IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 515 OF 2020

VICTOR W. MEENA .....1 ST APPELLANT

HALIDINI H. SARAKIKYA ..... 2ND APPELLANT

VERSUS

ARUSHA TECHNICAL COLLEGE ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division at Arusha)

(Mzuna, J.)

Dated the 20th day of February, 2020

in

Revision No. 61 of 2017

JUDGMENT OF THE COURT

07th & 21st February, 2024

MGEYEKWA, J.A.

The appellants, Victor W. Meena and Haladini H. Sarakikya, challenged the award of the Commission for Mediation and Arbitration ("the CMA") before the High Court of Tanzania at Arusha in Revision No. 61 of 2017. In that decision, the High Court allowed the revision by the respondent against the award of the CMA dated 20th April, 2017, which

held that the respondent's termination from employment was substantively and procedurally unfair and ordered the reinstatements of the appellants.

The facts from which this appeal arise is the employment relationship between the appellants and the respondent. The appellants were employed by the respondent as Assistant Lecturers at different times through employment contracts for specific renewable terms. The first appellant was employed as an Education Officer Engineering grade IV on 29th June, 2000. The second appellant was employed as an Education Officer Electrical Engineering grade I on 1st September 2006. In August, 2013, the appellants were granted study leave to pursue their PhD studies in the Republic of Kenya. However, there were some complaints concerning the conducts of appellants by the respondent, following investigation, the appellants were terminated from employment on 25th June, 2015. Aggrieved by the respondent's decision, the appellants successfully referred the matter to the CMA *vide* Labour Dispute No. CMA/ARS/ARB/ 114/2015 claiming that their employments were unfairly terminated and prayed for orders of reinstatement, payment of all remunerations, and terminal benefits. The matter was heard at the CMA and eventually it found that the termination was both substantively and procedurally unfair.

Consequently, the CMA ordered the appellants to be reinstated to their employment from the date of their termination without loss of remuneration during their absence from work.

Being aggrieved by the CMA decision, the respondent challenged the CMA award before the High Court. In its judgment, the High Court agreed with the CMA's findings that there were no valid reasons for terminating the appellants' employment. The court further concurred with the CMA's findings that the termination was substantively and procedurally unfair. So far as the award is concerned, the High Court vacated the order of reinstatement on the reason that, promotion of harmony at the work place is not the best option due to the nature of the community. In the place of reinstatement, the High Court ordered the respondent to pay the appellants compensation of 12 months remuneration. Apart from reversing the award of reinstatement, it granted the respondent's Labour Revision No. 61 of 2019 and terminated the appellants from employment.

Dissatisfied, the appellants have preferred the instant appeal to the Court seeking to assail the decision of the High Court on five grounds, however, at the hearing the appellant abandoned the third and fourth grounds of appeal leaving grounds one, two and five. The three grounds of

grievance are re-arranged and paraphrased as follows; **One** that, the Honourable High Court Judge erred in law for purporting to interpret Revision Application No. 61 of 2017 to be an Appeal No. 61 of 2017 which occasioned injustices to the appellants; **two** that, the Honourable High Court Judge erred in law for substituting the CMA Arbitrator's reinstatement award to one for compensation of 12 months' salary in lieu thereof without; giving reasons and taking into account that the given order would deny justice on the part of the appellants; **three** that, the High Court Judge erred in law for failing to comply with the law by not ordering payment of remuneration of the appellants for all the period when they were out of work due to the unfair termination.

At the hearing of the appeal before us, the appellants enlisted the legal representation of Mr. Jacob Malick, learned counsel, while the respondent was represented by Mr. Deodatus Nyoni, Principal State Attorney, assisted by Ms. Jacquiline Kinyasi, learned State Attorney.

Before elaborating on the written submissions in support and against the appeal, for clarity, we invited Mr. Nyoni to address the Court on the gist of the cross-appeal, which was lodged on 1st June 2020. Upon reflection Mr. Nyoni, expressed the respondent's intention of abandoning

the cross-appeal. Therefore, he prayed to withdraw it; his uncontested prayer was granted. That means, in the matter at hand, the respondent is not challenging the CMA decision and that of the High Court that the appellants' termination of employment was both substantively and procedurally unfair.

Mr. Malick filed a written submission on 28th December, 2020 in support of the appeal. The appellants' written submissions was countered by the respondent through her written submissions in reply filed on 30th July, 2020. The same were respectively adopted by both parties.

On taking the floor, on the first ground of the appeal, the learned counsel sought to fault the learned Judge for purporting to interpret the Revision Application No.61 of 2017 as Appeal No. 61 of 2017, which occasioned injustice to the appellants. The learned counsel contended that the appellant filed an Application for Revision at the High Court of Tanzania (Labour Division) at Arusha which was registered as Revision No. 61 of 2017. Mr. Malick further asserted that, astonishingly, the learned High Court Judge termed the revision as an appeal. He contended that there is no provision of the law that confers the High Court with appellate jurisdiction in labour matters. He predicted his submission on the provisions

of sections 91 (1) (a) and (b), 94 (1) (b) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 24 (1) (2) (a) (b) (c) and (f), (3) (a) (b) (c) and (d) and rule 28 (1) (a) (c) (d) (e) of the Labour Court Rules, GN. 106 of 2007. He stressed that the learned High Court Judge erred in terming the revision as an appeal; as a result, he proceeded to substitute the CMA award of reinstatement and replaced it with compensation of 12 months' salaries.

On the second and fifth grounds of appeal, Mr. Malick contended that since the appellants' termination of employment was substantively and procedurally unfair, the Court had an option to order reinstatement. However, it was his view that in accordance with rule 32 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2007, there are some exceptions where the Court cannot order reinstatement. Fortunately, the appellants do not fall under the requirement of rule 32 of GN. 67 of 2007.

With regard to the award, the learned counsel had a serious contest on this issue; he faulted the High Court Judge for reversing the CMA award of reinstatement by replacing it with an award of compensation of 12 months of remunerations without any other entitlements. Mr. Malick

clarified that the CMA, in awarding the appellants, adhered to section 40 (1) (a) of ELRA by ordering the respondent to reinstate the appellants. With regard to whether or not it was proper for the High Court to change the award of the CMA, Mr. Malick contended that the High Court erred in awarding the appellants compensation of 12 months' remuneration. To reinforce this argument, the learned counsel cited the case of **Xstrata South Africa (PTW) Ltd v. Masha and others** (2016) JA 4/15 (LAC) Labour Appeal Court of South Africa, where the Court held that the word 'shall' in section 32 is used in mandatory terms to mean it is a compulsory requirement where the Court cannot order reinstatement.

Mr. Malick, in his oral submission, was sure that, as long as the appellant's termination was substantively and procedurally unfair, the appellants deserved to be reinstated without losing their salaries. In his view, the compensation was far beyond the actual award. In the same vein, he urged us to allow the appeal, set aside the High Court award of compensation of 12 months remuneration, and uphold the CMA award of reinstatement. In alternative, he urged the Court to order the respondent to comply with section 40 (3) of ELRA in case, he will not reinstate the appellants.

On the opposite side, Mr. Nyoni adopted the same style of submission as done by Mr. Malick. He started to argue the first ground by stating that the High Court did not sit as a first appellate court because the case citation reads Revision Application. He contended that, although the learned High Court Judge, in his judgment, referred to the matter as an appeal/revision instead of revision only, the error was minor; it did not go to the root of the case. He clarified that the impugned decision clearly shows that the High Court Judge treated the matter as a revision. Therefore, in his view, the purported mistake did not mean that the High Court Judge dealt with an appeal instead of a revision. He went on to cement his argument that instead of faulting the whole judgment, a slip of pen can be cured under section 96 of the Civil Procedure Code, Cap. 33 (the CPC).

Submitting on the second and fifth grounds from the outset, Mr. Nyoni defended the High Court decision as sound and reasoned. He contended that the appellants' counsel conception is baseless for failure to understand the reasoning and holding of the High Court. Concerning the award, he defended the High Court award as fair and sound. He asserted that the leaned Judge was correct to award compensation to the appellants

since the three reliefs were not conjunctive but separate. He submitted that in his holding, the learned Judge relied on rule 40 (1) (a) of ELRA, and considered the three reliefs in awarding the appellants for unfair termination. He submitted that the respondent could not compensate them when the CMA or High Court opted to reinstate them. He argued that the High Court gave reasons for reversing the CMA award. To buttress his submission, he referred us to page 553 of the record of appeal. He stated that the High Court Judge found that, in order promote harmony at the workplace, it was better to award the appellants compensation of 12 months' remuneration instead of reinstatement. When we probed him on the issue of relief, Mr. Nyoni contended that the High Court had the discretion to substitute the relief, and each relief stands alone. Mr. Nyoni bolstered his argument with the unreported decision of this Court in **Charles Mwita Siaga v National Microfinance Bank PLC** (Civil Appeal No. 112 of 2017) [2022] TZCA 227 (29 April 2022) TanzLII and **Eliya Kasalile & Another v. The Institute of Social Work** (Civil Appeal No. 145 of 2016 [2018] TZCA 364 (4 April 2018) TanzLII. The learned Principal State Attorney concluded by imploring the Court to dismiss the appeal for being destitute of merit.

In his rejoinder, Mr. Malick reiterated his submission in chief. He distinguished the cited case of **Kasalile** (supra) from the case at hand and argued that section 40 (1) (a) of ELRA clearly states that compensation is not the basic payment but additional to other primary entitlements. He stressed that the learned Judge did not state reasons for reversing the CMA award. Regarding the issue of clerical mistakes, it was his stance that it is not a clerical mistake because the High Court Judge, at the beginning of his judgment, wrote an appeal/revision, which cannot mean it was a revision. Ending, he urged us to allow the appeal.

We have considered the written and oral submissions by both learned counsel. The grounds of appeal shall be determined in the same manner and style adopted by both learned counsel in their arguments, that is, by determining the first, second, and fifth grounds of appeal in that order.

On ground one, the appellants faulted the learned High Court Judge for purporting to interpret the Revision Application No. 61 of 2017 as an Appeal. In his view, the omission occasioned injustice to the appellants. On his part, Mr. Nyoni admittedly, noted the said error made by the High Court Judge. However, he took a different swipe; he termed the said error as a slip of a pen, which can be rectified under the provision of section 96 of

the CPC by ordering the deletion of the word 'appeal' and replacing the same with the word 'revision.'

The record is plain that, the High Court Judge, at the beginning of his judgment, started by introducing the matter as an appeal/revision although the case citation before the High Court was referred to a 'Revision Application No. 61 of 2017'. According to Blacks' Law Dictionary "a clerical error" means "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (See - Blacks' Law Dictionary, Ninth Edition Bryan A. Garner at page 622). This implies that for an error to be clerical, it must be minor and should not go to the root of the court's decision or affect the substance of the judgment, decree, or court order. As rightly submitted by Mr. Nyoni, the appellants' complaint can be rectified by using the slip rule under section 96 of the CPC. This section confers the court powers to correct any slip or accidental errors arising in its proceedings, judgment, order and decree, so as to give effect to the manifest intention of the court. In **Jewels and Antiques (T) Ltd v. National Shipping Agencies Co Ltd** [1994] TLR 107 and **Sebastian Stephen Minja v. Tanzania Harbours Authority**, Civil Application No.

107 of 2000 (unreported). In **Jewels and Antiques (T) Ltd** (supra), the Court considered the circumstances under which the slip rule can be applied. The Court stated that:

> *"The slip rule under section 96 of the CPC is applied to correct clerical mistakes and accidental slip or omission by the judicial officers of the Court in Judgement, decree or orders."*

The importance of section 96 of the CPC is based on two important principles; (i) an act of the Court should not prejudice any party. See the Indian case of **Bishnu Charan Das v. Dhan Biswal**, AIR 1977 ORI 68 (69) and; (ii) it is the duty of the courts to see that their records are true and present a correct state of affairs.

