IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 188/01 OF 2021

COSTANTINE VICTOR JOHN.....APPLICANT
VERSUS
MUHIMBILI NATIONAL HOSPITAL..... RESPONDENT
[Arising from the Decision of the Court of Appeal of Tanzania at Dar es Salaam]

(Mbarouk, Mwarija and Mziray JJA,.)

dated 25th day of January, 2016
in
Civil Application No. 44 of 2013
.....

RULING OF THE COURT

3rd & 24th October, 2022

MKUYE, J.A.:

This is an application for review of the Ruling of this Court in Civil Application No. 44 of 2013 (Mbarouk, J.A., Mwarija, J.A., and Mziray, J.A.) which revised and set aside the decisions of both Labour Court and the Commission for Mediation and Arbitration (the CMA) and found that the applicant's termination was based on justifiable reasons. The application is brought under Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by an affidavit deponed by Constantine Victor John, the applicant. Apart from that, he has filed his written submissions and list of authorities. In the notice of motion, the applicant has fronted four grounds as follows:

(a) *That the decision was based on a manifest error on the face of the record because the court failed to consider that*

Exhibit D5 which contravened section 12 (c) of the Muhimbili Nationai Hospital Act, No. 3 of 2002 and regulation 10.4.3 and 10.6.b of the Kanuni za Wafanyakazi, Hospitali ya Taifa ya Muhimbili.

(b) *That the decision was based on a manifest error on the face of the record as the Court in Civil Application No. 44 of 2013 did not consider that Exhibit D5 qualifies not to be called the termination letter but a mere information for abscondment.*

(c) *That the decision was based on a manifest error on the face of the record as the Court in Civil Application No. 44 of 2013 regarding the (sic) considered unexplained 7 days between 19/09/2009 and 25/09/2009 without considering weekends, public holidays and sickness excuses as per CMA records.*

(d) *That the decision was based on a manifest error on the face of the record as the Court in Civil Application No. 44 of 2013 failed to consider that the applicant reported at work on 24/09/2009.*

In paragraphs 10, 11, 12 and 13 of the applicant's affidavit in support of the application, the applicant has reiterated what is stated in the grounds for the application and in paragraph 14 of the said affidavit he has insisted that, had the Court in Civil Application No. 44 of 2013 considered some material irregularities with Exhibit D5, it would have decided in favour of the applicant.

On the other side, the respondent in resisting the application has filed an affidavit in reply and a list of authorities.

When the application was called on for hearing, the applicant was represented by Mr. Josephat Mabula, learned advocate whereas the respondent had the services of Ms. Alice Mtulo, learned Senior State Attorney assisted by Ms. Debora Mcharo and Mr. Rashid Mohamed, both learned State Attorneys.

Upon being availed an opportunity to amplify the grounds of application, Mr. Mabula reiterated that the Court did not consider that Exhibit D5 which was used to determine the applicant's case was not qualified to be so used since the applicant was denied a chance to be heard. He pointed out that there was no Disciplinary Committee convened to determine his fate as per the *Kanuni za Wafanyakazi, Hospitali ya Taifa ya Muhimbili.* To support his argument, he cited to us the case of **Muhidin Ally @ Muddy and 2 Others v. Republic**, Criminal Appeal No. 2 of 2006 (unreported) where it was reiterated that the Court may review its decision on among other grounds that a party has been wrongly deprived of an opportunity to be heard.

Mr. Mabula contended further that although the Court at page 13 of its Ruling stated that the applicant failed to account for seven (7) days from 07/09/2009 to 25/09/2009, among those days there were weekend and public holidays which were not excluded. He elaborated that 19/09/2009 and 20/09/2009 were Saturday and Sunday respectively; whereas 21/09/2009 and 22/09/2009 were Eid el Fitr

holidays. As such he said, there remained only three (3) days which were unaccounted for. To fortify his submission, he referred us to the case of **Philip Tilya v. Vedasto Bwogi,** Civil Application No. 546/01 of 2017 (unreported) page 6. He said, after excluding those weekend and public holidays there remains three (3) days which did not warrant termination of his employment since, according to Rule 9 item 1 of the Employment and Labour Relations (Code of Good Practice) Rules an employee's employment can be terminated if he absconds for more than five (5) days.

In this regard, he prayed to the Court to find that the application merited and grant it.

In reply, Ms. Mtulo in the first place sought to adopt their affidavit and written submissions to form part of their oral submission. Having done so, she reiterated that the applicant has filed an application under Rule 66 (1) (a) of the Rules which means that it is based on a manifest error on the face of the record which has occasioned miscarriage of justice. However, looking at the grounds of review in totality, she said, they seek this Court to re-assess the evidence. She elaborated that, the contention that the Court failed to consider Exhibit D5 which was in contravention of section 12 (c) of the Muhimbili National Hospital Act and rules 10.4.3 and 10.6.b of the *Kanuni za Wafanyakazi, Hospitali ya*

Taifa ya Muhimbili requires new evidence and insisted that the fact that the Court's decision is erroneous is not a good ground for review. To bolster her argument, she cited the case of **Attorney General v. Mwahezi Mohamed and 3 Others,** Civil Application No. 314 /12/ of 2020 (unreported).

In relation to ground no. 2 that Exhibit D5 did not qualify to be a termination letter, Ms. Mtulo contended that it is not a ground for review as it entails the Court to re-assess the evidence which is contrary to the provisions of Rule 66 (1) (a) of the Rules. To support her argument, she referred us to the case of **Shadrack Balinego v. Fikiri Mohamed @ Hamza and Others**, Civil Application No. 25/08 of 2018 page 19 (unreported) where the Court cited with approval the case of **Peter Kindole v. Republic,** Criminal Application No. 3 of 2011 (unreported) and stated as follows:

> *"The applicant is merely asking the Court to revisit evidential, legal and factual matters. This is synonymous with asking the Court to sit on appeal against its own decision. This is not acceptable as the circumstances for review are clearly set out in Rule 66 (1) of the Court Rules".*

As regards the third ground of review that the Court failed to consider the weekend and public holidays in between 19/09/2009 and 25/09/2009, the learned Senior State Attorney contended that the said

ground also requires the Court to re-evaluate evidence. At any rate, she submitted that the Court dealt with it as shown at page 13 of the judgment and held a view that the applicant ought to have obtained authorization of his absence rather than informing his employer about his absence from duty even if the duration of supplementary examination is to be excluded (07/09/2009 to 25/09/2009) as seven days still remained unexplained. She was of the view that, this would have required the Court to go back to the evidence not brought earlier on.

With regard to the applicant's complaint that he was denied an opportunity to be heard, Ms. Mtulo argued that it was a new ground which was brought as an afterthought. She added that, it does not fall under the provisions of Rule 66 (1) (a) of the Rules based on apparent error on the face of the record and which is likely to occasion miscarriage of justice to which the applicant has failed to show it. In support of her argument, she cited the case of **Shadrack Balinego** (supra).

Ms. Mtulo went on to distinguish the cases of **Muhidin Ally @ Muddy** (supra) and **Philip Tilya's** case (supra) in that in the former case the issue was identification and the error was quite apparent not

requiring evidence; while in the latter case the issue related to filing of supplementary record on the date which fell during Eid el Fitr holiday.

In the end, she contended that all grounds do not fall within the ambit of Rule 66 (1) of the Rules. In concluding their submission, Mr. Mohamed added that all grounds needed evidence. He, therefore, prayed to the Court to find the grounds are not ground for review and dismiss the application.

In rejoinder, Mr. Mabula insisted that the grounds are within the ambit of Rule 66 (1) (a) of the Rules since the Court would not have acted as it did had all the circumstances of the matter been known to it which to him are exceptional case.

With regard to ground No. 1, it was Mr. Mabula's submission that **one,** the Court did not know that the applicant was irregularly terminated. **Two**, that the applicant's employment was not terminated. **Three**, it was an inadvertence on the part of the Court not to consider and exclude the Saturday, Sunday and public holidays and that applicant ought not to be terminated for failure to go to work for three days. He maintained that the ground on the denial of right to be heard was not new since it violated the *Kanuni za Wafanyakazi, Hospitali ya Taifa ya Muhimbili.*

When probed by the Court on whether the ground relating to right to be heard was formally brought, he conceded that it was not but he urged the Court to invoke the overriding objective principle and consider it.

We have examined and considered the submissions by both parties and the entire record of the application. We think we are now in a position to determine whether or not the application before us is meritorious.

Rule 66 of the Rules empowers this Court to review its own decisions. The parameters under which the Court can exercise such power are provided for under the said Rule as follows:

> *"66(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard; or*
>
> *(c) the court's decision is a nullity; or*
>
> *(d) the court had no jurisdiction to entertain the case; or*
>
> *(e) the judgment was procured illegally, or by fraud or perjury".*

The conditions set out under the above cited provision were emphasized in the case of **Roshan Meghee & Company Limited v. Commissioner General of Tanzania Revenue Authority** [2017] T.L.R. 482 in which the Court stated that:

> *"The Court has time and again held that an application for review will be entertained only if it falls within the grounds stipulated under the provisions of Rule 66 (1) of the Court of Appeal Rules"*

In this case, the applicant has predicated his notice of motion under paragraph (a) of sub rule (1) of Rule 66. It means, therefore, that as it was argued by Ms. Mtulo, there is a manifest or apparent error on the face of the record which resulted in the miscarriage of justice.

As to what entails a manifest error on the face of the record, the law is now settled. It was well stated in the case of **African Marble Company Limited (AMC) v. Tanzania Saruji Corporation TSC,** Civil Application No. 132 of 2005 (unreported) as follows:

> *"An error apparent on the face of the record must be such as can be seen by one who rides and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions....".*

(See also **Chandrakant Joshubhai Patel v. Republic**, [2004] TLR 218).

It should be also emphasized here that, an application for review is really meant to address the irregularities in a decision sought to be reviewed which have resulted into injustice to the aggrieved party. Thus, it is not an appeal in disguise to a party who is dissatisfied with the decision of the Court- **See Patrick Sanga v. Republic**, Criminal Application No. 8 of 2011 (unreported) and **Charles Barnabas v. Republic,** Criminal Application No. 13 of 2009 (both unreported). More importantly, this is intended to restrict the Court from sitting on appeal against its own decisions in compliance with the public policy that litigation must come to an end - (See **Chandrakant Joshubhai Patel's** Case (Supra)).

In this application, the grounds in the notice of motion, affidavital information (paragraphs 10, 11, 12, and 13) and oral submissions by Mr. Mabula are basically to the effect that the decision of the Court was based on manifest error on the face of the record because of **one**, the courts failure to consider Exh. D5 which contravened section 12(c) of Muhimbili National Hospital Act, No. 3 of 2003 and rule 10.4.3 and 10.6.b of the *Kanuni za Wafanyakazi, Hospitali ya Taifa ya Muhimbili;* **two** failure to consider that Exh. D5 did not qualify to be called the

termination letter but an information for abscondment; **three** failure to consider that the unexplained seven days among them were weekend and public holidays; and **four** that the court did not consider that the applicant reported at work on 24/9/2009.

However, having examined the said grounds, we are in total agreement with Ms. Mtulo that the said grounds are not grounds of review envisaged under Rule 66 (1) (a) of the Rules as they require the Court to re-asses the evidence. The contention that the Court failed to consider that Exh D5 contravened section 12 (c) of the Muhimbili National Hospital Act and rule 10.4.3 and 10.6.b of the *Kanuni za Wafanyakazi, Hospitali ya Taifa ya Muhimbili;* or that the said Exhibit did not qualify to be a termination letter require to revisit the evidence. This also applies to the claim that the applicant had reported to work on 24th September 2009. In other words, they do not depict an obvious or patent error which can be established without a long-drawn process of reasoning whereby there may be two opinions - (See **African Marble Company Limited** (supra) and **Chandrakant Joshubhai Patel** (supra).

What is clear in this application, the applicant is making an attempt to challenge the decision of the Court based on evidence which is not envisaged in a review. Thus, in the case of **Abel Mwamwezi v.**

Republic, Criminal Application No. 1 of 2013 (unreported) when the Court was confronted with akin scenario, it had this to say:

> *"A ground of review inviting the Court to consider any evidence afresh, amounts to inviting the Court to determine an appeal against its own judgment. This shall not be allowed".*

(See also **Sudy Mashana @ Kasala v. Republic**, Criminal Application No. 2/09 of 2018 (unreported).

It is noteworthy at this juncture that public policy demands that in the proper functioning justice system, the litigation must come to an end and that a judgment of the final court in the land should be final and its review must be an exceptional –See **Karim Kiara v. Republic**, Criminal Application No. 4 of 2007; **Japhet Msigwa v. Republic**, Criminal Application No. 7 of 2011 and **Eusebia Nyenzi v. Republic**, Criminal Application No. 6 of 2013 (all unreported). Unfortunately, this is not the case in the matter at hand.

We note that Mr. Mabula in the course of his submission forcefully argued that the applicant was denied the right to be heard as he was not taken to the Disciplinary Committee before his termination. However, we agree with the learned Senior State Attorney's view that this is a new ground as it is not pegged under any provision of Rule 66(1) of the Rules.

At any rate, we have gone through section 12 (c) of the Muhimbili National Hospital Act and we have observed that it establishes the disciplinary bodies among them being the head of department to be a disciplinary authority to all other employees of the Hospital while the Board is the final appellate authority in that respect. The said provision, however, does not specifically provide for the requirement for the applicant to be taken there. We think this argument may have been misconceived at the moment.

We have also considered the argument raised by Mr. Mabula that Court might not have considered that some days of absenteeism were weekend and public holidays. According to section 59 (1) (g) of the Evidence Act, [Cap 6 R.E. 2019], the Court is mandatorily required to take judicial notice on among others the division of time, the geographical division of the world and public festivals, feasts and holidays notified in the Gazette.

In the case of **Philip Tilya** (supra) cited by Mr. Mabula, the Court took judicial notice that the date in which the appellant ought to file supplementary record of appeal was a public holiday upon being satisfied itself from IPP Media Website and found that by filing it on 28/6/2017 instead of 26/6/2017 the same was filed within time.

In this case, the applicant's employment was terminated basically on the ground that he had absconded from work for seven days. We have gone through the Habari Leo, Mwananchi and Mtanzania Newspapers issue Numbers 01006, 7575 availed to us all dated 21/9/2009 showing His Excellency President Jakaya Kikwete attending Eid el Fitr festival at Mnazimmoja on the previous day (20/9/2009) (Sunday). Apart from that, we have perused the copy of 2009 calendar which, although does it not show clearly whether 20/9/2009 and 21/9/2009 were public holidays, it has revealed that 19/9/2009 and 20/9/2009 were Saturday and Sunday respectively. It means, therefore, that Eid el Fitr was celebrated on 20/9/2009 and 21/9/2009 as opposed to Mr. Mabula's suggestion that it was on 21/9/2009 and 22/9/2009. From this investigation, it follows that the applicant's days of absenteeism were four (4) instead of three (3) as was suggested by Mr. Mabula.

In this regard, being guided by the above cited authority and having in mind rule 9 item 1 of the Code of Good Practice Rules, we are of the considered view that the applicant's employment ought not to have been terminated since his absence from work without permission or without acceptable reason was not more than five working days. We are, therefore, in agreement with Mr. Mabula that had the Court been

availed with this information, it would not have arrived at that conclusion.

In the event, that said and done, we allow the application and review our decision dated 8/2/2013. Instead, we uphold the decisions of the Labour Court and CMA.

It is so ordered.

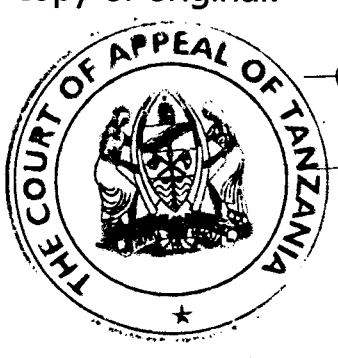
DATED at **DAR ES SALAAM** this 19th day of October, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 24th day of October, 2022 in the presence of Mr. Josephat Mabula, learned counsel for the applicant and in the absence of the Respondent though duly served, is hereby certified as a true copy of original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL