IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 379 OF 2021

AMRI YAHAYA MFIKILWA & 12 OTHERS ..... APPLICANTS

VERSUS

M.A KHARAFI & SONS LTD ..... RESPONDENT

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

(Mahindi: Mediator)

dated 30th August, 2021

in

REF: CMA/DSM/KIN/174/2021

JUDGEMENT

27th April & 22nd July 2022

Rwizile J

In this application, the applicants asked this Court to call for the records of the proceedings from the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/DSM/KIN/174/2021 so as to satisfy itself as to the legality, correctness and propriety of the award and then revise it.

It has stated in facts that the applicants were employees of the respondent. At different time, in between 23rd to 29th March 2021, they were terminated.

In their termination letters, their dues were listed but stated that their subsistence allowances will be deducted. They did not agree to it and they conducted a meeting with the respondent's representative who assured them that there will be no deductions. They waited for their payment until 12th May, 2021 and 13th May, 2021 when only some of the applicants were paid. The payment made to them, did not include subsistence allowance. They decided to apply for condonation to institute the dispute at CMA out of time as they were waiting for their payment from the respondent. The application was dismissed for failure to show cause for delay. The applicants were aggrieved by the ruling that dismissed their application, hence this application.

The application was supported by the affidavit of Amri Yahaya Mfikilwa, Representative of the applicants. The application was opposed by a counter affidavit of Selemani Almasi, respondent's Advocate. The grounds for revision raised by the applicants were: -

i. *That honourable mediator was wrong in arriving at a decision denying to grant leave to the applicants to institute the dispute out of time, ignored the genuine reasons adduced by the applicants in their application and submission.*

ii. *That honourable mediator was wrong by holding that applicants waited to be paid, so as to institute the dispute, ignored the evidence adduced that some were paid their dues which are deducted, and others were not paid to date.*

iii. *That honourable mediator erred in law and facts by pronouncing the order to the parties of filing the submission by not exceeding three pages, later did not honour his order. Respondents exceeded three pages surprisingly the ruling delivered in favour of the respondent despite of disobeying the order of the honourable mediator.*

iv. *That the honourable mediator was wrong by not considering natural justice, by not allowing applicants the right to be heard.*

Mr. Francis Munuo, learned Advocate appeared for the applicants, whereas the respondent was represented by Mr. Seleman Almas, learned Advocate. Mr. Munuo submitted that the application ought to be filed in thirty days after termination. But the applicants, he said, filed this application after 58 days. He stated that the CMA did not consider the

reasons that led them to lateness. In his view, the arbitrator only considered the degree of lateness.

More so, he argued that the applicants were given termination letters on 27th March 2021 while they were prepared on 26th February 2021. He submitted further that the applicants were not given notice for termination contrary to section 38 of the Employment and Labour Relations Act, [CAP 366 R.E. 2019] (ELRA). He stated that the letter dated 26th February 2021 (exhibit AK 2) showed what the applicants were to be paid as their dues. According to the learned counsel, that is what caused the delay to file the application in time.

He stated further that there was an illegality in the retrenchment process of the applicants and the learned counsel sought support in the case of **TRC Ltd v Herman Minja**, Civil Appeal No. 100/18/2019 at page 16.

In the view of Mr. Munuo the applicants be given a change to present their case in compliance to Rule 11(3)(b) of The Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007.

The learned counsel was convinced that the applicants have a good chance to win their claims. Noting further, Mr. Munuo was clear that the dispute arose when the respondent failed to pay the applicants on 13th

May 2021. He asked this court to hold that, time ought to run from the day payment was made which is 12 days late from the day of termination. He prayed, the application to be granted.

In reply, Mr. Almas submitted that the issues of 12 days of lateness and that the letter for termination as cause of delay as submitted by the advocate for the applicant are new facts and should not be entertained. He stated that the mediator dealt with the CMAF.1 and the submission thereto. He stated further that, there was lateness of 58 days to file the application to the CMA.

He stated further that the CMA held correctly by finding no reason for condonation. According to him, the reasons stated in the CMAF.1 were disputed and so claimed salaries compensation. He said therefore, delay of payment and deductions were not stated therein. He submitted that time began to run from the termination date. Furthermore, it was argued that communication pending filing of the application for condonation were not proved. He cemented his submission by citing the cases of **Philipo Katembo Gwandumi v Tanzania Forest Service Agent & Another**, Revision No. 891 of 2019, High Court at Dar es Salaam, **Remigious Scarion Muganga v Greenlight Planet Tanzania Ltd**, Revision No. 06 of 2020, High Court at Tabora and **Rev. Muhunda Francis Paul v**

Bukoba Municipal Director & 26 Others, Land No. Case No. 08 of 2019, High Court at Bukoba. He finalized by stating that the issue of illegality was not raised at CMA.

In a rejoinder, Mr. Munuo submitted that the cases cited on negotiation as the cause of delay speak for the side of the applicant as exhibit AK 2 states. The learned counsel then reiterated what was submitted in the submission in chief and stated that there was an illegality on the right to be heard.

Having heard the submissions of the parties. It is now opportune to determine one crucial point which is *whether the applicants showed sufficient reasons for condonation.*

Under Rule 10(1) of The Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007 it is stated that: -

> *"Dispute about the fairness of 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 final decision to terminate or uphold the decision to terminate."*

Mr. Munuo submitted that the applicants delayed to file the labour dispute due to the arrangement between the parties in respect of payment. But it

is clear in the records that the applicants were terminated on March, 2021 as per exhibit AK1. The application based on the CMAF.1 was filed on 24th June, 2021. The reason for delay, as it has been always the case, has to be proved by the applicants. They have as held, to account for all days of delay. I think, since they were in agreement that they will be paid their claims in some future date, they had to procure some documentary evidence to prove so. In actual fact, the applicants did not account for all those days that they delayed. This is cardinal and it has been held in the case of **Juma Nassir Mtubwa v Namera Group of Industries Ltd**, Revision No. 251 of 2019, High Court at Dar es Salaam (unreported) that:

> *"It is principle of law that, in any application for extension of time the applicant must account on each day of his delay. The reason that, in whole 68 months he was waiting for his employer to call him back after production increase cannot stand as a good cause for condonation. It is apparently showing lack of diligence and seriousness on his part."*

The applicants have raised a point of illegality in the retrenchment process. But it is a trite law that illegality has to be on the face of the record as held 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. It was held that: -

> *"... a point of law must be of sufficient importance and apparent on the face of the record to compel the Court to allow for an extension."*

Illegality stated by the applicant is not glaring on the face of the record. It cannot be readily found in this case that retrenchment followed no procedure unless one is drawn in arguments to that effect. Doing so now, will be getting to hear the dispute through the back door.

In the circumstances therefore, this application lacks merit. It is dismissed with no order as to costs.

A.K. Rwizile

JUDGE

22.07.2022