

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 703 OF 2019

BETWEEN

MATHIAS JOHN MWIMBILIZYE & 3 OTHERS.....APPLICANTS

VERSUS

M/S G.M. DEWJI AND COMPANY LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 18/09/2020

Date of Judgment: 10/11/2020

Z.G. Muruke, J.

Mathias John Mwimbilizye legal representative of John Mathias Mwimbilizye deceased and also representing three (3) others has filed present revision, faulting ruling of Commission for Mediation and Arbitration (CMA) that dismissed an application for claims of general damages following accident that caused death and injuries to the respondent employees.

John Mathias Mwimbilizye, Salim Awadhi, Warneri Kahema, Ramadhani Khamisi were both employed by Respondent as drivers and assistant drivers respectively in respondent's vehicle (Truck) Number T. 873 BZA and T. 501 CCZ (Trailer). They were assigned to transport coal from Kyela to Tanga Cement Company. Before travelling driver reported

defective breaks in the car. Respondent, insisted to go on with the trip on return problem will be fixed. Unfortunately, accident occurred at Kyela due to breaks failure on 25th February, 2014 in which John Mathias Mwimbilizye, Salim Sad Awadhi, Isaya Warneri Kahema both died while Ramadhani H. Rashidi was seriously injured.

After investigation and finally administrators were appointed, thus filed dispute at CMA. Upon respondent being served, raised preliminary objection on jurisdiction, in which dispute on claim of damages was dismissed for lack of jurisdiction, hence present revision. Hearing was conducted by way of written submissions. Applicants were represented by Godwin Ernest Ndonde while Respondent had the service of principal officer Tibegebuka Charles.

In brief applicant representative maintained that Respondent has not refuted the problem of defective break. Thus it is upon such negligence that vehicle overturned, caused death of 3 persons and injured one, who late gave statement on what happened after he has recovered. Failure by respondent to repair the vehicle, after even being remained by John Mathias Mwimbilizye now deceased is the cause of all that episode. Applicant representative maintained that CMA had jurisdiction to deal with this dispute and not Resident Magistrate Court bearing in mind that amendment of section 88 of Act No. 4 of 2006 in which amendment deleted subparagraph ii of subsection (1) (B) and substituting with the following:-

(ii) any other contravention of this Act or any other Labour Law or breach of contractor any employment or labour matter following under common law, tortious liability or vicarious liability in which the amount claimed is below the pecuniary jurisdiction of the High Court.

In essence, applicant representative insisted that, it was totally wrong for CMA to dismiss the dispute for lack of jurisdiction, then asked the court to quash CMA ruling and order hearing in fully.

Respondent on the other hand submitted that the issues for consideration here is whether the CMA had jurisdiction to entertain application which was placed before it. Although the fact that the applicants were employees of the respondent is not objected, the applicants could not refer the matter before CMA and instead they had to channel their claims through the labour office under **the Workers Compensation Act (Cap 263 of R.E. 2019)** for the benefit provided for under the **Workers Compensation Fund (WCF)**.

It has been alleged that what the applicants are claiming is tortious liability and the case of **Lewis Reuben Ngahugha Vs. M/S Kunduchi Beach Hotel and Resort, Labour Revision No. 3 of 2012** as considered by Hon. Wambura, J cited by applicant is distinguishable. CMA has jurisdiction on tortious liabilities where the matters before it is related on all issues pertaining to the Employment and Labour Relation Act 2004. The act covers only issues concerning disputes at work and not injuries.

As the court will go through the submission, it is clearly that what the applicant are claiming is nothing else but compensation. Compensation are available to the victim through the **Workers Compensation Act, (Cap. 263 R.E. 2019)**. Among the institution available for adjudicating issues of compensation arising out accident at work, CMA is not versted with powers and instead it is the Court of Resident Magistrate as provided for under the provisions of **section 3 (1) of the Worker's Compensation Act, (Cap. 263 R.E. 2019)**.

Award of CMA was and stands to be proper as it has no jurisdiction to entertain mattes other than labour disputes which are between employer and employee, Respondent representative prayed for dismissal of the application.

Before dealing with the merits of the revision application, let me note the following:- the applicants have annexed to the submission documents marked as annextures P"A", P"B", P"C^a", P"C^b", P"D". This is contrary to what has to be accompanied with submission. This approach is unacceptable as written submission is not giving of evidence but deal with legal arguments. While considering a similar situation High court in the case of **Vocational Education Training Authority versus Ghana Building Contractors Ltd. , Civil Case No. 198 of 1995** in which the court (Kyando, J. as he then was) said:-

"I wish in conclusion to comment on the matter of procedure and practical. Mr. Kayange has attached the annexture to the written submissions. I don't know what purpose are they supposed to serve.

