IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO. 30 OF 2020

HENAN AFRO ASIA GEO ENGINEERING CO. LTD ...... APPLICANT

VERSUS

JOHN MIHAYO JANDIKA .... 1ST RESPONDENT

EMMANUEL JOHN JEREMIAH .... 2ND RESPONDENT

HAMIS MAGAMBO DAUDI .... 3RD RESPONDENT

(Arising from the decision of the Commission for Mediation and Arbitration for Musoma in Labour Dispute No. CMA/MUS/286/2019

JUDGMENT

22nd and 22nd June, 2021

KISANYA, J.:

The applicant, Henan Afro Asia Geo Engineering Co. Ltd filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration for Musoma (herein referred to as CMA) in Labour Dispute No. CMA/MUS/286/2019. The application was made by way of chamber summons and supported by an affidavit of her counsel one, Alhaji A. Majogoro. The respondents were duly served. However, only the 1st respondent filed a counter affidavit to contest the application. Thus, the application was not contested by the 2nd and 3rd respondents.

Briefly, the respondents filed a labour dispute claiming to have been unlawful terminated by the applicant in 2016. They prayed for order of reinstatement, payment in lieu of notice (TZS. 300,000), severance pay, gratuity, substance allowance (TZS 30,000,000), payment for leave not taken (TZS 2, 040,000 for the first respondent, TZS 400,000 for the 2nd respondent and TZS. 300,000 for the third respondent), compensation (TZS 7,200,000), salary arrears from January 2016 to October, 2019 (TZS, 13, 500,000) and any other relief that the CMA may deem fit and just to grant.

The applicant disputed the respondents' claims. She averred that the respondents were not her employees.

In view thereof, four issues were framed for determination of the labour dispute. These were:

1. Whether the respondents were employed by the applicant.
2. If the issue number 1 is answered in affirmative, whether there was valid reasons for terminating the respondents.
3. Whether the procedure for terminating the respondents were complied with.
4. To what reliefs are the parties entitled to?

In her endeavor to prove its case, Henan Afro Asia Geo Engineering Co. Ltd paraded one witness namely, Andrew Ndaki (PW1) who happened to be her

Assistant Human Resources officer. On the other side, each respondent gave evidence without calling other witness (es). After a full hearing, the CMA answered the above issues in favour of the respondents. It went on to order compensation of 24 months' salary, one month payment in lieu of notice and gratuity. As a result, the total amount awarded in favour of the respondents was TZS 8, 065, 385 for the 1st respondent, TZS 7, 742, 308 for the 2nd respondent and TZS 7, 984, 615 for the 3rd respondent.

Dissatisfied, the applicant filed this application in which the Court is moved to determine five issues including, "whether it was proper for the arbitrator to allow John Mihayo (first respondent) to examine in chief other respondents while there was no order for representative suit." For the reasons to be noted in this judgment, I find no need of reproducing other issues.

In the course of determining this matter, I noticed that the 2nd and 3rd respondents were not afforded the right to cross examine the sole witness (PW1) called by the applicant. Therefore, I found it apposite to implore the parties to address the Court on the said irregularity.

During the hearing of this application, the applicant was represented by Mr. Alhaj Majogoro, learned advocate while the 1st and 3rd respondents appeared in person. The hearing proceeded in the absence of the 2nd respondent who defaulted to appear without notice.

Starting with the issue raised in the affidavit in support of the application, Mr. Majogoro argued that the 1st respondent had no power of examining in chief other respondents. His argument was based on the fact that there was no order for representative suit that had been issued by the CMA. In his view, the 2nd and 3rd respondents gave evidence under instruction of the 1st respondent.

As regards the issue raise by the Court, Mr. Majogoro submitted that each party was entitled to give evidence and cross-examine witness called by the other party. He contended that the 2nd and 3rd respondents were denied the right to cross-examine PW1 because the record does not show that they waived their right of cross-examining him. The learned counsel was of the form view that the proceedings of the CMA were vitiated. As an officer of the Court, he urged me to nullify the same and quash and set aside the award arising thereto.

On the other hand, the 1st respondent submitted that each respondent gave his own evidence. He went on to contend that the learned counsel for the applicant ought to have raised the issue pertaining to irregularity on examination in chief at the hearing before the CMA.

In relation to the issue whether the 2nd and 3rd respondents were given the right to cross-examine PW1, the 1st respondent's reply was in affirmative. He contended that the 2nd and 3rd respondents had no questions to ask PW1.

Therefore, the 1st respondent was of the view, that the CMA's proceedings were conducted according to the law and asked me to dismiss the application.

The 3rd respondent had nothing to respond. He adopted the 1st respondent's submissions. He also contended that he had no questions to ask PW1.

Rejoining, Mr. Majogoro contended that the objection on the 1st respondent's power to examine in chief other respondents was raised orally during the hearing but, not recorded or decided upon by the Hon. Arbitrator. He contended further that it was not recorded that the 2nd and 3rd respondents had no question to ask PW1.

Having gone through the record and rival submissions by the parties, I am of the view that this application can be disposed of by considering issues pertaining to irregularities in proceedings of the CMA.

It is common ground that the 2nd and 3rd respondents were examined in chief by the 1st respondent. It is also not disputed that PW1 was cross-examined by the 1st respondent only. Therefore, the first question to ask ourselves is whether the first respondent was representing other respondents. In terms of rule 21 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN No. 67 of 2007, a person entitled to represent a party to a dispute before the CMA is either member or an official of that party's trade union or employers' association; or an advocate. The said provision reads as follows:

"21.-(1) A party to a dispute may be represented by-

(a) a member or an official of that party's trade union or employers' association; or

(b) an advocate."

In view of the above, a person other than member or official of the party's trade union or employers' association or advocate has no power to represent the party to a dispute referred to the CMA.

It this case, each respondent lodged his own labour dispute before the CMA. Page 3 of the hand written proceedings indicates that, the Arbitrator decided to consolidate the respondent's labour disputes in order to save time. There is no evidence that the 1st respondent was also representing the 2nd and 3rd respondents. He did not introduce himself as such before the CMA. Further, no evidence showing that the 1st respondent was a member of the trade union to the extent of representing other respondents. Therefore, I am satisfied that the 1st respondent had no authority of representing 2nd and 3rd respondents.

Reverting to the issues under discussion, the procedure of adducing evidence before the CMA is provided for under rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules (supra). All parties to a labour dispute prove their respective cases through evidence and witnesses who testify in the following manner; examination in chief by a party calling the witness, cross examination by the adverse party or parties as the case may be; and and re-

examination by the party that initially called the witness. In the event there are more than one parties, each of them must be accorded the right to cross-examine the witness called by the other party. This is pursuant to rule 25(1) (b) (i) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules (supra).

The law is settled that unless the right to cross examine is waived, the testimony of such witness cannot be considered as legal evidence if it is not subjected to cross-examination. See **EX-D.8656 CPL Senga s/o Idd Nyembo and 7 Others vs R**, Criminal Appeal No. 16 of 2018 (unreported) where the Court of Appeal had this to say on this issue:

> *"Unless, a party has waived his right to cross examine the witness, the testimony of a witness cannot be taken as legal evidence unless it is subject to cross-examination. Consequently, the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of cross-examination"*

The above procedure guarantees the right to fair hearing enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977. A party who is not afforded the right to cross examine witness called by the other party or examine in chief his witness is taken to have denied the right to fair hearing. The law is also settled that that, any decision premised on the proceedings conducted in violation of the right to be heard is a nullity due to infringement of

the principle of natural justice. It does not matter whether similar position would have been reached had the parties been heard on the matter. There are many authorities on this position. One of them is the case of **Mbeya - Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 251, the Court of Appeal held that:

> *"In this country natural justice is not merely a 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.*

In yet another case of **M/S Darsh Industries Limited vs M/S Mount Meru Milleers Limited,** Civil Appeal No. 144 of 2015 [2016] TZCA 144; (23 October, 2016) the Court of Appeal cited with approval its decision in **Abbas Sherally and Another v. Abdul S. H. M. Faza Iboy**, Civil Application No. 33 of 2002 (unreported) that:-

> *The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***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 considered to be a breach of natural justice. "[Emphasis added].*

In our case, the applicant's sole witness (PW1) was not cross-examined by the 2nd and 3rd respondents. As a rightly observed by Mr. Majogoro, it was not recorded that the 2nd and 3rd respondents were given the right to cross-examine PW1 and opted not to ask him question(s). In that regard, the 1st respondent's contention that the 2nd and 3rd respondents had no question to ask PW1 is not supported by the record. As a result, it is not known whether PW1's evidence that all respondents were not employed by the applicant was not challenged by the 2nd and 3rd respondents for this Court to employ the trite law that failure to cross examine a witness on a particular fact is tantamount to admission of that fact.

Likewise, the 2nd and 3rd respondents were examined in chief by the 1st respondent. As indicated earlier, there is no evidence that the 1st respondent was representing other respondents. Therefore, he had no right to examine them in chief.

In view thereof, I am of the considered opinion that, the 2nd and 3rd respondents were not afforded a fair hearing. I am aware that the 2nd and 3rd respondents did not demonstrate that they were prejudiced by the said irregularities. However, they might be affected if this Court decides to revise the CMA's award basing on evidence adduced by PW1. In the circumstances, the proceedings of the CMA and award arising thereto are vitiated because the 2nd and 3rd respondents were not afforded a fair hearing. For that reason that, I find it not

appropriate to consider other issues raised in this application because they are stemmed from the decision made on vitiated proceedings.

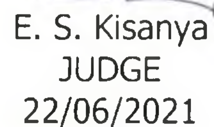
In the event and for the reasons I have endeavored to offer, I find merit in this application. So, I have no hesitation to nullify the proceedings and quash and set aside the award of the Commission for Mediation and Arbitration for Musoma in Labour Dispute No. CMA/MUS/286/2019. Eventually, I order that the case file be remitted to the CMA for re-hearing of the labour dispute before another Arbitrator. This being a labour matter, I make no order as to costs.

Order accordingly.

DATED at MUSOMA this 22nd day of June, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered this 22nd day of June, 2021 in the presence of the 1st and 3rd respondents and in the absence of the applicant and 2nd respondent.



E. S. Kisanya
JUDGE
22/06/2021