IN THE HIGH COURT OF TANZANIA

[LABOUR DIVISION]

AT SUMBAWANGA

LABOUR REVISION NO. 13 OF 2019

(Originating from the Decision of Hon. Ngaruka, Arbitrator in Labour Dispute No. KTV/CMA/16/2019 dated 30th August, 2019)

KASCO CO. LIMITED ..... APPLICANT

VERSUS

JOHN ABERY .....RESPONDENT

JUDGEMENT

28th July-3rd September 2020

MRANGO, J

This application is made by the applicant, **Kasco Co. Limited** under **Section 91 (1) (a), 91 (b) and 91 (2), 91 (2) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, No .6 of 2004** (herein ELRA) read together with **Rules 24 (1)(2) (3) (11)(c)** and **28 (1) (c) (d) and (e)** and **(2) of the Labour Court Rules, Government Notice No. 106 of 2007** (herein Rules).

The application is supported by the affidavit sworn by Mr. Hafidhi Mohamed, the Principal Officer for the applicant.

The applicant prays for this court to call, examine, the record of all the proceedings of the Commission for Mediation and Arbitration for Katavi at Mpanda (herein CMA) in Labour Dispute with reference No. **KTV/CMA/16/2019** revise it and set aside the said award which, was delivered by Hon. A. Ngaruka, O (Arbitrator) dated on 30.08.2019 with a view to satisfy itself as to legality, propriety, rationality, logical and correctness thereof and any other relief this Honourable court may deem fit to grant.

In opposing the application, the respondent, John Abery defaulted appearance after he was served with the service.

For a better understanding of the essence of this application I find it pertinent to briefly narrate the facts of this matter. It is in record that, the respondent and his fellow were employed by the applicant as labourers on daily basis. John Abery worked with the applicant for the period of 9 months while Hussein Juma worked for 5 months. They alleged that they were unfair terminated by the applicant. Hence each filed/instituted a Labour Dispute No. **KTV/CMA/14/2019** and **KTV/CMA/16/ 2019** at the Commission for Mediation and Arbitration (CMA) for Katavi at Mpanda complaining of unfair termination and discrimination. The CMA consolidated the two disputes into one following the applicant application to join the

same. After hearing of the dispute the CMA entered an award in the favour of the John Abery only after being satisfied that his termination by the applicant was unfair under **section 37 (1) (2) (a) (b) (c) of Employment and Labour Relations Act, of 2004.** The CMA ordered the applicant payment of all benefits for the period under termination, including notice payments, gratuity payment, annual leave payments, compensation, salary arrears and be issued with clean certificates of service.

The applicant was dissatisfied with the award given to the respondent by CMA hence this application for revision.

At the hearing of this application, Mr. Ileth Mawala – learned advocate represented the applicant while the respondent defaulted appearance as he refused to sign summon. Mr. Ileth Mawala prayed for the application to be argued by way of written submission. Mr. Mawala filed written submission as scheduled and ordered by this court.

In support of the application Mr. Ileth Mawala learned advocate for the applicant made his submission in form of answering issues.

As regard to the ground that the award was made with material error as the respondent did not prove his claim against the applicant Mr. Mawala submitted that the main claim of the respondent before the Commission of

Mediation and Arbitration was that in respect of the unpaid allowances which was termed by the Commission as "malimbikizo" and unfair termination, but when the matter was heard in merit the respondent failed to prove his legal dues which went unpaid, in his sworn testimony he testified that the work contract was oral also he said he was employed in a daily basis. Basing on these explained views it was wrong for an arbitrator to conclude that the respondent was unfairly terminated meanwhile he did not prove on the balance of probability.

With regard to overtime claims Mr. Mawala cited the case of **Yaaquub Ismail Enzron versus Mbaraka Bawaziri Filling Station**, Labour Revision No. 33 of 2018, DSM, unreported, where the court held that;

> "The court has considered the claims of overtime and housing allowance and find there is no proof if he was entitled to the said claims"

Mr. Mawala submitted that the respondent did not prove his unfair termination claims and the so called "malimbikizo" before the CMA.

With regard the argument that the CMA made an error for entertaining the matter without giving the parties the certificates which

concluded the failure of mediation, Mr. Mawala submitted that it is the requirement of the law as stipulated under **section 86 (7) (b) (i) of the Employment and Labour Relations Act, 2004** that after failure of mediation the party may refer the dispute to arbitration in practice the reference of the dispute to arbitration is done after the issuance of certificate of failure of mediation something which was not done by the Commission. He added that records does not show that the parties themselves did fill the form of referring the matter to arbitration as it envisaged by **section 86 (7)(b)(i) of the Employment and Labour Relations Act, 2004.**

Mr. Mawala cited the case of **Tanzania Building Works versus Ally Mgomba & 4 Others** LCCD 1 2011-2012 Case No. 103 where the court held that;

> "The practice has been that following failure of mediation, parties when signing Form No. 5 indicate whether they choose to proceed with arbitration or not"

In this dispute he submitted that before the Commission there was no any form that was signed by the parties stating that they are willing to refer the matter to the arbitration stage something which was illegal.

In other words Mr. Mawala added that it is tantamount to say that records of the Commission does not speak for themselves how the dispute reached arbitration stage contrary to what was established in the land mark case of **Edna Pendael Tenga versus Parokia ya Bugando**, Revision No. 19 of 2017 at Mwanza, unreported, Hon Rweyemamu, J as she then was at page 2 noted that;

> "The record does not show how the case commenced what issues were up for arbitration, what evidence were lead and the like. It would appear the parties were only requested to file statement themselves not indicated to be part of the record. In short there was no record of proceedings properly so called"

With regard the ground that the Commission made an error for entertaining the matter specifically on payment arrears which was time barred, Mr. Mawala submitted that claims of unfair termination are required to be referred to the Commission in the period of 30 days according to **Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007**, moreover all other disputes must be referred to the Commission within 60 days according to **Rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules**

GN. No. 64 of 2007 what is illegal in the CMA award is the fact that the respondent was granted the claims which was filed out of statutory time, the so called malimbikizo ya mshahara was filed in 2019 together with the claims of unfair termination, but in his sworn testimony the respondent agreed that he was not paid his full salary since 2017. Therefore since 2017 the claims were time barred and the respondent ought to file the application for condonation (CMA F.2) but that was not done hence rendering the award delivered thereby illegal.

Mr. Mawala submitted further that the issue of delaying in instituting claims was squarely discussed in the case of **Masoud Kondo & 3 Others versus Tanganyika investment Oil Transport LCCD** 1 2011-2012 Case No. 17 where it was held that;

> "The issue of overtime allowance and leave allowance. These claims have to be proved and be claimed in time. There is nothing in evidence as to why they did not claim these as and when they were due. Apart from that there was also no evidence to support their claims. The claims are time barred"

He added that since the respondent admitted himself in his sworn testimony before the Commission that the claims he instituted arose

sometimes in 2017, the same was time barred and he ought to follow the required legal procedure for instituting the same.

As regard the fourth ground, Mr. Mawala submitted that it is established principle of the law that parties have to stick to their pleadings, this principle was established in the celebrated case of **Makori Wassanga versus Joshua (1987) TLR 88** where it was held that;

> "In general, and this is, I think, elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence. He is not permitted to set up a new case."

He said a similar position was cemented in the case of **James Fungengwagilo versus the Attorney General [2004] TLR 161** where the court stated that, the functions of pleadings is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise."

He was of the view that the Commission was supposed to stick to what the respondent pleaded in his CMA. F1 and not otherwise. At the Commission the respondent pleaded Tshs. 4,725,000/=only however the

Commission granted a total of Tshs. 16,577,500/= which was not pleaded in the respondent CMA. F1 something he said is illegal and unfounded.

Finally, Mr. Mawala cited the case **of Cocacola Kwanza Ltd versus Kajeri Misyangi LCCD** 1 2011-2012 Case No. 3 where the court held that, I therefore find that the Arbitrator's award had material irregularity and he erred in awarding the terminal benefits as he did. The award is reversed and it is set aside accordingly, and the application is granted.

I have carefully perused this Court and the CMA records, and duly considered the submissions of both parties in this revision. The issue to be determined by this court is whether the arbitrator properly considered the matter before him in view of the proper interpretation of the law in the available facts.

However, in the course of composing this decision I noted some irregularity in the application. I find it necessary to preface the position of the law which must be observed by parties in application filed to this court where a party is not appearing in person. **Section 56 of the Labour Institution Act No. 7 of 2004** recognizes three agents, an official of a registered trade union or employer's organization, a personal representative of the party's own choice and an advocate. These agents by

virtue of the cited law are required to comply with the law that provide for procedure to institute suit before a labour court.

The procedure for representation is provided under **Rule 43 of the Labour Court Rules GN. No. 106 of 2007**, thus;

> "A representative who acts on behalf of any party in any proceedings shall, by a written notice advice the registrar and all other parties of the following particulars:- (a) the name of the representative (b) the postal address and the place of employment or business; and any available fax number, e-mail and telephone number."

The rationale of this rule is to enable the court and other party to know to whom the service of document can be transacted.

In this application, applicant's advocate was not appointed by the applicant rather he appointed himself. Looking at Form No. 4 notice of representation, I noted the same was signed by the applicant's advocate himself instead of the applicant who appointed him which is procedural irregularity as per the case of **Philomon Lukaija & 10 Others versus Director Mwanza Municipality**, Labour Revision No. 30 of 2014.

With the above in mind, I take no hesitation to hold that this application is incompetent, and I struck it out. And in the interest of justice I give the applicant a chance to file an application according to the law as hinted upon above. The applicant is to file an application within 14 days from today if he wishes to pursue his application on merit.

It is so ordered.

D. E. MRANGO

JUDGE

03.09.2020

Date	-	03.09.2020
Coram	-	Hon. D.E. Mrango – J.
Applicant	}	Absent
Respondent	}	
B/C	-	Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 3rd day of September, 2020 in the absence of the parties - without notice.

Right of appeal explained.

D.E. MRANGO

JUDGE

03.09.2020