IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY ,J.A., MKUYE, J.A., And KITUSI ,J.A.)

CIVIL APPEAL NO. 173 OF 2016

FINCA TANZANIA LTD.....APPELLANT
VERSUS
WILDMAN MASIKA & 11 OTHERS.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania
Labour Division at Iringa)

(Mashaka, J.)

Dated the 11th day of April, 2016
in
Revision No. 66 of 2015

JUDGMENT OF THE COURT

13th August & 30th September, 2019

MZIRAY, J.A.:

This is an appeal against the judgment and decree of the High Court of Tanzania (Labour Division) at Iringa in Labour Revision No. 66 of 2015.

The facts in brief upon which the appeal is grounded are as follows: The respondents were employed by the appellant Financial Institution on different dates in different capacities and posted at Iringa branch where they worked until on 11.6.2015 when their contracts of employment were terminated by the appellant on the ground that they assembled unlawfully. This happened after the respondents had written

a letter dated 16.5.2013 addressed to the Chief Executive Officer (CEO) of the appellant company inviting him to visit their branch by 20.5.2013 to solve some labour disputes between them and the management of their branch. This letter was viewed by the appellant as an arranged unauthorised meeting, aimed to strike, without exhausting available company procedures for addressing their grievances. The consequences which followed was termination of the respondents contracts of employment.

Being discontented with the termination, the respondents filed Dispute No. CMA/IR/64/3013 at the Commission for Mediation and Arbitration (CMA) at Iringa. Upon mediation, the dispute was not resolved. Subsequently, the dispute was referred for Arbitration and on 21.8.2015 an award was delivered in favour of the respondents. The appellant was aggrieved with the Arbitrator's award and for that reason, filed application No. 66 of 2015 seeking revision at the High Court (Labour Division) which was determined on 11.4.2016 in favour of the respondents. Dissatisfied by the High Court's decision, the appellant has brought this appeal raising three grounds of complaints as follows;

1. That, the High Court erred in law and facts for holding that no unauthorised assembly or meeting

at the working place by the respondents without taking account that the appellant proved on balance of probability.

2. *That, the High Court erred in law and facts to hold in favour of the respondents while the Commission for Mediation and Arbitration had no power to adjudicate the dispute since no party to the case referred the dispute to arbitration*

3. *That, the High Court erred in law and facts for holding in favour of the respondents while the decision of Commission for Mediation and Arbitration was delivered after expiration of 4 months and no reasons were adduced by the arbitrator for the delay in the decision.*

The appeal was heard before us on 13.08.2019 during which the appellant was represented by Mr. Yusuf Sheikh, learned advocate and Mr. Daniel Ngudungi, learned advocate appeared representing the respondents.

Mr. Sheikh, learned advocate adopted the grounds of appeal and written submission filed earlier on as part of his oral submission. In his submission to support the first ground of appeal, he contended that a letter written by the respondents requesting the appellant to appear on 16.5.2013 signified a strike because it intimated that failure of the appellant to appear on the due date, the respondents will not attend work. He argued citing the case of **Mallett v. Mcmonagle** (1969) 2 ALL ER 178 that the termination in the circumstance was fair and proved on a balance of probability.

In relation to the second ground of appeal, Mr. Sheikh submitted that the procedure to refer the matter from Mediator to Arbitrator was tainted. He was of the view that the aggrieved party is the one duty bound to refer the matter to Arbitrator and not the Mediator. He submitted that the Mediator acted without jurisdiction in referring the dispute to the Arbitrator. He relied on the case of **Nicodemus Kajungu & 1374 Others V. Bulyankulu Gold Mine (T) Ltd,** Civil Appeal No. 110 of 2008 (unreported).

As to the third ground of appeal, Mr. Sheikh submitted that the decision was against the principle of "justice delayed justice denied". He contended that the law requires that the decision be given within 30

days after the date of hearing. He submitted that in the instant case, the decision was given four months thereafter, in violation of section 88(9) of Employment and Labour Relation Act.

On his part, Mr. Ngudungi, learned advocate having adopted the written submission that he had filed to oppose the appeal was of the contrary view. In response to the first ground of appeal, he submitted that the allegation that there was unlawful assembly culminating into a strike was not supported by the record. He asserted that the respondents did not assemble. They only wrote a letter requesting the management from the Head Office to visit their branch on 20.5.2013 to solve some labour disputes between them and the branch management. He submitted that by any standard such a letter cannot be taken and construed as a strike.

Addressing in reply to the second ground of appeal, the learned advocate argued that there is no proper procedure to refer a matter from mediation to arbitration. He said, the procedure is not codified. He submitted that when mediation was marked to have failed, the mediator recorded what the parties agreed upon and referred the matter to arbitration and the parties signed, which implies that they agreed for the dispute to be referred to the MCA. In the circumstance, it was not

correct to say that the mediator went outside the parameters of his powers, he argued.

As to the third ground of appeal, he admitted that the judgment was delivered after 30 days. In his view, the irregularity of delivering judgement after 30 days was not fatal. He argued that the intention of creating section 88(9) of Employment and Labour Relations Act, was to expediate the decision and not to make it a nullity.

Finally and eventually, he maintained that the appeal was without substance. He urged the Court to dismiss the same with the contempt it deserves.

We have carefully gone through the rival arguments both in support and against the appeal. In determining the appeal, we shall start with the third ground of appeal. The law in terms of s.88(9) of the Employment and Labour relations Act requires that decisions be given within 30 days after the date of hearing. It is true that the CMA's decision in this case was delivered after 4 months. However, the delay in our view is not a material irregularity in procurement of an award, sufficient to have the same invalidated. We say so because if for example the award is nullified merely because the decision was not given within thirty days the effect is to have the process commence

afresh causing further delay which is to the disadvantage of both parties. To us that is not the spirit behind section 88(9). The spirit is to have a time frame in completing matters brought before the CMA but failure to meet the deadline stipulated in section 88(9) will not invalidate the proceedings and the award. At any rate, the delay of four months in this case has not prejudiced any party, hence no injustice occasioned. It is at this stage we tend to agree with the findings of the High Court on this complaint of delay. We accordingly dismiss the third ground of appeal.

As to the second ground of appeal, we wish to state briefly that there is no codified procedure for referring a matter from mediation to arbitration. As the record reflects, when mediation was marked to have failed, the mediator recorded what the partied agreed, referring the matter to arbitration and the parties signed, something suggesting that parties agreed for the dispute to be referred to the CMA. On that basis, we cannot say that parties did not refer the dispute to arbitration. As such therefore, the ground is without merit.

With regards to the first ground of appeal, we are of a firm view that a letter written by the respondents requesting the appellant to appear on 16.5.2013 does not by itself signify a strike. The appellant

ought to have given evidence that the respondents assembled unlawfully, participated in a strike and did not attend work. In the absence of evidence to prove the same, the termination was unfair with no backing of the law.

That said and in the light of the above considered substantive matters herein, we are increasingly of the view that, this appeal was filed without serious and sufficient grounds of complaints. For that reason, we accordingly dismiss the appeal in its entirety. This being a labour dispute, we make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 16th day of September, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

I.P KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2019 in the presence of the respondents in persons certified as a true copy of the original.

L. M. CHAMSHAMA
A.G:DEPUTY REGISTRAR
COURT OF APPEAL