THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 5 OF 2019
(*Originating from CMA/MBY/45/2017*)

COCA COLA KWANZA LIMITED.....APPLICANT
VERSUS
PAUL S/O KINGAZI.....RESPONDENT

JUDGMENT

Date of Judgment: 05/04/2020

Dr. A. J. Mambi, J

This is an application for revision of the Commission for Mediation and Arbitration (CMA) at Mbeya Decision and awards both dated 18 February 2019 from the Complaint No. CMA/MBY/45/2017.The application was brought under Section 91(1) (a) and Section 91(2) (c) of *the Employment and Labour Relations Act, No.6 of 2004* read together with Rules 24(1) & 24(2) (a), (b) (c) and (d) and Rule 24(3) (a), (b), (c) and (d) and Rule 28 (1)(c) of the Labour Court Rules, 2007 (G,N,No 106/2007). The application is supported by an affidavit sworn by one Mika Thadayo Mbise (The learned Counsel for the applicant) on behalf of the applicant. The applicant is seeking among others the following order:

That this Court to call for records proceedings for labour Dispute No. CMA/MBY/45/2017*and revise the proceedings and decisions of Hon.Gofrey Jonas, orders and award thereof*

During hearing, parties' prayed to dispose of the matter by way of written submissions and this court ordered parties to do so.

The applicant through the learned Counsel Mr. M.T.Mbise madc submission basing on the following premises of issues:

i) The counter affidavit by the respondent was bad in law for contravening the provisos of the laws.
ii) CMA erred in fact and in law in holding that the Respondent's termination was unfair procedurally while the termination was substantively fair.
iii) The CMA failed to exercise its jurisdiction by not determining evidence by the applicant and confining itself to the respondent evidence.
iv) The CMA Arbitrator erred in fact and in law in by being biased
v) There were irregularities in the proceedings and misconduct on the part of the Arbitrator.
vi) The decision by the CMA Arbitrator was biased on the proceedings of the disciplinary committee and not on evidence adduced before him.

The learned Counsel for the submitted that the Arbitrator's finding in this aspect is faulty for failure to consider the evidence on record at CMA hearing. He argued that failure to consider the applicants evidence in his award is fatal irregularity that warrants for revision

by this court. The learned Counsel further submitted hat the arbitrator was wrong in holding that the respondent violated principles of natural justice without giving reasons for his decision. He averred the issue of unfair termination was wrongly interpreted by the arbitrator. He referred this court to the decision of the Court in **NBC Mwanza V. Justa B. Kyaruzi,** Labour Revision No. 79 of 2009 where at Page 18

The learned Counsel was of the view that procedure for the termination of the respondent was fair in accordance of the provisions of the law.

In response, the respondent briefly submitted that he does not agree with the grounds for applicant. Addressing the allegation that the counter-affidavit was bad in law as alleged by the applicant counsel, the the respondent submitted that the counter-affidavit was prepared in line with the provisions of the law. He argued that if this court finds some omission on the paragraphs of the affidavit the court can expunge those paragraph and proceed with other paragraphs. He referred this court to the decision of the court in ***Massani Penisula Hotels Limited Vs Barclays Bank Tanzania LTD Civil Application No.192 of 2006.***

Addressing is issue of termination, the respondent Counsel submitted that the Arbitrator was correct in holding that the applicant's termination was unfair procedurally which was contrary to section 37 of the Employment and Labour Relations Act No.6 of 2004. He referred this court to the decision of the court in Issac Sultan vs North Mara Gold Mine Ltd Revision No.16 & 17 of 2018.

He averred that the arbitrator was fair and not biased in his decision as claimed by the respondent Counsel.

I have keenly perused the documents and the whole file to satisfy myself on the contradicting issues transpired at the CMA as raised by both parties. One of the key issues raised by the applicant was the question of right to be heard that emanates from the claim that the CMA did not consider the evidence of claim. I will not dwell much in dealing with counter-affidavit since my perusal have not observed any incurable defectiveness as claimed by the applicant counsel apart from mind errors that does not make the affidavit defective.

Before I address whether the termination was fair or unfair, I will first address the issue as to whether the arbitrator considered the evidence of both parties and whether he made his decision with reasons. The applicant submitted that the applicant was not availed with right to be heard since his evidence was not considered apart from mainly relying with the respondent evidence.

I have gone through the records from the CMA and observed that the proceedings and award of the CMA was tainted by irregularities that in my view jeopardized justice to all parties though the appellant seems to be more jeopardized. My perusal from the records of the CMA show that The Arbitrator seems to be biased by mainly basing on the evidence of the respondent ignoring the evidence and issues raised by the applicant. It appears the arbitrator just summarized the evidence without analyzing the evidence of both parties but he unfortunately failed to consider the evidence of the applicant. This

means that the applicant was not availed with right to be heard. See ***COSMOS CONSTRUCTION CO. LTD VS. ARROWGARMETS LTD (1992) TLR 127***. It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. There are various decision of the court of appeal which has insisted the need for considering the evidence of both parties and failure to do is bad in law. This was underscored in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on its own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

The records further reveal that Hon. Arbitrator grossly erred in law for failure to properly analyze assess and evaluate the evidence on records, in order to arrive into a just decision with regard to the rights of the applicant. This court can also borrow a leaf from the relevant persuasive decisions from other common law jurisdictions such as England. For instance, in one of a persuasive decision in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162. **Lord Denning L.J** observed and pointed out that:

> *"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him.* ***He must know what evidence has been given and what***

***statements have been made affecting him**; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision made Appeal by the Court of Appeal in ***MBEYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was held that:

"In this country, natural justice is not merely principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part"

"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa

*uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na **haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

*"**....That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard,** because the violation is concerned to be a breach of natural justice."*

I also wish to refer the decision of the court in ***Tanzania Portland Cement Co. Ltd v. Minister For labour, Misc. Civil Application No. 147 of 1994*** (as correctly cited by the applicant). The court in this case at page 5 held that:

> *"I therefore agree with the learned applicants counsel that there was no negligence in their part in not applying on time. The reasons are that the Court itself did not obey its own order. The order to notify the parties of the date the ruling would be delivered. That information is not found in the Court proceedings or copies of notices Issued to the parties.* ***It is, I should say, that when the court makes its orders, it should follow and obey them****. Failure of obey its own orders could lead to such applications like this one, which can lead to the giving of benefit of doubts, perhaps to a party who did not deserve it. (emphasis supplied)".*

I have gone through the judgment of the CMA and found that the CMA Arbitrator neither made analysis of evidence nor gave reasons on his decision. Now having held that, the applicant was not fully availed with right to be heard, what would the proper order to be made by this court? Indeed before making any order resulting from the irregularities observed by their court I wish to highlight that this curt has wide powers of making revision of the decisions of the lower court either *suo moto* or by being moved by any party. In the matter at hand the court have been moved by the applicant to revise the decision of the CMA and find out if there are any curable irregularities. Indeed this court is empowered by the laws to exercise its powers of revision where there are material irregularities. The provisions of the laws cloth the High court with the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice. This enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts

and provides the means to an aggrieved party to obtain rectification of non-appealable order.

My perusal from the records of the CMA also show that the arbitrator failed to consider the evidence adduced by the applicant and he also not properly evaluated the evidence and he made his decision without clear reasons. This in my view was fatal as it vitiated the justice on the part of the applicant. Reference can be made to the decision of the court in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported).*** In this case the court made clear observation on the importance of considering and dealing with the evidence of both parties. In this case, the court observer and held that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

The record such as the award or decision of CMA does not show the point of evaluating evidence and giving reasons on the decision. I am of the settled view that the trial CMA did not subject the evidence of

both parties to any evaluation to determine its credibility and cogency. The court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** observed and held that:-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524)*** at page 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

I have gone through the decision of the CMA and found that the Arbitrator neither made analysis of evidence nor gave reasons on his decision. It is trite law that every judgment or judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate or arbitrator in the language acceptable to the governing laws and must contain the ***point or points for determination, the decision thereon and the reasons for the decision*** , dated and signed. The laws is clear that the judge or magistrate or any decision maker must show the reasons for the decision in his decision or judgment.

Looking at the records, I am of the settled mind that this court has satisfied itself that there is a need of revising the legality, irregularity, correctness and propriety of the decision made by the CMA. Having established that in this case both CMA has failed to follow the legal principles that renders the proceedings and judgments incompetent, the question is, can such omission or irregularity occasioned into injustice to any party if the matter is remitted back to determined afresh?.I wish to refer the decision of court in ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013.*** The Court of Appeal of East Africa restated the principles upon which court should order retrial. The court observed that:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

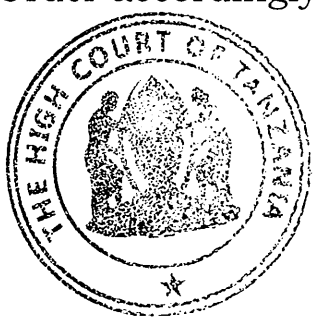
I subscribe the above position by the court which started that an order for retrial should only be made where the interests of justice require it. In my considered view, there is no any likelihood of causing an injustice to any party if this court orders the remittal of the file for the CMA to properly deal with the matter immediately. The CMA should consider this matter as priority and deal with it immediately

within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for retrial or trial de novo need to be dealt expeditiously within a reasonable time.

The legality of those two purported award and even the whole proceedings at the CMA starting is highly questionable on the eyes of the law. From my observation U have made above, I am of the settled view that the whole proceedings and the decision of the CMA were nullity and *void ab initio* and I hold so. This Court thus finds the CMA proceedings, the decision and any award made thereof a nullity *ab initio.* Basing on my findings and reasons above, I nullify both the proceedings and the decision/award of the CMA. In the premises, the CMA proceedings and decision are revised and quashed.

In the interest of justice, I order and direct that the matter be remitted to the CMA to be determined afresh by a different arbitrator in accordance to the law if parties wish to do so. Where it appears the Same CMA has no more than one Arbitrator the matter can be dealt by any arbitrator with competent jurisdiction from the nearest region. All parties should be summoned to appear within reasonable time.

Order accordingly.



DR. A.J. MAMBI

JUDGE

05/5/2020

Judgment delivered in Chambers this 5thday of May, 2020 in presence of both parties.

DR. A.J. MAMBI

JUDGE

05/5/2020

Court: Right of Appeal to the Court of Appeal of Tanzania explained.

DR. A.J. MAMBI

JUDGE

05/5/2020