

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 377 OF 2019

BETWEEN

ELIAS KAYALA..... APPLICANT

VERSUS

JUST RENT A CAR LIMITED..... RESPONDENT

JUDGEMENT

Date of Last Order: 29/06/2021

Date of Judgement: 06/07/2021

M. Mnyukwa, J.

The applicant Elias Kayala filed this application on 23rd April, 2019. The application was filed under s. 91 (1) (a) (b), 91 (2) (c), 94 (1) (b) (i) of the Employment and Labour Relations Cap 366 R.E 2019, Rules 24 (1) (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules GN. No. 106 of 2007.

He prayed before this court:-

- (1) To call the records of proceeding of the Commission for Mediation and Arbitration at Dar es Salaam in Labour Dispute No. CMA/DSM/KIN/R. 182/18 revise it and set aside the said decision on the ground that there has been an error material to the merit of the subject matter involving injustice.

The matter was scheduled for hearing on 25/06/2021. On the date of hearing Mr. Charles Lugaila, appeared for the applicant and Ms. Josephine Yasenga holding brief for Mr. Nehemia Gabo who was alleged to be the advocate of the respondent. The applicant's advocate was

ready to proceed with hearing but Ms. Josephine Yasenga informed this court that Mr. Nehemia Gabo filed a notice to withdraw from the case. Upon perusal of the court record, I noticed that Mr. Nehemia Gabo was not an appointed advocate of the respondent as per Notice of Representation filed on this court on 11/07/2019. Therefore I struck out the notice of withdraw from court record, adjourn the matter and ordered the parties to be notified on the hearing date.

When the application was called on for its hearing on 29/06/2021 the applicant was represented by Mr. Charles Lugaila, Learned Counsel, the respondent advocate Samwel Angelo was absent. Mr. Lugaila prayed the matter to proceed ex-parte; a prayer was granted by the court.

The brief fact of the dispute may be summarized as hereunder; that on 19th January, 2018 the applicant filed at CMA labour complaint through CMA Form No. 1 together with CMA Form No. 2 which was given Reference No. CMA/DSM/KIN/R. 182/18. The matter was fixed for hearing the application for condonation in order to enable the applicant's complaints be heard out of time. On 23rd November, 2018 CMA delivered a Ruling to dismiss the application for condonation on the ground that the applicant had failed to adduce sufficient reasons to enable CMA to condone his complaints out of time. The same Ruling is a subject for revision before the court.

In his submission the advocate of the applicant prayed the affidavit of Elias Kayala to be adopted as part of his submission. He submitted that the issue before this court is whether the applicant had failed to adduce sufficient cause for the delay to enable the CMA to condone his labour complaint out of time.

The applicant's learned counsel submitted that they had adduced sufficient ground before the CMA to condone its application out of time on the reasons that there is an illegality on the decision made by the employer who terminated the applicant on the ground of retrenchment. The applicant's counsel further submitted that the procedure were not followed as it is required under s. 38 (1) (a) (b) and (c) of the Employment and Labour Relations Act, Cap 6 RE. 2004. Failure to follow the procedure provided in the above section render the whole process illegal.

He supported his argument by referring to the Court of Appeal decision in the case of **Amour Habib Salim vs Hussein Bafagi**, Civil Application No. 32 of 2009, CAT at Dar es Salaam. In the above case the CAT cited the case of **VIP Engineering and Marketing Limited and three others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (unreported) in which the Court of Appeal stated that, where the point of law at issue is illegality or otherwise of the decision being challenge, that by itself constitutes sufficient reasons.

He therefore submitted that, it was wrong for the CMA to conclude that there was no sufficient reason while the applicant challenged the legality of the procedure of termination under operational requirement since the respondent did not comply with the the mandatory requirement of section 38 of the ELRA. He stated that failure to adhere with legal requirement constitute an illegality the applicant's counsel also referred the case of **Muhsin Mohamed V. Just Rent A Car Limited**, Revision No. 379 of 2019 which emanated from the same transactions and the same reason was adduced before the court and that reason was

accepted by the court as a sufficient reason for CMA to condone the applicant's application out of time.

