IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 123 OF 2022

THE REGISTERED TRUSTEES OF

CHAMAZI ISLAMIC CENTRE..... 1ST APPELLANT

CHAMAZI ISLAMIC CENTRE.....2ND APPELLANT

VERSUS

MOHAMED CHEKI GUNI.....1ST RESPONDENT

SALHA MUSTAPHA CHICHIRI.....2ND RESPONDENT

SANURA ALI MKILALU ..... 3RD RESPONDENT

HAMIDA MOHAMED ..... 4TH RESPONDENT

HADIJA IBRAHIM HAMAD ..... 5TH RESPONDENT

YASIN ALLY KULINDWA ..... 6TH RESPONDENT

SULEIMAN IDRISA TECHUBA ..... 7TH RESPONDENT

ATHUMAN MUSA MBOWETO ..... 8TH RESPONDENT

ALLY ABDALLAH MASALU ..... 9TH RESPONDENT

HUSSEIN JUMA ZUNGIZA ..... 10TH RESPONDENT

HILDA OMAR ALI ..... 11TH RESPONDENT

ZAUJATI NGIMBA ..... 12TH RESPONDENT

RASHID NGUMBE ..... 13TH RESPONDENT

SWAREHE ISSA FERUZI ..... 14TH RESPONDENT

ZUBERI BAKARI NDETE ..... 15TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division, at Dar es Salaam)

(Mwipopo, J.)

dated the 16th day of July, 2021

in

Labour Revision No. 29 of 2019

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JUDGMENT OF THE COURT

29th Sept. & 7th December, 2023

SEHEL, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) in Labour Revision No. 29 of 2021 that affirmed an Award issued by the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA/DSM/TEM/505/2018/164/2018 (the labour dispute).

The brief facts leading to the present appeal are such that; on diverse dates between the year 2014 and 2017, the Registered Trustees of Chamazi Islamic Center, the 1st appellant, employed the respondents to a position of teachers at Chamazi Islamic Centre, the 2nd appellant, for a two-year contract. The respondents worked with the 2nd appellant up until 16th February, 2018 when they were terminated. Aggrieved by the termination, the respondents filed a complaint against the 1st appellant before the CMA alleging that they were unfairly terminated from employment and sought to be paid terminal benefits such as leave, one month's salary in lieu of notice of termination at the rate of TZS. 280,000.00, unpaid salaries, severance pay and repatriation. They also

sought re-engagement and payment of statutory compensation for unlawful termination.

After the 1st appellant was served with the compliant, it lodged a notice of preliminary objection challenging the competency of the complaint and contended that the respondents ought to sue the 2nd appellant. The CMA sustained the objection and struck out the application with leave to file the same within fourteen (14) days from the date when the complaint was struck out on 1st August, 2018.

On 10th August, 2018, the respondents lodged another complaint, namely; CMA/DSM/TEM/505/2018/164/2018 wherein they claimed to have been terminated on 16th February, 2018.

After hearing the evidence from both parties, the CMA found that the respondents' termination on 16th February, 2018 was substantially and procedurally unfair and thus, awarded the respondents a total sum of TZS. 235,264,524 as unpaid salaries, one month salary in lieu of notice, severance pay and compensation for the breach of contract.

Dissatisfied with the award, the appellant filed an application for revision in the High Court. After hearing the parties, the High Court

partly allowed the revision by holding that the CMA erred in fact in holding that termination was done on 16th February, 2018 while it was actually on 3rd January, 2018. Nonetheless, it concurred with the arbitrator that the said termination was substantially unfair because the appellants had stopped to pay the respondents' salaries. Accordingly, the High Court dismissed the application. Still aggrieved, the appellants filed the present appeal advancing the following three grounds:

> *"1. That, the learned judge erred in law for wrongly applying and interpretating the provisions of section 90 of the Employment and Labour Relations Act, 2004 and consequently neglected to consider that the appellants were denied a fundamental right to be heard at the time the CMA award was corrected upon the respondent's application ex-parte.*
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> *2. That, the learned judge erred in law for not applying the provisions of section 123 of the Evidence Act (estoppel) in determining the respondent's declaration on termination of their employment.*

3. That, the learned judge erred in law for holding that the respondents were terminated by the appellant."

At the hearing of the appeal, Messrs. Mashaka Ngole and Ephraim Koisenge, learned advocates, appeared for the appellants and the respondents, respectively.

At the very outset, the learned counsel for the appellants informed the Court that he abandons the 2nd ground of appeal; and that, he will start submitting on the 3rd ground of appeal followed by the 1st ground. However, before the learned counsel for the appellants began his submission, the Court wanted to satisfy itself on whether the 3rd ground of appeal is in compliance with the dictates of section 57 of the Labour Institutions Act (the LIA) which stipulates that an appeal arising from the decision of the High Court, Labour Division lies to the Court on a point of law only.

In responding to the question posed by the Court, the learned counsel for the appellants was insistent that the 3rd ground of appeal poses a question of law thus well within the ambit of section 57 of the

LIA. Elaborating, he contended that the 3rd ground of appeal is on a point of law because it invites the Court to assess and determine whether it was correct for the High Court the CMA's decision on fairness of the respondents' termination. to uphold that the respondents were terminated by the appellants. He added that, for the Court to makes such assessment, it will have to look at section 36 of the Employment and Labour Relations Act (the ELRA) which outlines three types of termination. To augment his submission, he referred us to our decision in the case of **Hassan Marua v. Tanzania Cigarette Company Limited**, Civil Application No. 338/01 of 2019 [2022] TZCA 491 (1 August 2022; TANZLII), where we said that:

> *"We are mindful, and we have no doubt... that points of law do not exist in a vacuum. That means that a determination of a point law cannot be divorced from the underlying facts which includes evidence on record. We cannot hazard a guess how could the Court determine that ground without relating it with the evidence on record to satisfy itself if the High Court and the CMA applied the law correctly to the facts and evidence before concluding as it did...."*

The learned counsel further contended that since the 3rd ground of appeal invites the Court to determine whether the respondents were terminated, the Court will have to consider the evidence on record in order to satisfy itself on whether the High Court correctly applied the law to the facts and evidence. to cap it up, Mr. Ngole invited us to examine whether the High Court's finding that the respondents were terminated on 3rd January, 2018 augurs well with the referral form presented by the respondents which indicated that they were terminated on 16th February, 2018. He also referred us to exhibit D2, a staff attendance register, found at page 275-296 of the record of appeal, indicating the time in and out for the days that the respondents reported at work.

Further, the learned counsel for the appellants argued that the High Court wrongly applied the principle of constructive termination based on allegation that the appellants defaulted to pay salary hence the respondents' boycott. He submitted that, in terms of section 36 (a) (ii) of the ELRA read together with rule 7 of the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No. 42 of 2007 (henceforth G.N. No. 42 of 2007), in order for constructive

termination to apply, the employee must resign from work. He contended that in the present appeal, there is no constructive termination allegedly because the respondents did not resign from employment.

Responding to a question posed by the Court, the learned counsel for the respondents briefly replied that the 3rd ground of appeal does not raise any point of law worth determination by the Court; and that, it is too general.

On the argument that the respondents were terminated on 16th February, 2018 and not 3rd January, 2019, the learned counsel for the respondents submitted that, according to the evidence on record, particularly, the evidence of Ally Khamis Nyuki (DW2), the Chairperson of the 1st appellant, who testified that, following a meeting of 3rd January, 2018, the appellants did not consider the respondents as employees. He added that, after the respondents were informally notified of their termination, they continued to report at work but could not teach for lack of salaries. However, on 16th February, 2018 they were barred from

entering the school premises. This action prompted the respondents to lodge a complaint in the CMA.

It is trite law that, jurisdiction of the Court regarding appeals arising from the High Court, Labour Division is governed by section 57 of the LIA that reads:

> *"A party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal of Tanzania on a point of law."*

According to the above provision, a party who is aggrieved by the decision of the High Court, Labour Division may appeal to the Court on a point of law only. A point of law or a question of law was well defined in the case of **CMA – CGM Tanzania Limited v. Justine Baruti**, Civil Appeal No. 23 of 2020 [2021] TZCA 256, that:

> *"...a question of law means any of the following: **first**, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. **Secondly**, a question on the application by the Tribunal of a provision of the*

Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. ***Finally****, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

Now let us see whether the 3rd ground of appeal which we have earlier on reproduced falls under any of the categories stated above.

In our view, the issue before us is not related to the interpretation of a provision of the Constitution, a statute, a subsidiary legislation or any legal doctrine, and therefore, does not fall in the first category of the definition of "question of law" as stated in the **CMA-CGM Tanzania Limited v. Justine Baruti** (supra).

In our considered analysis, we failed to find any words, either express or by implication, inviting the Court to look at and determine the application of constitutional provisions or provisions of the ELRA to the evidence on record so as to fall in the second category of the definition stated above. In the same vein, we failed to find any words in rule 7 (2)

of the G.N. No. 42 of 2007 inviting the Court to determine the issue of constructive termination. More so, the record of appeal indicates that the High Court was invited to determine three issues: **One**, whether it was proper for the arbitrator to entertain the application for correction of an Award without giving parties a right to be heard. **Two**, whether it was proper and correct for the arbitrator to disregard the appellants' evidence that the respondents gave two contradictory dates on termination of their employment. **Three**, whether it was proper for the Arbitrator to disregard the weight of evidence of the appellants on termination of the respondents' employment. None of the three grounds of revision raised the issue of constructive termination. Further, in the entire impugned judgment, there was no mention or discussion concerning constructive termination. Given the circumstances, we are settled that the 3rd ground of appeal does not fall in the second category of the definition as earlier on stated.

We now turn to the third category. It be recalled that the 3rd ground of appeal questions the findings of the High Court in upholding that the CMA's decision to the effect that the respondents were unfairly terminated. Our reading of the 3rd ground of appeal shows that the

appellants challenge the High Court decision on termination of the respondents and not on the procedure adopted by that court to reach its decision. That being the case, we find that this ground of appeal is simply one of fact, and not on a question of law. Our understating is fortified by the substance of the submission by the learned counsel for the appellants which focused on the date of termination. The learned counsel questioned the exact date when the respondents were terminated and suggested that two conflicting dates were on record, 3rd January, 2018 and 16th February, 2018. In our view, the issue on the date of termination is a matter of fact and therefore, according to section 57 of the ELRA, the Court has no jurisdiction to determine the 3rd ground of appeal.

Before we conclude on this ground of appeal, we think it is opportune to address the issue of time limitation that features in the course of hearing the 3rd ground of appeal. The learned counsel for the appellants contended that the dispute against the appellants was time barred allegedly because it was filed on 10th August, 2018 while termination took place on 16th February, 2018. It was contended that, the CMA had no jurisdiction to hear and determine the dispute which

was filed after a lapse of fourteen (14) days prescribed by rule 10 of the Labour Institutions (Mediation and Arbitration) Rules, Government Notice No. 64 of 2007 (G.N. No. 64 of 2007). The counsel for the respondents responded that, prior to the dispute whose decision was challenged in the High Court, the respondents had filed a similar dispute before the CMA which was subsequently struck out. Upon the order of striking out that dispute, CMA permitted the respondents to refile the same within fourteen (14) days. Since, the CMA's decision was delivered on 1st August, 2018, the filing of the dispute on 10th August, 2018 was within the time condoned by the CMA. Accordingly, we proceed to dismiss the 3rd ground of appeal for lacking merit.

In respect of the 1st ground of appeal, the learned counsel for the appellants submitted that section 90 of the ELRA permits for correction of any clerical errors which may be made *suo motu* or by application. He contended that, since the respondents made a formal application for correction of an award, the appellants had a right to be served with the said application and be heard on it. It was asserted by the learned counsel for the appellants that hearing that application *ex-parte* by CMA without affording the appellants a right to be heard contravened the

basic principle on fair trial. He thus implored the Court to quash and set aside the corrected Award which was allegedly arrived at without affording parties a right to be heard.

Responding to a complaint that the appellants were not given a chance to be heard, the learned counsel for the respondents acknowledged that none of the parties were heard when the CMA made correction of the Award. However, he was quick to add that the errors corrected were clerical as they related on the calculation of the sum awarded that did not go into altering the substance of the Award. He was therefore of the strong view that it was not necessary for CMA to hear parties because they would not have anything useful to submit on the calculation of figures.

Having heard the rival submissions and upon examination of the record of appeal, particularly the CMA's corrected Award, we observed that, the respondents moved the Arbitrator to correct the arithmetical calculation errors in the Award. The Arbitrator made the correction without affording any party a right to be heard. The learned counsel for the appellants contended that, since the respondent moved the CMA

then they ought to have been served with the said application and be heard on it. Here, we find it instructive to quote section 90 of the ELRA which reads:

> *"An arbitrator who has made an award under section 88 (8) may, on application or on his own motion, correct in the award any clerical mistake or error arising from any accidental slip or omission".*

Gathering from the above provision of the law, and it is our view that the law sanctions the arbitrator to correct, either *suo motu* or on application of any of the parties, any clerical mistake or error arising from accidental slip or omission. The powers bestowed upon the Arbitrator under section 90 of the ELRA does not contemplate varying the substance of the Award but rather correcting mistakes or errors due to accidental slip or omission done by the Arbitrator when composing the Award. In other words, the correction is not meant to correct mistakes or errors which goes to the merit of the Award. The scope for such correction is well explained in the case of **Sebastian Stephen Minja v. Tanzania Harbours Authority**, Civil Application No. 107 of 2000 (unreported), wherein the Court discussed the applicability of the slip

rule principle in rule 40 (1) (now rule (42 (1)) of the Tanzania Court of Appeal Rules, 2009, thus:

> *"Rule 40 (1) [now Rule 42 (1)] of the Court Rules is a provision which empowers the Court to make certain corrections in its judgement after it had been delivered. In order to avoid violating the functus officio principle, the corrections are limited in scope. 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 judgement.... A judgment cannot be corrected under the Rule by bringing into the judgment a new matter which does not appear naturally to have been in the contemplation of the Court when the judgement was being written."*

We are of the settled view that the principle stated in the case of **Sebastian Stephen Minja v. Tanzania Harbours Authority** (supra) is not limited to the Tanzania Court of Appeal Rules but is equally apposite to errors that featured in the award issued by the CMA and therefore it is in line with section 90 of the ELRA.

Earlier on, we observed that the learned counsel for the appellants does not have any issue with the powers of the arbitrator and acknowledged that the correction geared at correcting arithmetical error. The complaint centred on the decision to grant the application *ex-parte*. Much as we aware of the cardinal principle of natural justice that, a person should not be condemned unheard, and that, fair procedure demands that both sides should be heard before an adverse decision is made, nevertheless, section 90 of the ELRA has to be read in conjunction with rule 30 (2) of the G.N. No. 64 of 2007 that requires the arbitrator, on his own accord, to correct the award within fourteen (14) days, and re-issue the corrected award with a written explanation of the correction. Since the learned counsel for the appellant is neither on the failure to issue explanation nor exceeding the powers of correction, we find that the corrected Award was within the ambit and powers of the

arbitrator. Accordingly, we find that the first ground of appeal is meritless and thus dismissed.

For the above stated reason, we find that the entire appeal has no merit. Accordingly, we proceed to dismiss it. Given the circumstances of the appeal, we order that each party shall bear its own costs.

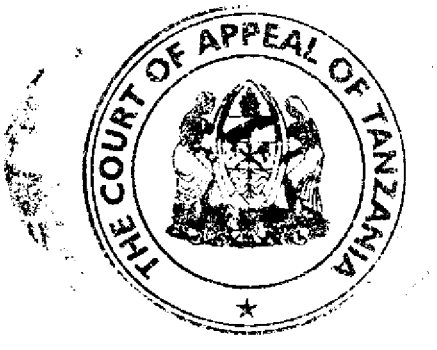
DATED at **DAR ES SALAAM** this 29th day of November, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2023 in the absence of the Appellants, duly notified through phone and Ms. Caroline Kombe holding brief for Mr. Philemoni Msegu learned counsel for Respondents is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL