IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A, SEHEL, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 323 OF 2021

SHULE YA SEKONDARI MWILAMVYA..... APPELLANT

VERSUS

KAEMBA KATUMBU.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated 27th day of August, 2019

in

Revision No. 4 of 2018

.....

JUDGMENT OF THE COURT

5th & 9th June, 2023

SEHEL, J.A.:

The respondent in this appeal was an employee of the appellant, Mwilamvya Secondary School. He was employed on 8th July, 2016 as a secondary school teacher and worked in that position until his termination on 9th January, 2018 on grounds of misconduct. It was alleged that he was teaching while in an inebriated state and was refusing to undertake his assigned tasks claiming to be on leave. As he was not satisfied with his termination, he filed a complaint to the Commission for Mediation and Arbitration at Kigoma (CMA), CMA/KIG/DISP/31/2018 seeking for reinstatement, compensation of 12

months' salary and repatriation allowance. After completion of the preliminaries, both parties appeared for mediation, which was unsuccessful. Hence, the dispute was referred for arbitration. On the date scheduled for hearing of the arbitration, the appellant defaulted appearance. Consequently, the dispute proceeded *ex-parte* against it. On 29th June, 2018, an *ex-parte* award was issued in favour of the respondent.

On 10th August, 2018, the appellant filed an application seeking to set aside the *ex-parte* award vide Labour Dispute No. CMA/KIG/MISC/APP/04/2018 on grounds that; the head teacher, one Emmanuel Saguda, was invigilating Form Six national examinations hence he could not attend the arbitration and since the examinations required his full attention, the head teacher failed to assign another officer to attend the arbitration on his behalf. It was further deponed in the affidavit in support of the application that the copy of the award was supplied to it by the respondent's counsel on 25th July, 2018.

Having heard both parties and when composing its ruling, the CMA raised suo motu the issue of time bar. It discussed it at length and concluded as follows:

"Kwa msingi huo Tume hii inaona mleta maombi amekiuka utaratibu wa kisheria uliomtaka kuleta maombi yake ndani ya siku kumi na nne na kama sivyo basi awasilishe kwanza maombi ya kuomba kuongezewa muda na kutokana na ukiukaji huo maana yake hakuna maombi kwenye Tume na nafuu pekee anayostahili muombaji huyu ni maombi yake kufutwa..."

The above literally translating to mean:

"In that respect, this CMA finds that the applicant contravened the laid down procedure that requires the applicant to file its application within fourteen days or to seek extension of time to lodge the application out of time. Since the applicant did not comply with the dictates of the law, there is no proper application before the Commission and the only remedy available to the present applicant is to strike it out..."

Despite such observation, the CMA went ahead to determine the application on merit. It was not satisfied with the reason given by the appellant that the head teacher was attending the national examinations. The CMA observed that since the appellant was not an individual rather an institution there was no justifiable reasons as to why the appellant failed to assign a staff from its pool to attend the

arbitration. Accordingly, the CMA held that the applicant was negligent hence it dismissed the application.

Dissatisfied with the CMA's ruling, the appellant filed an application for revision in the High Court seeking to revise both the *ex-parte* award and the decision refusing to set aside the *ex-parte* award.

Regarding the *ex-parte* award, the High Court held that since the application was filed a year after the decision of the CMA then it was out of time because section 91 (1) (a) of the Employment and Labour Relations Act, Cap. R.E. 2019 requires a party to lodge an application for revision within a period of six weeks (42 days) from the date of the impugned decision. It therefore dismissed the application.

Regarding the refusal to set aside the *ex-parte* award, the High Court concurred with the CMA that the absence of the appellant before the CMA was due to the appellant's own negligence which is not a good reason to extend time. It thus upheld the CMA's decision by dismissing the application. Undaunted, the appellant has come to this Court seeking to challenge the decision of the High Court on the following grounds of appeal:

1. *That, while the exparte award in Labour Dispute No. CMA/KIG/DISP/31/2018 before the CMA was delivered on 29th June, 2018 and the appellant's*

application to have it set aside, which is Labour Dispute No. CMA/KIG/MISC/APPL/04/2018 being delivered on 18th May, 2019 then the High Court erred in law that the appellant's revision against Labour Dispute No. CMA/KIG/DISP/31/2018 was time barred.

2. *That, while the High Court affirms the observation by the CMA that the appellant's application before the CMA, Labour Dispute No. CMA/KIG/MISC/APPL/04/2018 was time barred then the High Court erred in law to affirm the CMA findings on the merits of the application instead of quashing the same asserting the ground that time limitation was not an issue before the CMA.*

At the hearing of the appeal, Mr. Sadiki Aliki, learned advocate appeared for the appellant, whereas, the respondent appeared in person, unrepresented.

Being mindful of the provisions of section 57 of the Labour Institutions Act, Cap. 300 R.E. 2019, Mr. Aliki abandoned the first ground of appeal which is not on a question of law and focused his submission on the second ground of appeal. He was brief to the point that when the CMA was composing the ruling it raised the issue of time limitation, suo motu, without giving parties a right to be heard. He added that a right to be heard is so basic and fundamental such that the

CMA was supposed to have invited parties to hear from them on the question raised by it before reaching to any decision on the matter before it being time barred. It was his further submission that although the High Court noted the anomaly, but held that time limitation was a mere observation by the CMA, whereas, he argued, it goes to the root of the jurisdiction of the CMA. With that brief submission, Mr. Aliki implored the Court to allow the appeal, quash and set aside the decision of the CMA and nullify the proceedings of the High Court which emanate from a null decision.

The respondent strongly opposed the appeal arguing that, although none of the parties was invited to address the CMA on the issue of time limitation raised by the CMA itself when composing the ruling, the appellant was given a benefit of doubt as the CMA did not end there. He pointed out that the CMA went further to determine the application on merit hence no prejudice was occasioned to the appellant. He thus invited us to dismiss the appeal.

From the parties' submissions, it is without doubt, and as conceded by the respondent that, the CMA raised and answered the issue of time limitation in the course of composing its ruling. It did not invite parties to address on that issue. It is a cardinal principle of natural

justice that a person should not be condemned unheard, and that, fair procedure demands that both sides should be heard.

This Court has held time and again that a right to be heard is not only a cardinal principle of natural justice but also a fundamental right constitutionally guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended. For that reason, any decision arrived in contravention of it will not be left to stand even if the same decision would be reached had the party been heard - see: the decision of this Court in the cases of **The Director of Public Prosecutions v. Sabini Inyasi Tesha & Another** [1993] T.L.R. 237, **National Housing Corporation v. Tanzania Shoe Company Limited & Others** [1995] T.L.R. 251, **Mbeya-Rukwa Auto Parts & Transport v. Jestina Mwakyoma** [2003] T.L.R. 251, **Abbas Sherally & Another v. Abdul Sultang Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) to mention the few.

For instance, in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy** (supra) the Court said:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the 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."

As indicated earlier, in this appeal, the CMA in the course of composing the ruling discussed the issue of time limitation and ruled that the application before it was time barred thus ought to be stricken out. Obviously, this is a clear breach of the parties' basic rights because they were not afforded a right to be heard on the question of time bar. In that respect, having noted the violation, the High Court was supposed to revise and invalidate the decision of the CMA.

The respondent argued that the appellant was not prejudiced because the CMA went ahead to determine the question of extension of time on merit. With respect, we do not subscribe to his argument because the law on time limitation is now settled that it goes to the root of the jurisdiction of any court, tribunal or judicial making body including the CMA. That being the case, if the CMA noted that there was an issue concerning its jurisdiction, it ought to have invited parties to address it on the issue. Given the peculiar circumstances of this appeal, we are

satisfied that failure by the CMA to afford parties the right to be heard vitiated its entire ruling and we cannot let it to stand.

Accordingly, we find merit to the appeal. We allow it and proceed to quash and set aside the ruling of the CMA, nullify the proceedings of the High Court and set aside its judgment that emanated from a null decision of the CMA. We further order that the case be remitted to the CMA and be assigned to another arbitrator to proceed from the proceedings when the matter was set down for ruling. Should the assigned arbitrator see a need to look into the question on period of limitation then parties should be invited to address that question.

DATED at **KIGOMA** this 8th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 9th day of June, 2023 in the presence Mr. Sadiki Aliki, learned advocate for the appellant and respondent appeared in person is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL