IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 106 OF 2019

MHUBIRI ROGEGA MONG'ATEKO.....APPELLANT

VERSUS

MAK MEDICS LTD.....RESPONDENT

[Appeal from the Ruling of the High Court of Tanzania, Mwanza District Registry at Mwanza]

(Rumanyika, J.)

dated 31st day of January, 2019

in

Labour Revision No. 9 of 2017

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JUDGMENT OF THE COURT

12th & 20th July, 2022

KWARIKO, J.A.:

This case has had a chequered history which can be summarized as follows: The appellant, Mhubiri Rugega Mong'ateko was employed by the respondent, MAK Medics Limited until on 15th August, 2012 when his employment was terminated on allegation of involvement in causing loss of TZS. 150,000,000.00 to the respondent.

Aggrieved by the termination, the appellant lodged a labour dispute before the Commission for Mediation and Arbitration (the CMA) in Mwanza. However, the complaint was dismissed for want of

prosecution. Having been dissatisfied with the dismissal order, the appellant filed an application for revision before the High Court where it was struck out for being premature as it was observed that, the remedy for the dismissal of the suit for want of prosecution is to apply for restoration of the same before the CMA. The appellant, instead of complying with the directive by the High Court, he applied for extension of time to file a labour dispute before the CMA. The application was refused and the applicant was directed to comply with the order of the High Court. The appellant was further aggrieved by that decision hence he filed yet another application for revision before the High Court where Nyerere, J. upheld the decision of the CMA. However, the High Court invoked section 91 (4) (a) and (b) of the Employment and Labour Relations Act, No. 6 of 2004; now CAP 366 R.E. 2019 and directed the CMA to restore the dismissed application and hear the parties on merit.

The CMA complied with the order of the High Court, mediated the dispute and upon failure, the parties were duly heard on merit. The respondent's case before the CMA was that the appellant was employed by the respondent as a drugs order recorder. His duties were to check inventory, handling purchases and returns and keeping records. The respondent claimed that, in the course of execution of his duties, the appellant caused loss of TZS. 150,000,000.00 being the property of his

employer. Following which he was charged and convicted before the District Court of Nyamagana with the offence of stealing by servant in Criminal Case No. 557 of 2012.

The respondent's further evidence was that the appellant admitted liability with a common understanding to repay the same. Thereafter, a disciplinary hearing was conducted where the appellant admitted the allegations and, in the end, he was terminated from employment.

On the other hand, though he did not dispute that he was charged with a criminal offence, he denied the fact that he agreed to compensate the alleged loss. He complained that, his termination from employment was procedurally unfair for the reason that while the notice of hearing indicated that hearing was to take place on 12th August, 2012, the same was conducted on 13th August, 2012 without notifying him.

At the end of the trial, the CMA found that the appellant's termination was fair and the procedure was followed. The complaint was thus dismissed.

Undaunted, the appellant applied for revision before the High Court but he was not successful. He has filed this appeal before the

Court against the decision of the High Court upon the following seven grounds:

1. *That, the learned Judge erred in law by holding that the appellant admitted to have duty of care and loss of the alleged sums of money amounting to 150m which had never been in his custody.*
2. *That, the learned Judge failed to find out that the CMA's proceedings were fabricated, saturated and tainted with fraud and material irregularities which resulted to his perverse decision.*
3. *That, the learned Judge erred in law for his failure to discover that the whole of the CMA's proceedings whose both parties' witnesses gave their oral testimonies in Kiswahili was interfered with by the arbitrator who delivered the award in the English language the witnesses neither used nor agreed to contrary to rule 35(1) (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007.*
4. *That, the learned Judge erred in law to base his decision on the exhibits like D4 which the appellant raised objections to and argued against them at their tendering not to be accepted or admitted and still maintained his objections at page 8 of his closing arguments, the act which was illegal to admit them that occasioned injustice to the appellant.*
5. *That, the learned Judge erred in law when he perverted and twisted the case record by not showing the presence of the appellant's personal representative of his own choice Mr. MARWA CHACHA KISYERI who appeared on 25/9/2018 ready to represent the appellant as he did in CMA.*

6. *That, the learned Judge erred in law when he refused the appellant to be represented by his personal representative of his own choice MR. MARWA CHACHA KISYERI on 25/9/2018.*

7. *That, the learned Judge, the same as the CMA arbitrator, failed to discover that the appellant was neither employed as a cashier nor an accountant as he was the drugs order recorder.*

In terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009, the appellant also filled written submissions in support of the appeal. There were no reply written submissions from the respondent. On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented, whilst the respondent had the services of Mr. Emmanuel John, learned advocate.

When he was invited to argue his appeal, the appellant adopted his grounds of appeal and the supporting written submissions without any further explanation. In his written submissions, the appellant mostly argued the grounds of appeal generally and he dwelt much on the exhibits which the respondents tendered to fortify her case. He contended that, he did not admit the alleged loss of TZS. 150,000,000.00 and he was not part of the agreement purportedly contained in exhibit D4. He argued that during the trial, he objected to the exhibits which were tendered by the respondent but he was

surprised to see that both the CMA and the High Court relied on them to hold that he was responsible for the alleged loss.

In his further contention, the appellant specifically attacked exhibit D4, the purported agreement for him to refund cash and lost items which he said was illegally admitted because upon objection to its being tendered in evidence, the CMA did not give out its ruling. He went on to argue that the record of the CMA does not bear testimony that this exhibit was admitted in evidence. In that case, he was surprised to see that the CMA and the High Court relied on that exhibit to find that he had admitted liability for the loss.

Still on that complaint, the appellant argued that, he was wrongly held responsible for the loss of money of the respondent because he was not dealing with the company's money transactions as he was only handling drugs with the title of a drugs order recorder. He denied that he had admitted to have been responsible for the loss and the alleged agreement was fraudulently prepared to include him. He further argued that the respondent's witnesses DW1, DW2 and DW3 were only tutored to give untruthful evidence against him.

As to the language used by the CMA, the appellant argued that while the trial was conducted in Kiswahili, the record of the proceedings

is in English which is contrary to section 35 (1) (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 0f 2007.

The appellant also complained that the High Court contravened the provisions of rules 2 (2) and 43 (1) (a) and (b) of the Labour Court Rules G.N. No. 106 of 2007 read together with section 56 (a) (b) and (c) of the Labour Institutions Act No. 7 of 2004, now CAP 300 R.E. 2019 (the Act), because it denied him a constitutional right to representation when it refused his personal representative to act on his behalf during the hearing of the application for revision.

He finally argued that his termination was unfair since the reasons for it were vague, unreasonable and ambiguous and the procedure at the hearing was not followed because the date of the hearing of the disciplinary offences was changed without him being notified. On the basis of his submissions, the appellant urged us to allow his appeal.

On the other hand, Mr. John did not support the appeal. He argued at the outset that only the appellant's third and fourth grounds of appeal raise points of law as required of the appeals to the Court per section 57 of the Act. He submitted that the other grounds of appeal are based on facts which have been conclusively determined by the courts below. Nonetheless, the learned counsel argued in respect of the first ground of appeal that the appellant admitted liability for the loss and

signed the agreement between the parties to that effect before an advocate, thus exhibit D4 which contained the admission was properly admitted at the trial.

As regards the second ground, the learned counsel contended that the court record cannot be easily impeached as the appellant wants since he has not even given any reason for his complaint. He argued that, the proceedings before the CMA were properly conducted since the appellant was accorded an opportunity of being heard and his representative also assisted him.

Mr. John contended in relation to the third ground, that the CMA did not contravene the law since its proceedings were in English as it is for the Award. In relation to exhibit D4 which forms a complaint in the fourth ground of appeal, he argued that the same was properly admitted in evidence.

The learned counsel argued in relation to the fifth and sixth grounds of appeal that, the record of appeal does not bear testimony that the appellant's representative was denied audience before the High Court.

Lastly, in the seventh ground of appeal, Mr. John contended that the position of the appellant in the respondent's company was not an

issue before the CMA because he was a drugs order recorder and was never termed as a cashier or an accountant. For the foregoing, he urged us to find the appeal unmerited and dismiss it.

