IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

LABOUR REVISION NO. 27 OF 2020

(Arising from Labour Dispute No. CMA/TAB/MED/62/2018)

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....APPLICANT

AND

MRISHO ABDALLAH

JOHN MBWAMBO

VICENT W. BWAFUMBA .....**RESPONDENTS**

YOHANESS YUDA

LUCASI LUNGWILA

RULING

Date: 8/6/2021 -16/7/2021

BAHATI,J.:

The applicant **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED (TANESCO)** filed this application seeking revision and setting aside the award made by the Commission for Mediation and Arbitration (CMA) at Tabora in Dispute No. CMA/TAB /Med /62 /2018 by Hon. Abdallah, M dated 15th July 2020. The applicant moved this court by way of chamber

summons supported with an affidavit deposed by Juliana William, the counsel for the applicant.

The application is made under sections 91 (1) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by Section 14 (b) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2010 and Rule 24 (1), 24 (2) (a), (f) and 24 (3) (a),(b),(c), (d) and Rule 28 (1) (a), (c), (d), (e), (f) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 any other enabling provisions of the law.

A brief account of the background of the matter subject of the current application to facilitate better appreciation of the merit or otherwise of the application is that the respondents Mrisho Abdallah, John Mbwambo, Vicent Bwafumba, Yohanes Yuda and Lukas Lugwila were employed by TANESCO on 1st September 2008 as drivers whereas some of them were stationed at Tabora and others at Nzega until when they were terminated from employment on 25th April 2018. They were all terminated due to the countrywide crackdown on the unqualified employees in the civil service of Tanzania who were wrongly employed without the qualifying minimum academic criteria of form four certificates. After notice of termination, the Applicant paid them all their dues which include salary for twenty-five (25) days worked in April 2018 amounting to TZS 832,254/= for each of them, one month salary instead of notice which is TZS 932, 125/= for each of them and accrued leave totalling TZS 932,932,125/= for each of them. In addition, the

respondents who were recruited from outside Tabora were paid repatriation fees depending on the place of domicile for them and their respective dependants and severance pay.

The respondents filed a complaint to the CMA where they were awarded the claimed award.

Dissatisfied with the CMA's award, the applicant filed the present application for revision to set aside the award made by the subject CMA that;

i. *The Commission had no jurisdiction to entertain the dispute as the same was filed prematurely.*
ii. *The arbitrator erred in law and fact by awarding repatriation expenses and subsistence allowance to the respondent while the same was not claimed in CMA Form No. 1.*
iii. *The arbitrator erred in law and fact by awarding repatriation expenses and an exorbitant amount of subsistence allowances without justification.*
iv. *The arbitrator erred in law and fact by ordering the applicant to pay the respondent's salary for 25 days worked in April 2018 while the same was already paid.*
v. *The arbitrator failed to consider the applicant's evidence tendered, so delivered an erroneous award.*

vi. *The arbitrator failed to consider the points raised by the applicant in his final submission hence delivered an erroneous award.*

The matter before this court was argued orally where the applicant was represented by; Ms. Juliana William, learned counsel for the applicant, and Mr.Lucas Ndanga, learned counsel appeared for the respondents.

The counsel for the applicant prayed to this court to adopt the affidavit as part of her submissions. Submitting on the legal issues, the counsel stated that the Commission had no jurisdiction to entertain the dispute as the same was filed prematurely. She strongly submitted further that the dispute was filed by the respondents who were public servants employed by TANESCO. She asserted that TANESCO is a public institution in which the government entity owns 100% shares and its employees are public servants. Since the respondents are public employees, they had to exhaust all remedies internally before going to the CMA.

She prayed to this court to consider and verify if this Commission had jurisdiction. The Counsel for the applicant also contended that section 3 of the Public Service Act, Cap.289 defines who a public servant is. Similarly, TANESCO is an institution that delivers service, for that matter, it is a public service.

She further submitted that as public servants, the respondents were supposed to exhaust internal remedies as provided under section 32 (A) of the Public Service Act through the Written Laws and Misc. Amendment Act, No.3 of 2016 which imposed such mandatory requirements. The section provides that;

> *"Public servant shall prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under the Act."*

Therefore, according to her, all disputes concerning public servants are supposed to be dealt with in a manner prescribed in the Public Service Act, Cap. 289[R.E 2019]

To bolster her argument she cited a case of the **Board of Trustees of PSPF Vs Jalia Mayanja Revision No. 248 of 2017 Civil (Unreported)** in which it was held that CMA had no jurisdiction to determine a matter where the complainant is a public servant. Similarly, in **Benezer David Mwampombe Mwangombe Vs the Board of Trustee 2018 Misc. Application No.380 of 2018 (Unreported)** court stated that;

> *"Despite the fact that the labour laws cater for disputes between employers and employee relations as a general rule there is specific or special law governing a certain category of employer relationships like the government and public servants as it is, in this case, the specific law should prevail."*

She went on submitting that section 32(A) of the Public Service Act, Cap. 289 as amended stresses public servants before going to other laws to exhaust all remedies. Likewise in the Employment and Labour Relations Act, Cap. 366 the amendment added to section 34 (A) of the Public Service Act provides that where there is inconsistency, the Public Service Act provisions shall prevail. Therefore, it was the requirement for respondents to adhere before instituting the CMA.

Regarding the second issue, she submitted that the arbitrator erred in law and fact by awarding repatriation expenses and subsistence allowances to the respondents while the same was not claimed in CMA form No. 1.

The counsel for the applicant submitted that it is true that CMA Form No. 1 is the one that initiates a dispute like in a plaint and whatever is claimed should be explained in CMA form No. 1. She submitted that in this dispute the respondents did not fill form No. 1 to indicate any claims of subsistence allowance, salary arrears, or repatriation. She contended further that to her surprise, the arbitrator initiated *suo moto* for the employer to pay for the claims that were not claimed for and this was not deliberated thoroughly during the hearing of the claims.

She in addition argued that it was the duty of the respondents to prove those claims. Nevertheless, since there was no proof whatsoever it is her view that the arbitrator acted contrary to the law and the CMA decision

should thus be quashed. To support her stance she cited the case of **Shirika la Usafiri DSM Vs. Victor Alfred Milangi, Revision No. 674 of 2019** (unreported) where it was held that;

> *"As it was held in several cases parties are bound by their pleadings and judges or arbitrators are not supposed to decide on claims which were not pleaded by the parties".*

She stressed that such claims which had not been prayed for in form No.1 were not right for the Commission to act on them. For that reason, the prayers were not pleaded and there was no evidence to back them up. The CMA accordingly erred, and she consequently prayed for the revision to rectify such unjust award by quashing and/or setting it aside.

On the 3rd issue, she submitted that the Arbitrator erred in law and fact by awarding the respondents' repatriation expenses and an exorbitant amount of subsistence allowances without any justification.

She submitted that the arbitrator ordered the applicant to pay without considering that other employees were recruited in Tabora. To her, there were no justifications for them to be paid an aggregate of TZS 25,167,375/= without any proof. She further submitted that there is no explanation on how long they have waited for the payment. She also submitted that those facts would assist the Commission to arrive at the correct decision. She cited the case of **Elidhiaha Fadhili and Others Vs**

The Executive Director Mbeya District Council, Civil Appeal No. 24 of 2014 where the court held that;

> *"In our view, we do not doubt that the appellant was entitled to repatriation and subsistence allowance up to the date of repatriation. From the evidence on record, this appears to be common ground. The burden of proof was then on him to prove what the applicable* rate was."

It was the burden of proof to prove the applicable rate. There is nowhere stated by the respondents rather the arbitrator decided without justification. Similarly in **Juma Akida Suchagor Vs. SBC Tanzania Ltd Civil Appeal No.7 of 2019** subsistence allowance and repatriation fees must be defended before the CMA because his evidence shows that he never said any in that regard.

Worse enough, according to her, the CMA did not deliberate nor make any opinion on this point and the record is silent. As this matter at hand, there is nowhere in the evidence the claims by the respondents. It was not part of their evidence. Also in **Tanzania Electric Supply Co.Ltd V Vs Pascalis Bandikubi (Labour Revision No. 27 of 2020), (Unreported)** the witness in the CMA testified and the Commission admitted as identification No.1 and No.2 which supported the evidence of the applicant.

As to the 4th issue, she submitted that the arbitrator erred in law and fact by ordering the applicant to pay the respondents's salary for 25 days worked in 2018. The applicant explained and testified in the Commission; had the Commission followed the evidence given it would have not concluded that the payment was done. The applicant paid the respondents on 12/6/2018 where they were terminated on 24/4/2018. She submitted that it was only one month and 17 days only. The figure could not have reached such an amount while there is no justification for such payment of TZS. 25,000,000/= to the respondents.

Therefore she submitted that since the CMA had no jurisdiction this decision should be quashed, and if this court finds it otherwise that it had jurisdiction it should revise the CMA's award to the extent of the part of the payment which is not just and other orders it thinks fit.

In response, Mr. Ndanga the counsel for the respondent objected to what was submitted by the applicant. He contended that the dispute has been caused by the applicant. Also on the issue of payment; he asserted that the Commission inquired from the applicant about the payments vouchers but she never gave any evidence nor did she show the signature of the employees in acknowledgment of their respective payments.

In respect of jurisdiction; the counsel for the respondents submitted that Article 107 (A) of the Constitution of the United Republic

of Tanzania Cap.2 provides that the Commission had jurisdiction to hear the matter. He also cited Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 calling for the Court not to be bound by technicalities.

He contended that the applicant has cited the Public Service Act, Cap. 289 nevertheless the CMA is one of the institutions which has been established by law. Indeed, to him, the decision of the judge does not overrule the laws of the country. He submitted to this court that the respondents are here for justice but not which laws apply. He reiterated his submission that the CMA had jurisdiction to determine the matter.

On the second ground of application, he submitted that the CMA as a tribunal used its discretionary power or *suo motto* to give the claimed amount and suggested that it did not go beyond any law and/or no laws were contravened. He maintained that TZS.25,000,000/= awarded should be confirmed to the respondents.

The counsel for the respondent also submitted that the applicant cited a lot of cases which are distinguishable from the matter under discussion. To him, the applicant never submitted any document to back up her allegations before this court.

On the fifth and sixth grounds, he submitted that he was surprised that TANESCO which is a big institution should maintain records but the applicant had no records to support its averments. He prayed to this

court that the respondents be paid accordingly and be re-reinstated in their position.

In a short rejoinder, the counsel for the applicant reiterated her submissions in chief that the payments were paid soon after termination.

She conceded that the respondents were not informed of their payments but they received the money through their bank accounts. Since termination was fair, the respondents agreed on the award. She prayed this court to allow the application.

Having objectively considered the arguments submitted by the parties, Court Records, and relevant labour laws I find the Court is called upon to determine whether the application has merit.

I do not think the determination of this matter will detain me for long since after going through the court record; I shall dispose of the application on the ground regarding jurisdiction. It is pertinent, in my firm view, that the first ground if properly addressed suffices to dispose of the application. Undisputable in this matter, is the fact that the applicant has raised the issue of premature filing of the complaint to CMA by the respondents before exhausting the remedies available under the law.

According to Section 3 of the Public Service Act, Cap.289 a public servant means a person holding or acting in a public service office.

Similarly, under section 26 of the Written Laws (Miscellaneous Amendment) Act, No.3 of 2016, the Public Service Act, Cap. 289 was amended by adding Section 32A provides that;

> *" A public servant shall, before seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act. "*

As correctly submitted by the applicant's Counsel the issue of jurisdiction is the bedrock of the court's power to entertain any dispute before it. I believe that jurisdiction is a fundamental matter to be considered by a Judge or Magistrate before hearing any matter. Before assuming powers to entertain any matter, courts and quasi-judicial bodies are supposed to ensure that they have the requisite jurisdiction to do so. Jurisdiction is a creature of statutes. In **Shyam Thanki and Others v. New Palace Hotel** [1972] HCD **No. 92**, it was held that:

> *"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

I am also bound by the decision of the Court of Appeal in **Tanzania Revenue Authority vs Tango Transport Company Ltd, Civil Appeal No. 84 of 2009 (unreported)** the Court stated;

> *"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests".*

As stated in many cases the issue of jurisdiction can be raised at any stage of the case even at the appellate jurisdiction. In this matter, the applicant's Counsel raised the issue of jurisdiction of the CMA that the respondents were employed by TANESCO; a public institution.

The law under the Written Laws, Miscellaneous Amendment Act, No 3 of 2016, is clear in so far as the mechanism for settlement of employment disputes in public service. All remedies provided under the Public service Act must be sought first before resorting to any other recourses.

Again, this position was also restated in the case of ***Asseli Shewally vs Muheza District Council*** Labour Revision **No. 6 of 2018 HC Tanga (Unreported)** where he observed that I quote;

"Indeed it is the law that after exhausting all remedies as provided under the Public Service Act, a party shall have a right to seek remedies provided for under the labour laws. The law is however extraneous and it subjects the parties to inconveniences. As the exhaustion of the remedies under the Public Service Act results in the final decision, the CMA is not entitled to admit and determine the matter previously determined by the President of the United Republic of Tanzania."

Guided by the above principle, I am in accord with the assertion made by the learned brother Mkasimongwa J in the decision cited above

that, the procedure under section 32A of the Public Service Act, Cap.298 entails Public servants to exhaust all remedies under the laws governing public servants.

The public Service Act under section 25(1) (d) provides that;

> *"Where a public servant is aggrieved with any decision, shall appeal to the President."*

In the matter at hand, the record shows that this dispute was instituted at CMA by the respondents who were public servants employed under the permanent basis by TANESCO, a public entity. Also in his submission, the respondent's Counsel has conceded that although the respondents were public servants the court should do away with legal technicalities to attain substantive justice.

Applying the principle laid down in the case of **Benezer David, Supra,** the respondents being public servants had no other option than to fully utilize all remedies available under the Public service Act before exploring other avenues for dispute settlement.

It is my respectful view that the Commission for Mediation and Arbitration has no jurisdiction to entertain labour disputes concerning a public servant as a proper forum for that is the one which has been provided for by the Public Service Act, Cap 289[R.E. 2019].

I am aware that while entertaining labour matters, the court should do away with the legal technicalities, but as said earlier I am at per with the decision of the Court of Appeal in Tanzania **Revenue Authority vs**

Tango Transport Company Ltd, Civil Appeal No. 84 of 2009 (unreported) that:

> *"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests."*

Also, this court had the opportunity to consider section 32A of the Public Service Act, Cap 289 where the respondent filed a direct dispute at Commission for Mediation and Arbitration in the case of ***Tanzania National Roads Agency Vs Godo Ramadhani Biwi [2020] TZLC 14*** and held that;

> *"It is obvious that labour dispute number CMA/PWN/KBH /14/2018 was determined without jurisdiction. Any matter that is adjudicated without jurisdiction ought to be quashed. Accordingly, proceedings in labour dispute. No. CMA/PWN/KBH/14/2018 is quashed and award is set aside."*

In this regard the jurisdiction of any court is basic; it goes to the very root of the authority of the court to adjudicate upon cases of different nature. I am of the firm view that the respondents instituted the labour dispute pre-maturely before exhausting the remedies under the Public Service Ac, Cap 289.

As this ground disposes of the application, I won't adjudicate upon the remaining grounds of the application.

In the event, for the reasons stated herein, I nullify the proceedings before CMA and quash its award thereto. If the respondents still wish, they may seek appropriate remedies provided under the Public Service Act, subject to a limitation period, if any.

Order accordingly.

A. A. BAHATI

JUDGE

16/07/2021

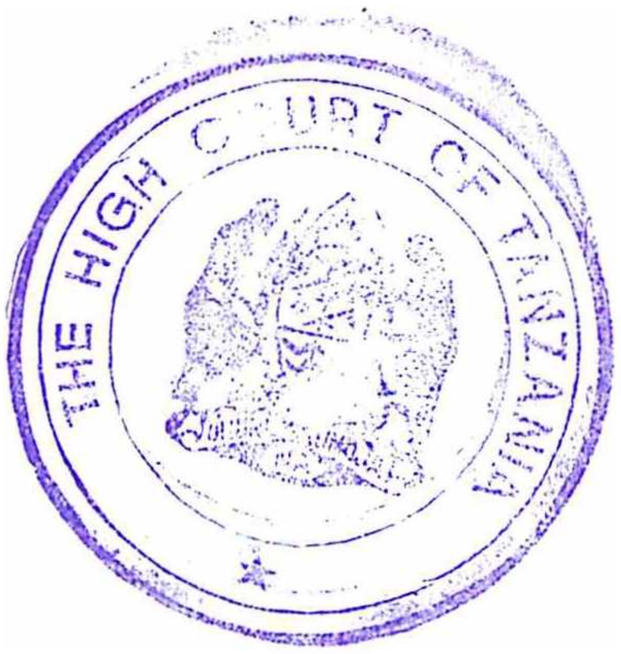
Ruling delivered under my hand and seal of the court in the chamber, this 16th day July, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

16/07/2021

Right of appeal +-fully explained.



A. A. BAHATI

JUDGE

16/07/2021