

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT SUMBAWANGA

LABOUR REVISION NO. 5 OF 2017

**ASSOCIATION OF TANZANIA TOBACCOAPPLICANT
TRADERS LTD**

VERSUS

JORDAN ^S/_O MTWEVE.....RESPONDENT
(Application for revision from Award of the Commission for Mediation and
Arbitration for Rukwa at Sumbawanga in Labour Dispute
No. CMA/SBA/21/2015)

JUDGEMENT

28th September, - 23rd January, 2019

MRANGO, J;

This application is made under **Sections 91 (1) (a) and (b), (2) (b) and 94 (1) (b) (i) of the Employment Labour Relation Act, 2004** (herein ELRA) read together with **Rules 24(1) (2) (a) (b) (c) (d) (e) and (f), (3)(a)(b) and (c), and 28(1) (c) (d) and (e) and (2) of the Labour Court Rules, GN No. 106 of 2007** (herein Rules). The application is supported by the affidavit sworn by Mr. Mathias Budodi, the learned counsel for the applicant.

In opposing the application on 21st day of November, 2017 the respondent filed a counter affidavit sworn by himself.

The applicant call upon this court to examine, revise the proceedings and set aside arbitration award made by Commission for Mediation and Arbitration (herein CMA) at Sumbawanga in dispute No. CMA/SBA/21/2015 delivered by Hon. O. W. Ngaruka (Arbitrator) dated 11.3.2016.

Briefly, the background of the dispute is that the respondent was the employee of the applicant and was employed as tobacco grower educator/instructor on 1.9.2002 he was later on promoted to the level of Agronomy supervisor. In the course of performing his activities as agronomy supervisor, the applicant claimed there being a poor performance of the respondent in performing his duties. As result, the applicant claimed to have warned him and thereafter, summoned him to appear before a disciplinary meeting held on 9.4.2015. The respondent was found guilty. On 6.5.2015 the respondent was terminated. The respondent was not satisfied with the decision of the applicant and he referred an employment dispute to the CMA. The CMA purported to have determined the complaint revolves around unfair termination of employment, and found the respondent termination was unfair and order

to compensated to the tune of Tshs. 5,463,378.00/= as his six months' salary. The applicant was aggrieved by the CMA decision hence this application for revision.

At the hearing the applicant was represented by Mr. Mathias Budodi, the learned counsel; while, the respondent appeared in person, unrepresented.

In support of this application Mr. Budodi, prayed this court to adopt the affidavit he lodged to this court which contained the grounds of the application. He added further that the award by CMA the arbitrator ruled out that the respondent was unfairly terminated on the ground that he had never warned and given ample to improve himself to the standard of work before reinstatement basing on operation requirement. He said the CMA decision based on rule 18(2) of Employment and Labour Relation (Code of good practice) GN No. 42 of 2007. However, that kind of decision was contrary or contradicts exhibit K2. The letter K2 indicates that there was different warning including the letter dated 30th August, 2014. There was also email and verbal conservations required the respondent to improve. He said since there was warning before termination as a result CMA error to reach the decision made.

Mr. Budodi asserted further, it is not correct that there was no representation during disciplinary meeting as it was held by CMA. As per exhibit K9 it is clearly indicated that at the disciplinary meeting respondent was represented by the trade Union TPAWU who is a member number seven (7) and it was signed by the respondent himself.

Mr. Budodi, went on asserting that there was no proof of unfair termination. Instead there was a fair termination. He added that the Respondent applied for reinstatement before the CMA. However, the CMA awarded compensation in lieu of reinstatement. It awarded for what was not asked for and had no mandate to do so as was held in case of **Steere Ndaona versus Oriental Construction Co. LTD.** Revision No. 197 of 2010 H/C Mbeya (Unreported) Pg. 5.

Similarly, in our case there was no compensation but reinstatement. The law is clear under **Section 40 (3) of ELRA**. It gives option to the employer and not the CMA as it was decided in this case. Even the prayer for reinstatement was not tenable. The respondent was already paid terminal benefits. He had no right to seek remedy for reinstatement. Exhibit K10 – K15 were evidence for payment of terminal benefits, he submitted. And the respondent admitted to have no claims against the

Employer as per exhibit K15. Therefore he had no justification to lodge a claim before the CMA. He is therefore estopped in law to re-claim as per **Section 123 Tanzania Evidence Act, Cap. 6** and also as per the decision in the case of **Bulyamhulu Gold Mine Ltd. versus Chama Stanslaus Ngeleya** Revision No. 12 of 2011 H/C at Shinyanga (Unreported) Pg. 3. Thus they pray this court to grant the application and revise the award granted by the CMA.

In reply the respondent submitted that he had never been represented as submitted by the learned counsel. There is no proof to the said allegation. He said his trade union was FIBUCA and not TPAWU as submitted. He had never ever acknowledged represented by the TPAWU.

Respondent admitted to have claimed for restatement at CMA, however CMA awarded him compensation. He also that he was paid terminal benefit but were unfair what he is claiming now is an unfair terminal benefits.

In rejoinder, Mr. Mathias Budodi submitted that the respondent admits exhibit K2. That was a warning and is among the series of warning. He referred this court **Section 61 & 100 (1) of Tanzania Evidence Act**

which suggests that written evidence supersede oral evidence. He finally, insisted to reiterate what he submitted earlier.

I have kneeled passed through the records of the CMA. I have as well read between the lines the grounds of application and the counter affidavit opposing the application and the submissions by both sides. Let me, first start with an ailment I noted in the course of composing this judgment which was neither noted by the court nor the parties during the hearing of this application. The ailment is relating to the manner the receptions of evidence were done by the CMA.

Without gainsaying the CMA's record reveals that the trial of this case began on 16.06.2015 when it came for mediation. Upon declared mediation failed. The matter continued for arbitration on 28.7.2015 whereby the applicant (the then respondent) started giving his opening statement, then, the respondent (the then applicant) followed. Thereafter the CMA framed issues for determination and proceeds to receive documentary evidence from both sides of the dispute. Unknowingly, the matter came again on 16.11.2015 for continuation of hearing. At this time the CMA received the so called oral testimonies. It started with that of the

applicant (the then respondent) and followed by the respondent (the then complainant).

With great sympathy, as the record appears, it is not clear as to whether when the parties when giving their testimonies did take oath as required by the law. The record speaks as follows when the matter came for hearing and I quote;

"UPOKEAJI WA USHAHIDI

Mlalamikiwa:-

Amewasilisha vielelezo vyake vya maandishi vilivyopo
17 (K) vyote vimewasilishwa mbele ya Tume na
tayari vimepokelewa vyote.

Mlalamikaji:-

Vielelezo vya kutoka upande wa mlalamikaji
vilitolewa vyote (AP) ambapo ukusanyaji huo
ulifungwa.

Mlalamikiwa

Kwa ushahidi niliutoa mbele ya Tume yako tukufu naomba kuwasilisha na kufunga ushahidi wangu dhidi ya kesi yangu kw aupande wangu.

Toka mlalamikajiAmeomba kutokana na vielelzo vyote aivyoviwasilisha hapo juu ameomba hivyo vimuwakilishe dhidi ya kila kitu ili kumfanya mwajiri wangu aweze kunifikiria. Ameomba kufunga kesi kwa upande wake pia.

Tume

- Tume imefunga kesi kwa upande wa usikilizaji na kutoa kutoa nafasi ya siku 14 kwa kila upande kwenda kuandaa utetezi/majumuisho yote ya mwisho. Shauri hili litakuja tena tarehe 2/12/2015 kwaajili ya kupokea majumuisho ya mwisho toka kila upande.

O. Ngaruka
Mwamuzi " (Sic)

As it is discerned therefrom in the above quoted CMAs' proceedings, it is vividly and clearly indicated that the parties, both complainant and respondent gave their testimonies without first being sworn/affirm. The law requires that witness should testify on oath. **Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No. 67/2007** published on 23.3.2007 (herein GN. No. 67 of 2007) reads as follows and I quote;

"The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath..."

[Underline added]

The section is coached in a mandatory term, since it used the word "shall". Evidence given without oath has no evidential value and should be discounted. That position was clearly stated by the Court of Appeal of Tanzania in the case **Mwita Sigore @ Gora v Republic, Criminal Appeal No. 54 of 2008** quoted with approval in the case of **Ngelleja versus The republic, Criminal Appeal No. 242 of 2013 (CAT) (Mbeya)** (Unreported) where the Court remarked thus;

“Evidence given without oath in a trial within a trial is no evidence at all and should be discounted.” (Sic)

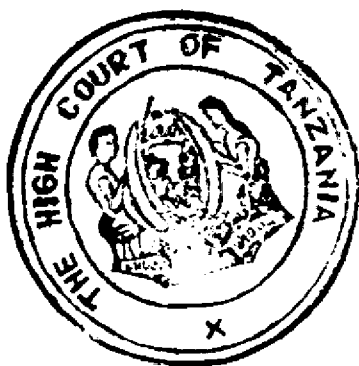
From the foregoing position of the law, I find without hesitation that the CMA did receive testimonies of both the complainant’s witness and the respondent’s witness without them did take oath first. In consequence thereof, I do proceed to discount their evidence from the record for failure to comply with **Rule 25 of GN No. 67 of 2007**, as I hereby do. (See the cases of **Ebon Stephen @ Chandika versus Republic**, Criminal Appeal No. 86 of 2011, and **Mwami Ngura versus Republic**, Criminal Appeal No. 63 of 2014 (CAT - all unreported).

Once that evidence is discounted, no evidence remains to prove the claim by the respondent before the CMA. It follows therefore renders the complainant’s case with no legs to stand on.

In the event, I find merit in the application, as a result this application is granted. The proceedings and arbitration award of the CMA is hereby revised, quashed and set aside. This being a labour dispute, prudent requires me to order and direct that the case file in respect of

labour dispute **CMA/SBA/21/2015** be remitted to the CMA Rukwa at Sumawanga to be heard afresh before another arbitrator with competent jurisdiction. In the circumstance of this application and given the fact that the ailment was discovered by this court *suo motu*, I make no order as to costs.

It is so ordered.

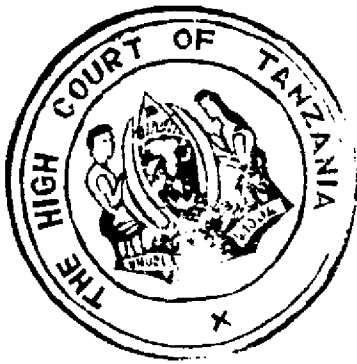



D.E. MRANGO
JUDGE
23.01.2019

| | | |
|---------------|---|-----------------------|
| Date | - | 23.01.2019 |
| Coram | - | Hon. R.M. Mbuya – DR. |
| Applicant | } | Absent |
| For Applicant | | |
| Respondent | | |
| B/C | - | J.J. Kabata |

COURT: Judgment hereby delivered this 23rd day of January, 2019 of all parties and in the present of Ms. J.J. Kabata the Court Clerk.

Rights of appeal explained.



A handwritten signature in black ink, appearing to read "R.M. MBUYA".

R.M. MBUYA

DEPUTY REGISTRAR

23.01.2019