had conflict and grudges with one of the Committee's members and informed the applicant, but the applicant declined to disqualify the member from sitting and deciding the matter in the Committee. Finally, the respondent argued that he filled

Form No. 2, but the employer declined to reply hence filed a dispute before the Commission.

I perused the record of this appeal. The record shows that the respondent was charged by the applicant in February 2013 for: *kutokuwepo kazini kwa zaidi ya siku tano bila ruhusa ya mwajiri kuanzia tarehe 06/01/2013 mpaka tarehe 13/02/2013 kinyume na Kanuni ya 89 (1) ya Utumishi wa Hifadhi za Taifa Tanzania*, and was called to enter his defence on 6th September 2013 for disciplinary hearing on 10th September 2013 at Fort Ikoma area at 08:00hours, as per exhibit D.4 (letter referenced TNP/SNP/CPF.474/21) & D.5 (letter referenced TNP/HQ/PF.876).

However, the respondent declined for reasons displayed in his letter drafted on 9th September 2013. Before his concerns were resolved, including a complaint on sitting in the Disciplinary Committee of one of the members, the applicant proceeded with the meeting on the second day, 10th September 2013 and terminated the respondent forthwith from the 10th day of September 2013. In short, the respondent is complaining on the right to be heard.

On my part, I think, the record display it all. The way the proceedings were conducted at the Disciplinary Committee, leaves a lot to be desired. The right to be heard as enshrined in our article 13

(6) (a) of the Constitution, labour laws and the cited precedents in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251, **Darsh Industries Limited v. Mount Meru Millers Limited**, Civil Application No. 144 of 2015, **National Microfinance Bank v. Rose Laizer**, Revision No. 123 of 2014, and **Abbas Sherally & Another v. Abdul S.H.M. Faza Iboy**, Civil Application No. 33 of 2002, require reasonable time to the employees to defend their cases. At any rate, twenty four (24) hours after receipt of the respondent letter, the appellant to proceed with the hearing and determining the fate of the respondent, is not reasonable. Even Regulation 13 (3) of the **Employment and Labour Relations (Code of Good Practice) Regulations**, GN, No. 42 of 2007 does not allow such a practice. In any case, any case, the applicant has never replied the respondent on the raised issues.

Having said so, and considering both tribunals below breached labour laws, practice of this court and Court f Appeal, the proceedings of the Commission and Disciplinary Committee are hereby set aside and decisions emanated from both bodies are quashed for want of proper application of laws. For interest of justice, I have decided to order the applicant's Disciplinary Committee to invite and hear the respondent in accordance to the laws regulating labour disputes, without any delay.

It is so ordered.

F.H. Mtulya

Judge

24.02.2022

This ruling is delivered in Chambers under the seal of this court in the presence of the applicant's learned counsel Mr. Mr. Samwel Ochina and in the presence respondent, Mr. Ernatus I. Aron, through teleconference.

F.H. Mtulya

Judge

24.02.2022