

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

REVISION APPLICATION NO. 44 OF 2022

*(Arising from an Award issued on 29th June 2020 by Hon. H. Makundi, Arbitrator in Labour dispute
NO. CMA/PWN/BAG/29/2019/03 at Bagamoyo)*

BETWEEN

MARIAN BOYS HIGH SCHOOL APPLICANT

AND

RUGAIMUKAMU RWEKENGU RESPONDENT

JUDGMENT

*Date of Last Order: 29/07/2022
Date of Judgment: 12/08/2022*

B. E. K. Mganga, J.

On 1st August 2018, applicant and the respondent entered a two-years fixed term contract of employment expiring on 31st July 2020. In the said two-years fixed term contract of employment, respondent was employed as a teacher. It happened that on 9th January 2019, applicant terminated employment of the respondent. Respondent was aggrieved by the said termination, as a result, on 12th September 2019, he filed Labour dispute No. CMA/PWN/BAG/29/2019/03 before the Commission for Mediation and Arbitration henceforth CMA at Bagamoyo claiming to be paid TZS 14,226,923/= being payment of one month salary in lieu of

notice, leave pay, severance pay and compensation. In the referral Form referring the dispute at CMA (CMA F1), respondent indicated that the dispute was on breach of contract, but he also filled part B that relates to unfair termination. In addition to that, in the said CMA F1, respondent prayed to be issued with a Certificate of Service. Respondent indicated further in the said CMA F1 that the dispute arose on 9th January 2019. Together with CMA F1, respondent filed an application for condonation (CMA F2) showing that he was late for 190 days. In the said CMA F2, respondent showed that he delayed to file the dispute because he was taking care his brother who was severally sick in Bukoba. Respondent filed his affidavit in support of the application for condonation attaching *inter-alia* bus tickets from Dar es Salaam to Bukoba and back to Dar es salaam.

Respondent filed the counter affidavit objecting the application for condonation deponing that there was no good cause for the delay.

On 20th November 2020, Hon. Grace W. Massawe, Mediator, delivered a ruling granting condonation to the respondent.

After respondent being granted condonation, the dispute was heard by Hon. H. Makundi, Arbitrator, who, after considering evidence of both sides, on 29th June 2020, found that termination of employment of

the respondent was unfair for want of both reason and procedure. The arbitrator therefore awarded respondent to be paid TZS 17,100,000/= being 19 months salaries compensation and TZS 450,000/= being leave pay for 14 days, all amounting to TZS 17,550,000/=.

Applicant was aggrieved by the said award, as a result, she filed the Notice of Application supported by an affidavit sworn by Evarist Mafunguo, her principal officer, seeking the court to revise the said award. In the affidavit supporting the notice of application, applicant raised five (5) issues namely: -

- 1. Whether the Arbitrator had jurisdiction to entertain the matter initiated by pleadings which contain two distinct kinds of disputes giving rise to two different reliefs.*
- 2. Whether the Arbitrator erred in law and facts by holding in favour of the respondent since the latter consented to early termination.*
- 3. Whether the Arbitrator erred in law and facts by granting the application for condonation.*
- 4. Whether the Arbitrator erred in law and facts by determining the matter without conducting mediation and without assigning reasons.*
- 5. Whether the Arbitrator erred in law and facts by awarding the reliefs not sought in the CMA F1.*

In opposing the application, respondent filed both the Notice of Opposition and the Counter Affidavit.

By consent, the application was disposed by way of written submissions whereas applicant enjoyed the service of Jacqueline Rogath

Massawe, learned Advocate while respondent enjoyed the service of Magreth Joseph, learned Advocate.

Submitting on the 1st issue, namely, whether; the Arbitrator had jurisdiction to entertain the matter initiated by pleadings which contain two distinct kinds of disputes giving rise to two different reliefs, Ms. Massawe, learned counsel for the applicant, submitted that CMA F1 that is a pleading, was defective because respondent filled both breach of contract and part B that relates to unfair termination only. She argued that the defect rendered the pleading incompetent and the whole proceeding a nullity. To support her argument, Ms. Massawe, cited the case of *Bosco Stephen v. Ng'amba Secondary School*, Revision No. 38 of 2017, HC- Mbeya(unreported) and prayed the proceedings be nullified, the award be quashed, and set aside.

On the 2nd issue namely, whether; the Arbitrator erred in law and facts by holding in favour of the respondent since the latter consented to early termination, counsel for the applicant submitted that, termination of contract was by consent and the respondent did not dispute that fact during trial. Counsel for the applicant argued that respondent is barred to deny that truth and cited section 123 of the Evidence Act [Cap. 6 R.E. 2019] and the case of ***Otto Mark Mosha v.***

Abel Mussa Ojung'wa, Civil Appeal No. 16 of 2019, HC (unreported) to support her argument. She concluded that there was no breach of contract by the applicant because respondent agreed to terminate the contract and was paid his benefits.

On the 3rd issue relating to granting of condonation to the respondent, counsel for the applicant submitted that respondent did not account for each day of the delay. To support her argument, counsel cited the case of ***Sebastian Ndaula v. Grace Rwamafa (legal representative of Joshwa Rwamafwa)***, Civil Application No. 4 of 2014, CAT (unreported), [*Yazid Kassim Mbakileki v. CRDB \(1996\) Ltd Bukoba Branch and Jackem Auction Marts and Court Broker*](#), Civil Application No. 412/04 of 2018 CAT (unreported). Counsel submitted further that, respondent was supposed to show that there was good cause for the delay and that he was diligence. Counsel cited the case of [*MZA RTC Trading Company Limited v. Export Trading Company Limited*](#), Civil Application No. 12 of 2015, CAT (unreported) to support her argument. She maintained that there was no sufficient reason or material for the Arbitrator to grant condonation.

On the 4th issue, namely Whether; the Arbitrator erred in law and facts by determining the matter without conducting mediation and

without assigning reasons, counsel for the applicant submitted that mediation is not an option that can be opted to be conducted or not. She argued that, in the application at hand, mediation was not conducted. She argued further that failure to conduct mediation vitiates the whole CMA proceedings and cited the case of ***Mariam Samburo (Legal Representative of the late Ramadhan Abas v. Masoud Mohamed Josh & 2 Others***, Civil Appeal No. 109 of 2016, CAT (unreported).

On the 5th issue namely, whether; the Arbitrator erred in law and facts by awarding the reliefs not sought in the CMA F1, counsel for the applicant reiterated her submissions in the 2nd issue and went on that, under the principal of issue estoppel, respondent is barred to deny what he agreed with the applicant and signed.

Resisting the application, Ms. Joseph, learned Advocate for the respondent, submitted on the 1st issue that CMA had jurisdiction to determine the dispute since it arose in the same transaction. She cited the provisions of Order II Rule of the Civil Procedure Code [Cap. 33 R.E. 2019] and argued that labour statutes are silent in joinder of cause of action hence a resort must be made on Cap. 33 R.E. 2019 (supra). In her submissions, counsel for the respondent conceded that respondent

filed the dispute at CMA relating to both breach of contract and unfair termination. She cited Rule 8(2)(b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 Of 2007 and submitted that, where there is no breach of contract, in order to terminate employment, there must be mutual agreement for early termination of employment but that did not happen in the application at the hand.

On the 2nd issue, counsel for the respondent submitted that, there was no reason for termination of employment of the respondent and that, in terms of section 39(1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], applicant was under duty to prove fairness of termination of employment of the respondent. Counsel cited section 37(2) of Cap. 366 R.E. 2019 (supra) and the case of ***A-One Products and Bottlers Ltd v. Flora Paulo and 32 Others***, Revision No. 356 of 2013, HC-Labour Division(unreported) to support her argument. She added that applicant was duty bound to prove both fairness of reason and procedure.

On the 3rd issue relating to condonation, counsel for the respondent submitted that the issue has been overtaken by event hence cannot be raised at this stage. She went on that, applicant was

supposed to challenge the grant of condonation prior to filing this application. She argued further that, arbitrator exercised her discretion in granting condonation as there was sufficient cause based on sickness of respondent's relative at Bukoba and respondent justified the delay by submitting travel tickets from Dar es Salaam to Bukoba.

On the issue relating to failure to conduct mediation, counsel for the respondent submitted that mediation was conducted. On the reliefs granted to the respondent, it was submission of counsel for the respondent that the same were properly granted because there was unfair termination.

In rejoinder, counsel for the applicant reiterated her submissions in chief and maintained that it was not proper for the respondent to indicate that the dispute was both for breach of contract and unfair termination.

I have examined the CMA record and considered submissions of both sides in this application. In disposing the application, I will deal first with the issue relating to condonation because that goes to the jurisdiction of CMA. It was submitted by counsel for the applicant that respondent did not prove that there was sufficient cause for the delay and failed to account for each day of the delay. On the other hand,

counsel for the respondent submitted that respondent proved that there was sufficient cause for the delay namely sickness of his relative that forced him to travel to Bukoba. I have examined the CMA F2 and find that respondent indicated that he was late for 190 days and that the reason for delay was that he was taking care his brother who was severally sick in Bukoba. The affidavit sworn by the respondent in support of the application had six (6) paragraphs reproduced hereunder:

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- 1. That, I am the applicant in this application hence conversant with the facts I am about to depose.*
- 2. That, I was employee of the respondent up to 9th January 2019 as a teacher...*
- 3. That, termination of employment was both substantively and procedural unfair.*
- 4. That, the reason for late filing of the dispute before the Commission is that, I was on travel to Bukoba to take care of my brother who was severely sick...*
- 5. That, if this application is granted, the respondent will have nothing to lose but rather justice will be attained.*
- 6. That, there is overwhelming chances of success on merits of this matter.*

The above affidavit was challenged by the applicant who filed the counter affidavit sworn by Evarist Mafunguo showing the dates respondent was in Dar es Salaam hence in a position to file the dispute timely. In the counter affidavit, it was deposed that on 27th March 2019,

respondent was in Dar es Salaam where he stayed from that date to 20th April 2019 amounting to 23 days.

In the Ruling, the Mediator found that respondent was late for 190 days and that there was sufficient cause for the delay. The Mediator found further that the delay was not inordinate. The mediator also found that reasons that respondent's relative was seriously sick, and that respondent travelled to Bukoba for that purpose was sufficient to grant condonation. In the same Ruling, the Mediator agreed with the applicant that for some time, the respondent was in Dar es Salaam. The Mediator disagreed with the applicant's view that respondent was capable to file the dispute at that time. It was views of the Mediator that due to sickness of his relative, respondent was not capable to file the dispute at CMA. It was also argued by counsel for the respondent that there was sufficient cause for the delay. With due respect to both the Mediator and counsel for the respondent. I have carefully examined the affidavit of the respondent and annextures thereof and find that, there was no medical report attached thereto showing that respondent's relative was sick. What was attached to the affidavit in support of the application are (i) a copy of the fixed term contract between applicant and the respondent and (ii) bus tickets from Dar es salaam to Bukoba and back

to Dar es Salaam. In my view, these bus tickets did not prove reasons for the respondent to travel from Dar es Salaam to Bukoba. It is my opinion that respondent might have travelled to Bukoba for his own mission or business. In fact, there is no evidence on record showing how sickness of his brother caused/ prevented the respondent to file the dispute in time. The court of Appeal in the case of [Nyanza Road works Limited v. Giovan Guidon](#), Civil Appeal No. 75 of 2020 (unreported) was confronted with a similar issue where sickness was advanced as a ground for the delay of filing the dispute at CMA. In ***Guidon's case*** (supra), it was the respondent himself who was sick, but the Court of Appeal found that the respondent failed to prove how the said sickness prevented him to file the dispute in time and held *inter-alia*: -

*"...Firstly, it is long settled that the court's **discretion must be exercised judiciously as opposed to capriciousness on the basis of material placed before it for consideration.** While there is no dispute on the respondent's heart complications which would ordinarily constitute good cause, **the respondent did not satisfy the CMA that the delay was solely due to sickness.** We think the learned advocates for the respondent's reference to **John David Kashekya v. The Attorney General** (supra) **can only be relevant where sickness is the sole reason for the delay and properly explained...** Unfortunately, the learned Judge directed his attention to the respondent's illness in the absence of evidence how was it material to not only the delay*

but also failure to lodge his application for condonation immediately after the lapse of 30 days..." (emphasis is mine)

It was deponed in the counter affidavit opposing the application for condonation that respondent was in Dar es Salaam for 23 days from 27th March 2019 to 20th April 2019. The Mediator also noted at some point that respondent was in Dar es salaam but was of the view that, on the circumstances that his relative was sick, respondent was not in the position to file the dispute. I have examined the bus ticket (annexture A2 collectively) and find that on 14th January 2019 respondent was issued with ticket No. 9953 by City Boy express travelling from Dar es Salaam to Bukoba. I have noted that, on 26th March 2019 respondent was issued with bus ticket No. 1728 issued by Ilyana Safaris showing that he was travelling from Bukoba to Dar es Salaam on 27th March 2019. I have noted further that, on 20th April 2019 respondent was issued with bus ticket No. 5484 by Osaka Royal Class travelling from Dar es Salaam to Bukoba on 22nd April 2019 and that, on 27th August 2019, he was issued with bus ticket No. 55318 by Osaka Royal Class travelling on 29th August 2019 from Bukoba to Dar es Salaam. As pointed hereinabove, the dispute arose on 9th January 2019, but respondent filed it at CMA on 12th September 2019. As also pointed hereinabove, the Mediator believed that respondent travelled to Bukoba to attend his

brother who was sick and that, in the opinion of the Mediator, that was a good cause for granting condonation. With due respect to the mediator, there is no evidence to that effect because respondent might as well travelled to Bukoba for his own business as I have held hereinabove. In my view, the Mediator was overwhelmed by sympathy. It is a settled principle that cases should be decided based on evidence placed before the court and not based on sympathy or extraneous matters. In fact, this position the Court of Appeal held in the case of **Attorney General v. Maalim Kadau & Others [1997] TLR 69** that:

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"...Time and again this Court has expressed the correct position in law for the courts in administering justice. The Courts should base their decisions on nothing else other than the evidence adduced in court and the applicable law in the circumstances of the case..."

As pointed held herein above, there was nothing in the affidavit in support of the application for condonation suggesting that, at the time respondent was in Dar es Salaam between 27th March 2019 and 20th April 2019, was unable to file the dispute due to sickness of his brother who was staying in Bukoba. It should be recalled that respondent had already travelled from Dar es Salaam to Bukoba then back to Dar es Salaam. Respondent thereafter travelled to Bukoba and came back in Dar es Salaam on 29th August 2019. Respondent did not account for

each day the delays for 190 days that the Mediator was of the view that was not inordinate. It is a settled principle of law that in an application for extension of time/ condonation, applicant must account for each day of the delay. See. [Yazid Kassim Mbakileki' case](#) (supra), **Sebastian Ndaula's case** (supra) and [Constantine Kalipeni v. Sudi M. Dibwe T/A Auction Mart](#), Civil Application No. 532/01 of 2018, CAT(unreported) to mention a few. It is my view further that, the delay was inordinate and was not accounted for.

It was submitted by counsel for the respondent that the Mediator exercised discretion in granting condonation and that the issue has been overtaken by event. With due respect to counsel for the respondent, considering the circumstances of the application at hand, the Mediator did not judiciously exercise discretion in granting the application for condonation. The court of Appeal has held several times that in granting extension of time or condonation, discretion must be exercised judiciously. See [Guidon's case](#) (supra) and [MZA RTC's case](#) (supra).

In **MZA RTC's case**, the Court of Appeal held *inter-alia*:-

*"An application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court **based on what is fair, under the***

circumstances and guided by the rules and principles of law ..."

(emphasis is mine)

It is my considered opinion that, for the foregoing, there was no material placed before the Mediator to justify grant of condonation. Further to that, the circumstances of the application at hand was not warranting the grant of condonation.

It was submitted by counsel for the applicant that CMA F1 that is a pleading, was defective because respondent filled both breach of contract and part B that relates to unfair termination only hence the dispute was incompetent. During her submissions, counsel for the respondent conceded that respondent filed the dispute at CMA relating to both breach of contract and unfair termination. She defended that procedure relying on the provisions of Order II Rule of the Civil Procedure Code [Cap. 33 R.E. 2019] that allow joinder of cause of action on ground that labour statutes are silent. With due respect to counsel for the respondent, it was not proper for the respondent to indicate in the CMA F1 that the dispute was both for unfair termination and breach of contract. As correctly submitted by counsel for the applicant, the CMA F1 was defective making the whole dispute to be incompetent. I therefore associate myself with the position taken by my learned sister (Mongela, J) in [Bosco Stephen's case](#) (supra) and hold that CMA

proceedings were nullity and that the award arising therefrom cannot stand.

For the foregoing I hereby allow the application and nullify CMA Proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam this 12th August 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 12th August 2022 in chambers in the presence of Jacqueline Massawe, Advocate for the applicant and Rugaimukamu Rwekengo, the respondent.



B. E. K. Mganga
JUDGE