IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 19 OF 2017

BAYPORT FINANCIAL SERVICES (T) LIMITED ..... APPELLANT

VERSUS

CRESENCE MWANDELE ..... RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Tanzania, Labour Division at Mbeya)

(Aboud, J)

dated the 12th day of May, 2015
in
Labour Revision No. 33 of 2013

JUDGMENT OF THE COURT

18th & 26th November, 2020

KWARIKO, J.A.:

This matter originates from the Commission for Mediation and Arbitration Mbeya (hereinafter "the CMA"). The respondent, Cresence Mwandele was employed by the appellant in the position of Regional Manager Mbeya. He filed a complaint before the CMA against the appellant alleging unfair termination of employment, claiming a total of TZS 362,732,000.00 being 200 months' salaries, severance allowance and repatriation expenses as compensation. The appellant resisted the claim

for the reason that the termination was fair as it followed due process of the law.

The facts which led to the dispute can briefly be stated as follows: On 17/3/2011 the respondent received a letter from the appellant to hand over the Mbeya Office and shift to a new working station at Ifakara. He was required to report to that station on 01/4/2011. However, the respondent did not report to the new working station. This move aggrieved the appellant who issued a letter to the respondent to show cause why disciplinary measures should not be taken against him.

On 9/5/2011 the respondent was summoned to attend before the Disciplinary Committee (hereinafter "the Committee") for hearing which was conducted on 12/5/2011. The complaint by the appellant was failure by the respondent to follow the instruction of the Chief Executive Officer to report to a new working station at Ifakara. On his part, the respondent complained that the transfer amounted to demotion because Ifakara was a satellite station as compared to the Regional Office at Mbeya.

At the end of the hearing, on 13/5/2011 the Committee found the respondent to have committed a disciplinary offence of gross insubordination and recommended his termination. The respondent was

given five days within which to appeal against the findings. He was also served with the Committee's report on the same date.

The respondent did not appeal and on 23/5/2011 the appellant terminated his employment. The termination letter was received by the respondent on 24/5/2011. Aggrieved by the termination, the respondent filed his complaint before the CMA on 13/6/2011.

In the end, the Arbitrator found that the respondent was unfairly terminated on account of the partiality of the Chairman of the Committee and non-adherence of the procedure. The respondent was thus awarded a total of TZS 48,027,587.00 being severance allowance, 25 months remuneration, repatriation costs and daily subsistence allowance from the date of termination to the date of payment.

Aggrieved by that decision, the appellant lodged a revision before the High Court of Tanzania Labour Division at Mbeya where he partly succeeded. The High Court upheld the arbitral award save for the payment of subsistence allowance which was instead ordered to be paid on the basis of the respondent's monthly salary.

The appellant was further aggrieved by the decision of the High Court, hence has filed this appeal to the Court. He has raised the following four grounds of appeal:

> *"1. That, the High Court erred in law in failing to hold that the conduct of the arbitrator in meeting the counsel for the Respondent in the absence of the Appellant was in violation of Rule 5 (h) and (i) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007 G.N. No. 66 of 2007 thus amounted to misconduct.*
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> 2. *That, the High Court erred in law in failing to hold that the Arbitrator did not provide legal justification for granting of compensation of more than 12 months' salary as required by law.*
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> 3. *That, the High Court erred in law in failing to hold and decide that the respondent having admitted to have secured a new employment immediately after and at the place of termination was not entitled to repatriation payment from Mbeya to Dar es salaam.*
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> 4. *That, the High Court erred in law in failing to hold and decide that the Arbitrator wrongly entertained the Respondent's referral to the Commission for Mediation and Arbitration which had been prematurely made prior to exhausting a right of appeal at the place of work."*

Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended, both parties filed written submissions for and against the appeal which were adopted during hearing.

At the hearing of the appeal, Messrs. Denis Msafiri and Makaki Masatu, learned advocates represented the appellant whilst the respondent enjoyed the services of Mr. Kamru Habibu, also learned counsel. For the reasons that will be apparent in the course of this judgment, we will consider the counsel's submissions in relation to the first and fourth grounds of appeal only.

In his submission regarding the first ground of appeal, it was submitted for the appellant that the High Court ought to have found that the Arbitrator committed a misconduct when he met with the respondent alone and extended time for him to file written submissions. He argued that the misconduct was contrary to Rule 5 (h) (i) of the Labour Institutions (Ethics and Conduct for Mediators and Arbitrators) Rules, 2007 G.N. No. 66 of 2007 (hereinafter "G.N. No. 66 of 2007").

The appellant's counsel argued further that the proceedings is silent as to whether the Arbitrator summoned and heard any or both of the parties before he extended the time to file written submissions, after both parties failed to do so by 10/4/2013 as was ordered. Instead, it was

argued that the Arbitrator only indicated in his decision that he met the respondent, heard him and granted him extension of time to file written submissions. The appellant's counsel submitted that the act by the Arbitrator vitiated the award deserving to be set aside as per the dictates of section 91 (2) (a) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] (the Act). The counsel implored us to set aside the award.

As regards the fourth ground of appeal, it was the appellant's submission that the respondent's reference of the dispute to the CMA was premature. This is because he had not exhausted his right of appeal at the place of work. It was submitted that the disciplinary hearing was conducted on 13/5/2011, which recommended termination of the respondent and gave him five days within which to pursue his appellate right within the appellant's organization structure. Instead, it was argued, the respondent did not exercise his right of appeal until he was served with a letter of termination on 25/5/2011.

Additionally, it was argued for the appellant that the Committee only gave recommendation for the respondent's termination which might have been overturned by the appellate authority had the respondent appealed against it. It was therefore argued that the High Court misdirected itself by holding that the recommendation by the Committee was final

termination order to merit reference to arbitration. It was argued further that the High Court misinterpreted the provisions of Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007 (hereinafter "G.N. No. 64 of 2007") that it is not mandatory to exhaust internal remedies before an employee refers the dispute to arbitration. To cement the foregoing submission, the appellant's counsel referred us to the persuasive decisions of the High Court of Tanzania in the cases of the **Attorney General v. Maria Mselem,** Labour Revision No. 270 of 2008 at Dar es Salaam and **Rev. Jonathan M. Mwamboza v. Bishop Dr. Stephen Munga & Another**, Labour Dispute No. 1 of 2011 (both unreported). The learned counsel prayed that the appeal be allowed by quashing the judgment and decree of the High Court and set aside the award.

In reply to the first ground of appeal, the respondent's counsel argued that the Arbitrator did not commit any misconduct when he met the respondent's representative in the absence of the counsel for the appellant. It was argued that the appellant did not attend to the Arbitrator on 10/4/2012 as it was ordered, that is when the respondent's representative prayed and was granted extension of time to file written submission. Therefore, according to the respondent's counsel, the

application for extension of time was made orally. It was argued further that although the application of that nature ought to have been made in conformity with Rule 29 (1) of G.N. No. 64 of 2007 the Arbitrator had discretion to depart as it happened in this case which is permissible in terms of Rule 29 (11) of G.N. No. 64 of 2007.

The learned counsel for the respondent argued that though the court record does not show that the Arbitrator heard the respondent the omission is not fatal and it did not amount to a misconduct but it was a mere error. He implored us to expunge the respondent's written submission and decide the appeal on the basis of the evidence on record.

As regards the fourth ground of appeal, it was submitted that the respondent was served with the letter of termination on 24/5/2011 and the five days provided for appeal had already expired, counting from 13/5/2011, the date of the Committee's findings and 13/6/2011, the date on which the dispute was filed in the CMA. The learned counsel argued that the High Court correctly interpreted Rule 10 (1) of G.N. No. 64 of 2007 in that there was no need for the respondent to go back to invoke the appellant's machinery since by 24/5/2011, the appeal time had expired. The respondent's counsel further submitted that the appellant's

employment policy was not tendered as evidence to show that the appeal process or extension of time to do so was in place.

The respondent's counsel argued that failure to appeal did not oust the jurisdiction of the CMA. To fortify his contention, he referred to the High Court of Tanzania case of **MUCOBA Bank PLC V. Herry Bwende,** Labour Revision No. 32 of 2017 at Iringa (unreported). He also distinguished the cited case of **Rev. Jonathan M. Mwamboza** (supra) in that the same related to religious matters contrary to normal labour disputes as in the instant case.

In rejoinder, the appellant's counsel argued in respect of the first ground that Rule 29 (11) does not allow *ex parte* applications and it does not dispense with the requirement under Rule 4 of G.N. No. 66 of 2007.

As regards the fourth ground, the appellant's counsel contended that where there are internal remedies, the employees are supposed to exhaust them before referring the disputes to the CMA and that the respondent admitted the presence of those mechanisms in his evidence at page 39 of the record.

Upon being probed by the Court, the appellant's counsel submitted that by not appealing against the Committee's recommendation it

connoted that the respondent was contented with the findings. He concluded that the respondent ought to get a final decision at the place of work before he referred the dispute to the CMA.

Having considered the submissions for and against the appeal, we propose to start with the fourth ground of appeal which touches on the issue of jurisdiction of the CMA.

The appellant is adamant that the respondent referred the dispute to the CMA prematurely as he had not exhausted the internal mechanism. It is in record that the respondent was given five days within which to appeal against the findings of the Committee counting from 13/5/2011. However, the respondent did not exercise that right until he was terminated from employment on 23/5/2011 and the same communicated to him on 24/5/2011. Therefore, by 23/5/2011 the time within which the respondent could have appealed had expired. He referred the dispute to the CMA on 13/6/2011. For these circumstances, the respondent could not have gone back to appeal to the appellant's institution as he was already time barred.

Further, there is no law which forbids a terminated employee to refer the dispute to the CMA simply because he/she has not exercised the right of appeal within the employer's organization. In addition to the

foregoing, the appellant failed to tell the Court to whom the respondent was supposed to appeal. Although the respondent acknowledged that he was aware of the appeal process, there was no policy mechanism, or regulations in place on how one could exercise such right. See also a similar situation in the decision of the High Court of Tanzania in the case of **MUCOBA Bank PLC Ltd** (supra) where the respondent referred the complaint to the CMA after having not been informed where to appeal against the decision of the disciplinary committee. The court in that case stated that the respondent did not err to have referred the dispute to the CMA. The instant case is thus distinguishable from the cited persuasive decision of **Rev. Jonathan M. Mwamboza** (supra). This is because in that case the appeal machinery was vividly explained in the Diocese Constitution. It was provided that the decision to disrobe the complainant was made by the Pastoral Council and the appeal lay to the Executive Council and then to the Synod. Unlike in that case no one explained the appeal process within the appellant's institution. This ground is therefore devoid of merit.

Coming to the first ground of appeal, we have perused the record before the CMA and found that the parties closed their evidence before the Arbitrator on 22/8/2012 with an order for them to submit written

submissions on 10/4/2012. The Award was scheduled to be delivered on 10/5/2012. There is no any record to show whether and how the parties submitted their written submissions. Instead, the Arbitrator in his decision at page 186 of the record of appeal stated that on 10/4/2012 the respondent appeared before him and sought extension of time to file written submissions the prayer which was granted. The Arbitrator stated that the appellant neither filed his written submissions nor applied for an extension of time to do so. In that decision the Arbitrator referred to what he termed the respondent's lengthy written final submissions.

It is therefore not disputed that the Arbitrator met and heard the respondent on his plea for extension of time to lodge written submissions in the absence of the appellant to his detriment. The procedure to prefer applications before the CMA was clearly flouted. This is provided for under Rule 29 of G.N. No. 64 of 2007 as follows:

> *"Rule 29- (1) Subject to Rule 10, this Rule shall apply, to any of the following-*
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> *(a) condonation, joinder, substitution, variation or setting aside an award;*
>
> *(b) jurisdictional dispute;*
>
> *(c) other applications in terms of these Rules.*

(2) An application shall be brought by notice to all persons who have an interest in the application."

According to the cited provision, applications before the CMA should be made by informing all parties concerned. This means that the Rules do not provide for *ex parte* hearing without prior notification to opposite party as it was done by the Arbitrator in this case when he heard the respondent alone and extended time for him to file written submissions. It is our considered view that these requirements of law were aimed to ensure transparency and fairness to the parties concerned. Failure to comply with the provisions of law creates mistrust to those who are charged with a duty of determining employees' rights. We are not, therefore, prepared to go along with the respondent's counsel that the Arbitrator's conduct can be saved by sub-rule (11) of Rule 29 of G.N. No. 64 of 2007 which provides thus:

> *"Notwithstanding this rule, the Commission may determine an application in manner it deems proper."*

Our understanding of this provision is that until the application is brought before all persons having interest in the matter as provided under Rule 29 (2), the Commission cannot exercise its discretion under sub-rule (11).

Therefore, the Arbitrator ought to have convened both parties in the case before extending the time to the respondent to file the submissions.

The appellant argues that the Arbitrator's action amounted to misconduct whilst the respondent termed it as a mere error on the part of the Arbitrator.

Rule 5 (h) (i) of G.N. No. 66 of 2007 provides thus:

> *"Rule 5 - All mediators and Arbitrators shall in the course of discharging their duties:*
>
> *(h) Avoid having any communication except for the purpose of arranging the dates for meeting or hearing in which case the outcome of those conversations should be notified to both parties; and*
>
> *(i)* ***Avoid having any meeting with a party except in the presence of the other"*** *[Emphasis supplied]*

From these provisions, Mediators and Arbitrators are not allowed to meet with one party in the absence of the other. Moreover, section 91 (2) (a) of the Act provides that:

> *"S. 91- (1) N/A*

(2) The Labour Court may set aside an arbitration Award made under this Act on ground that-

a) There was misconduct on the part of the Arbitrator".

The question to be answered at this juncture is whether the Arbitrator committed misconduct to warrant setting aside the award. As stated earlier, the law says that an arbitral award may be set aside if there was misconduct on the part of the Arbitrator. In the instant case, we have seen that the Arbitrator committed misconduct by having a meeting with the respondent only and gave orders material to the case.

By entertaining the respondent alone and granting his request for extension of time in exclusion of the appellant, the Arbitrator not only extended an unfair advantage to the respondent but also abrogated the appellant's right to be heard on the issue. Furthermore, we are perturbed that in his award at page 186 the Arbitrator had the audacity to condemn the appellant's failure to lodge its submissions indicating that the said failure was prejudicial to its case. In our considered view, the Arbitrator's act was a fundamental mistake going to the root of the matter as it

resulted in making the arbitral forum uneven and biased. We would conclude that the conduct vitiated the award which we hereby set aside.

This appeal has merit and we allow it. Having set aside the award, we remit the file to the CMA for the complaint to be entertained by another Arbitrator. This being a labour related matter, we make no order as to costs.

DATED at **MBEYA** this 25th day of November, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of November, 2020 in the presence of Mr. Peter Kilanga holding brief for Mr. Denis Msafiri, counsel for the Appellant and Mr. Denis Lazaro, holding brief for Mr. Kamru Habibu counsel for the Respondent is hereby certified as a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL