IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 22 OF 2018

DEOGRATIAS KABADO..... APPELLANT

VERSUS

VOCATIONAL EDUCATION AND TRAINING

AUTHORITY.....RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Mashaka, J.)

dated the 28th day of July, 2017
in
Labour Revision No. 103 of 2016

.....

RULING OF THE COURT

25th Aug & 3rd September, 2021

FIKIRINI, J.A.:

This appeal is against the judgment and decree of the High Court of Tanzania (Labour Division) at Dar es Salaam (the Labour Court) in Revision No. 103 of 2016. The decision confirmed the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/TEM/202/2014 dated 19th February, 2016.

Brief facts leading to the present appeal can be stated as follows: the appellant, Deogratias Kabado was employed as Development Program Manager by the respondent, Vocational Education and Training Authority (VETA) on 4th June, 2012. His employment was however terminated a year later on 30th May, 2013. The reason assigned for the termination was poor performance as specified in his termination letter dated 23rd May, 2013 which was admitted in evidence as exhibit A10 as indicated at page 160 of the record of appeal. Disconcerted he appealed to the Director General as exhibited in **A11** which can be found at page 162 of the record of appeal. The letter to the Director General dated 27th May, 2013 was replied to on 14th July, 2013 confirming the appellant's termination. Exhibit A12 can easily be traced at page 166 of the record of appeal. Dissatisfied the appellant referred the dispute to the CMA. The CMA found that the termination was procedurally and substantively fair and decided in favour of the respondent.

Aggrieved by the CMA award, the appellant unsuccessfully filed for revision in the Labour Court challenging the award. The Revision

No. 103 of 2016 before the Labour Division was determined, again in favour of the respondent. Undettered, the appellant preferred this appeal containing two grounds:

1. *That, the Honourable Judge, having found that, the appellant was still under probation, erred in law and in fact holding that, the respondent adhered to a fair procedure for termination of the appellant's contract of employment based on incompetence.*
2. *That, the Honourable Judge, erred in law and in fact when she failed to take into consideration the appellant's defence before coming to the conclusion that the appellant was incompetent and as such termination of his contract of employment was substantively fair.*

On the part of the respondent, it raised two preliminary points of objection that:

1. *That, the notice of appeal is incurably defective because of incorrect citation of the case number of the judgment appealed against.*
2. *That, the appellant's appeal is incurably defective as there is no memorandum of appeal on record, which is contrary*

to Rule 90 (1) (a) of the Court of Appeal Rules, 2009 as amended (the Rules).

Ms. Jenipher Kaaya, learned State Attorney assisted by Ms. Gati Museti, Ms. Mariam Matovolwa and Mr. Fortunatus Mwandu all learned State Attorneys appeared for the respondent. The appellant had the services of Mr. Evans R. Nzowa learned counsel.

Practice requires preliminary points of objection to be disposed of first, and thus we allowed the counsel for the parties to address us on the preliminary objection.

Mr. Nzowa outrightly conceded that the preliminary points of objection raised by the respondent's counsel have substance. He was however quick to impress upon us that the defects are curable under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and that the appellant should thus be allowed to amend his record of appeal in terms of Rule 111 of the Rules. On the issue of service, he admitted that the service was effected on 3rd May, 2018, but he contended that he was not the counsel who was in conduct of the appeal at the time,

and went on pressing that he be allowed to amend both the notice of appeal and memorandum of appeal within 30 days.

Ms. Kaaya, appreciated the concession made by Mr. Nzowa, and intimated that they were actually going to withdraw the 1st preliminary point of objection. Following her prayer to that effect, the 1st point of objection was marked withdrawn.

On the 2nd point of objection, Ms. Kaaya sternly opposed the prayer alleging that there was no memorandum of appeal fitting the application in terms of Rule 111 of the Rules. She further contended that a memorandum of appeal being one of the major documents in initiating an appeal, without it, there was no appeal worth consideration by the Court. Ms. Kaaya cited to us the case of **SGS Societe Generale De Surveillance SA & Another v VIP Engineering & Marketing Limited & Another,** Civil Appeal No. 124 of 2017, (unreported). Explaining the effect of the decision to the present situation, she underscored the fact that a memorandum of appeal is essentially what institutes an appeal, therefore, without one in the record, the appeal is rendered incompetent. Taking us through the above cited case, Ms.

Kaaya discussing the facts in the **SGS Societe Generale De Surveillance SA** (supra), she contended that the memorandum of appeal was not signed by the Registrar and that was sufficient ground for the Court to conclude that the appeal was incompetent. Based on her submission, she urged us to strike out the appeal for being incompetent.

Mr. Nzowa in rejoinder, maintained that the memorandum of appeal was in the record. He stressed that only the names of the parties and the citation of the case were incorrectly cited. Otherwise, the contents, related to the decision intended to be impugned were correct. In another vein however, the learned counsel opted to leave the matter for Court's decision.

Having considered the submissions from either counsel, the issue for our determination is whether the application is tenable. Rule 111 of the Rules, which has been relied upon by Mr. Nzowa provides as follows:-

> "*The Court may at any time allow amendment of any notice of appeal or notice of*

cross appeal or ***memorandum of appeal****, as the case may be, or any part of the record of appeal, on such terms as it thinks fit. "*

The memorandum of appeal in our record of appeal refers to the different parties and the number of the case from which the decision arose. In the memorandum of appeal the parties are **Dr. Jean-Bosco Ngendahimana v. The University of Dar es Salaam (UDSM)** instead of **Deogratias Kabado v. Vocational Education and Training Authority (VETA)** and the number of the case is **Miscellaneous Civil Cause No. 24 of 2016, before Honourable. Munisi, J., dated 17th October, 2017** instead of **Revision No. 103 of 2016, before Honourable. Mashaka, J., dated 28th July, 2017.**

From what is contained in the record of appeal, it is obvious there is no memorandum of appeal in reference to the intended appeal by the appellant. What is found at pages 5-6 of the record of appeal speaks loud on this fact. In our view, Rule 111 is applicable when there is a valid or proper document, in this case a memorandum of appeal. In the case of **Masumbuko Kowolesya Mtabazi v. Dotto Salum**

Chande, Civil Application No. 170 of 2013 (unreported), the Court construed the provisions of Rule 111 of the Rules and stressed that:-

> *"Properly interpreted the provision empowers the Court to allow a party to amend the document named in that provision or any part of the record.* ***This means that there must be existence in the record of appeal filed in Court for a prayer to amend to be granted.***
> "[Emphasis added]

Going by the interpretation of Rule 111 of the Rules above, it means that there must be in existence in the record of appeal filed in Court, documents which need to be rectified for purposes of improving the record of appeal. In the instant case there is none. It is therefore impossible for the Court to grant the application as there is no valid memorandum of appeal which can be amended. Going by our previous decision in the case of **SGS Societe Generale de Surveillance SA** (supra), we find that since the memorandum of appeal which is among the basic documents in the institution of appeal, there being none filed, renders the appeal incompetent. We thus agree with Ms. Kaaya, that

the memorandum of appeal in the record of appeal cannot be amended, as there is no memorandum of appeal to be amended.

For the reasons stated above, we find that the appeal is incompetent and we thus hereby proceed to strike it out without costs as the matter arose from a labour dispute.

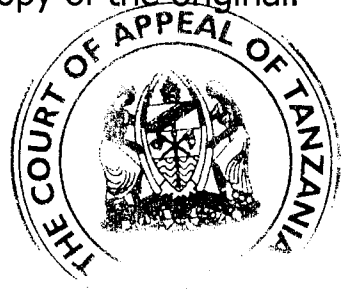
DATED at **DAR ES SALAAM** this 1st day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of September, 2021 in the presence of Mr. Charles Lugaila also holding brief of Mr. Evance Nzowa, learned counsel for the appellant and Mr. Felix Chakila, learned State Attorney appeared for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL