

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

REVISION NO. 146 OF 2022

ATHUMANI S. MSHAMU 1ST APPLICANT
SALUMU ALLY DIHONI 2ND APPLICANT
ISAYA M. MNGULWI 3RD APPLICANT
YUSTINE ALFRED MNKENI 4TH APPLICANT
BARNES STEVEN MDUSHI 5TH APPLICANT
SOUD ABDALLAH MGEILEYA 6TH APPLICANT
SULTAN MWINYIMADI MWELEKA 7TH APPLICANT
MAJALIWA LUCAS 8TH APPLICANT

VERSUS

AGA KHAN HEALTH SERVICES TANZANIA RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Mahindi: Mediator)

dated 02nd March, 2022

in

REF: CMA/DSM/KIN/393/2021

JUDGEMENT

24th October & 15th November, 2022

Rwizile, J

The applicants have asked this Court to revise and set aside the ruling of the Commission for Mediation and Arbitration (CMA) in the labour dispute No. CMA/DSM/KIN/393/2021.

It was alleged, the applicants were employed by the respondent. the applicants were retrenchment by the respondent on 06th April, 2021.

It was further alleged that the applicants on 01st April, 2021 signed a retrenchment agreement without reading the minutes of the retrenchment meeting and the contents of the agreement. Later, they filed a labour dispute at CMA with an application for condonation. The CMA dismissed their application for wanting of sufficient reasons. dissatisfied with the dismissal, they have preferred this application.

Their application is supported by the affidavit with the following grounds for revision: -

- i. That the trial Mediator erred in law and facts for holding that the applicants failed to account each day of delay.*
- ii. That the trial Mediator erred in law and facts by holding that the applicants were negligence to file their application in time.*
- iii. That the trial Mediator erred in law for failure to consider illegality on procedures taken by the respondent on retrenchment.*

- iv. That the trial Mediator erred in law for dismissing the applicants' application for condonation relying on technicalities.*
- v. That the trial Mediator erred in law for failure to interpret well the meaning of "good cause" in granting extension of time/condonation.*

The applicant enjoyed service of Mr. Jonas Kilimba learned advocate whereas, Mr. George A. Shayo learned advocate represented the respondent.

Mr. Kilimba submitted that applicants being the employees of the respondent were retrenched by the respondent on 06th April, 2021 unlawfully. On 21st May, 2021, he said, they filed a labour dispute at CMA with registration number CMA/DSM/ILA/138/21, which was struck out on 20th September, 2021. He said another one was filed at CMA on 05th October, 2021.

According to him, the applicants managed to account for each day of delay as shown in paragraphs 9,10,11,12,13,14 and 15 of the affidavit supporting this application. To cement his argument, he cited the case of **Regional Manager, Tanroads Kagera v Ruaha Concrete Company Ltd**, Civil Application No. 96 of 2007 (unreported) which was referred in the case of **John Peter and Another v Republic**, Miscellaneous

Application No. 123 of 2020. In his view, the mediator did not consider facts stated in the applicant's affidavit.

On the second ground, he submitted that the applicants were not negligent but were surprised with redundancy. At the time, they were striving to survive because they were not paid their benefits. It was argued that they had no money to hire an advocate to institute the case and so were looking for legal assistance. It was his view that the applicants' first application was struck out due to technicalities.

Mr. Kilimba argued the third ground that, the applicants were not supplied with notice of retrenchment as provided for under section 41(1)(b)(ii) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019]. Insisting, the learned counsel submitted that illegality was advanced by the applicants but the mediator did not consider it. He stated that it is established principle of law that illegality constitutes sufficient cause. To support his point, he cited cases of **Arunaben Chaggan Mistry v**

On the fourth ground, it was argued that, the mediator held that 16 days were not accounted by the applicants. He submitted that the days include weekends and their advocate was preparing a fresh application. In his view, dismissing their application on technicality was an infringement of the applicants' rights under the Constitution of the United Republic of

Tanzania of Tanzania of 1977, article 107A (2)(e). He then cited the case of **Tanga Cement Company Limited v Jumanne D. Masangwa and Another**, Civil Application No. of 2001 (unreported) and the case of **Benedicto Mumello v Bank of Tanzania**, Court of Appeal of Tanzania. He said further that the mediator relied on frustration and separation and left other grounds unconsidered.

In reply, Mr. Shayo submitted that the mediator considered the facts and law in holding that applicants have failed to account on each day of delay as required by the law. He said, the applicants' contracts ended on 09th April, 2021. They were therefore supposed to file a dispute before the deadline on 08th May, 2021. Since the last day was a weekend, they ought to file their application on 10th May, 2021. Instead, he added, the application was filed on 21st May, 2021. The same, he said was struck out on 20th September, 2021. Another application, he argued was then filed on 05th October, 2021. In his view, all this shows sloppiness and lack of diligence on the part of applicants.

In the second ground, it was his argument that the mediator could not consider frustration and separation because they are not good grounds for condonation. He said further, redundancy did not come as a surprise to the applicants. Retrenchment procedures, according to him, were

followed and parties entered into an agreement. He prayed, the second ground also to be dismissed.

On the third ground, he submitted that, illegality was supposed to be a ground in support of their allegation for unfair termination and not in support of condonation. He supported his point by citing the case of **Moto Matiko Mabaga v Ophir Energy Plc, Ophir Services Pty Ltd, British Gas Tanzania Limited**, Civil Application No. 463/01 of 2017, Court of Appeal of Tanzania. Illegality, as alleged by the applicants was not disclosed. He believed, it was for a notice to retrenchment, but he stated that all procedure was followed.

Mr. Shayo, on ground four, submitted that the application for condonation was not dismissed for technical reasons but rather the matter was heard and finally decided. It was found, they had no good reason for extension of time. He stated that this ground was not advanced at CMA and so prayed, it should be dismissed.

Lastly, it was the advocates argument that the mediator did not define good cause but rather used case laws in considering reasons for condonation. Finally, he prayed the application be dismissed.

In rejoinder Mr. Kilimba reiterated what was submitted in chief. But in support of the issue of illegality, he added the cases of **Metro Petroleum Tanzania Limited, Bill Kipsang Rotich, Florence Chepkoech and Premium Petroleum Company Limited v United Bank of Africa**, Civil Appeal No. 147 of 2019z, Court of Appeal of Tanzania at Dar es Salaam, **Alnoor Shariff Jamal v Bahadir Ebrahim Shamji**, Civil Appeal No. 35 of 2006 which quoted the case of **Kukal Properties Development Ltd v Maloo and Others** (1990 - 1994) E.A 281.

Having considered the submissions of the parties, I have to determine;

- i. Whether the CMA properly found that the applicants did not have sufficient reasons for extension of time.*

In labour law, it is plain under rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) G.N. No. 64 of 2007 that the dispute about fairness of termination should be filed in 30 days from the day of the dispute. In this case, the records show, in CMAF1 the applicants had a dispute with the respondent based on unfair retrenchment. It is clear therefore that their application was to be filed file within 30 days from the day they were terminated or when made aware of the ruling.

Records show, the dispute arose on 06th April, 2021. The first application was filed on 21st May 2021. It was struck out in September, which paved the way to the other application filed on 05th October, 2021. Under rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, the mediator may condone any failure to comply with the time frame on good cause. The applicants were therefore under obligation to show why such a delay.

Among the advanced reasons for delay is that they were frustrated by retrenchment. They had no money to file a dispute with the CMA. In as much as this reason is not sounding, but I think the mediator was to apply the test stated and case laws and then use his discretionary powers to grant or refuse an extension. In the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010. The court laid down principles to apply when granting or refusing an extension. It was held that: -


1. *The delay should not be inordinate*
2. *The applicant should show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*

3. If the Court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

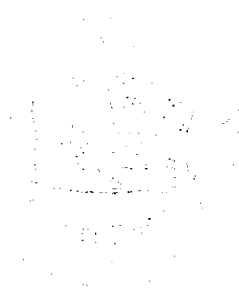
From the foregoing and having examined the record, I find it proper to clearly state that the applicants went before the CMA late for 15 days from the date of the dispute. This is when the first application was filed. The second application was filed months thereafter following its dismissal. I think the degree of lateness should be measured from the date the first application was filed.

In my considered opinion, viewing it from this a point of view leads to see if 15 days is such an ordinate delay. With respect, it is not. The applicants were indeed terminated. Whether properly or illegally, that is what the CMA had to examine if the application for condonation was allowed. Pleading that the applicants had no means to hire a lawyer and were frustrated by retrenchment are good reasons for 15 days delay. Had the mediator dealt with this matter from this point of view, he would have properly extended time for the applicants to file their application.

That being the case, I agree with the applicants that this application has merit. It is granted. The CMA ruling is set aside.

X 

Signed by: A.K.RWIZILE



A. K. Rwizile

JUDGE

15.11.2022