Are they intended to be evidence or exhibit to the application? if so they should have been annexed to the plaint or counter affidavit. Exhibits cannot be attached to the written submission. Submissions are supposed to be elaborations or explanatory to the evidence tendered. They cannot themselves be termed as evidence. I reject therefore the annexures annexed to the submission by Mr. Kayange. I direct that they be turned to him”.

Again in the case of **Moses Stephen Versus Commercial Bank of Africa, Revision No. 163 of 2018**, Hon. Muruke, J. at page 11 last paragraph to page 12 it was held as follows:-

“Before addressing the merits of the application, it is worth noting that applicant counsel attached evidence in his submission. That is not proper. Court cannot receive evidence in the manner brought at this stage. To deal with evidence attached, is to create irregularity in the proceedings. More, so, respondent will not have an opportunity to counter for evidence. Evidence sneaked in proceedings by way of submission, is a statement from the bar not from the witness, it amounts to advocates own created evidence. That cannot be left to be part of the court records. Evidence attached to the applicant’s submission is expunged from the court record”.

The position has been that, anexture attached to the submission as evidence are rejected and ordered to be returned to the applicants, I hold so. Having heard both parties submission issue before me is whether CMA had jurisdiction to determine claims of compensation following road

accident involving employee while using employer's car in the cause of their work.

There is no dispute as correctly submitted by applicant representative that section 88 (1) (B) (ii) of the Employment and Labour Relations Act 2004 as amended in 2010 read that; For purpose of this section a dispute means a complaint over:- (ii) any other contravention of this Act or any other labour law or breach of contract or any employment or labour matter falling under common law, tortious liability and vacariously liability.

From the wording above, it is clear that, tortious liability arising out of employment are covered by above law. Following amendments of 2010, CMA has unlimited jurisdiction to entertain any other contravention of the ELRA or any other labour law or breach of employment contract. In other words it is tort committed by employer against employee. Facts and evidence prove that four persons, were involved in the road accident in the cause of their work using employers car. Is this tort committed by employer against employee for compensation to be granted? Looking at CMA form No. 1, signed and filed on 19th November, 2015, on paragraph 3 on the type of the dispute it was started that:-

"Mgogoro huu unahusu madai ya kufidiwa kwa ajili ya vifo na majeruhi wakiwa kazini".

Again on paragraph 4 on the results of mediation it is started that:-

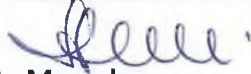
"Kulipwa fidia kwa wasimamizi wa mirathi na mmoja aliyeumia akiwa kazini".

From the above quoted prayers in CMA form No. one, (1) signed by applicant representative, there is nowhere applicants are seeking to enforce labour laws or claiming to say at least unfair termination.

The above notwithstanding, there is allegations of employer negligence by directing four employee's to continue using the car that had defective break. This is an issue to be discussed. It falls under the breach of contract by employer who did not provide suitable tools of work. More so, after warning that the car had defective break. Failure by employer to provide suitable tools of work as a result ocarance of accident that costed life of three person and one injured seriously is a breach of employer/employee relationship. Thus, CMA has the requisite jurisdiction only because of failure to provide applicants ***with working tools if proved at CMA***. Applicants door was closed following ruling to dismiss their application. For the applicant to prove if any that there was breach of contract by employer (respondent), they must be heard in fully. Evidence like Traffic Motor Vehicle inspection report, PF 90 and PF 115 need to be evaluated by CMA if any, to prove negligence by employer. That cannot be done without hearing applicants and respondent. Thus CMA ruling is quashed and set aside.

It is worth noting that, CMA after finding that lacked jurisdiction to entertain the dispute, ought not to have dismissed the dispute. The remedy was to struck out the same. Once dispute is dismissed, it cannot be filed in any court. It will be res-judicata. As a matter of principle if court lacks jurisdiction, dispute has to be struck out not dismissed. In the

end, ruling of CMA is quashed and set aside. CMA records is to be returned within thirty days from today for the dispute to be heard on merits by different mediator. Ordered accordingly.



Z.G. Muruke

JUDGE

10/11/2020

Judgment delivered in the presence of Ndonde applicant personal representative, and Tibekebuka for the respondent.



Z.G. Muruke

JUDGE

10/11/2020