IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 194 OF 2021

TANZANIA RAILWAYS CORPORATION ..... APPLICANT

VERSUS

RAPHAEL SIAGA ..... RESPONDENT

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

(Chacha: Arbitrator)

dated 22nd September 2020

in

REF: CMA/DSM/ILA/2789/09

JUDGEMENT

1st & 11th April 2022

Rwizile J

This application seeks revising the proceedings and the award of the Commission for Mediation and Arbitration (CMA) in Complaint No. CMA/DSM/ILA/2789/09.

Brief facts of the same can be stated that; the respondent was employed by the applicant in 1987 in the Directorate of Signals and

Telecommunications stationed at Dar es Salaam. Later in 2005, the applicant was transferred to Tanga station. On 4th May, 2005 the respondent was reported to have been involved in an accident while travelling from Tanga to Dar es Salaam. For that reason, he was provided with sick sheet at Dar es Salaam to attend treatment at the applicant's health facility. The respondent did not go for treatment as directed and decided to be treated somewhere else (at Mwananyamala Hospital). He was then required to explain as to why he decided to be treated somewhere else not at the applicant's designated health facility.

On 19th April 2005, the applicant issued Form No. 1 to the respondent with intention to punish him for insubordination. The respondent for that matter referred the matter to the Conciliation Board which decided in favour of the applicant by ordering the respondent to be terminated from employment. After the decision, the applicant convened several meetings with the respondent prior termination.

Finally, he was terminated on 29th May 2005 and was paid all his entitlements. Upon termination, the respondent filed a dispute at CMA where he was successfully. The CMA ordered reinstatement and payment of salaries from 2008 to date of the decision and until reinstatement. Being aggrieved by the CMA award, this application was filed.

The application is supported by the affidavit of Augustine Kulwa, Legal Officer and was opposed by the counter affidavit of the respondent. The following grounds (issues) were advanced for determination;

i. *That, the Arbitrator proceeded to hear and determine the matter without including the Attorney General as a necessary party as required by law;*
ii. *That, the Arbitrator decided the matter beyond the prescribed time for making an award without assigning good reasons for her delay.*
iii. *That, the Arbitrator did not consider that the respondent was paid all his terminal benefits upon being terminated from employment on 2008.*
iv. *That the award contravenes with some facts stated in the evidence adduced by both parties,*

The hearing was by way of written submission. The application was argued by Xavier M. Ndalahwa, State Attorney for the applicant whereas for the respondent appeared John Seka, learned Advocate.

Mr. Ndalahwa submitted on the first issue that the applicant is a state corporation established by Section 4(1) of the Railways Act, No. 10 of 2017 and so any person intending to sue the same, the requirement is to

join the Attorney General as provided by section 6 of Government Proceedings Act, [Cap. 5 R.E 2019] as amended by section 25 of Government Notice No. 1 of 2020. He stated that failure to join the Attorney General as provided under section 4 of the Act, renders the proceeding null and void, as held the case of **Institute of African Leadership Development (Uongozi Institute) v Khamis Mgeleka**, High Court – Labour Division, Revision No. 627 of 2018.

He stated further that the applicability of Government Proceedings Act was since the inception as Act, No. 16 of 1967. He went on stating that in the event there is a new enactment, in law while there is a pending matter in court, the proceedings must comply with the new law in procedural matters.

He asked this court to be also guided by the case of **Lala Wino v Karatu District Council**, Civil Application No. 132/02/2018, Court of Appeal.

On the second issue Mr. Ndalahwa submitted that Section 88(11) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] provides for an award to be delivered within thirty days from the day of completion of the proceedings. The learned attorney stated that the award was delivered out of scheduled date and it was after the 30 days, which is on 13th September, 2020. In his view, the law does not give powers to the

arbitrator to deliver the award beyond thirty days from the day the proceedings were completed. He added, what was done by the arbitrator is null and void ab initio.

On the third issue, he submitted that the applicant complied with the conditions for termination of employment as per section 44(2) of [CAP 366 R.E. 2019], exhibit D8 proves so. To support this point, the learned State Attorney referred this court to the cases, **Serengeti Breweries Ltd v James Mwafute**, Revision No. 4 of 2019, and the case of **Abdi Kilenga and 47 Others v National Poultry Company**, Revision No. 226 of 2019. He stated further that since the respondent was given his terminal benefits, it means the procedure for termination was fair in accordance with the law.

