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

REVISION NO. 163 OF 2020

GRACE LOBULU.....1ST APPLICANT

DR. FRANK LEKEY.....2ND APPLICANT

BEATUS CHIJUMBA.....3RD APPLICANT

MICHAEL MHANDO.....4TH APPLICANT

JACKSON BUHULULA.....5TH APPLICANT

CONSTANTINE MAKALA.....6TH APPLICANT

VERSUS

NATIONAL HEALTH INSURANCE FUND.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
(From the decision of the Commission for Mediation and Arbitration of DSM at Temeke)

(Mwidunda, Massay, and Massawe : Arbitrators)

dated 25th February, 2019

in

REF: CMA/DSM/TEM/541/2016/36/2017

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JUDGEMENT

15th July & 2nd September 2022

Rwizile J

This ruling is in respect of three points of law raised by the court and the parties herein against an application for revision of the decision of the Commission for Mediation and Arbitration ('CMA') in labour dispute No. CMA/DSM/TEM/541/2016/36/2017. The decision was delivered on 25th

February 2019. Although the dispute was heard by three arbitrators, Mwidunda, Massay and Massawe, the decision was delivered and signed by two of them namely Hon. Alfred Massay and Massawe G. The relevant points are to the effect that: -

i. *Whether CMA is duly constitution with three Arbitrators, while the award is signed by two of them*
ii. *What is the effect of the unsworn testimony of witnesses*
iii. *Whether the CMA had jurisdiction to trial the matter.*

Before this court, the applicants were represented by Mr. Kalasha Daniel, Personal Representative whereas Mr. Gabriel Malata, Solicitor General being assisted by Grace Lupondo and Lyidia Choma State Attorneys, appeared for the respondents.

Addressing this court orally on the first point, Mr. Malata submitted that the CMA constitution is governed by section 15(1)(b) of Labour Institutions Act, [Cap. 300 R.E 2019] ('LIA') read together with Rule 7(4) of the Labour Institution (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007 (GN 66 of 2007). He submitted that the referred provisions empower the CMA to appoint more than one mediator and/or arbitrator to hear one case. In his view, the Commission in this case was duly constituted when seated with three arbitrators. The learned Solicitor

General did not submit on the propriety of the validity of the award being signed by two arbitrators even though three of them heard the dispute.

As to the second point, Mr. Malata submitted that the effect of unsworn testimony was clearly stated in the case of **Joseph Elisha v Tanzania Postal Bank,** Civil Appeal No. 157 of 2019 at pages 8-9 that the proceedings are vitiated and a trial denovo is to be ordered.

Regarding the third point Mr. Malata submitted that the CMA did not have jurisdiction to determine the matter. The counsel argued that jurisdiction is a legal mandate of the court, tribunal or body to discharge its functions according to law. Before the hearing, he argued, the CMA had to ascertain if it had jurisdiction to persue the matter. Mr. Malata further argued that what is done without jurisdiction is a nullity. He supported his submission by the case of **Sospeter Kahindi v Mbeshi Mashini**, Civil Appeal No. 56 of 2017.

He stated that the issue of jurisdiction is therefore a statutory creation or constitutional as per Article 107A or 107B and 108 of the Constitution of the United Republic of Tanzania, 1977.

Mr. Malata went on to submit that the applicants before this court are Public Servants within the meaning of section 3 of the Public Service Act

[Cap. 298 R.E 2019] ('PSA'). That the same provision defines a Public Service Office and the respondent's office falls within that meaning. He added that the National Health Insurance Fund is the Public Institution established under Section 4 of National Insurances Act, [Cap. 395 R.E 2019], it provides insurance on behalf of the Government. He further submitted that the employees employed by Public Institutions are legally called Public Servants doing their duties on behalf of the President as per Article 35(1) of the Constitution of United Republic of Tanzania.

He strongly submitted that in case of labour disputes therefore, the Public Servants have to apply section 25 of the PSA read together with Regulations 60 – 64 of the Public Service Regulations, 2003, which provide procedure of appeal where a Public Servant is aggrieved by termination. Mr. Malata further stated that the applicants filed the dispute at the CMA. It has no mandate to try the matter. He submitted that section 34(A) of the PSA, provides that in case of conflict with other laws, the PSA prevails as held in the case of **TANROADS (MBEYA) v Felix Masatu** Rev. No. 44 of 2017 at page 8. The counsel continued to submit that this case was instituted on 29th November, 2016 at the CMA, after the amendment of the PSA, that came into operation on 18th November, 2016. He insisted that

the CMA had no jurisdiction to determine the matter. The applicants, he added, were to first exhaust remedies available in the PSA.

To support his submission, he cited the cases of **Joseph Khenani v Nkasi District Council,** Civil Appeal No. 126 of 2019 Pg 9 and **Tanzania Posts Corporation v Dominic A. Karangi,** Civil Appeal No. 12 of 2022. He asked this court to quash the award.

Responding to the first point, Mr. Kalasha submitted that the CMA was not duly constituted by seating with 3 arbitrators as per section 88(2)(a) ELRA. He submitted that the CMA has to appoint an administrator not administrators, it was therefore not duly constituted. He added that even Rule 27(1) of Labour Institutions (Mediation & Arbitration Guidelines) Rules GN 67 of 2007 (GN. 67 of 2007) require the arbitrator to write an award and not arbitrators. He stated that in the matter at hand the award was prepared and signed by two arbitrators which is against Rule 27(2) of GN. 67/2007.

Mr. Kalasha went on to submit that the proceedings were heard by three arbitrators, who were Hon. Mwidunda, Massawe and Massay however, Hon. Mwidunda did not sign the award. He added that under Rule 19(1) of GN 67 the CMA is empowered to conduct proceedings in a manner it thinks fit, but not to sit with three arbitrators in the same case. He further

submitted that there is no law, which empowered the CMA to be duly consulted with three Arbitrators. He added that the proceedings are a nullity because the dispute was heard by three Arbitrator's but only two of them signed the award and no reason why the remaining Arbitrator did not sign the same.

As to the second point, Mr. Kalasha agreed with the decision in **Joseph Elisha (supra)** and the case of **David Hagha v Salim Ngezi and another**, Civil Appeal No. 313 of 2017.

He submitted that the original record shows, witnesses did not swear when testifying. He therefore, prayed, the proceedings to be nullified and trial a denovo be ordered.

Regarding the last point as to jurisdiction of CMA, he submitted that the point was also raised before the CMA by the respondents. The preliminary objection was raised on 12.11.20218. The CMA ruled out that it had jurisdiction. He added that the dispute was filed on 18.08.2016. It was discussed based on amendment of the PSA, which came into operation on 18.11.2016. The CMA held that the applicants were not covered by the amendment because the law does not act retrospectively. He added, that the dispute was filed before the amendment and not on 29th November,

2016 as submitted by the respondent. He insisted that it was filed on 12.08.2016 however, the same was struck out with leave to refile.

Mr. Kalasha further submitted that; it was proper for the CMA to hold that it had jurisdiction to entertain the dispute because the law does not act retrospectively as was held in the case of **Dominion (T) Ltd v Commissioner General (TRA)** Civil Appeal No. 159/2021.

In a rejoinder, Mr. Malata reiterated his submission in chief. As to the first pointed he maintained the position that the CMA was duly constituted with three Arbitrator's. As to the third point, he submitted that the applicants have conceded to have filed their complaint on 12.08.2016. They are Public Servants and bound by the PSA. He stated that the complaint which was initially filed was struck out which means there was no application before the CMA. He went on to submit that the same was refiled on 29th November, 2016 as a fresh application which was after amendment of PSA which came into force on 18th November, 2016.

Therefore, the applicants were bound by the amendment. To support his submission, he referred the court to the cases of **Joseph Khinani (supra)** and **Tanzania Posts Corporation v Dominic A. Karangi (supra)**. Since it was lodged on 29th November, 2016, they were to operate within the existing law. Mr. Malata strongly submitted that the

amendment of 2016 was procedural and so affected this case as in the case of **Lalawino v Karatu, DC,** Civil Appeal No. 132/2002 of 2018. He therefore prayed; CMA had no jurisdiction.

Since the third point questions the jurisdiction of the CMA to adjudicate the matter, it has to be determined first. Mr. Malata argued that the applicants were Public Servants hence the CMA had no jurisdiction over this dispute. I have critically examined the records, as rightly submitted by Mr. Kalasha, the objection on jurisdiction was raised before the CMA and was duly determined in a ruling dated 14th November, 2018. In the referred decision, it was found that since the cause of action which is termination of employment arose on 15th July, 2016 before amendments of the PSA which came into force on 18th November, 2016, then the CMA had jurisdiction to determine the matter.

In my view, the Arbitrator's finding is the correct position of the law. The law cannot act retrospectively as it was held in the case **Dominion (T) Ltd v Commissioner General (TRA)** (supra). In this matter the applicants were terminated from employment before the amendment of PSA. Equally, I have considered the cases of **Joseph Khenani v Nkasi District Council (supra)** and **Tanzania Posts Corporation v Dominic**

A. Karangi (supra). Indeed, the referred cases are of great importance in my determination.

As to the case of **Tanzania Posts Corporation v Dominic A. Karangi (supra),** I think it does not apply here because the respondent in the case was terminated before an amendment to the PSA and the dispute was filed in court after the same was in force. Turning to the case of **Joseph Khenani v Nkasi District Council (supra)** it was held that the amendment of the PSA does not act retrospectively. The dispute was filed according to the record in August 2016 before the amendment was in effect which is November 2016. Thus, the CMA had jurisdiction to determine the matter.

Coming to the second point as to constitution of the CMA, Mr. Malata strongly argued that the CMA was duly constituted pursuant to section 15(1)(b) of LIA which provides as follows: -

> *"In performance of its functions, the Commission may-*
>
> *(b) assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law."*

In my view, the wording of the above quoted provision does not indicate or clearly state that more than one Arbitrator can be appointed to arbitrate

one matter at per. The counsel further stated that the quoted provision reads together with Rule 7(4) of GN 66/2007 which also provides as:-

> *"In circumstances where more than one person act as Mediators or Arbitrators, they shall afford each other opportunity to participate in the proceedings."*

In the above quoted provision, there is no doubt that the provision implies that there may be some circumstances where more than one Mediator or Arbitrator can be appointed to mediate or arbitrate the same dispute. However, the labour laws do not provide under what circumstances more than one arbitrator or mediator can be so appointed. In the premises it is crystal clear that there is a lacuna in the law. But if the law so meant, it ought to provide how can the decision be made. Is it by majority vote or simply by consensus and in case of divided opinion what would be the mode of arriving at the decision.

Revisiting the provision of other laws in similar circumstance as this one, the law is very clear on the appointment of judges to sit as a bench and how the matter can be determined by all of them. For instance, under section 6(3) (4), (5) and section 27 of the Magistrate's Courts Act, [CAP 11 R.E 2019] the law provides as follows, to start with, section 6(3)(4) and (6)

(3) Where two or more magistrates of the same description are assigned to a particular magistrates' court each may hold sittings of the court concurrently with the other or others.

(4) Notwithstanding the foregoing provisions of this section, the Chief Justice may direct two or more magistrates of the same or other appropriate description to sit for the hearing and determination of any proceeding or any category thereof, and in any such case the court shall not be duly constituted for such proceeding nor any proceeding of such category, unless it is composed of the number and description of magistrates so directed.

(5) In any case where any proceeding is directed to be heard and determined by two or more magistrates, the same shall be determined in accordance with the opinion of the majority and if the court is equally divided the proceedings shall be dismissed.

"27.- (1) Appeals to the High Court under this Part shall be heard by one judge unless the Chief Justice directs that an appeal be heard by two or more judges.

(2) Any direction by the Chief Justice under subsection (1) may be given at any time before judgment.

(3) If two or more judges hearing an appeal are equally divided, the appeal shall be dismissed."

As stated above the provisions quoted above are crystal clear on the appointment and sitting of magistrates and judges in the determination of the cases brought before courts. Unfortunately, in the labour laws neither of those circumstances have been stated. In the matter at hand, even the appointment of the sitting Arbitrators is not indicated. Worse still, it is not known who appointed the three arbitrators and the record is silent as to how it came about.

The record shows that on 07.09.2018 the trial Arbitrator Hon. Batenga stated that she was going for annual leave.

The case file was returned to the Director of CMA for reassignment. Notwithstanding the order of the mentioned date, on 11.09.2018 the same Arbitrator Hon. Batenga appeared again to the record adjourning the case. Surprisingly, on 05.11.2018 the names of three Arbitrator's appeared in the file taking over the matter.

Furthermore, even though the case was heard by three Arbitrator's only two of them signed the award which leaves the court in a dilemma.

What happened to him, did he indeed take party in arriving at the decision. As shown above, it is not known, if the decision was of the majority or not. Therefore, with all the noted illegalities, it is my view that the CMA was not duly constituted. But if I am wrong, it is otherwise found that the same was duly constituted, still, failure by the three arbitrators who heard the dispute to sign the award renders the same a nullity. I am not in disregard of the provision that the arbitration proceedings should be conducted with minimal legal formalities pursuant to the provision of section 88(4)(b) of ELRA. However, I do not think the legality of the appointment of Arbitrators to sit as a bench falls on minimal formalities. Appointment, hearing and signing of the award by Arbitrators is a crucial issue that goes to the jurisdiction of the CMA.

Turning to the last point as to the effect of unsworn testimonies; both parties have conceded that the witnesses testified without taking oath contrary to Rule 25(1) of GN. 67/2007 which provides as follows: -

> *'...Rule 25 (1) The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process..."*

The effect of recording testimonies of the witnesses without administering oath was emphasized in the case of **Joseph Elisha v Tanzania Postal Bank** (supra) and in the case of **Catholic University of Health and Allied Science (CUHAS) v Epiphania Mkude Athanase,** Civil Appeal No 257 of 2020 (unreported) where it was held that: -

> *'...having perused the records of appeal as well as the original records of the CMA, we agree with the learned counsel for the parties that the evidence of appellant's PW1 and that of the respondent DW1, was not given under oath. ...we find that the omission vitiates the proceedings of the CMA... we order the matter be remitted to the CMA for the Labour Dispute to be heard de novo before another Arbitrator.'*

In the final result, for the reasons stated above, the CMA's proceedings and subsequent award are hereby quashed and set aside. The applicants are at liberty to pursue their right if they still wish to do so.

It is so ordered.

A.K. Rwizile

JUDGE

02.09.2022