He concluded by submitting that CMA was wrong to rule out that the applicant failed to adduce sufficient reason to condone his application out of time. He therefore prayed the decision of the CMA be quashed and judgment to be entered in favour of the applicant.

In regards to the length of the delay, he urged that the applicant's termination was on 2nd November, 2017 and that by 19th January, 2018 he filed his application for condonation. He stated that the reasons for the failure to file application on time is an attempt to pursue other means to settle the dispute with his employer which were nevertheless fruitless.

He also contended that the application has overwhelming chances of success since the applicant's complaints based on the illegality because the employer disregard section 38 (1) (a) (b) and (c) of the ELRA.

I have considered the submission of the applicant, as I stated earlier, the respondent was absent on the day of hearing though he had filed a Notice of Representation and a counter affidavit. In the case of **Muhsin Mohamed V. Just Rent a Car Limited** (cited above) the court stated that "it is a trite law where an opposing party has filed a counter affidavit timeously and do not appear at the hearing, the matter is placed on the opposed motion roll and should be dealt with on the applicant's paper only, meaning that the counter affidavit should not be considered. The court reached that decision by cited the case of **Brazafnc Enterprises Limited Vs. Kaderes Peasants Development**

(Plc), Misc Commercial Application No. 15 of 2020 (unreported). I therefore adopt the same in this application. I will consider the submissions of the applicant.

In the case at hand, I agree with the applicant's counsel that the issue is whether the applicant had sufficient cause to warrant the granting of his application of condonation by the CMA.

In his application supported by the chamber summons and affidavit the applicant alleged that there has been an error material to the merit of the dispute involving injustice hence warranting the revision and setting aside of the decision of the CMA.

When referring to paragraph 3.6, 3.7 and 3.16 of the affidavit of Elias Kayala one may not hesitate to conclude that the applicant's termination was characterized by illegality because the mandatory procedure were not complied with. The employer did not adhere with substantive and procedure to terminate the applicant as it is provided under section 38 (1) (a) (b) and (c) of the ELRA. The applicant's counsel insisted that failure to comply with the procedure was a sufficient ground to warrant the grating of the application for extension of time before the CMA. The procedure of section 38 of the Act. I quote the relevant section for easy of reference:-

'Section 38 (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be shall:-

- (a) **give notice of any intention to retrench** as soon as it is contemplated;*
- (b) **disclose all relevant information** on the intended retrenchment for the purpose of proper consultation;*

(c) ***consult prior to retrenchment*** or redundancy on [*Emphasis is mine*]


The applicant's counsel submitted that there was illegality on the whole process of termination of the applicant.

In my view I fully agree with the submission by the learned counsel for the applicant that the ground of illegality is a sufficient or good reason to allow the applicant's application for condonation to be entertained by CMA.

Likely in the case of **Amour Habib Salim V. Hussein Bafagi** (cited above) the Court of Appeal among other things stated that if there is an alleged illegality on the procedure followed we find it appropriate to allow the application on the basis of this point so that the issue may be considered.

In the result the present application has merit. I find that the applicant had a valid reason to have his dispute entertained by the CMA and therefore the dismissal of his application for condonation by the CMA was not warranted. Therefore this application is granted, the Ruling of the CMA's delivered on 23rd November, 2018 in respect of the Labour Dispute No. CMA/DSM/KIN/R. 182/18 is hereby quashed and set aside, the applicant's delay to file or refer his dispute to the CMA is hereby condoned and the applicant is given 30 days from the date of this ruling to refer his dispute to the CMA for hearing and determination.

It is so ordered.



M. Mnyukwa

JUDGE

06/07/2021

Judgment delivered in the presence of Charles Lugaila, an Advocate of the applicant and in the absence of the respondent.



M. Mnyukwa

JUDGE

06/07/2021

Labour Court TZ.