

TANZANIA / JUDGMENT

the registered trustees of st benedicts ndanda referral hospital vs mathayo malaika 43 others 2023 tzhc 23096 31 october 2023

COURT
TZHCDECIDED
31 October 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY) AT MTWARA LABOUR REVISION NO. 9 OF 2022 (Originated
from Labour Dispute No. CMA/MTW/61 of 2021) THE REGISTERED TRUSTEES OF ST BENEDICT'S
NDANDA REFFERAL HOSPITAL APPLICANT VERSUS

1. MATHAYO MALAIKA J
2. LEXCHMEBE
3. JOYCE SYLVESTER NGULI
4. THERESIA S. CHASENS
5. MARIA STEPAN NG ULI
6. MARTHA DAMLANI MPANDA
7. CHRISTINA ISSAYA IGNAS
8. JOHNBOSCO MICHAEL MAN GAYA
9. FRANCIS GALUS MBONDE
10. AGNES ZAKARIA KACHINGWE RESPONDENTS
11. LUCIA GALUS LIBABA
12. ALLI YUSU ERIO
13. EMILIAN MAMERTUS CHIKOJO Page 1 of 18
14. YOHANA BARTHOLOMEW LYAKURWA
15. VERONIKA BONIFAS CHISAMBA
16. BONITA PIUS MBUNDA

17. FELIX BE AT US LIKANGA
18. ROGASTO ROMANUS KAYOMBO
19. GEMINA PETER MTWICHE
20. GENOVEVA GERSA KAM BAG A
21. ROUBEN PETRO MMOLE
22. LUCIA KARO ERIYO
23. FAUSTA BEATUS MLAPONI
24. FORTUNATUS HENRICH MTWEVE
25. CLARA JO H N N DAU KA
26. TORIBIA RICHARD ERIYO ,
27. PETRONILA CYPRIAN MILANZI 1
28. TITO LUKOMBESO MTOKOMA
29. EMMANUEL NANTENDA CHILEDI
30. EDGAR TEODOR MWAMBE
31. MARTIN VALENITNWKASEMBE
32. BAHATI ABDALLAH KUWEKA RESPONDENTS
33. CHARLES SIMON MILANZI
34. JOSELINE KASEMBE KAGOMBE y
35. AZIZ MSANGENI
36. JOYCE SYLVESTER NGULI
37. BAHATI NGTTU
38. REIN FRIDAAUGUSTINE MROPE
39. CHINA JOACHIM MWANGA
40. SEIF HASSAN MNONJELA
41. EMMANEL ZEALOT URIYO
42. ALEX SIMON MLIAMANDAGO
43. JOSEPH LOIS KIDANDO
44. DAYS ERIYO ' Page 2 of 18

RULING

24/08/2023 & 31/10/2023 LALTAIKA, J, The applicant, namely, THE REGISTERED TRUSTEES OF ST BENEDICT'S NDANDA REFERRAL HOSPITAL, has filed this revision seeking to set aside the entire award of the Arbitrator from the Commission for Mediation and Arbitration for Mtwara at Mtwara in the matter CMA/MTW/KIN/61/2021, delivered by Hon. KWEKA A.J., Arbitrator, on October 19, 2022. The application was submitted through a Notice of Application and Chamber Summons, supported by an affidavit sworn by Mr. SYLVESTER KESSY, the Board Chairman of the applicant. The Chamber Summons invoked Section 91(1)(a), 91(2)(b) & (c), and Section 94(1)(b)(i) of the Employment and Labour Relations Act No.6 of 2004 (as amended) and various rules from the Labour Court Rules, G.N. No. 106 of 2007. The applicant bases this revision on ten (10) legal issues, namely: (i) Whether the honourable Arbitrator was rights in conducting a case filed by dead person,(ii) Whether the honourable arbitrator was right in analysis, evaluation and interpretation the evidence tenders during the hearing,(iii) Whether the honourable Arbitrator was right in allowing an incompetent and illegal application for condonation, (iy) whether the honourable Arbitrator was right in allowing the application for condonation in the backdrop of the Applicants therein failure to account for each day of the delay (v) whether the Honourable Arbitrator was right in conducting a case instituted against a non-existing entity by the name of ST. BENEDICT NDANDA REFERAL Page 3 of 18 HOSPITAL,(vi) Whether the Honourable Arbitrator was right in granting reliefs to parties who never testified for the same before the commission,(vii) Whether the Honourable Arbitrator was right in her interpretation of Rule 25(3) Labour Institutions (Mediation and Arbitration) Rules G.N. Number 64/2007 as far as the removal was right in holding that there were no good reasons for the retrenchment process,(ix)Whether the honourable Arbitrator was right in holding that the Applicant herein didn't follow proper procedures in the retrenchment process,(x) Whether the Honourable Arbitrator was right in deciding the case based on extraneous matters not borne but of evidence on record. The respondents vigorously opposed the application through a counter-affidavit sworn by Mr. MATHAYO MALAIKA, one of the respondents who was appointed, instructed, and authorized to depose for and on behalf of other respondents. Additionally, the respondents filed a notice of preliminary objection containing six (6) preliminary objections on points of law, which were later withdrawn. To comprehend the matter, a brief background is necessary. St. Benedict's Ndanda Referral Hospital is a trust and property owned by the Registered Trustees of St. Benedict's Ndanda Referral Hospital, which also serves as the employer of the hospital's employees. In response to a financial crisis in 2016, the applicant decided to retrench 59 employees to prevent the hospital's coilapse and maintain services. The respondents filed an employment dispute at the Commission for Mediation and Arbitration for Mtwara six years later, claiming unfair Page 4 of 18 termination and unpaid retrenchment benefits. After the CMA issued an award in favor of the respondents, St. Benedicts Ndanda Referral Hospital filed Labour Revision No.2 of 2017, leading to a court decision that the termination was not in compliance with procedures. The respondents then lodged an application for execution/ opposed by the Registered Trustee of St. Benedict's Ndanda Referral Hospital, arguing that the respondents were not part of the original labor dispute. In response, the respondents initiated a new Labor Dispute NoXMA/MTW/61/2021, focusing on whether the applicant had followed proper retrenchment procedures. During

arbitration, the applicant presented one witness, Mr. Stanslaus Gefrid Wambyakay, a medical doctor, and head of the Department of Children at St. Benedict's Referral Ndanda Hospital. He testified about the procedure followed in retrenching the respondents. On the other hand, Mr. Mathayo Malaika, representing the respondents, testified that they were terminated without proper procedures, emphasizing the lack of involvement of all employees and inadequate notice for some. Another witness, Joseph Lois Kikando, an employee for thirteen years, testified about the unfair termination and inadequate notice. The applicant, represented by Mr. Emmanuel Ngongi, and the respondents, represented by Ms. Radhia Abdallah Luhuna, agreed to settle the matter through written submissions, complying with the court's scheduling order. In these submissions, Mr. Joseph Muhenga, learned Advocate, argued the legal issues for the applicant.

- Page 5 of 18 On the first legal issue, Mr. Muhenga contended that the complaint filed in the name of a dead person is a nullity, citing the case of Juma A. Zomboko and 42 Others vs. Avic Coastal and Development Co. Ltd & 4 Others. He argued that some individuals allegedly represented by Mathayo Malaika in this case had passed away before the complaint was filed, making their signatures on the documents and affidavits forged. For the second legal issue, Mr. Muhenga criticized the arbitrator for failing to properly analyze and evaluate the evidence, emphasizing the burden of proof on the employer in cases of unfair termination. He asserted that the employer successfully discharged this duty, proving the financial crisis and the validity of termination. Continuing with the third legal issue, Mr. Muhenga argued that the mediator had no authority to grant condonation, and the application was incompetent as it was based on affidavits sworn by deceased persons. He referenced the case of Benjamin Lazaro Isseme vs Yapi Merkezi Insaat Ve Sanayi Anonim Sirket, which held that mediators lack the power to grant condonation. Regarding the fourth legal issue, Mr. Muhenga asserted that the respondents failed to account for the delay in their affidavit supporting the application for condonation. Citing the case of Benjamin Lazaro Isseme, he reiterated that applicants must show good cause for delay. On the fifth legal issue, Mr. Muhenga argued that the respondents had already been paid their terminal benefits since 2016, citing Exhibit KW7 (salary slip) and Exhibit KW6 (bank statements) as proof. He claimed that Page 6 of 18 the respondents had not objected to this evidence, and thus, no claims remained. Mr. Muhenga contended that the respondents deposed in their affidavit that the delay was not their fault, citing it as their main reason for the delay. He further submitted that the respondents failed to specify whose fault it was for the delay. The learned counsel emphasized that the respondents failed to account for each day of the six (6) years of delay. He contended that, as this was their primary reason for the extension of time, it was insufficient for the Commission to grant condonation. Therefore, Mr. Muhenga was of the view that this was a miscarriage of justice by the learned Arbitrator and the Commission, potentially deviating this court from the long-established and cherished taboo of respecting procedures, precedents, and legislations. Regarding the legal issue of whether the Honorable Arbitrator was correct in conducting a case instituted against a non-existing entity named ST. BENEDICT N DAN DA REFERRAL HOSPITAL, Mr. Muhenga argued that, as a person interested in instituting the suit, one must consider the capacity of the person

intended to be sued. He submitted that the respondents intentionally sued a non-existing entity, implying they sued a person with no capacity to be sued (*locus standi*). The learned counsel asserted that, despite several official and friendly reminders to the Commission, it proceeded to adjudicate the matter against a non-existing entity that had never appeared before the Commission. To support his argument, Mr. Muhenga cited the case of *Kanisa La Anglikaha Page 7 of 18 Ujiji vs Abel S/0 Samson Heguye (Labour Revision 5 of 2019) [2019] TZHC 37 (Unreported)*, which held that "No other body of unincorporated trustees can sue or be sued in any court of law as they have no legal personality." Accordingly, Mr. Muhenga contended that the Commission wrongly adjudicated the matter against a non-existing entity. Mr. Muhenga submitted on the issue of whether the Honourable Arbitrator was right in granting reliefs to parties who never testified before the Commission. He argued that, according to trite law, those who allege must prove. The alleged 45 complainants filed their complaint under a fabricated representative suit, which he deemed fatal and against the law. The learned counsel submitted that the representative suit was instituted without leave of the Commission order, as the respondents never filed an application for a representative suit, nor prayed for the formal leave of the Commission or the consent of adverse parties. He further argued that the respondents failed to satisfy the Commission that they deserved to be granted leave to file a representative suit, as per the conditions stated by the Tanzania Court of Appeal in *K. J. Motors And 3 Others Vs. Richard Kishamba and Others*, Civil Application No. 74 of 1999, at Dar es Salaam. In addition, the learned counsel submitted on the defectiveness of the respondents' affidavit. He contended that it is trite law that an affidavit tainted with untruth is no affidavit at all and cannot be relied upon to support an application. Mr. Muhenga argued that the false evidence cannot be acted upon to resolve any issue. He contended that, in the case at hand, the Page 8 of 18 affidavit fified with an annexure of the list of persons alleged to participate and signed it, two of them died before the complaint was instituted. Consequently, Mr. Muhenga submitted that this means the affidavit was tainted with untruth and incurably defective. To substantiate his position, he cited the case of *Ignazio Messina versus Willow investment SPRL*, Civil Application No. 21 of 2001, CAT (Unreported). Furthermore, Mr. Muhenga argued that the deceased had no right to swear the affidavit as well as the verification clause. He insisted that the affidavit was incurably defective by containing hearsay statements, stating that "What is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 is true to the best of "our" knowledge." He submitted that, since not all applicants appeared before the Commissioner for a joint oath, it should be considered as incurably defective. The learned counsel argued that only two complainants out of the 45 complainants appeared to testify, meaning 43 failed to appear before the Commission to testify against their case individually. Mr. Muhenga contended that, because every complainant has different claims against the employer in a representative suit, there was no leave of the Commission granted for the purposes of a representative suit. To this end, the learned counsel argued that the respondents failed to prove their claims since they did not participate in the alleged representative suit. Mr. Muhenga went further and argued on the legal issue of whether the Honourable Arbitrator was right in her interpretation of Rule 25(3) Labor Institutions (Mediation and Arbitration)

Rules G.N Number 64, 2007, Page 9 of 18 concerning the removal of the deceased complainants. He submitted that the Arbitrator wrongly interpreted the provision of the law, which allows the Commission to correct defects and errors by giving notice to parties. He argued that the concerned defects and errors are those related to typographical errors, wrong citations of the law, and the correction of the respondents' names. However, Mr. Muhenga argued that statutory errors were not covered, and there was no notice issued; the application of the law was only found in the ruling. He contended that the arbitrator had no power to drop a dead person from the case without the interested party praying for it. Mr. Muhenga insisted that dropping the parties in the case after the preliminary objection is preempting the law and a misconception of the legal interpretation; the solution was to remedy the respondents by dismissing the suit. However, he argued that the arbitrator decided to remove the deceased complainants from the award. Moving forward, Mr. Muhenga argued on the legal issue of whether the Honourable Arbitrator was right in holding that there were no good reasons for the retrenchment of the respondents. He contended that the arbitrator gravely erred in holding that there was no reason for retrenchment. The learned counsel argued that it should be clear from the start that the applicant herein managed to show the financial crisis. He stressed that the institution was experiencing a financial crisis for a period of more than five (5) years. Mr. Muhenga averred that the termination was on an operational basis; hence, it was a valid reason. Page 10 of 18 On the fast legal issue of whether the Honourable Arbitrator was right in deciding the case based on extraneous matters not borne out of evidence on record, Mr. Muhenga argued that the arbitrator erred in law and fact in deciding the case based on extraneous matters not borne out of evidence on record. He contended that there is a litany of decided cases that direct the Courts and Commission to adjudicate justice by directing itself in matters borne from the proceedings. The learned counsel stressed that it is a principle that in suits, parties are bound by their own pleadings. He referred to the case of *Nkulabo vs Kibirige* 9 [1973] E.A 102, and the same position was adopted by the Court of Appeal of Tanzania in the case of *ASTEPRO INVESTMENT CO. LTD. VS JAWINGA CO. LTD*, Civil Appeal No.8 of 2015, DSM (unreported). Furthermore, the learned counsel argued that parties are bound by their pleadings and evidence. The arbitrator ought to use their earlier pleadings, which were instituted, and the adduced evidence based on the pleadings. To this end, the learned counsel was of the view that the Commission directed itself on erroneous matters and illegal. He argued that the position of the law is that nothing legal can be procured arising from illegality, as it was observed in the case of *Tanzania One Mining Ltd vs Andre Ventre*, Labour Revision No. 276 Of 2009 HC, DSM, (unreported), at page 4 the court had this to say; "All that is based on illegalities is rendered illegal. Hence all the findings and orders made therefrom were illegal." Finally, Mr. Muhenga prayed that the decision and orders of the Commission be quashed and dismissed. Page 11 of 18 In response, Mr, Jamisto Kayombo submitted the legal issue of whether the Honourable Arbitrator was right in conducting a case filed by a dead person. He argued that the suit was filed in the nature of a representative suit, where all 45 persons agreed in a meeting to enforce their rights through jointly suing the same party on the same cause of action. The learned counsel submitted

that the death of some persons occurred later while the suit was already in court and not before, as presented by the applicant To support his argument, Mr. Kayombo cited Order XXII Rule 1 of the Civil Procedure Code [Cap. 33 R.E. 2019], which provides that "The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." He argued that similarly, the procedure where one of several plaintiffs or defendants dies and the right to sue survives is stipulated under Order XXII Rule 2 of the Civil Procedure Code. Mr. Kayombo submitted that based on the above provisions of law, in the instant matter, the suit could not abate on the death of some of the persons. To this end, the learned counsel stressed that that is why even the raised preliminary point of objection was overruled. Replying to the second legal issue of revision of whether the Arbitrator was right in the analysis, evaluation, and interpretation of the evidence tendered during the hearing and burden of proof, Mr. Kayombo argued that, according to section 11.0(1) of the Evidence Act, it is clear that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." He further argued that under section 110 (2) of the same Act, it is provided Page 12 of 18 that 'when a person is bound to prove the existence Of any fact, it is said that the burden of proof lies on that person/ Further still, as per the section 39 of Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 9(3) of the Employment and Labour Relations (Code of Conduct of Good Practice) Rules of 2007, G.N. No. 42 of 2007, the burden of proof in labour disputes is on the balance of probabilities. Moreover, Mr. Kayombo argued that section 39 of Employment and Labour Relations Act provides that: "In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair." He insisted that the above provisions, therefore, place the burden on the employer to establish on the balance of probability that the termination of the employee was fair. However, the learned counsel argued that, in the context at hand, the applicant failed miserably to show that the termination was fair and properly done as per the law. Mr. Kayombo contended that, even if the CMA failed to consider the Disciplinary Hearing Committee's finding of guilty, the finding cannot stand as the allegation was not supported by sufficient evidence that meets the requisite standard of proof. Mr. Kayombo argued on the second legal issue of whether the arbitrator was right in allowing an incompetent and illegal application for condonation. He averred that the respondents applied for condonation and were granted upon proof of reasonable grounds. The condonation application was competent, valid, and legal as per the law. He insisted that the Commission used discretionary powers to grant an extension of time. More so, he argued that, as to what amounts to judicial discretion was held Page 13 of 18 by the Court of Appeal in the case of Mza RTC Trading Company Limited vs Export Trading Company Limited, Civil Application No. 12 of 2015 [2016] TZCA 12 that: "An application for extension of time for the doing of any act authorized ... is an exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law..." Mr. Kayombo argued that, in determining an application for condonation, one should consider circumstances, rules, arid principles of laws. He stressed that that cannot be said to be a mediation process. He cited the provisions of

section 86(4), (7), and (8) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and found that the powers of the Mediator are to assist the parties to resolve the issue by settlement. In addition, Mr. Kayombo argued that the mediator can only do so by helping the parties to settle their dispute as provided for under Rule 3(1) and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, G.N. No.67 of 2007. In the light of that submission, Mr. Kayombo argued that the condonation was competent and legal because the Commission allowed the application on reasonable grounds. Addressing the legal issue of whether the Honourable Arbitrator was right in conducting a case instituted against a non-existing entity by the name of ST. BENEDICT NDANDA REFERRAL HOSPITAL, Mr. Kayombo argued that, to his understanding, it is upon a party who is suing to opt for which parties to invite in a dispute. Page 14 of 18 To support that position, he cited the case of *Departed Asians Property Custodian Board v. Jaffer Brothers Ltd.* [1999] 1 EA 55, where the Supreme Court of Uganda held that there is a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of one whose presence before the court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit. In line with that submission, Mr. Kayombo argued that a necessary party is one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed. He cited the *Black's Law Dictionary*, 8th Edition, which defines "necessary party" as "a party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings." Furthermore, Mr. Kayombo cited the case of *TANG GAS DISTRIBUTORS LIMITED V. MOHAMED SALIM SAID & 2 OTHERS*, Civil Application for Revision No. 68 of 2011 (unreported), where the Court considered the circumstances upon which a necessary party ought to be added in a suit. In the light of the above submission, Mr. Kayombo prayed this court to dismiss the application for revision for being irrational and lack of merit. I have impartially considered the records of the Commission, the grounds for revision, and the opposing submissions. I am convinced that the first ground for revision may effectively resolve this labor dispute. This ground urges the court to scrutinize and determine whether the Honorable Arbitrator was justified in hearing and adjudicating on the labor U Page 15 of 18 complaint/dispute, considering that some of the respondents were already deceased. Regarding the Commission's records, it is evident that two respondents, namely Bahati N.g'itu and Days Eriyo (the 37th and 44th respondents, respectively), were no longer alive when this matter was initiated at the Commission for Mediation and Arbitration for Mtwara at Mtwara- According to the testimony of Mathayo Yona Malaika, these individuals had passed away before the commencement of the present case at the CMA. Additionally, the learned Arbitrator acknowledged the demise of these individuals on page 25 of the Award. In light of this, the learned Arbitrator invoked Rule 25(3) of the Labour Institutions (Mediation and Arbitration) Rules to expunge Bahati Ng'itu and Days Eriyo from the records of the CMA. With due respect, the procedure adopted by the learned Arbitrator was inappropriate, as the powers vested in her under Rule 25(3) of the Labour Institutions (Mediation and Arbitration) Rules do not encompass the removal of deceased persons from the record. Furthermore, the learned Arbitrator failed to issue any notice to the parties

about her decision. Respectfully, what transpired was untenable. While the cited law permits the correction of errors or defects in the record; the issues present in the CMA records, especially concerning the deceased respondents, strike at the very core of the matter. The inclusion of the names and signatures of deceased persons in the labor dispute, along with the consent to permit Mr. Malaika to represent them posthumously, Page 16 of 18 does not fall within the purview of Rule 25(3) of the Labour Institutions (Mediation and Arbitration) Rules. In this regard, I concur with the submission made by the learned counsel for the applicant that the Commission was only authorized to correct/rectify typographical errors. Additionally, I align myself with the decision of the Court of Appeal of Tanzania in Juma A. ZOMBOKO AND 42 OTHERS VS. AVIC COASTAL AND DEVELOPMENT CO. LTD & 4 OTHERS (supra). In that case, the Court stated that a suit filed in the name of a deceased person is a nullity. I subscribe to the view expressed by the High Court of Tanganyika in BABUBHAI DHANJI V. ZAINAB MREKWE [1964] 1 EA 24, where Law, J. held that 'a suit instituted in the name of a dead person is a nullity.' Premised on the above, I find that the learned Arbitrator erred in relying on Rule 25(3) to rectify the matter. Therefore, this matter was inherently flawed as it was filed in the names of deceased persons. Consequently, I hereby strike it out, with no order as to costs. It is so ordered. E.I. LALTAIKA JUDGE 31.10.2023 Court This Ruling is delivered under my hand and the seal of this court on this 31st day of October 2023 in the presence of Mr. Emmanuel Ngongi, learned Advocate holding brief for Mr. Joseph Muhenga, learned Advocate for the applicant. While Mr. Jamisto Kayombo (Personal Representative) appeared for the respondents. E.I. LALTAIKA JUDGE 31.10.2023 Court The right to appeal to the Court of Appeal of Tanzania is fully explained. E.I. LALTAIKA JUDGE 31.10.2023 Page 18 of 18

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Prepared on 13 October 2026 · Esheria