In the same vain, in **Sebastian Stephen Minja** (supra), we stated that:

> *"...The Court can correct a clerical mistake such as where the word "from" instead of the intended word "for" had been written, or an arithmetical mistake such as the figure "108" instead of the intended figure "180" appearing in the judgment.* ***It can also correct an error arising from an accidental, that***

> ***is to say, unintended, slip or omission.*** *For example, if the Court intended to say "we allow the appeal" but by a slip of the pen wrote "We dismiss the appeal."* ***The word "dismiss" was not intended and is wholly inconsistent with the reasoning in the judgment."*** *[Emphasis added].*

The bolded expression justifies that the accidental slip in the present appeal is inconsistent with the reasoning of the High Court Judge. The clarification and or correction of the said accidental error is apparent from the High Court judgment. Unlike the learned counsel for the appellants, we have found that the error is a result of an oversight; it does not change the substance of the judgment. Had it been a mistake arising from the Court's misunderstanding of the law, then the slip rule could not apply. We have perused the whole judgment and noted that it is plain that the learned High Court Judge, at the end of his judgment, proceeded to revise the decision of the CMA and issued orders, which implies that the learned Judge of High Court dealt with revision, not otherwise. We, therefore, find the shortcoming to be trivial; this was a slip of a pen or accidental error, which is curable. The Court has jurisdiction to rectify the said error as we hereby do.

The second and fifth grounds assails the High Court's compensation award. The issue in controversy which calls for our painstaking consideration is *whether or not reinstatement can be substituted with an order of compensation.* The law relevant to remedies of unfair termination of employment is contained in section 40 (1) (a) (b) and (c) of the ELRA. For easy reference, we undertake to reproduce it hereunder. It reads:

> *"40 -(1) 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; or*
>
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
>
> *(c) to pay compensation to the employee of not less than twelve months remuneration."*

Given the above position of the law, it is plain that, the tenor and import of section 40 (1) (a) of ELRA, is that reinstatement can only be ordered if the termination was both substantively and procedurally unfair.

In **Magnus K. Laurean v. Tanzania Breweries Limited**, Civil Appeal No. 25 of 2018 (unreported), we held as follows:

> *"...if the termination is held to be both substantively and procedurally unfair, it will be fitting to order reinstatement without loss of remuneration unless there are justifiable grounds for not doing so in terms of Rule 32 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, G.N. 67 of 2007 ("the Guidelines Rules")."*

From the record, there is no dispute that in the CMA Form No. 1, the respondents complained that they were unfairly terminated and sought, among other reliefs, an order of reinstatement. Again, there is no dispute that the High Court found that the termination of the appellants was substantially and procedurally unfair. Under section 40 (1) of the ELRA, reinstatement to employment is one of the remedies that an employee may be granted when the Arbitrator or the Labour Court finds that the employee was unfairly terminated from his employment.

Apart from reinstatement, the Arbitrator or the Labour Court can order the employer to reengage the employee or order payment of compensation of not less than 12 months remuneration. On that, we

cannot fault the High Court Judge who exercised his power under section 40 (1) (c) of ELRA by ordering payment of compensation of 12 months remuneration. However, we disagree with the learned Judge's findings and Mr. Nyoni's contention for awarding the appellants the relief of compensation only. Mr. Nyoni's submission collapsed in the face of the law because, in accordance with section 40 (2) of the ELRA, the relief of compensation of twelve (12) months remuneration does not stand alone; it is an addition to other entitlements in terms of any law or agreement. Therefore, the High Court's reversal order was improper because it failed to include other basic benefits.

All said and done, we allow the second and third grounds of appeal and proceed to make the following orders; **one**, we nullify the High Court's order of termination. **Two**, we substitute the award of compensation as ordered by the High Court by replacing it with reinstatement. Therefore, we ultimately order the respondent to reinstate the appellants without loss of remuneration from the date of unfair termination to the date of reinstatement. In case the employer cannot reinstate the appellants, it should abide by the conditions stipulated under rule 40 (3) of ELRA.

In the upshot, appeal is allowed to the extent shown above. This being a labour-related matter, we make no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 21st day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL