IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 246 OF 2022

ROMBO DISTRICT COUNCIL ..... 1st APPELLANT

ATTORNEY GENERAL ..... 2ND APPELLANT

VERSUS

HAMIS HAJI MFINANGA ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Moshi)

(Simfukwe, J.)

dated the 15th day of October, 2021

in

Revision No. 21 of 2021

JUDGMENT OF THE COURT

15th & 21st March, 2024

MGEYEKWA, J.A.:

The appellants have appealed against the decision of the High Court of Tanzania at Moshi in Labour Revision No. 21 of 2021 dated 15th October, 2017 (Simfukwe, J.) reversing the decision of the Commission for Mediation and Arbitration at Moshi (the CMA) dated 11th May, 2015 which was decided in favour of the appellants. The matter arose from the employment relationship between the first appellant and the respondent. The respondent was employed by the first appellant on 1st July 2004, as a teacher under a permanent contract. Until the termination of his

employment contract, he was posted at Rombo. On 18th September, 2017 the first appellant terminated the respondent.

Aggrieved by the outcome of the decision of disciplinary committee, on 25th April, 2018, he unsuccessfully appealed to the Teacher's Services Commission. Still discontented, on 7th July 2018, the respondent appealed to the President of the United Republic of Tanzania, and on 26th February 2019, his appeal was rejected.

Subsequently, on 8th March, 2021, the respondent decided to file a labour dispute concerning his terminal benefits together with an application for condonation of late referral before the CMA at Moshi. On 11th May 2021, the respondent's application for condonation was dismissed for want of sufficient reasons. Unsatisfied with that decision, the respondent, on 25th May, 2017, lodged a Labour Revision No. 21 of 2021 in the High Court challenging the CMA decision. Having heard the parties, the learned High Court Judge found that it was improper for the arbitrator to dismiss the respondent's application for condonation after the respondent had sufficiently accounted for the days of delay. As such, the learned High Court Judge allowed the revision, quashed and set aside the CMA's decision, and allowed the respondents to lodge a dispute at the CMA, and it was ordered to proceed with arbitration of the dispute.

Dissatisfied, the appellants preferred the instant appeal to the Court seeking to assail the decision of the High Court on four grounds. However, the first, second and third grounds of appeal were abandoned.

At the hearing of this appeal, the appellants were represented by two learned counsel, Ms. Narindwa Sekimanga and Mr. Yohana Marco, both learned State Attorneys. The respondent enjoyed the service of Mr. Yona Lucas, learned advocate.

Before the commencement of hearing of the appeal, Mr. Marco prayed for and obtained leave of the Court under Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009, to argue an additional ground of appeal which faults the CMA for entertaining a dispute while it had no jurisdiction to entertain a labour dispute involving a public servant.

The first additional ground argued as the first ground raises the issue whether the CMA had jurisdiction to determine the matter. In his oral submissions, Mr. Marco tried to convince us that the CMA had no jurisdiction to determine the application for condonation involving a public servant pursuant to section 32A of the Act, before exhausting the avenue available under the Public Service Act, by referring his complaints to the Public Service Commission before resorting to the CMA. To support his argument, the learned State Attorney referred to our earlier decision in

Tanzania Posts Corporation v. Dominic A. Kalangi, Civil Appeal No. 12 of 2022 (unreported).

Opposing the argument that the CMA was not clothed with the requisite jurisdiction to entertain this matter, Mr. Lucas spiritedly submitted that both the CMA and the High Court were clothed with jurisdiction to determine the application for condonation and revision respectively. He clarified that the respondent referred his complaints to the Public Service Commission before resorting to the CMA and the same determined it to its finality. Subsequently, the respondent lodged a different claim related to subsistence and repatriation allowances before the CMA.

The learned counsel for the respondent distinguished the cited case of **Tanzania Posts Corporation v. Dominic A. Kalangi** (supra) from the instant matter and argued that the cited case is not relevant to this appeal. He reasoned that, the respondent's claims before the CMA are related to subsistence and repatriation allowances, and its remedies are not provided for under section 32A of the Act.

In our determination of the complaint on jurisdiction, we shall be guided by section 32A of the Act on which the ground is premised. For easy reference, we reproduce it hereunder. It reads:

"A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act".

From the evidence on record and the rival submissions from the counsel for the parties, we agree that all disciplinary matters involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President. The Court held as such in **Tanzania Posts Corporation v. Dominic A. Kalangi** (supra). The other undisputed fact is that the respondent's claim at the CMA involved subsistence and repatriation allowances and not otherwise.

However, we are unconvinced that the respondent being a public servant was required to exhaust the avenue available under the Public Service Act before resorting to the CMA to pursue his entitlement to repatriation and subsistence allowances. We hold this view for the following reasons: **one**, the respondent's claims which were lodged at the CMA on 8th March, 2021, did not arise from disciplinary actions. Instead, they arose from the claims for terminal benefits which include, repatriation and subsistence allowances. **Two**, in terms of section 43 (1) (a), (b) and (c) of Employment and Labour Relations Act, repatriation is an automatic remedy paid by an employer regardless of whether an employee was terminated, retired, or resigned. See the case of **Joseph Khenani v.**

Nkasi District Council, Civil Appeal 126 of 2019 [2022] TZCA 82 (23 February 2022) TanzLII and **three**; our reading of the Public Serviced Act and its regulations do not suggest that there are remedies for a claim of a substantial and repatriation allowances.

