

TANZANIA / JUDGMENT

SELEMANI OMARY SHABANI V

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 22080 OF 2024 (Arising from Award issued on 25/7/2024 by Hon. Nyang' uye, H.
A, Arbitrator, in Labour Dispute No. CMA/DSM/TEM/330/2020 at Temeke) SELEMANI OMARY
SHABANI APPLICANT VERSUS SWIFT MOTORS LTD
..... RESPONDENT

JUDGMENT

Date of Last Order: 12/11/2024 Date of Judgment: 18/11/2024 B. E. K. Mganga, J. Mr. Selemani Omary Shabani, the abovenamed applicant and Swift Motors Ltd, the abovenamed respondent, had their employment relationship whereas applicant was employed as a driver. It is said that employment relationship of the two commenced on 01st August 2013. It is also said that the two enjoyed their good employment relationship from that date until on 27th July 2020 when respondent terminated employment contract of the applicant. Aggrieved with termination, on 5th August 2020, applicant filed Labour dispute No. CMA/DSM/TEM/330/2020 before the Commission for Mediation and Arbitration (CMA) at Temeke. On 25th July 2024, Hon. Nyang'uye H.A, arbitrator, issued an award that, termination of applicant's employment 1 was unfair both substantively and procedurally. With those findings, the arbitrator awarded applicant to be paid a total of TZS 3,653,846/= being 12 months' salary compensation for unfair termination, one month salary in lieu of notice, and severance pay for 6 years. Applicant was not satisfied with the said award hence this application for revision. In support of the Notice of Application, applicant filed his own affidavit in which he raised one (1) ground and two (2) issues. The ground raised by the applicant is that the arbitrator erred in law and in fact by failing to properly evaluate evidence tendered by the applicant during the trial. The two issues raised by the applicant are: -

1. Whether overtime evidence adduced by the applicant during the trial was considered in the final award given by the arbitrator.
2. Whether the arbitrator fail to analyze the evidence regarding overtime which has been adduced by the applicant during the trial. Contesting the application, respondent filed both the Notice of Opposition and the Counter affidavit affirmed by Mohamemed Dewji (sic). When the application was called on for orders on 23rd September 2024, Mr. Themistocles Rwegasira, learned advocate, appeared on behalf of the applicant while Mr. Isaack Zake also learned advocate, appeared on behalf of the respondent. The two learned advocates prayed

the application be argued by way of written submissions, as a result, I issued an order to that effect. The parties complied with submissions orders as a result, I scheduled the application for judgment. At the time of composing the judgment, I noted that, on 8th September 2023, this Court (Hon. Opiyo J) in revision in Revision No. 59 of 2023, ordered the parties to go back to CMA so that the dispute can be heard on merit by a different arbitrator. I also noted that, when the parties went back to CMA, the successor arbitrator drafted new issues and scheduled a date of hearing. I further noted that, no hearing was conducted by the successor arbitrator, instead, the parties agreed that the successor arbitrator should compose the award based on evidence recorded by the predecessor arbitrator and it was so done. In my further perusal of the CMA record, I noted that, in CMA F1, applicant indicated that the dispute was relating to (i) termination of employment, (ii) breach of contract, (iii) tort and (iv) others (unfair treatment). I also noted that, in the said CMA F1, as reliefs, applicant claimed to be paid

- (i) notice, (ii) severance, (iii) Compensation for unfair treatment, (iv) compensation for tortious injuries sustained and (v) compensation for breach of contract of employment. Not only that but also, I noted that, the dispute that was mediated is termination of employment only. With those observations, I resummoned the parties and asked them to address the court (i) whether, the order of this court was complied with, 3 and (ii) whether, the dispute was properly filed, mediated, heard and determined at CMA and (iii) the effect thereof. Responding to the first issue that was raised by the court, Mr. Rwegasira, advocate for the applicant submitted that, in revision No. 59 of 2023, this court (Hon. Opiyo J) issued an order remitting the file to CMA so that a different arbitrator can determine the issues that were not determined. He submitted that, this court's order was complied with. He further submitted that, since in Revision No. 59 of 2023 this court considered proceedings and concluded that, there was termination, then, by implication, those proceedings were properly recorded at CMA. He added that, there was not prayer by the parties in revision No. 59 of 2023 to set aside CMA proceedings. He went on that, the Court only set aside the orders and not proceedings. He further submitted that, this court did not order trial de novo. When probed, counsel submitted that, the matter was ordered to be heard on merit before a different arbitrator. Mr. Rwegasira further submitted that, when the parties went back to CMA, for purposes of expediting proceedings, agreed and directed their minds on the issues that were between the parties because, there was no issue relating to competence of proceedings. He added that, under Order xxxiii Rule 3 and section 95 of the Civil procedure, Cap 33 4 R.E. 2019, parties may compromise the matter with a view of expediting it. He went on that, if there is any procedural error, that error did not go to the root of the case. Counsel also submitted that, in determination of this application, the court should be guided by the provisions of Article 107(2)(e) of the Constitution of the United Republic of Tanzania which emphasises the use of overriding objectives to facilitate justice expeditiously, proportionately and focus on substantive issues between the parties. To bolster his submissions, counsel cited the case of Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT(unreported). Mr. Rwegasira also submitted that, probably, there

was irregularity based on the ground that other disputes were not mediated. He was quick to submit that, that did not occasion injustice to the other party. He added that, in the application at hand, applicant prays overtime that was not determined by CMA. When probed by the court as to whether, in CMA F1, applicant pleaded that he was claiming to be paid overtime, counsel submitted that, overtime was pleaded impliedly in CMA F1 and the same prayers were pleaded impliedly based on breach of contract. Counsel strongly submitted that, CMA F1 was properly filled and filed and that, the dispute was properly heard. He maintained that, even if there were irregularities, the overriding objective principle should apply 5 and cure the said irregularities. He concluded that, these are procedural irregularities that did not occasion injustice to parties. Responding to the issues raised by the court, Mr. Zake submitted that, the order by this court was not complied with. He submitted that, the judgment of this Court (Hon. Opiyo, J) in Revision No. 59 of 2023, granted the prayers by the applicant and issued directions that the file be remitted to CMA for the dispute to be heard on merit before a different arbitrator. He added that, the parties were supposed to adduce fresh evidence before a different arbitrator. To support his submissions, counsel for the respondent cited the case of Jackson Clemence Swenya v. The republic, Criminal Appeal No. 47 of 2022, HC(unreported) that, trial de novo is the same as hearing the parties on merit and that, in the said case, this court held that parties should adduce evidence. He concluded that, it was an error on part of the arbitrator to compose an award without hearing evidence afresh. Mr. Zake also submitted that, the dispute was not properly filed, mediated and or adjudicated. He further submitted that, in CMA F1, applicant indicated four different type of disputes, namely (i) termination, (ii) tort, (iii) breach of contract and (iv) other (unfair treatment). He added that, all these disputes were supposed to be mediated and be included in CMA F6 showing mediation results. He went on that, that would have given the parties a chance to know the nature of the dispute to be determined contrary to what was done by the mediator. Counsel submitted that, only one dispute of termination was mediated and the rest were not. He added that, that was fatal irregularity for proceedings to be conducted on unmediated disputes. He therefore prayed the court to nullify CMA proceedings and order trial de novo starting with mediation procedures. Mr. Zake submitted further that, the dispute was not properly before Hon. Mikidadi, arbitrator and later before Nyanguye, arbitrator, who did not record evidence as it was not properly mediated. Counsel further submitted that, arbitration proceedings were conducted by Hon. Mikidadi, arbitrator, who recorded evidence of the parties. He added that, Hon. Nyanguye, did not conduct arbitration proceeding because the parties agreed that the order by this court(Hon. Opiyo, J) was for the different arbitrator to compose an award. Counsel for the respondent conceded that, agreement by the parties did not change the order of this court. He added that, the parties wrongly interpreted this court's order. He also submitted that, Hon. Nyanguye raised new issues that were not raised by the previous arbitrator and composed an award based on the record that were revised by this court. 7 Counsel for the respondent further submitted that, CMA F1 had different disputes with different prayers. He added that, the relief of unfair termination is 12 months salary compensation while the relief of breach of contract, is the remaining period of contract. He

further submitted that, CMA F1 was not properly filed because, it included different disputes. In disposing this application, I will start with the issues raised by the court suo moto and asked the parties to make submissions thereof. I will start with the issue relating to compliance of the order of this Court(Hon. Opiyo, J) in revision No. 59 of 2023. I have read the said order and it is my considered opinion, as it was correctly submitted by counsel for the respondent that, it was not complied with. This court expressly directed the parties to go back to CMA so that the matter can be heard on merit by a different arbitrator. The said order reads in part:- “Based on the above authority, this court being a revision court and not trial court, cannot act as CMA by determining the issues that were not addressed by the trial court, the CMA in this matter. The issues are to be determined by CMA as a trial body before being dealt with the revisional court. For the reasons the application is found to be meritorious. It is therefore allowed. The decision that the matter was preferred prematurely is quashed and set aside. The file is remitted back to the CMA for the matter to be heard on merits before a different arbitrator.” (emphasis is mine) 8 As pointed out hereinabove, the bolded sentence clearly directed the parties to go back to CMA so that the matter can be heard on merit before a different arbitrator. This court did not direct the parties to go back to CMA so that issues that were not determined can be determined by a different arbitrator. It was correctly, in my view, submitted by counsel for the respondent that the said order was not complied with. In my view, it was not open to the parties to disregard that order by whatever reason, including but not limited to the need of expediting determination of the dispute as it was submitted by counsel for the applicant. It is my view that, if the parties were unclear as to what were supposed to be done, they were supposed to approach the same court. Equally, there was no room for the arbitrator to defy the order of this court based on agreement of the parties. I should point out that, both counsel did not assist properly the arbitrator and are the ones who caused this confusion. I am of that view because, the CMA record shows that, on 3rd June 2024 the parties appeared before Hon. Nyang’uye, arbitrator and made submissions. The record shows that Mr. Themistocles submitted inter-alia that: - “...hivyo maamuzi yale ya CMA kuwa kulikuwa hakuna termination yalitenguliwa na kuorder matter kurudishwa CMA na matter isikilizwe... kwa tafsiri hiyo na kwa mtazamo wangu evidence na proceedings hazibishaniwi 9 sisi tunaona kwamba, Tume iendeleo pale Mahakama Kuu ilipoishia kwa kuzingatia record zilizopo mbele ya Tume... The CMA record shows that Mr. Zake, advocate for the respondent submitted that: - “Sina mengi ya kusema, naungana na wakili alichosema kwani revision hii iliset aside order ya Mh. Mikidadi sio kuanza upya... hivyo ivacate order zote zilizofutwa na Tume baada ya shauri kurudi CMA.” After submissions by the parties, the arbitrator recorded: - “TUME: Nimesikiliza hoja za pande zote mbili nimepitia uamuzi uliotolewa na na Jaji Opiyo juu ya shauri hili. Ni kweli kwa uamuzi wa Mahakama Kuu uliset aside uamuzi wa Tume uliotolewa na iliona kuwa kulikuwa na termination. Hivyo basi nakubaliana na hoja ya wakili msomi kuwa hakukuwa na order yoyote ya Mahakama Kuu kutaka shauri hili lianze upya toka mwanzo. Na wala proceedings za awali hazikufutwa. Hivyo basi kazi ya tume sasa ni kujibu hoja bishaniwa tatu zilizobaki hapo awali ambazo ni sababu za termination, utaratibu kama ulifuatwa na nafuu ya pande zote mbili. Kwa misingi hiyo,

Tume inazifuta inaziacha proceedings za tarehe 30/10/2023, 11/3/2024, 23/1/2024 na tarehe 27/3/2023 pamoja na nyaraka zilizotolewa upya...mara baada ya shauri hili kurudishwa toka Mahakama Kuu. Shauri hili litatolewa uamuzi based on evidence on record ..." In my view, the words "the file is remitted back to the CMA for the matter to be heard on merits before a different arbitrator" in the order of this Court quoted hereinabove were clear. As I have pointed out hereinabove, this court did not remit the file to CMA so that a different arbitrator can determine the issues that were not determined. It is my view that, submissions by the parties before Hon. Nyang'uye, arbitrator, 10 and the decision reached namely of composing the award based on evidence that was recorded by the predecessor arbitrator was erroneously made. It is my view that, by the wording of this Court's order quoted hereinabove, parties were supposed to adduce evidence afres. What was done was not hearing the matter on merit rather composing the award which is quite different from what was ordered by this court. I should point out in a passing that, prior to the above quoted submission by the parties and issuance of the above order, on 30th October 2023 the arbitrator ordered the parties to file opening statement on 13th November 2023 and scheduled framing of issues to be done on 16th November 2023. On 16th November 2023 applicant did not attend but respondent notified the arbitrator that she has raised a preliminary objection. On 23rd November 2023, the arbitrator ordered the preliminary objection raised by the respondent be argued by way of written submissions. The ruling relating to preliminary objection was delivered on 27th March 2024 as a result, the arbitrator found the preliminary objection unmerited, and the parties proceeded to draft four new issues. All these proceedings were vacated by the arbitrator after submissions by the parties and opted to compose the award. The order 11 by the arbitrator to vacate or expunge those proceedings, cannot, in my view, be legally correct. It is undisputed that the arbitrator, after submissions by the parties, did not follow this courts' order. That was, in my view, not proper because, orders of the higher court in the ladder must be obeyed and followed as it was held in the case of Omary Abdallah Kilua vs Joseph Rashid Mtunguja (Civil Appeal No. 178 of 2019) [2020] TZCA 1791 (25 September 2020). In Mtunguja's case (supra). The Court of Appeal held inter-alia that:- "...We want to say in the clearest terms that in the ordinary course of things, a direction given by a superior court to a court subordinate to it should be observed and complied to the letter. Otherwise it will amount to a breach of the long established principle of stare decisis. Clear as it is shown above, the learned chairman was obligated to hear the testimony of TW1 and then compose a fresh judgment taking into consideration the evidence of all the witnesses. In the circumstances, we are entitled to take the view, as rightly argued by Mr. Erick, that the learned chairman completely disregarded the High Court's direction..." The CMA record shows that, on 17th December 2020, issues that were drafted by the parties before Hon. Mikidadi, arbitrator were (i) complainant's employment was terminated by the respondent, (ii) whether there was valid reason for termination, (iii) whether procedures for termination were adhered to, (iv) whether complainant suffered 12 damages or injuries arising out of tort and (v) to what reliefs are the parties entitled to. It is undisputed by the parties that, the dispute that was only mediated is termination of employment. In other words, the disputes relating to tort, breach of contract,

and others (unfair treatment) were not mediated. That was violation of section 86 of the Employment and Labour relations Act [Cap. 366 R.E. 2019] that requires dispute to be mediated prior to be filed to the arbitration stage. It was submitted by counsel for the applicant that, this Court should rely on the provisions of Article 107A(2) of the United Republic of Tanzania Constitution and disregard technicalities and apply the overriding objective principles and proceed to determine the application. With due respect to counsel for the applicant, the said Article of the Constitution or the overriding objective principles is not a ticket for the parties not to abide by procedural rules. In fact, in the case of Zuberi Mussa vs Shinyanga Town Council [2007] T.L.R. 104 [CA] also (Civil Application 100 of

2004) [2007] TZCA 181 (16 March 2007) Tanzlii neutral citation, the Court of Appeal held inter-alia that:- “...in our decided opinion, article 107A(2)(e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word 'unduly' here should only be taken to mean ‘more than is right or reasonable; excessively or wrongfully’... One cannot be said to be acting wrongfully or unreasonably when he is executing the dictates of the law...” The Court of Appeal in the case of Abubakar Ali Himid vs Edward Nyelusye (Civil Appeal No. 70 of 2010) [2017] TZCA 139 (28 July 2017) quoted its decision in the case of Uledi Hassani Abdallah v. Murji Hasnein Mohamed and two Others, Civil Appeal No.2 of 2012 and Quality Group Limited v. Tanzania Building Agency, Civil Application No. 120 of 2013 (unreported) wherein it inter-alia that: - “Therefore, a party who is under obligation to comply with certain requirements of the law...cannot flout them and expect to rely on Article 107 A (2) (e) or Rules 2 or 4 of the Rules to get his way. Better interests of justice or substantive justice, and the like, cannot be met by violating the very laws and rules that are maidens of justice and the rule of law ... Article 107A(2)(e) of the Constitution does not in any way command that procedural rules should be done away with in order to advance substantial justice...” See also the case of Watere Waryoba vs Republic (Criminal Application No 64,01 of 2016) [2020] TZCA 1943 (16 March 2020) and Mohamed Issa Mtalami & Others vs Tanga City Council & 14 Another (Civil Appeal No. 200 of 2019) [2021] TZCA 226 (4 June 2021). It was correctly submitted by counsel for the respondent that, the dispute was not properly before Hon. Mikidadi, arbitrator and later before Nyanguye, arbitrator. I agree with those submissions because, as pointed out hereinabove, other disputes were not mediated. I am of that view because, mediation is mandatory in labour disputes. In other words, each dispute filed must pass through mediation stage and it should, for disputes that goes to arbitration stage, be clearly indicated that mediation failed. In the application at hand, that was not done in stead, it was termination of employment alone that was mediated. For the foregoing, I reject the

invitation by counsel for the applicant to rely on both the afore cited article of the United Republic of Tanzania Constitution and the overriding objective principles. It is my view that, the irregularity was fatal vitiating the whole CMA proceedings. It was correctly submitted by counsel for the respondent that arbitration was made by predecessor arbitrator and not the successor arbitrator because, the latter did not record evidence of the parties. The successor arbitrator relied on arbitration proceedings based on the dispute of termination of employment as the only dispute that was 15 mediated though one of the issues framed was relating to tort. As pointed hereinabove, the dispute relating to tort was not mediated. The record also shows that, 27th April 2023, Hon. Nyang'uye H.A, arbitrator, drafted four issues namely, (i) whether complainant was a confirmed employee, (ii) whether there were valid reasons for termination, (iii) whether procedures for termination were adhered to and (iv) to what reliefs are the parties entitled to. In the impugned award, the arbitrator indicated that, the only issues that were not determined by the predecessor arbitrator were (i) whether there was valid reason for termination, (ii) whether procedures for termination were adhered to, and (ii) to what reliefs are the parties entitled to. Based on the foregoing, the successor arbitrator determined these issues relying on evidence recorded by the predecessor arbitrator. With due respect to the successor arbitrator, as pointed herein above, issues that were drafted by the predecessor arbitrator were five namely,

- (i) complainant's employment was terminated by the respondent, (ii) whether there was valid reason for termination, (iii) whether procedures for termination were adhered to, (iv) whether complainant suffered damages or injuries arising out of tort and (v) to what reliefs are the parties entitled to. There is no dispute that the predecessor arbitrator answered only the first issue and concluded that there was no 16 termination and dismissed the dispute. The said award was revised by this Court (Hon. Opiyo, J) in revision No. 59 of 2023 by holding that there was termination and directed the parties to go back to CMA so that the dispute can be heard on merit by a different arbitrator. Therefore, even if assuming that parties were directed to go back to CMA so that a different arbitrator can determine the remaining issues, of which it was not the order of this court, still it was an error on part of the successor arbitrator to indicate in the award that only three issues namely, (i) whether there was valid reason for termination, (ii) whether procedures for termination were adhered to, and (ii) to what reliefs are the parties entitled to, were pending for determination. In no doubt, out of the four issues that were not determined by the predecessor arbitrator, the successor arbitrator, left out the issue relating to tort namely, whether complainant suffered damages or injuries arising out of tort. In short, all issues that were drafted and evidence give in support or negation were not all considered. It was correctly submitted by counsel for the respondent that, the dispute was not properly before Hon. Mikidadi, arbitrator and later before Nyanguye, arbitrator. I agree with those submissions because, as pointed out hereinabove, other disputes were not medaited. I am of that view because, mediation is mandatory in labour disputes. In other 17 words, each dispute filed must pass through mediation stage and it should, for disputes that goes to

arbitration stage, be clearly indicated that mediation failed. In the application at hand, that was not done in stead, it was termination of employment alone that was mediated. It was submitted by counsel for the applicant that, applicant prays the court to determine his prayers of overtime that was not determined by CMA. It was further submitted on behalf of the applicant that, in CMA F1 applicant pleaded the claim for overtime impliedly and the prayer thereof was claimed impliedly. With due respect to counsel for the applicants, pleadings and prayers thereof must be specifically pleaded and prayed for. Both pleadings and prayers cannot be made impliedly. I am of that view because, implied pleading and prayers invites the court to do guesswork which is not the duty of the court. If that is accepted, then, the long settled principle that parties are bound by their pleadings will have eroded because now and then parties will state that the fact and prayers were pleaded by implication. That will create a chaos in administration of justice. I am not prepared to see that happening. For all what I have discussed hereinabove, I nullify CMA proceedings, quash the award arising therefro and remit the CMA record to CMA so that all disputes can be mediated and if mediation fails, the matter can be heard de novo by a different arbitrator withoput delay. 18 Dated at Dar es Salaam on this 18th November 2024 B. E. K. Mganga JUDGE Judgment delivered on this 18th November 2024 in Chambers in the presence of Janeth Shayo advocate holding brief of Themistocles Rwegasira, advocate for the applicant and Isack Zake, Advocate for the Respondent. B. E. K. Mganga JUDGE 19

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