Dealing with the fourth issue, it was submitted that exhibit P1 refers to Siaga Kiboko who had never been an employee of the applicant. In record, he added, that in the applicant's office, the respondent is Raphael Siaga. He stated that the award did not say anything on the issue of the name of Siaga Kiboko. In reference, he cited the case of **Mary Lupatu v Magdalena Kulwa Itumbagija**, P.C. Civil Appel No. 42 of 2019, High Court DSM District Registry. Finally, the learned State Attorney prayed, the application be granted. The award be quashed and set aside.

Opposing the application Mr. Seka on the first issue submitted the Government Proceedings Act, [Cap. 5 R.E. 2019] is inapplicable. The learned counsel was of the view that the alleged amendment was brought in by Act No. 1 of 2020. When the matter was already in court, the law cannot act retrospectively to cover this matter. He stated that the applicant is a Government Corporation established under the Railways Act [Act No. 10 of 2017], the applicable law at that time of filling this complaint was the Railways Act. He said section 4(2)(a), (3) and (5) of the Act are clear on the subject. He stated further that basing on the nature of the law cited above, the respondent took initiatives to inform the office of the Attorney General who intervened. He went on submitting that the intervention by the AG, witnessed Mr. Xavery Ndalahwa, learned State Attorney to prosecute the same to the finality before the CMA. It was his view that the applicant is now employing a mere technicality.

Mr. Seka continued to argue that the non-inclusion of Attorney General at CMA is not fatal because the complaint was filed in 2008 before the 2020 amendment. He said, it was not a requirement under the Government Proceedings Act in 2008 to include Attorney General as a necessary party. Further, he argued that the procedure under the government proceedings Act, is not applicable at the CMA where complaints must be referred within

30 days while under Government Proceedings Act the suits have to be filed upon expiry of 90 days as in the case of **Evans G. Minja & 6 Others V. Bodi ya Wadhamini Shirika la Taifa la Hifadhi [TANAPA]**, Labour Revision No. 37 of 2020. He then stated that the case of **Institute of African Leadership Development** (supra) is distinguishable and inapplicable to the matter at hand as in the case there was no specific law providing for procedure to sue.

On the second issue Mr. Seka submitted that it is not a disputed fact that the award was delayed beyond the prescribed period. He cited the case of **TIB Development Bank v Geoffrey Mwakagenda** [2015] LCCD No. 2 and **Happy Sausages Ltd v Revocatus Tarimo & Others** [2015] LCCD No. 210 to support his finding. He stated that in the cases the arbitrator assigned the reasons for the delays to issue the award and he was of the view that the applicant did not state the scope and extent of prejudice suffered by the delay.

Submitting on the third issue, Mr. Seka said, this is the new ground which was not canvassed at the CMA and so prays for this court to disregard it. He also stated that the case of **Abdi Kilenga** and that of **Serengeti Breweris** (supra) are distinguishable.

On the fourth issue he stated that exhibit D-1 was tendered by the applicant's witness [DW-01] and so if it had defect in terms of names then those defects have originated from the applicant's office. In his view, the exhibit D-1 did not occasion any injustice to the applicant and so this ground be dismissed for lack of merit, reference was made to the case of **Gasper Peter v Mtwara Urban Water Supply Authority [MTUWASA]**, Civil Appeal No. 35 of 2017. Finally, he submitted that the application be dismissed.

After considering the submissions of both parties, I think the court has been called upon to determine *whether it was mandatory to include Attorney General as a necessary part in this suit, whether the delay of delivery of the award was fatal, whether the arbitrator was correct to reinstate the respondent and to what reliefs are the parties entitled.*

Dealing with the first issue, it is apparent that failure to join the Attorney General as a necessary party vitiates the proceedings in terms of the amendment of section 6 to the Government Proceedings Act (section 25 of the Misc. Act, No 1 of 2020). It is true also as submitted by the applicant that when the law amends the procedural matters, the same apply with retrospective effect as held in the case of **Lala Wino vs Karatu District Council** (supra). In this application, it has been submitted as well that

section 4 of the Railways Act, No. 10 of 2017, invites the Attorney General to intervene. Indeed, it was submitted that intervention was made by the AG. In doing so, the solicitor General appeared before the CMA and no legal officer of the applicant went on defending the matter. It is in record that Mr. Ndalahwa appeared and defended the matter at the CMA as the law provides. It is in record also that he did not ask the CMA to join the AG. This point was raised at this point when well aware that joining the Attorney General is not simply done for ornamental purposes. It is meant for affording proper representation in order to protect the vested interest of the government in its corporations. In this case therefore, I hold that none joined of the Attorney General is not fatal as held by this court in the case of **Evans G. Minja & 6 others vs TANAPA**, Revision No. 37 of 2020. This issue therefore has no merit, it is dismissed.

Dealing with the second issue, there is no dispute that the award was delivered after 30 days as per section 88(11) of ELRA. This is because the record has it that the application was heard and finalized on 22nd July, 2020 but it was pronounced on 22nd September 2020. The reasons for late delivery were stated as follows-

> *"Tuzo hii ilitakiwa kutoka mnamo tarehe 31/08/2020, lakini imechelewa kutoka na kukosekana kwa wino na karatasi kuweza ku-*

print uamuzi huu kwa wakati. Hakuna amri ya gharama, kila upande utabeba gharama zake. Haki ya marejeo/mapitio Mahakama kuu imeelekezwa."

In the case of **Malaik K. Mwasungi v Tanzania One Mining Ltd** [2011-2012] LCCD 28 it was held by this court that: -

"... if there is a good cause the award can be issued beyond the prescribed limit."

This was not the first time this court decided that way, in the case of **Tanga Cement Co. Ltd v Leah Mchome,** Revision No. 15 of 2009 HC Labour Division DSM, it was stated, if the award is procured out of the period of time of thirty days prescribed under the law the arbitrator is required to give reasons for the delay to pronounce the award and parties should not be prejudiced by the delay. It can also be added that, since the law provides for 30 days within which to deliver the CMA award, but does not provide for the remedy on failure to deliver the same in time, rules of wisdom would dictate that nullifying the award as the applicant asked this court would be illusory and a cause of failure of justice. It is enough for the arbitrator to simply state reasons for delay. Otherwise, if there is unexplained delay, the arbitrator should be dealt with in administrative actions. Doing otherwise, will be punishing the parties for

laziness of the arbitrator, which they are in themselves with no control. This ground, lacks merit.

On the third issue, it can be stated that, the CMA ordered reinstated, payment of salaries from May 2008 to the day the respondent will be reinstated. The evidence of Dw1 who was the Human Resource Officer is clear that the law applied to terminate the respondent was the Employment and Labour Relation Act No. 6 of 2004. In my view, section 40(2) of the ELRA provides that: -

> *"An order for compensation made under this section shall be in addition to, and not a substitute for any other amount to which the employee may be entitled in terms of any law or agreement."*

But still, reinstatement as the law puts it goes without loss of benefits. In clear terms section 40(1) (a) of the ELRA, states;

> *Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period*

that the employee was absent from work due to the unfair termination.

It goes without saying therefore that if proved that the respondent had been paid some of his benefits and pocketed, the same should be deducted in the terms clearly stated by the law to avoid letting him, take unfair advantage of the matters. It is not true in my considered view that since the applicant paid some terminal benefits to the respondent on termination date, it means termination was fair as the applicant has just submitted. Payment of terminal dues by the employer does not necessarily mean, termination was fair.

Fairness of termination is a matter of compliance to the validity of reason for termination and procedure for the same. After all, the applicant in this matter has not challenged the finding of unfair termination held by the CMA. This issue has no merit.

The last issue, is about contradiction of the evidence adduced before the CMA. The record is silent as to whether this point was raised before the CMA. It is indeed true that the respondent is called Raphael Siaga. He was consistently referred so by both sides. But in the absence of evidence proving that exhibit P1 bearing the name of Siaga Kiboko, was not issued by the applicant to the respondent, and that it is not the respondent who

used it in all desired transaction, one finds that the issue raised now in this respect is an afterthought. In as much as I agree with the applicant that, it may be an error, still I do not consider that as to have gone deep into the root of the application. I therefore agree with Mr. Seka that there is no perfect proceeding as held in the case of **Gasper Peter vs Mtwara Urban Water Supply Authority, (MTUWASA),** Civil Appeal No. 35 of 2017. Further, since there is no dispute that the document was issued and transacted in line with exhibit D1, this court finds no reason to fault the decision of the commission for that matter. This ground as well has no merit. It is dismissed. Having determined the issues raised. I am now bound to hold that this application has no merit. It is dismissed with no order as to costs.

A. K. Rwizile

JUDGE

11.04.2022