In our view, the respondent's claims are not among the disputes that involve the employee's internal dispute settlement mechanisms within the Public Service Commission. Therefore, the respondent was litigating in the correct forum. The case referred to us by Mr. Marco is distinguishable from the present case in that **Tanzania Posts Corporation v. Dominic A. Kalangi** (supra) as it was about the failure by an employee who was a public servant to exhaust the remedies as envisaged by the Act therein. In contrast, in the present case, there are no such remedies under Public Service Act.

From the foregoing analysis, we entertain no doubt that the applicability of section 32A of the Act in the matter at hand is misplaced. Accordingly, the additional ground stands dismissed.

We turn to the second ground of appeal, that calls for the Court's determination on *whether the respondent has advanced sufficient cause to warrant condonation for late referral.* CMA's power to grant condonation is derived under Rule 56 (1) of the Labour Court Rules (the

Rules). The powers are discretionary. However, the discretion has to be exercised judiciously by taking into account all relevant factors.

In determining whether or not the applicant has shown good cause in terms of Rule 56 (1) of the Rules, a number of factors have to be considered. In **Ngao Godwin Losero v. Julius Mwarabu,** Civil Application 10 of 2015) [2016] TZCA 302 (13 October 2016) TanzLII, the decision of the defunct Court of Appeal of Eastern Africa in **Mbogo v. Shah** [1968] EA, where it was held that:

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice".*

The learned counsel for the appellants faulted the High Court judge for holding that the communication done by the respondent was a reason to be considered for extension of time. He forcefully contended that pre-court negotiations on the basis of which the High Court set aside the CMA's decision have never been a ground for stopping the running of time. To reinforce his contention, he referred us to the case of **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of 2020 (unreported).

In the first place, we agree with Mr. Marco that in the instant matter, the negotiation between the first appellant and the respondent did not bar the respondent from lodging his complaint timely before the CMA. However, we are settled in our mind that the case of **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA)** (supra) cited by the appellants' counsel is not applicable to this case. We say so because in **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA)** (supra), the issue was whether pre-court negotiations was capable of stopping the running of limitation time, which is not the issue in this case. In the instant case, the applicant was already out of time to lodge his application at the CMA and hence this application for condonation.

In his submission, Mr. Marco contended that, time started running from 24th September, 2019, when the respondent was paid his repatriation allowance. Therefore, the High Court misdirected itself to hold that time started to run from 5th March, 2021.

Mr. Lucas emphatically defended the High Court decision that the respondent accounted for each day of delay. On being probed by the Court whether the respondent was within time when the respondent issued him with a letter annexed as RD1, Mr. Lucas contended that the

respondent was within time. Upon further being probed as to whether the respondent was right in referring 14th September, 2017 as an exact date when the dispute arose. He conceded that the respondent was not right. It was however, his view that, the High Court rightly stepped into the shoes of the CMA and acted judicially by correcting the date when the dispute arose. He clarified that the High Court had the power to look at all the circumstances of the case and determine whether the applicant had adduced sufficient cause. It is the respondent's counsel further contention that the respondent had a right to raise his claims since in terms of section 43 of ELRA, every day of delay creates a continued cause of action from the date when the employee was terminated to the date of repatriation.

It is trite law that, a party seeking condonation is required to give a reasonable and acceptable explanation for the delay. The law governing the limitation of time relevant to this appeal is rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007 which provide that all other disputes must be referred to the Commission within sixty days from the date when the dispute arose. In **Sebastian Deogratius Kajula v. Simon Group/Shamba Africa**, Civil Appeal No.

160 of 2021 [2024] TZCA 83 (22 February 2024) TanzLII the Court held that: -

> *"...a party seeking condonation is saddled with a duty to make out a case entitling it to the court's indulgence. For, otherwise, it must be trite that condonation cannot be given on a silver plate... We also wish, to record our views that, given the position obtained under our labour laws, rather than wasting time as he did, the appellant could have timely referred his grievances to the CMA and thereafter pursued a court-annexed mediation in the pre-arbitration stage of his case in terms of section 14 (1) (a) of the Labour Institutions Act".*

As intimated earlier, the sixty days prescribed under rule 10 (2) of the GN No.64 of 2007 started to run from 24th September, 2019, when the respondent was paid his repatriation allowance. In counting for the days of delay, there is a lapse of approximately two years and four months which were not accounted for. Consequently, we agree with the appellants' counsel that, the High Court took into account an irrelevant factor that the respondent's delay was accounted for.

In the premises, we are of the firm view that the respondent failed to demonstrate good cause for warranting the CMA to grant his

condonation and the High Court erred in interfering with its discretion dismissing his application. There are no reasons to vary the CMA decision.

In the upshot, we allow the appeal to the extent explained above and quash the decision of the High Court and the orders emanating therefrom. As the appeal arises from labour dispute, we make no order as to costs.

DATED at **MOSHI** this 21st day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The judgment delivered this 21st day of March, 2024 in the presence of Ms. Edith Msenga, learned State Attorney for the appellants and Mr. Charles Mwanganyi, holdings brief for Mr. Yona Lucas, learned advocate for the respondent, is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL