

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

REVISION APPLICATION NO. 450 OF 2021

BETWEEN

UNIVERSITY OF DAR ES SALAAM APPLICANT

AND

DOROTHY PHUMBWE RESPONDENT

JUDGMENT

*Date of last Order: 1/03/2022
Date of Judgment: 28/03/2022*

B. E. K. Mganga, J.

Dorothy Phumbwe, the herein respondent, was an employee of the applicant as Assistant Lecturer in the department of Education Foundation, Management and Lifelong Learning with effect from 1st September 2004. On 13th March 2012, applicant completed her PhD studies as a result, in 2013 she was promoted to the rank of Lecturer. In March 2015 respondent absented herself from work without notice. Due to that absenteeism, applicant charged the respondent with two counts namely (i) absence from work without permission whereas the

particulars of this count was that respondent absented herself from duty without permission and or acceptable reason for one month and twelve days from 25th March 2015 to 12th May 2015 and (ii) major breach of the University of Dar es Salaam Code of Conduct contrary to section 2.4.4(c) and 3.3(f) of the University of Dar es Salaam Code of Conduct. Particulars of this count were that respondent decided to be away from her employer's business for one month and twelve days from 25th March 2015 to 12th May 2015. On 26th May 2015, respondent acknowledged that she received the disciplinary charge on 18th May 2015 and wrote her defence on the charges that were levelled against her. In her defence to the disciplinary charge, respondent stated that she travelled from Dar es Salaam to Kagera to attend her ill mother then to the United Kingdom to her three children who were schooling there. She stated further her action was driven by necessity and find herself obliged and under duty to take care of her family. She therefore prayed the applicant to see her situation as unique and that she was not a habitual offender. The disciplinary hearing was conducted, and the respondent was convicted and consequently terminated from employment.

Aggrieved with termination on 19th February 2016, the dispute was filed before CMA by filing a CMA F1 signed by Alfa Chapalama, the legal officer. On 24th May 2016 Applicant informed the arbitrator that she has raised an objection as to the competence of the dispute before CMA because the CMA F1 was not signed by the respondent. The arbitrator ordered that hearing of the preliminary objection will be on 14th June 2016. When the matter came for hearing on 14th June 2016, Petro Mselewa, a legal officer of the applicant submitted that the CMA F1 was signed by Alfa Chapalama, a legal officer who, in terms of section 86 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] is not recognized and prayed the matter be struck out.

In countering the said preliminary objection, Rahim Mbwambo, learned counsel for the respondent submitted that the matter was correctly filed at CMA. Counsel argued that CMA F1 is not like a plaint and does not have a similar consequence like the plaint. Counsel submitted that CMA and Labour Court deals with substantive justice and prayed leave be granted to the respondent to refile the matter within 30 days because the respondent was out of the country.

In rejoinder, the legal officer of the applicant submitted further that the respondent can refile the matter with an application for condonation. Mr. Mselewa went on that there is no rule which allow refiling the matter without following the procedure.

Having heard submissions of both parts, Hon. Massay, arbitrator, ordered that the ruling will be on 29th June 2016. Delivering his ruling, the arbitrator held:-

"There is no dispute that the CMA F1 was signed by one Alfa Chapalama the legal officer instead of complainant Dorothy Phumbwe. In terms of section 88(6) of ELRA, 2004 arbitrator is enjoined to deal with substantive justice with minimum of legal-technicality. In the commission considered (sic) opinion the omission is curable by requiring the complainant to properly sign the form and thereafter matter will proceed. The complainant who is reportedly out of the country is given the period of 30 days to sign the CMA F1. It is so ordered."

On 9th August 2016, Mr. Rahim Mbwambo, counsel for the respondent reported that the respondent has signed the CMA F1. Having so reported, the arbitrator scheduled the matter for hearing. The matter was adjourned several times but on 15th October 2017 Rose Raphael Ngeve (DW1) testified on behalf of the applicant. Thereafter the matter was adjourned several times as it was reported that the respondent was

outside the country. It was on 7th June 2019 when the respondent appeared before CMA and gave her evidence as the only witness on her side.

On 28th April 2020, Mr. Alfred Massay, arbitrator delivered the award in favour of the respondent that applicant did not have valid reason for termination of employment of the respondent and that the procedure was not adhered to. In short, arbitrator held that termination was unfair both substantively and procedurally and ordered that respondent be reinstated within fourteen (14) days from the date of the award.

Aggrieved with the said award, applicant filed this application seeking the court to revise the said award. In the affidavit sworn by Prof. David Alfred Mfinanga, the Deputy Vice Chancellor responsible for administration of the applicant, raised five grounds namely:-

- 1. That the arbitrator erred in law and facts by entertaining the complaint which was not condoned.*
- 2. The arbitrator erred both in law and facts by disregarding applicant's decision to terminate the respondent on a misconduct based on absence from work for more than five days without justifiable reasons.*
- 3. That the arbitrator erred both in law and facts by making his award on assumption that the cause of the action between the applicant and the*

respondent arose when the applicant denied the respondent request for one year leave of absence without pay.

- 4. The arbitrator erred in law and facts by ignoring the respondent's absence from work for more than five days before the commencement of disciplinary proceedings, during the disciplinary process and in the course of seeking the one year leave of absence.*
- 5. That the arbitrator erred both in law and facts by disregarding fundamental aspects of the law of evidence and civil procedure.*

When the application was called for hearing, Ms. Otilia Rutashobya and Janeth Makondoo, learned State Attorneys appeared and argued for and on behalf of the applicant while Mr. Rahim Mbwambo, learned counsel argued for and on behalf of the respondent.

On the 1st ground, Ms. Rutashobya, State Attorney, submitted that the dispute was heard in absence of application for condonation after the arbitrator found that the CMA F1 that was initially filed was not signed by the respondent. The learned State Attorney submitted further that, according to CMA F.1 the dispute arose on 12th May 2015. The CMA F1 was received by the applicant on 19th February 2016 but was found to be incompetent as it was signed by a legal officer instead of the respondent. Ms. Rutashobya, State Attorney went on that on 29th June 2016, the arbitrator directed the respondent to file a duly signed CMA F1 within 30 days. She submitted that respondent filed a new CMA

F1 on 16th December 2016 that is 5 months after the order that directed her to file a new CMA F.1 within 30 days. She argued that there was defiance of CMA order by the respondent. She submitted further that respondent did not file CMA F2 applying for condonation. She went on that since the complaint by the respondent was unfair termination, she was supposed to file the dispute at CMA within 30 days from the date of termination. The learned State Attorney argued further that, the dispute was heard out of time without condonation and that it was time barred. The learned State Attorney cited the case of ***The Export Processing Zones Authority v. Musa Fikiri Mahambi, Revision No. 632 of 2019*** (unreported) HC; ***University of Dar es salaam v. Amos Lazaro & 3 Others, Revision No. 782 of 2018*** HC; (unreported), ***Fortunatu S. Nyigaria Paul v. Permanent Secretary, Ministry of Home Affairs and Attorney General, Civil Appeal No. 37 of 2014***, CAT (unreported) to the effect that, a matter filed out of time, the order/ruling/award arising therefrom is null and void. She further cited Rule 10(1) of the Labour Institution (Mediation and Arbitrations Guidelines) Rules, GN. No. 64 of 2007 that the dispute was supposed to be filed within 30 days from the date it arose namely the date of

termination. She concluded that as there was no condonation and that CMA had no jurisdiction and prayed CMA proceedings and the award arising therefrom be quashed.

Ms. Rutashobya, learned State Attorney argued the 2nd, 3rd and 4th grounds together. She submitted that the respondent committed gross absenteeism for more than five days without justification. That, according to the evidence, respondent finished her PhD on 13th March 2015 and was supposed to report on duty on 25th March 2015. Learned State Attorney submitted further that, respondent did not report back to work but that on 18th March 2015 according to exhibit D4, respondent prayed permission to go to Bukoba. But instead of going to Bukoba, respondent went to the United Kingdom (UK) without permission. State Attorney went on that on 17th April 2015, head of department wrote a letter asking the respondent whether she resumed work, but she did not reply. State Attorney submitted further that on 23rd April 2015 respondent wrote a letter praying one year leave without pay but was not granted. Learned State Attorney prayed the application be allowed.

When asked by the court as whether it was proper for the arbitrator to order a new CMA F1 be filed while 30 days while the time

within which to file the dispute has elapsed and without application for condonation, learned State Attorney submitted that it was not proper. Learned State Attorney submitted that the arbitrator upheld the preliminary objection indirectly which is why he ordered a new CMA F1 be filed. State Attorney submitted that arbitrator was supposed to struck out the dispute and that the new CMA F1 was filed without condonation and the dispute was heard while CMA having no jurisdiction.

Mr. Rahim Mbwambo, learned counsel for the respondent, responding to the 1st ground, submitted that it is not true that the matter at CMA was time barred because the dispute was filed within 30 days. Learned counsel submitted that respondent was terminated on 22nd January 2016 as per termination letter (exhibit D9) and that the dispute was filed on 19th February 2016. Counsel submitted further that Rule 10(1) of GN No. 64 of 2007 (supra), requires the dispute be filed within 30 days from the date of termination and that since the same was filed on 19th February 2016 it was within time. During his submission, counsel for the respondent conceded that the CMA F.1 that was filed 19th February 2016 was signed by a legal officer and not the respondent. Learned counsel for the respondent submitted further that on 6th August

2016 the preliminary objection was determined by the arbitrator ordering the CMA F.1 duly signed by the respondent be filed within 30 days. Learned counsel for the respondent submitted that respondent complied with the arbitrator's order hence a new CMA F.1 was filed within time. He argued that the arbitrator ordered the respondent to properly sign the form meaning that the form not signed by the respondent was struck out. Counsel conceded that nowhere in the ruling the arbitrator showed that the said improperly signed CMA F1 was struck out. Learned counsel quickly submitted that arbitrator's order had the effect of amending the earlier CMA F1.

On the 2nd ground, Mr. Mbwambo, counsel for the respondent submitted that arbitrator was justified to hold that respondent was absent from duty but with good reasons as she was nursing her mother in Bukoba and tendered exh. P1 to that effect. Learned counsel for the respondent went on that respondent's children were neglected in UK. Mr. Mbwambo, learned counsel submitted further that respondent went to Bukoba after securing seven (7) days permission as evidenced by exhibit D2. He submitted further that respondent never went back in office but went to UK to see her children. Counsel for the respondent

conceded that there is no letter that was written by the respondent seeking permission before going to UK that she was permitted to go to Bukoba but there is an emergency in UK and that she must go to UK. Learned counsel for the respondent submitted that the permission to go to Bukoba started on 17th March 2015 and ended on 25th March 2015. Learned counsel conceded that on 29th April 2015, that is, 34 days after the said permission has expired, respondent wrote a letter exhibit D4 praying one year leave without pay but at all this time, applicant was believing that respondent was in Bukoba. Learned counsel for the respondent concluded his submission praying that the arbitrator rightly found that termination was both substantively and procedural unfair and prayed the application be dismissed.

Responding to the question raised by the court, Mr. Mbwambo, learned counsel for the respondent conceded that CMA lacked jurisdiction because after finding that the first CMA F1 was not signed by the respondent, the arbitrator was supposed to struck it out. The respondent was therefore supposed to file a new CMA F1 with application for condonation as she was out of time. Learned counsel submitted that the arbitrator proceeded to hear and determine the

dispute based on the CMA F1 that was filed out of time hence it lacked jurisdiction.

It is clear from the above quoted ruling of the arbitrator dated 29th June 2016 that the CMA F1 was signed by Alfa Chapalama, a legal officer. In terms of Section 86 of Cap. 366 R.E 2019 (*supra*), the dispute is referred to CMA by a party to the dispute. The parties to the dispute were the respondent as the complainant, and the herein applicant as the respondent. Mr. Alfa Chapalama was not a party to the dispute hence incompetent to file the dispute at CMA. As correctly submitted by Ms. Rutashobya, learned State Attorney for the applicant and Mr. Mbwambo, learned counsel for the respondent, the arbitrator was supposed to strike it out. There was no room for the said CMA F1 to be amended because on the first place there was no dispute between the herein applicant and respondent at CMA. More so, there was no prayer for amendment made by the respondent. What was before the arbitrator was a preliminary objection raised by the applicant that the applicant was incompetent for being brought by the person who was not an employee of the applicant, and who incidentally had no dispute with the applicant.

Having found that the dispute was improperly brought at CMA by a person who was not an employee of the applicant, the arbitrator was supposed to deliver the ruling to that effect and not to remain silent as he did. As submitted by both Counsels for the parties, the remedy for the incompetent application was to struck out and not to substitute it as it was done by the arbitrator. This was also the position in the case of ***Sultan Omary Kitambulo & 7 Others v. Dar es Salaam Water Sewerage Corporation and Dar es Salaam Water Authority, Misc. Application No. 457/2019.*** The argument that the order of the arbitrator amounted to amendment of the CMA F1 cannot hold water because the person who filed the dispute was not an employee of the applicant and there was no dispute relating to his termination. In short, there was nothing to be amended by the arbitrator.

The arbitrator was supposed struck out the incompetent dispute that was before him. The arbitrator erred in law by not striking out the CMA F1 and the whole purported dispute. Since at that time, respondent was out of time, it was not open to the arbitrator to order a new duly signed CMA F1 to be filed within 30 days without application for condonation. The new filed CMA F1 was illegally filed, and the dispute

was heard out of time in absence of application for condonation hence CMA lacked jurisdiction. The award and orders arising therefrom was therefore a nullity. I therefore allow the 1st ground. This also disposed the remaining grounds which, I see no need of determining.

For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom because CMA lacked jurisdiction.

Dated at Dar es Salaam this 28th March 2022.



B.E.K. Mganga
JUDGE