

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION NO. 649 OF 2019**

**BETWEEN**

**DOROTHY MNGONI.....APPLICANT**

**AND**

**YAPI MERKEZI CO. LTD.....RESPONDENT**

**JUDGMENT**

Date of last order: 20/04/2021

Date of Judgment: 25/06/2021

**A. E. MWIPOPO, J.**

The applicant herein namely **DOROTHY MNGONI** filed the present Application for Revision against the decision of the Commission for Mediation and Arbitration in labour dispute no. CMAPWN/KBH/23/2019 delivered on 14<sup>th</sup> June, 2019, by Hon. A. Mwalongo. The applicant is praying for the Court to call for the records of proceedings and the decision of the Commission and set aside the said decision dated 14<sup>th</sup> June, 2019. The Application is accompanied with Chamber Summons supported by Applicant's Affidavit. The Respondent namely Yapi Markezi Co. Ltd opposed the application and filed counter affidavit affirmed by Hussein Chambo, Respondent's Human Resources Manager.

In order to understand the dispute, the brief background of the dispute will suffice. The Applicant was employed by the Respondent in the post of Laboratory Technician in 24<sup>th</sup> October, 2017 for one year employment contract. The Applicant alleged that she was terminated orally by the Respondent on 13<sup>th</sup> December, 2018. Aggrieved by the Respondent decision, she referred the dispute to the Commission on 22<sup>nd</sup> March, 2019 together with application for condonation. The Commission heard the parties and dismissed the application for want of jurisdiction. The Applicant was not satisfied with the Commission decision and she filed the present application for Revision.

When the matter came for hearing on 20<sup>th</sup> April, 2021, the Applicant appeared in person and the Respondent was represented by Mr. Daniel Kalasha, Advocate. The hearing of the revision proceeded orally.

In summary, the Applicant submitted in support of the Application that the Mediator erred to rule that she referred the dispute to the Commission before she was terminated by the Respondent while she was terminated orally. There is evidence of the letter from TRC going to TAMICO trade union concerning her complaint of being terminated unfairly. She was of the view that the Mediator erred to hold that she was terminated on 9<sup>th</sup> May, 2019

while the dispute was referred to the Commission on 13<sup>th</sup> December, 2018 which means by 9<sup>th</sup> May, 2019 the dispute had already been lodged in the Commission. Also, the Respondent tried to settle the dispute out of the Commission.

In reply, the Respondent Counsel submitted that the dispute which was before the Commission was determined by the preliminary objection raised by the Respondent that the matter was prematurely filed. The Applicant allegation that she was terminated on 13<sup>th</sup> December, 2018 was not supported by any evidence. Thus, the Mediator was right to dismiss the dispute as it was referred to the Commission before the Applicant was terminated by the Respondent.

The Respondent Counsel submitted further that the Applicant continued to receive salaries from the Respondent even after she alleged to be terminated. This prove that at the time she referred the dispute to the Commission she was still employee of the Respondent. To support the position, the Counsel cited the case of **C.R.J. Construction Co. (T) Ltd V. Maneno Ndalije and Another**, Revision No. 205 of 2015, High Court Labour Division, at Dar Es Salaam where the Court held that the issue of termination is the matter of facts, thus the party who alleged to be

terminated is supposed to prove it. The Counsel submitted further that there was no settlement of the dispute before the Commission at all.

After both parties have submitted their case, the Court observed that the matter which was before the Commission was the application by the Applicant to be condoned to file his dispute out of time. Both parties before the Commission submitted on the issue of condonation. However, in its ruling the Mediator dismissed the application for the reason that it was filed prematurely filed in the Commission by the Applicant while she was still employee of the Respondent. This means that the Mediator instead of determining the issue of condonation, he dismissed the application for want of jurisdiction. The Court asked the parties to the application to address the Court on the issue.

Being a layperson, the Applicant did not have much to say. She stated that the Mediator denied the parties right to be heard on merits and that it was wrong for Mediator to deliver ruling without affording the parties the right to be heard.

On his side, the Respondent Counsel stated in his address to the Court that when there is issue of jurisdiction to determine the matter before it, the Arbitrator is obliged to determine the issue regardless of where it come from

and at any stage of the hearing. For that reason, the Counsel was of the view that the Mediator was right to raise the issue of jurisdiction and dismiss the matter.

After hearing parties' submissions and their address to the Court, I am in a position to determine the matter at hand. The main issue for determination is whether the Commission had no jurisdiction to determine the application which was filed by the Applicant.

In determination of the issue, I find it relevant to go through the law providing for the power of the Commission to condone the dispute which was filed out of time. Rule 10 (1) and (2) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 64 of 2007, provides for time limitation for referring a labour dispute to the CMA. The rule provides that the dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a decision to terminate or uphold the decision to terminate and all other disputes must be referred to the Commission within sixty days from the date when the dispute aroused.

However, the same rules gives discretion to Commission for Mediation and Arbitration to condone any failure to comply with time limitation provided by

the Rules. Rule 31 of Labour Institutions (Mediation and Arbitration) Guidelines, GN. No. 64 of 2007, provides that the Commission may condone any failure to comply with the time frame provided by the rules on good cause. It is on the basis of these rules, the Applicant filed the application to be condoned after she alleged to be terminated unfairly by the Respondent on 13<sup>th</sup> December, 2018.

The Respondent filed notice of opposition dated 4<sup>th</sup> April, 2019 in the Commission which was supported by the Counter Affidavit sworn by Maria Gwaje, Respondent's Advocate. In the notice of opposition and the counter affidavit, the Respondent disputed the content of the Applicant's affidavit and prayed for the application for condonation to be dismissed. Then, the parties filed their written submissions following the order of the Commission.

After both parties have filed their submission on the application for condonation, the Commission dismissed the application for lack of jurisdiction as the application was prematurely filed before the Applicant was terminated from employment in its ruling dated 14<sup>th</sup> June, 2019. The Mediator dismissed the application for a reason that the Applicant was still the employee of the Respondent by the time he referred the dispute to the Commission. The Mediator reached the decision after considering the

Respondent submission and Applicant's rejoinder on the issue that the dispute was referred to the Commission prematurely.

I'm of the opinion that the matter which was pleaded by the parties in the application for condonation was in respect of the Applicant reasons to be condoned. The fact that in the Respondent's submission and Applicant's rejoinder submission the issue of bringing the matter prematurely before termination was discussed, does not change the fact that the parties' pleadings on the application for condonation was in respect <sup>of the issue if</sup> there are sufficient reason for condonation. The Court of Appeal of Tanzania in the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No. 161 of 2016, Court of Appeal of Tanzania at Mwanza, (Unreported), cited with approval its decision in the case of **EX- B.8356 S/SGT Sylvester S. Nyanda Vs The Inspector General Of Police & The Attorney General**, Civil Appeal No. 64 of 2014 (unreported), where the Court held that:

*"On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

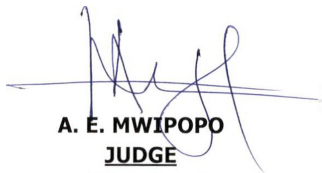
Thus, I'm of the opinion that by shifting issue both parties were denied right to be heard. '

Further, the Mediator erred to determine the issue whether the Applicant was terminated by the Respondent or not in the application for condonation since termination is the matter of facts which has to be proved by evidence. In the case of **C.R.J. Construction Co. (T) Ltd V. Maneno Ndalije and Another**, (supra), the Court was of the view that in dispute of fairness of termination of employment the employee has the duty to prove that he/she was terminated. Thereafter, the burden of proof shift to the employer to prove that termination was fair.

In the application at hand, the Mediator dismissed the application for condonation for the reason that the Applicant failed to prove that he was terminated on 13<sup>th</sup> December, 2018. However, by that time the matter was still in application for condonation stage and the Applicant had no opportunity to prove that he was terminated by the Respondent. Thus, the Mediator erred to hold that the Applicant was still Respondent employee at the time of referring the dispute to the Commission before affording her opportunity to be heard.



Therefore, I find the revision application has merits and is allowed. The entire proceedings and the Commission ruling is a nullity and as a result I quash the proceedings in labour dispute no. CMA/PWN/KBH/23/2019 before the CMA and its ruling is hereby set aside. The application is reverted to the Commission for Mediation and Arbitration where the hearing of the application for condonation has to start a fresh before another Mediator within 90 days from the date of this Judgment if the Applicant is still interested to pursue it. This being a labour matter, there is no order as to the cost of the suit.



**A. E. MWIPOPO**  
**JUDGE**

**25/06/2021**