IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 10 OF 2021

(Originating from the Labour dispute No. CMA/MUS/269/2019)

NORTH MARA GOLD MINE LIMITED.....APPLICANT

VERSUS

WANDIBA JUSTUS SUNGURA.....RESPONDENT

JUDGMENT

Date of Last Order: 23/08/2021
Date of Judgement: 31/08/2021

M. MNYUKWA, J.

The applicant, North Mara Gold Mine made the present application to call upon the court to examine the record and proceedings in Labour Dispute No. CMA.MUS/269/2019 and proceed to revise and set aside the award issued by the Commission for Mediation and Arbitration at Mwanza, Hon. Msuwallo, S. (Arbitrator) on 13/01/2021.

The application is made under the provision of section 91 (1) (a) 91 (2) (c) and section 94 (1) (b) of the Employment and Labour Relations Act

Cap 366 [R.E 2019] and Rule 24 (1) (2) (a) (b) (c) (b) (e) and (f) 29 (3) (a) (b) (c) and (d) and Rule 28 (1) (c) (d) and € of the Labour Court Rules of 2007 GN No. 106 of 2007. The application is supported by the applicant's counsel affidavit. The respondent filed a counter affidavit challenging the application.

Before hearing the application, on 12/07/2021, the applicant prayed leave of the court to file a Notice of prayer for leave to raise and argue a point of law during the hearing. The respondent's advocate opposing the application. With the leave of the court after hearing both sides the applicant's prayer was granted to raise and argue a point of law which was not stated in the application for Revision.

With the leave of the court, hearing of the Labor Revision No. 10 of 2021 was done through written submissions. The applicant file submission in chief on 2nd August, 2021, the respondent's file his reply on 13th August, 2021 and the applicant's opted not to file rejoinder. I thank both parties to the case for complying with the orders of the court.

The applicant had a service of Mr. Imani Mafuru and the respondent enjoyed the legal services of Mr. Nicholaus Majebele.

Briefly, the facts heading to this revision are as follows; The respondent was employed by the applicant as Loader Operator on 12th September, 2019. His employment contract was terminaated on the ground of incapacity due to illness. On 3rd September, 2019 the applicant through his redeployment committee decided that respondent could not continue to work hence should be terminated from employment after failure to find alternative Job for him. Being aggrieved with that decision, the respondent filed a labour dispute at the Commission for Mediation and arbitration (CMA). The CMA delivered award in favour of him. Aggrieved by that decision, the applicant filed the present revision.

The main issue for determination in the present revision was

(i) whether there was reason for termination

(ii) Whether the procedure for termination was followed

(iii) Whether the CMA at Mwanza vested with the jurisdiction to entertain the dispute.

As I earlier stated, the applicant was granted leave to argue on a point of law during the hearing. In his submission, the applicant's counsel submitted that the arbitrator erred in delivering an award based on unscrorn testimonies of the witnesses. He averred that, the testimonies of DW1, DW2,

DW3 and PW1 as reflected on page 5, 18,33 and 40 of the CMA proceedings were given without the said witnesses being sworn.

He went on to state that the said omission is contrary to mandatory requirements of Rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules (GN No. 67 of 2007). He supported his argument by referred this court to the decision of the Court of Appeal of Tanzania in the case of **Catholic University of Health and allied Science (CUHAS) v Epiphania Mkunde** Civil appeal No. 257 of 2020 CAT at Mwanza (unreported) where the court held that "it was mandatory for a witness to take oath before he or she gives evidence before the CMA". He further argued that the same position was taken in the case of **Sameer Africa (T) Ltd v Vivian Audax Mulokozi**, labour Revision No. 65 of 2020, HCT labour at Mwanza (unreported).

He therefore prayed for this court to allow the above ground of revision and quashing the CMA proceedings and setting aside the CMA award.

In the alternative, in the event the court finds that defect can not dispose the case, the applicant's counsel submitted that, the arbitrator erred when he ruled out that the applicant was wrong to terminate the respondent before getting the final doctor's report. Furthermore, the arbitrator erred in

ruling that the applicant did not look for and consider alternative job before terminating the respondent. He went on to state that there is no law which requires the employer to wait for doctor's final report before terminating an employment. He cemented his argument by citing Rule 19 (3) of the Employment and Labor Relations (Code of Good Practice) Rule GN No. 42 of 2007 which require the employer to be guided by an opinion of a registered medical practioner. He insisted that the evidence of DW 1 and DW2 together with Exhibit D 11 proved that the employer complies with the above requirement.

On the issue of the failure by the applicant to find an alternative job for the respondent, the applicant's counsel submitted that the respondent was placed on a rehabilitation program. That assertion can be proved by the testimony of DW1 and DW3. He averred that the purposes of the said plan was to enable the respondent to recover but he did not recover because the respondent complained that he was sick.

He insisted that since the respondent was complaining that he was suffering a lot and he wrote to the Occupational Safety and Health Authority (OSHA) that when he works he was getting pain, the applicant is not to be blamed for terminating the respondent on ground of illness because the

applicant's attention was for the respondent to continue working but the respondent was not willing to continue working. In that regard, it is obvious that the applicant had fair reason to terminate the respondent from employment. Therefore he prayed to uphold this ground of revision and set aside CMA Award.

The learned counsel for the applicant went on to state that, the arbitrator erred in ruling that all heads of departments were to attend the meeting to find alternative jobs for the respondent. He added that, the arbitrator erred in ruling that the chairman of the redeployment meeting had a conflict of interest as he was the human resource officer and at the same time he was a lawyer. The advocate of the applicant contended the arbitrator's finding on the following reasons; Firstly, there is no legal requirement on to who should attend a meeting that is considering alternative job and there is no law which prohibits a person to act in the two positions. Secondly, it was not the chairman who made the decision but rather the committee as a whole. Thirdly, the arbitrator did not state what kind of conflict of interest exists by the fact that the chairman was a human resource officer and at the same time a lawyer.

On the issue of all heads of department to attend the meeting, he submitted that there is no such kind of requirement under the law. The duty of looking for alternative job purely rests on human resource department and the representative from the human resource department who possessed relevant information of the respondent attended the meeting and opined that there was no alternative job. Therefore the arbitrator's findings that all heads of department should attend the redeployment meeting apart from not being legally justifiable it will also affect the applicant's operation. Therefore he prayed the court to revise and set aside the CMA Award.

He concluded his submission on the remedies awarded to the respondent. He averred that the arbitrator erred in awarding the respondent 24 months' salaries without justification. He added that the OSHA report was clear that if the respondent continued with duties, his illness condition would have been worsened. In that circumstances, the applicant had no other reason except to terminate respondent from employment. He went further to state that the arbitrator failed to consider that the respondent had already been paid his life insurance benefit as reflected at page 43 of CMA's proceedings. The award of 24 months' salary also defeated the spirt of Rule 32 (5) of the Labor Institutions (Mediation and Arbitration Guideline) Rules

GN No. 67 of 2007 and section 40 of the Employment and Labor Relations Act, Cap 366 [R.E 2019]. Furthermore the arbitrator also erred in including the night shift, overtime, travel allowance and rotational leave in calculating the compensation for the respondent. He therefore prays the court to set aside the amount awarded to the respondent.

In responding, the advocate of the respondent submitted that, it is worthy to save the time of the court and that of their parties by not arguing on a nullity that was occasioned not by the parties but by the CMA which are, witnesses were not sworn before taking their evidence and there is no record in the CMA's proceedings that the dispute was mediated and failed. He added that the above anomalies invalidate the proceedings.

He went on to state that in view of the decision by Tiganga, J in the case of Sameer Africa (T) Ltd (supra) it is clearly that omission to swear by the parties before the court is fatal and consequently vitiate the proceedings.

He further argued that, the other issue though not raised by the parties during the pleadings but being a point of law which can be raised at any time was that the matter did not go through mediation as no proceedings or order making mediation failed. He therefore prayed the matter be remitted for fresh mediation and arbitration processes before another

mediator and arbitrator. He finally submitted that since the above anomalies dispose the matter, he will not argue on the other grounds of revision as it will be academic exercise and wastage of time.

After going through parties submission, the important issue for consideration and determination by this court is whether the said defects vitiate the CMA proceedings and nullified the CMA Award.

Going through the available record, it is clear that the issue of failure to pass through mediation was raised by the respondent's counsel during the submission. Even though there was no prior leave of the court to raise and argue, which of course it is unprocedural, I will take it into consideration because a point of law can be argued at any time as it was rightly held by my learned brother, Hon. Tiganga, J in the case of Sameer Africa (T) Ltd (supra) when referred the case of **Tanzania- China Friendship Textile Co. Ltd v Our Lady of the Usambara Sister** (2006) TLR 70.

It has to be noted that, the issue of passing through Medication is a requirement of law as it is provided under section 86 (3) of the Employment and Labor Relations Act, [Cap 366 R.E 2019] in which the section provides that;-

"86 (3) On receipt of the referral made under subsection (1) the commission shall

(a) appoint a mediator to mediate the dispute.

(b) decide the time, date and place of the mediation hearing.

In the case of Nyangugu Sadiki Masoud v Tanzania Mining, Energy, Construction and Allied workers Unioun (TAMICO) (2013) LCCD 185, the court held that;

> *"With due respect, it is my considered view that under labour law, amicable settlement of labour dispute is preferable and encouraged, so as to maintain good labour relations such as the sprit and one on the objectives of the ECRA, in light of the that parties' efforts towards amicable settlement of disputes are recognized."*

Therefore, it is the requirement of the law for the parties in the labour dispute to attend the mediation before arbitration.

Going through the available record I managed to see CMA Form No. 6 which is the certificate of Non- settlement dated 30/10/2019 which shows that the dispute has not been resolved. The said form is signed by the applicant Wandiba Justus Shagura, the respondent Issack Kandoga and the Mediator Hon. Soleka.

However, the CMA proceedings at page 1 and 2 shows that Hon. Soleka as a mediator ordered the parties to submit opening statement and informed the parties that hearing will proceed on 17/1/2020. The CMA's proceedings are silent if the mediation fail. It is a trite law that court proceedings should be trusted and believed. As it was held in the case of Alex Ndendya v Republic, criminal Appeal No. 207 of 2018m CAT at Iringa the court held that;

> *"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal practice as the sanctify of the court record"*

In view of the above, it is doubtful if the parties go to mediation. It has to be noted that labour court is the court of mediation and the function of the mediation is to help the parties to dissolve their dispute amicably and to restore the destroyed relationship between the employer and his employee. This is also provided for under Rule 3 of the Labour Court Rules, GN No. 106 of 2007 which provides that, the the labour court is the court of record, law equity and mediation.

Having so found. I find the issue of referring the dispute to mediation is one of a significant importance and the CMA's proceedings do not show if

parties underwent mediation process. This is fatal and infact, vitiates the proceedings of the CMA and therefore the said proceedings deserved to be quashed and set aside.

On the second anomaly in regards to non-swearing of the witnesses before adducing their evidence, as it was rightly submitted by the applicant's counsel and conceded by the respondent counsel that it is a nullity that was accessioned not by the parties but by the CMA. In view of the decision of Hon. Tiganga, J in Sameer Africa (T) Ltd (supra) such kind of an omission is fatal to the evidence given and relied upon by the arbitrator and the same vitiates the proceedings.

On the final analysis, based on the above discussions I invoke my power under section 94 (1) (b) (i) to revise the proceeding and the award of the CMA. Therefore I proceed to nullify the whole proceeding and award of CMA delivered on 13/01/2021.

I find constrained to discuss other grounds of revision raised and argued by the learned counsel of the applicant because the same depended on the mediation and unsworn testimony of the witness. Parties are restored to the position they were after the matter was filed in the CMA through CMA Form No.1. I proceed to order CMA records to be remitted within 30 days

from today, the dispute to be heard by another mediator and arbitrator. No order as to costs.

It is so ordered.

M. Mnyukwa
Judge
31/08/2021

Judgment delivered on 31/08/2021 via audio teleconference whereby all parties were remotely present.

M. Mnyukwa
Judge
31/08/2021