Having considered the submissions by both parties, our task is to determine whether the High Court properly upheld the decision of the CMA. For the purpose of convenience, we shall begin our deliberation with the fourth ground of appeal. The appellant's complaint in this ground is that the High Court erred to act upon the respondent's exhibits such as exhibit D4 despite his objection to them during the trial before the CMA. Upon our perusal of the record of appeal, we have found that on 28th October, 2016, prior to the commencement of the trial before the CMA, the respondent filed four documents which she intended to rely on during the trial. These are: **one,** a copy of a summons to attend disciplinary hearing with reference No. MAK/31/2012 dated 9th August, 2012; **two,** a copy of minutes of disciplinary hearing conducted on 13th August, 2012; **three,** a dismissal letter dated 15th August, 2012; and, **four,** a copy of agreement to refund cash and lost items between the complainant and respondent.

On our further perusal from page 177 to 179 of the record of appeal it is revealed that, the respondent introduced in evidence the first three documents which despite objection from the appellant, they were

admitted as exhibits D1, D2 and D3 respectively. The record does not show that the fourth document was tendered and admitted in evidence as exhibit. However, from page 184 to 185 of the record of appeal, the proceedings show that one Asante Stanley (DW1) was extensively cross-examined by the appellant's representative in relation to exhibit D4 being the fourth document listed above. It was not shown how this document was named exhibit D4 without passing the rigorous process of admission of exhibits. Not only that, this document was heavily relied upon by the CMA to find that the appellant's termination from employment was for a valid reason as he had admitted liability for the loss occasioned to the respondent. This finding was ultimately upheld by the High Court.

It is our considered view that, the purported exhibit D4 which is the alleged admission by the appellant that he occasioned loss to the respondent, was not admitted in evidence for it to be acted upon to decide the case. It is trite law that a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record. In the case of **Chantal Tito Mziray & Another v. Ritha John Makala & Another,** Civil Appeal No. 59 of 2018 (unreported), in which a Will that was only attached to

the caveat but not tendered in evidence, was relied upon to reach a decision, the Court had the following to say:

> *"...We are satisfied that the "purported Will" which was extensively relied in the impugned judgment of the trial court to reach the conclusion that it is invalid was neither tendered nor admitted in evidence at the trial. Therefore, though it is not disputed that the Will was attached to the caveat in support of the caveat, the trial court wrongly, with respect, relied on it to reach the conclusion concerning dispute between the parties."*

Likewise, in an akin situation in the case **Shemsa Khalifa & Two Others v. Suleiman Hamed Abdallah,** Civil Appeal No. 82 of 2012 (unreported), the Court observed thus:

> *"We out-rightiy are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this led to a grave miscarriage of justice."*

[See also **Godbless Jonathan Lema v. Mussa Hamis Mkanga & Two Others,** Civil Appeal No. 47 of 2012 (unreported).

In the present case, the CMA relied on the purported exhibit D4 and held as follows:

> *"The complainant admitted and confessed to commit a gross misconduct which is provided under Rule 12 (3) (b) of G.N. No. 42 of 2007 which provides that the acts which may justify termination are ...**willful damage to property of the employer.** Therefore, the reason for termination is valid and fair and the allegations by the complainant have no merits at all and the same are dismissed."*

On its part, the High Court in relying to exhibit D4, stated as follows:

> *"...The alleged applicant's admission of loss (exhibit D4) may have been forged or, on his 2nd thought coerced, but without stating who, and how it was forged, the applicant is stopped from denying the truth. Leave alone serious contradictory evidence of his admission. Forged, forcefully obtained or both"?*

Therefore, it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence. The fourth ground passes, and

for this reason, we find the appeal meritorious and thus we find no need to determine the remaining grounds of appeal.

In the event, we allow the appeal, quash and set aside the whole revision proceedings in the High Court and that of the CMA from 21st November, 2016. However, for the interest of justice, we remit the case to the CMA for a trial *de novo* before another arbitrator. This being a labour matter, each party to bear its own costs.

DATED at **MWANZA** this 19th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 20th day of July, 2022 in the presence of the appellant in person and Mr. Emmanuel John, learned counsel for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL