IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 458 OF 2020

NORTH MARA GOLD MINE LIMITED ..... APPELLANT

VERSUS

ISAAC SULTAN ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Musoma)

(Galeba, J.)

dated the 26th day of July, 2019
in
Consolidated Labour Revisions No. 16 & 17 of 2018

JUDGMENT OF THE COURT

1st November & 16th December, 2021

KITUSI, J.A.:

The respondent was employed by the appellant in the position of Environmental Coordinator from March, 2013 to July, 2017, when the two fell out. The respondent was also the Branch Chairman of a trade union known as National Union for Mines and Energy Workers Tanzania (NUMET). On 26/7/2017 the respondent's employment was terminated following charges of dishonesty and breach of code of conduct, and a Disciplinary Hearing (DH) that convicted him. He was dissatisfied with

the decision, so he referred the matter to the Commission of Mediation and Arbitration (CMA), raising two issues namely: -

(i) Whether the reason for termination was valid.

(ii) Whether the appellant followed the requisite procedure in terminating the respondent's employment.

There is no dispute that on 6/11/2016 the respondent issued a memo (exhibit D 12) and signed it as Chairman of NUMET – North Mara Gold Mine Ltd, with the following contents: -

> ***"A G I Z O K W A W A F A N Y A K A Z I***
>
> *KUFUATIA MAMLAKA YA CHAKULA NA MADAWA (TFDA) KUTOA KATAZO LA GHALA LA NYAMA NA SAMAKI LA KAMPUNI YA AKO MKOANI DAR ES SALAAM.*
>
> *NUMET INAWAAGIZA WALAJI WOTE WAACHE KULA VYAKULA/BIDHAA ZA NYAMA NA SAMAKI ZA AKO KUANZIA LEO TAREHE 06 NOVEMBER, 2016, MPAKA HAPO MTAKAPOTANGAZIWA NA UONGOZI WA NUMET.*
>
> *UONGOZI WA NUMET UNASIKITIKA KUONA MWAJIRI AKIENDELEA KURUHUSU AKO KUWALISHA WAFANYAKAZI BIDHAA ZA NYAMA NA SAMAKI NA*

KUKAA KIMYA BILA HATA KUJADILI HILI SUALA NA UONGOZI WA NUMET.

SHERIA IMEIPA NUMET MAMLAKA YA KUJADILI MIKATABA INAYOATHIRI MASLAHI YA AFYA NA UHAI WETU WAFANYAKAZI KWA UJUMLA (WELFARE).

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Signed"

In the record of appeal, there is a translated version of that memo which, although tentative, is to the following effect: -

"FOLLOWING THE FOOD AND DRUG AUTHORITY (TFDA) PROHIBITIONS TOWARDS AKO WAREHOUSE OF MEAT AND FISH IN DAR ES SALAAM NUMET IS INSTRUCTING ALL CONSUMERS TO STOP EATING FOOD ESPECIALY MEAT AND FISH OF AKO FROM TODAY ON 06 NOVEMBER, 2016 UNTIL FURTHER NOTICE FROM THE LEADERSHIP OF NUMET.

LEADERSHIP OF NUMET IS SURPRISED TO SEE THE EMPLOYER IS STILL ALLOWING AKO TO FEED STAFF PRODUCTS SUCH AS MEAT AND FISH AND REMAINING SILENT WITHOUT DISCUSSING THIS MATTER WITH THE LEADERSHIP OF NUMET.

THE LAW HAS ALLOWED NUMET TO DISCUSS ALL THE CONTRACTS WHICH ARE AFFECTING THE

HEALTH AND LIFE OF THE EMPLOYEES (WELFARE) IN GENERAL.

Signed"

The allegations against the respondent revolved around the provision of catering services to the appellant's employees and the involvement of AKO Catering Services Company, so the memo reproduced above is relevant in setting the background.

Back to the issues that were proposed for CMA's determination. In proof of the reason for termination and whether it was valid, the appellant adduced evidence that the respondent was meddling with the appellant's choice of AKO as the service provider at the company, and that he had received bribes to cause AKO's downfall. The charges against the respondent alleged that he had received Tshs. 20 million from one George King and Tshs. 10 million from Mwita Bhoke, both of Nice Catering, who wanted him to instigate unrest in AKO, cause its removal, so that their Company known as Nice Catering Services could take over the contract of supplying food at North Mara Gold Mine Limited.

Meiseyeki Msangi (DW3), an investigator, testified that George King and Mwita Bhoke, employees of Nice Catering, informed him that they had given the respondent the money in order to win the tender of catering at the company. He said he tracked the meetings of the two with the respondent on 4/12/2016, 9/12/2016 and 19/12/2016. DW3 further said that following their meeting on 4/12/2016 the respondent issued the memo on 6/12/2016 for workers to stop eating AKO's food.

The witnesses for the appellant referred to recorded movements of the respondent and meetings he held with George King and Mwita Bhoke as suggesting truth in the charges of corruption.

The respondent denied those allegations but admitted issuing the memo after ITV Television station broadcast a surprise inspection of AKO's food stores in Dar es Salaam showing that fish and pork, was unfit for consumption. He held a meeting with workers' representatives at NUMET and resolved that they should issue the memo to avoid possible adverse effects on the workers.

He said that despite giving that account at the Disciplinary Hearing, he was found guilty of receiving bribes from George King and Mwita Bhoke. He lodged an appeal specifically demanding attendance

of George King and Mwita Bhoke to substantiate their allegations against him, but the appeal was determined without hearing their version of the allegations, confirming the findings of the Disciplinary Hearing. He said that the appellant failed to prove the allegations of bribery therefore the reason for termination was not valid. He also said that the procedure was not followed because the appeal was determined pre-maturely without hearing George King and Mwita Bhoke.

The CMA concluded that the appellant failed to prove validity of the reason for the termination but followed the laid down procedure. It awarded the respondent compensation equivalent to gross salaries for 48 months. The award was challenged to the High Court by both parties. The appellant argued that as the termination was for fair and valid reasons, the respondent was not entitled to any relief. On the other hand, the respondent challenged the CMA award as inadequate, arguing that he was entitled to payment of an amount equal to gross salaries for 96 months as pleaded.

The learned High Court judge who sat on revision concluded that the allegations of corruption and bribery had not been proved mainly because the key witnesses to prove that did not testify even when the

respondent requested. He also held that there was no connection between the respondent's alleged receipt of the money and the anticipated award of tender of catering to Nice Catering Company.

The learned judge proceeded to dismiss the revision by the appellant for want of merit and partly allowed that of the respondent by enhancing the award from 48 months equivalent of salaries to 90 months equivalent of salaries. This decision is the subject of this appeal.

Initially the appellant challenged the decision of the High Court on 9 grounds, however in the written submissions filed on 11/1/2021, it abandoned all except grounds 3, 4, 8 and 9. These grounds are as follows: -

3. *The learned High Court Judge erred in fact and in law in raising and determining the issue of procedural illegality in the hearing of the Respondent's appeal to the chairperson which issue was not raised in Revision Applications.*

4. *The learned High Court Judge erred in law and in fact in determining the issue of the respondent's reputation which was not raised and determined at the CMA.*

8. *The learned High Court Judge erred in law and in fact in increasing the compensation awarded to the respondent to 90 months which is excessive.*

9. *The learned High Court Judge erred in law and in fact in increasing the compensation awarded to respondent on basis that the respondent's reputation was tarnished/damaged.*

In addition, the appellant intimated that in those four grounds, the submissions would only be on points of law, not of facts. The appellant then prayed for leave to add two grounds, one in the course of making written submissions, which is: -

> *"The Honourable High Court Judge erred in law in holding that the CMA applied the right principle in awarding the compensation."*

Leave for the second additional ground of appeal was prayed for at the hearing of the appeal, during which Mr. Faustin Anton Malongo and Ms. Caroline Lucas Kivuyo, both learned advocates, appeared for the appellant. The respondent was represented by Mr. Alhaji Abubakari Majogoro, also learned advocate.

Mr. Malongo was granted leave to add and argue the second additional ground of appeal which is: -

> *"The Honourable court erred in law in upholding the CMA award which arose from proceedings which were a nullity for want of Arbitrator's signature at the end of testimony of every witness."*

By its very nature, this ground had the potential of disposing of the appeal, therefore it was argued ahead of the other grounds. It was Ms. Kivuyo who argued it.

In her submissions, Ms. Kivuyo drew our attention to pages in the record of appeal, showing that the arbitrator did not append his signature after each witness had finished testifying. She then submitted that the omission to append his signature was fatal to the proceedings because it rendered them unauthentic. To support her argument, Ms. Kivuyo cited our decisions in **Iringa International School vs. Elizabeth Post,** Civil Appeal No. 155 of 2019 and; **Unilever Tea Tanzania Ltd vs. Davis Paul Chacha,** Civil Appeal No. 290 of 2019 (both unreported). She went on to argue that although the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN No. 67 of 2007 (the Rules) are silent on the signing of proceedings, in the

two cited cases, the Court took inspiration from Order XVIII rule 5 of the Civil Procedure Code, [Cap 33 R.E 2002] (the CPC), and nullified the proceedings.

Ms. Kivuyo moved us to similarly invoke section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] (the AJA) to nullify the proceedings and quash the resultant judgments of both the CMA and that of the High Court.

On the adversary, Mr. Majogoro submitted that proceedings at the CMA are governed by the Rules as submitted by Ms. Kivuyo which do not make it mandatory for an Arbitrator to append a signature after the testimony of each witness.

The learned counsel also submitted that there is a presumption that court proceedings are always authentic. He then argued that the point now being raised by the appellant's counsel would have made sense if there was a complaint doubting the authenticity of the proceedings. Which is not the case, he submitted.

Mr. Majogoro went on to refer to parts from the case of **Iringa International School** (supra) where it was held that one of the factors for nullifying proceedings was lack of signature; "*If the*

genuiness of proceedings is questionable." He proceeded to submit that in this case there are signatures by the witnesses who testified as well as those of the advocates for the parties, which to him are sufficient to authenticate the proceedings. He argued that each case should be decided on its own facts, so we should see no merit in this additional ground of appeal.

In a rejoinder, Mr. Malongo submitted that there are two decisions of the Court on the point and that, as in those cases, there need not be any complaint on the authenticity of the proceedings by any party.

On the factor that there has to be a complaint as stated in the case of **Yohana Mussa Makubi and Another vs Republic**, Criminal Appeal No.556 of 2015 (unreported) cited in the case of **Iringa International School** (supra), Mr. Malongo pointed out that that was but only one of the factors, not the sole factor.

On the argument that the witnesses and advocates signed, Mr. Malongo submitted that although he had not seen the original record, the law requires the Arbitrator to authenticate by signing.

Our deliberations shall begin by appreciating the principle that every case is decided upon its own peculiar facts, which we think, is a ***sine qua non*** to deciding matters on the basis of the truth on the ground. The Rules have a specific provision to that effect which stipulates: -

> *"2 (1) These Rules aim to guide mediators and Arbitrators appointed by the Commission in the exercise of their powers and functions and assist parties to resolve disputes* ***provided that every mediation and arbitration shall be considered on its own merit."***

We are aware of the principle that court proceedings, which in this case includes CMA proceedings, are always presumed as representing the truth of what transpired, as rightly submitted by Mr. Majogoro.

With that preface in mind, we are going to have to decide whether the CMA's proceedings in this case were a nullity for the reason that the Arbitrator did not append his signature at the end of testimony of each witness.

In the instant case, it is relevant to point out that there appear to be signatures appended on the coram before commencement of proceedings of each day, and signatures at the end of the testimony of each witness. Admittedly that fact is not reflected in the typed version of the proceedings, so it is understandable that counsel who had no access to the original record, was unaware of it.

For instance, on 6/10/2017 before Haruna Soleka – Arbitrator, evidence of Emmanuel Kipingu was recorded in the presence of the following, who signed against their names: -

(1) Godfrey Kange – Advocate for the respondent

(2) Emmanuel Kipingu – HR Officer

(3) Isaac Sultan – Complainant

(4) Alhajl A. Majogoro – Advocate for Complalnant.

It is to be noted that the names on the coram were written by the attendees in their own respective hand writings. At the end of the examination in chief which was recorded in a form of questions and answers, the advocates for the parties signed again.

This was the same procedure followed on the subsequent dates when the matter proceeded before the CMA. Certainly, this procedure is not anywhere close to what the CPC provides under O. XVIII rule 5 cited in the case of **Iringa International School (supra).** Mr. Malongo insisted in his rejoinder submission, that what the above provision requires is the signature of the presiding Arbitrator, not of the advocates.

Mr. Malongo may be correct because we have recently held so in the case of **Joseph Elisha vs. Tanzania Postal Bank,** Civil Appeal No. 157 of 2019 (unreported) by stating that: -

> *"Though the Rules governing the proceedings at the CMA do not contain any provision regarding signing of the witness's testimony by the Arbitrator, it is our view that the requirement is imperative to safeguard the authenticity and correctness of the record."*

The question that still lingers, is whether the above position would still apply even when, as in this case, the Arbitrator has designed his own style of authentication of proceedings, by having all parties and their advocates sign on the coram, and later by calling upon the advocates, to sign again at the end of the testimony of each witness.

We take this question to be important for two reasons. **One**, as Mr. Majogoro reminded us, a court record is presumed to represent the truth of what happened. The Court stated so in **Halfan Sudi vs. Abieza Chichili** [1998] T. L. R 527 at page 529: -

> *"We entirely agree with our learned brother, MNZAVAS, JA, and the authorities he relied on which are loud and clear that "A Court record is a serious document. It should not be lightly impeached.... There is always the presumption that a court record accurately represents what happened."*

Two, an Arbitrator has the power to determine how the arbitration should be conducted, as provided under rule 19 (1) of the Rules. In **Finca Tanzania Ltd vs Wildman Masika and 11 Others,** Civil Appeal No. 173 of 2016 (unreported), the Court stated the following after reproducing the whole of Rule 19 of the Rules: -

> *"It is apparent from the quoted provisions that the Arbitrator has the power to regulate and determine the practice and procedure of how the arbitration should be conducted, including, in our view, how to handle the document tendered by parties during arbitration. There is nothing in the Mediation and Arbitration Guidelines Rules which calls for the strict*

application of Order XIII Rule 4 (1) of the CPC in the Arbitration proceedings before the CMA."

Our conclusion on this ground is that this case is distinguishable from the case of **Iringa International School; Unilever Tea Tanzania Limited** and; **Joseph Elisha vs Tanzania Postal Bank** (supra), because in this case the Arbitrator designed his own way of authenticating the evidence, which is within his powers to do in terms of rule 19(1) of the Rules. We are fully satisfied that the absence of the Arbitrator's signature at the end of the testimony of each witness in this case, did not vitiate the proceedings nor prejudice any party because, if anything, any possible suspicion on the authenticity of those proceedings, was cleared by the parties' advocates signing. Therefore, the additional ground that was argued orally at the commencement of the hearing, has no merit and we dismiss it.

The other additional ground of appeal is, in our view, linked with grounds 3, 4, 8 and 9 which the counsel for the appellant invited us to consider. The additional ground raises the issue; whether the learned judge was correct in concluding that the CMA applied the right principle in awarding the compensation. Grounds 3, 4, 8 and 9 raise the issues whether the learned judge applied the right principle in awarding the

compensation of 90 months' salary and whether it was correct for him to do so by considering matters that were not earlier raised. Therefore, the connection between that additional ground and grounds 3, 4, 8 and 9 is apparent.

In arguing these grounds, Mr. Malongo adopted the written submissions and asked us to ignore those parts that attack findings of facts because such matters may not be raised before the Court.

In ground 3 it was alleged that the learned judge raised the issue of illegality in the appeal proceedings before the Disciplinary Hearing and determined it without giving the parties a hearing. It was argued that it was wrong for the learned judge to do so and that error vitiates the decision. In support of this position, the case of **Truck Freight (T) Limited vs CRDB Bank Limited,** Civil Application No. 157 of 2007 (unreported), was cited.

In respect of grounds 4 and 9 which were combined, counsel for the appellant argued that the learned judge raised the issue of the respondent's reputation *suo mottu* and wrongly decided it in increasing the compensation while it was an issue of tort, which had not been raised and canvassed earlier.

In ground 8, the learned judge's conclusion increasing the compensation from 48 months to 90 months, is challenged for being based on wrong principles.

On the other hand, Mr. Majogoro who also adopted the written submissions, argued that the issue of the illegality at the Disciplinary Hearing was not new and that the High Court sitting on first appeal had the mandate to review the evidence. The case of **Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others,** Civil Appeal No. 53 of 2013 (unreported) was cited by the learned counsel to support the submissions. The learned counsel sought to distinguish this case from the case of **Truck Freight (T) Limited (supra)** on the ground that in the case the learned judge did not, on appeal, raise the issue *suo mottu,* but was reassessing the evidence on record.

As for grounds 4 and 9, Mr. Majogoro submitted that there is nowhere in the record of appeal that justifies the appellant's contention that the compensation was increased because of the issue of reputation. In his brief oral address to the Court, Mr. Majogoro submitted that even if the parties had been heard on what are termed as new points, the result would have been the same.

In rejoinder Mr. Malongo submitted that there was no evidence on the record on the respondent's reputation, so the learned judge had nothing before him to reassess. He emphasized on the right of the parties to be heard on those issues that were new, before the learned judge could decide on them.

We have decided to consider grounds 3, 4 and 9 and leave out ground 8. We think the common issue in these grounds, is whether or not the parties were given a hearing on issues that appear to the appellant to have been new. We are going to be straight about it that, with respect, the learned judge imported into the appeal, facts that had not been alluded to earlier, therefore those were new facts. For instance, at pages 324 – 325 of the record of appeal, he stated: -

> *"In this matter it is not only illegal but also shameful for a world class company large as North Mara Gold Mine Limited to terminate an employee on allegations for instance of theft while there was nothing stolen from the company or for fraud without anything that the company was defrauded by the applicant.* ***The acts of the respondent in this case did not only therefore negatively impact on the reputation of the applicant as an innocent person*** *but also*

on the character and integrity of the respondent itself." (emphasis ours).

These were new facts, in our firm view, and the parties did not have an opportunity to address them. We also hold the view that the above observations informed the learned judge's decision on the compensation. This is because after the above observations, he stated:

> *"Now was the amount of compensation awarded commensurate to all the odds that the applicant was thrown into, all for the faults which were not his."*

In view of the above, Mr. Majogoro's argument that the discussion on the new points did not affect the assessment of the compensation, cannot be correct. It is clear from the above quoted statement, that the judge was proceeding to assess the compensation with the respondent's predicaments in mind. The predicaments included the loss of reputation which the learned judge ruled had been suffered by the respondent.

With respect, it is also not in line with the settled law to argue, as Mr. Majogoro did, that even if the parties had been heard, the result would have been the same. This position is clear in our many decisions, including the cases of **Charles Christopher Humphrey Kombe vs**

Kinondoni Municipal Council, Civil Appeal No. 81 of 2017 and **Yazidi Kassim Mbakileki vs CRDB (1996) Ltd and Another,** Civil Reference No. 14/04 of 2018 (both unreported). The latter case quoted the oft - quoted paragraph from **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) in which it was observed that: -

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

On the basis of the above settled position of the law, and having found that the learned High Court judge raised and determined two issues without hearing the parties, we find merit in grounds 3, 4 and 9 of appeal and allow the appeal to that extent. We nullify the revisional proceedings of the High Court, quash the judgment and set aside the resultant order of compensation, for having been reached without giving the parties the right to be heard. We order that the Consolidated

Labour Revisions No 16 and 17 of 2018 be heard de novo, as soon as possible.

No order as to costs.

DATED at **DAR ES SALAAM** this 14th day of December, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of December, 2021 in the presence of Mr. Faustine Malongo Counsel for the appellant appeared remotely via video conference facility linked from his office at Mwanza and Mr. Alhaji Majogoro Counsel for the respondent appeared remotely via video conference facility linked from his office at Mwanza, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA

DEPUTY REGISTRAR
COURT OF APPEAL