

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

REVISION NO. 893 OF 2018

BETWEEN

KASINGA HIGH SCHOOLAPPLICANT

VERSUS

NEEMA JORAM AND 3 OTHERS..... RESPONDENTS

JUDGMENT

Date of the Last Order: 03/08/2020

Date of the Judgment: 04/09/2020

A. E. MWIPOPO, J.

The applicant in this Revision Application namely Kasinga High School was aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) in the labour dispute no. CMA/PWN/KBH/680/2016 dated 05/11/2018. The Commission awarded the respondents namely Neema Joram, Joseph Abel Mbilinyi and Joseph Pasiano Tarimo a total of shillings 8,923,076 being compensation for 3 months and 11 days salaries for breach of employment contract and one month salary in lieu of leave. The applicant is praying for the following orders of the Court;

1. That the Court be pleased to call, examine and revise the award of the CMA dated 05/11/2018, which was issued by Hon. E. Tibenda, Arbitrator.
2. That the Court be pleased to quash the award as the respondents filed the matter before the Commission out of time but the Mediator condoned them without justifiable reason.
3. That the CMA Form No. 1 was not properly filed as it shows that the respondents were terminated while it was a breach of contract.
4. That the Court be pleased to issue an order quashing the said award as the Arbitrator acted in excess of jurisdiction illegally and with material irregularity.
5. Any other relief this Court deem fit and just to grant.

The application is supported by the affidavit of Kagoma Mnyika, Principal Officer of the applicant. The applicant have three grounds of revision as contained in paragraph 6 of the affidavit. The grounds of revision are as follows hereunder;

- i. That the Commission for Mediation and Arbitration has acted in exercise of its jurisdiction illegally and with material irregularities for granting condonation to the respondent without justified reason.
- ii. That the Arbitrator has acted in exercise of its jurisdiction illegally and with material irregularities as she framed the issue which was not framed by the parties.
- iii. That the Arbitrator improperly procured the said award.

Both parties to the dispute were represented, Advocate Thomas Chubwa appeared for the applicant whereas Advocate Emmanuel Fungo Ngala appeared for the Respondents. The application was disposed by way of written submissions.

The counsel for the applicant submitted in support of all grounds of the revision as stated in the affidavit. Regarding the first ground of revision, it was submitted that the Mediator condoned the application which was referred to the Commission out of time without justifiable reasons. The respondents delayed to file their dispute before the Commission for 26 days without indicating the reason for the delay, but the Mediator condoned them. The Court of appeal had a similar view in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Case No. 2 of 2010, (Unreported), where it was held that:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But, the discretion is judicial and so must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily."

The applicant prayed for the Court to take the same position in the present application.

Then, the counsel for the applicant proceeded to submit on the second ground of revision that the CMA Form No. 1 shows that the respondents were terminated from employment by the applicant. However, the Arbitrator held that respondent were claiming for the breach of contract. The Form No. 1 which is the same as the plaint thus by framing issue outside the CMA Form No. 1 is illegality and irregular. The Arbitrator was not supposed to change what is in the CMA Form No. 1.

The last ground of the revision is that the Arbitrator improperly procured the said award. Submitting on the ground, the counsel for the

applicant stated that the dispute before the Commission shows that the Complainants were Neema Joram and 3 others, however, the award and other documents shows that there are 3 complainants namely Neema Joram, Joseph Abel Mbilinyi and Joachim Pasiani Tarimo. Thus the Award is illegally procured for omitting one respondent. The applicant prayed for the revision application to be allowed.

Replying to the applicant submission, the counsel for the respondent stated that the submission is against the revision for the CMA award delivered on 08/11/2018 by Hon. E. Tibenda, the Arbitrator, together with its correction in the dispute No. CMA/PWN/KBH/680/2016. The counsel submitted on the first ground of revision as submitted by the applicant that the respondents were condoned by the Commission through the CMA ruling dated 22/04/2016. The main reason being the promise by the applicant made through termination letter dated 20/12/2015 that the respondents will be paid their terminal dues. The respondents were reasonably condoned because of promissory estoppel. The respondents believed the letter from the applicant that they will be paid and the matter will be settled hence they keeping following without being paid. To support the position the respondent cited the case of **Messi Rogers Kimei vs. Motel Sea View**, Revision No. 14 of 2013, High Court Labour Division, at Dar Es Salaam, (Unreported).

It was submitted by the counsel for the respondents on the Applicant's second ground of revision that the act of Arbitrator to change the respondent prayers in CMA Form No. 1 was in line of justice as it was the Arbitrator's discretion. What was awarded by the Arbitrator was justly and fair depending on the circumstances of this case.

On the submission by the applicant in the last ground that the award was procured illegally for the reason that the fourth respondent was not mentioned in the award, the counsel for the respondents submitted that this is baseless as the error is curable under Section 90 of the Employment and Labour Relations Act, Act No. 6 of 2004. The content of the Award together with its correction makes reference to three applicants though in the title it is titled Neema Joram and 3 others. This is curable and does not prejudice the right of applicant in any way. The respondents prayed for the Court to dismiss the application.

The applicant did not file rejoinder submission.

The issues for determination arising from the submissions are as follows hereunder:

1. Whether the Commission condoned the labour dispute before it without sufficient reasons.
2. Whether the trial arbitrator framed issues outside the scope of pleadings and evidence adduced by the parties.
3. Whether the Commission Award was procured illegally for omitting one respondent (Complainant before the CMA) appearing in the title.

In determination of the first issue, Rule 10 (2) of Labour Institutions (Mediation and Arbitration) Guidelines, G.N. No. 64 of 2007 provides for the time limit for filing any dispute other than dispute for termination of employment. The rule reads as follows, I quote;

10.-(2) All other disputes must be referred to the Commission within sixty days from the date when dispute arise.

However, the Commission for Mediation and Arbitration have discretion to condone any failure to comply with time limitation which is provided by the Rules. The law provides in Rule 31 of Labour Institutions (Mediation and Arbitration) Guidelines, GN. 64 of 2007 that;

"31. The Commission may condone any failure to comply with the time frame in these rules on good cause."

It is a trite law that in application for condonation the Commission has discretion to grant or refuse it. The discretion has to be exercised judiciously according to rules of reason and justice. The Court of Appeal in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women Christian Association of Tanzania**, (Supra), held that:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But, the discretion is judicial and so must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily."

The extension of time may only be granted by the Commission where it has been sufficiently established that the delay was with sufficient or a good cause. (See. **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302 of 2017, Court Of Appeal of Tanzania at Dar Es Salaam). And what amount to sufficient cause was discussed by the Court of Appeal of Tanzania in **Tanga cement Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No.6 of 2001, Court of Appeal of Tanzania, at Tanga, (unreported) where it was held that;

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."

I have read the Commission ruling on application for condonation (Uamuzi Mdogo) by J. C. Lyimo, Mediator dated 22/04/2016. The ruling shows that the reason for condoning the respondents (in the dispute before the CMA the Complainants) is that the delay was caused by the failure of employer to pay respondents terminal benefits as promised. The dispute did arise following the failure of the applicant to pay respondents terminal benefits. Therefore, this ground of revision has no basis as the reason for condonation was provided by the Mediator. I find the answer to the first issue is negative.

The second issue is whether the trial arbitrator framed issues outside the scope of pleadings and evidence adduced by the parties. Rule 24(4) of the Labour Institutions {Mediation and Arbitration} guidelines Rules, GN. No. 67 of 2007 provides that at the conclusion of the opening statement the Arbitrator shall frame issue to narrow down the factual which need to be proved. From the rule, issues are supposed to be framed from the factual need to be proved and not from CMA Form No. 1 only. The CMA typed record shows in page no.2 that the Commission framed three issues for determination. The first issue before the Commission was whether there was valid reason for termination; the second one was whether procedure for termination was fair; and the last one was what was the remedy to each party. Reading the Commission award, I'm of the opinion that the Commission determined the same issues which were framed before the

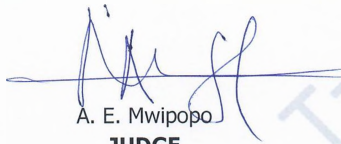
testimony of witnesses. I find the arbitration proceedings before the Commission was done in accordance with the law. The answer to the second issue is negative.

The last issue is whether the Commission Award was procured illegally for omitting one respondent appearing in the title. The Title of the Complaints before the Commission is Neema Joram and Three Others versus Director, Kasinga High School. The title shows that there are four complainants in the dispute before the Commission. Unfortunately, in the Commission award only three Complainants were considered. The Award and other document referred in the award refers three employees namely Neema Joram, Joseph Abel Mbilinyi and Joachim Pasiani Tarimo. The applicant is of the view that the error made the whole award to be illegal. On the other hand the respondent is of the view that the error is curable under section 90 of the Employment and Labour Relations Act, 2004.

I'm of the opinion that the error in the title of the dispute before the Commission that contains four complainants does not make the whole award to be illegal or invalid. This Court under rule 28 (1) (d) of the Labour Court Rules, G.N. No. 106 of 2007, have jurisdiction to revise the Commission Award where there is an error material to the merits of the subject matter involving injustice. Section 90 of the employment and Labour Relations Act, 2004, which was cited by the respondent gives discretion to the Commission to correct any clerical mistake or error arising from any accidental slip or omission. The same does not apply to this Court. In the present application, despite the presence of a clerical error showing that there are four complainants in the dispute before the Commission while they were three, the error did not cause injustice to either party. Thus, I find that the

complainants before the Commission were three as rightly held by the Commission. As a result, this grounds also have no merits.

Therefore, I find all grounds of the revision to have no merits. Accordingly, the revision application is dismissed and the CMA Award is upheld. No order as to cost.

A handwritten signature in blue ink, appearing to read 'A. E. Mwipopo', is written over a horizontal line.

A. E. Mwipopo

JUDGE

04/09/2020