THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LABOUR REVISION NO. 04 OF 2021

BETWEEN

YARA TANZANIA LIMITED ---------- APPLICANT

VERSUS

DIONIS TSHONDE ---------- RESPONDENT

12/04 & 13/05/2022

RULING

MATOGOLO, J.

This is an application for revision filed by the applicant YARA TANZANIA LIMITED praying for this court for the following orders:-

1. That this Honourable Court be pleased to call for the record of proceedings in Labour Dispute No. CMA/IR/34/2019 decided on 19th December, 2020 before (Hon. Msuri A. Arbitrator) between the above mentioned parties and be pleased to revise and quash the proceedings and award and set aside the above said award or make such orders as it deems fit and just.

2. Any other relief(s) this Honourable Court may deem fit and just to grant.

The applicant in this application appointed one Nuhu Mkumbukwa Reuben Robert, Erick Denga nd Geofrey Geay Paul learned advocates to represent her.

The respondent one DIONIS TSHONDE was represented by Ms. Eva Msandi learned advocate. The application was argued through written submissions. In his submission in chief, Mr. Nuhu Mkumbukwa learned advocate also prayed for the affidavit by Narindwa Shaidi to be adopted and form part of this submission. He argued that the impugned Award makes reference to exhibits that were neither tendered or tendered but not admitted by the commission in accordance with the Civil Procedure Code and the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, G.N. No. 67 requires and this consequently renders the entire award a nullity. He referred to order XIII Rule (1) and (2) of the Civil Procedure Code (the CPC) not to have been complied with.

He emphasized that failure to comply with the above mentioned provision for failure to admit documents the same cannot form part of the record and thus cannot be relied upon in the decision. Mr. Mkumbukwa mentioned the exhibits referred in the Award in Labour Dispute No. CMA/IR/34/2019 to include exhibits (DW1)(a) Employment Contract, DW3 minutes, DW16 –Email, DW17 – written warning PW15, YARA 19, DW1(4), PW1 (a), PW1 (8), PW16, PW5 YARA 8, Exhibit 5.

The learned advocate clarified that DW1 made a request to tender an employment contract between the parties but there is no evidence that the same was admitted. But the same was referred in the Award. Page 5 of the proceedings made reference to a key performance Indicator (K.P.I). But there is no evidence in the proceedings showing that there was a request made to tender that document nor that was admitted by the commission.

But the same was referred in the Award. Page 6 of the proceedings makes reference to the minutes of Inquiry meeting which was not admitted in evidence. However page 4 of the Award paragraph 5 makes reference to Exhibit DW3. Page 7 of the proceedings makes reference to the email correspondence between Dionis and Narindwa dated 11th April 2019 which was not admitted as evidence by the Commission. But page 5 of the Award at paragraph 1 makes reference to Exhibit DW16.

Page 8 of the proceedings make reference to the minutes of performance meeting, DW1 prayed to tender the minutes, but the same was not admitted as there is no evidence to that effect. However page 4 of the Award makes reference to minutes as exhibit DW3. Again page 8 of the proceedings make reference to a document named YARA 17 in which there is no proper identification of the document and whether it was admitted by the commission or not. Page 9 of the proceedings makes reference to YARA 20, YARA3, and YARA 19. The witness was questioned on whether she wants the documents to be tendered as

exhibit. But there is no evidence that the documents were admitted as evidence. Mr. Mkumbukwa was of the view that the commission erred to rely upon in its decision in those documents contrary to the requirements of order XIII Rule (1) and (2) of the CPC.

He argued further that it is a requirement that there must be evidence that the document was tendered and tested. To that he referred to the decision of the Court of Appeal of Tanzania in Civil Appeal No. 59 of 2018 ***CHANTAL TITO MZIRAY, ENOCK ANDREW MZIRAY VS. RITHA JOHN MAKALA AND NGANA ANDREW MZIRAY*** in which it was insisted that document not admitted in evidence by the trial court cannot be part of the record thus cannot be relied upon to reach the conclusion concerning the dispute between the parties. The learned counsel further referred the case of ***ZANZIBAR TELECOMMUNICATION LIMITED VS. ALI HAMADI ALI AND 105 OTHERS***, Civil Appeal No. 295 of the 2019, CAT (unreported) on the same position. He submitted further that the way the documents were handled during the hearing before the CMA and the way the award was delivered the procedural law was not followed. He also submitted that the Award is also contrary to the Labour Institutions (Mediation and Arbitration Guidelines) Rule 2007 G.N No. 67 Rule 27(3) (d).

Basing on the foregoing submission and arguments Mr. Mkumbakwa prayed to this court to nullify the proceedings of the commission as it was decided in the ***CHANTAL TITO MZIRAY*** (supra) at page 32.

Mr. Mkumbukwa learned counsel in the alternative he argued grounds 1, 2, 3, and 4 together and submitted that the commission was not proper in analyzing the evidence adduced and concluding that the reasons for termination of the respondent by the applicant was not valid. Contrary to what was decided by the arbitrator, he erred in law and fact in failing to properly admit and appraise the evidence tendered by the applicant during trial for failure to properly admit, identify and analyze the documentary evidence that was tendered without objection but the documents were not analyzed during preparation of the Award. He said that has caused confusion and miscarriage of justice.

The learned counsel also argued that the commission failed to analyze the entire evidence that was adduced at the hearing, as a result erred in law, fact and procedurally by stating that the respondent was not given proper guidance of his targets. He said the Commission has the obligation to summarize evidence and analyze the entire evidence that has been adduced before it gives decision and give reasons for its decision. But the Arbitrator did not do so as a result reached into a different conclusion.

Her further argued that had the Arbitrator properly analyzed the evidence by the applicant was water tight to the effect that the respondent was given chance to improve and accorded requisite training in line with the applicant's policy, and the allegations for poor performance was equally proved during disciplinary hearing. He further argued that it is trite law that judgment of the court must contain

analysis of evidence tendered and reasons for the decision and supported his argument by referring the case of ***ANORD ADAM VS. THE REPUBLIC***, Criminal Appeal No. 171 of 2019 CAT at page 5, where the court referred the case of ***LEONARD MWANA SHOKA VS. THE REPUBLIC***, Criminal Appeal No. 226 of 2014 also cited the case of ***YASINI s/o MWAKEPALA VS REPUBLIC***, Criminal Appeal No. 13 of 2012 both of CAT (unreported).

He further referred the case of ***MKULIMA MBAGALA VS. REPUBLIC***, Criminal Appeal No. 267 of 2006. The learned counsel prayed to this court being the 1st appellate court to step in the shoes of the trial commission to re-evaluate the evidence tendered and come to its own conclusion as it was held in the case of ***MICHAEL JOSEPH VS. THE REPUBLIC***, (supra) as well as in the case of ***SELEMAN JUMA KARANI VS. THE REPUBLIC***, Criminal Appeal No. 63 of 2017 CAT (un reported).

Submitting in respect of the ground 5 on the complaint that the Honourable Arbitrator erred in law, fact and procedurally by stating that the applicant was not afforded opportunity to be represented, Mr. Mkumbukwa had it that reading from annexure YARA-4 (notice of hearing) as reflected at page 9 of the CMA proceedings, the respondent was clearly told that he is allowed to be accompanied by any employee of his choice which means a representative, but he did not utilize that right. He said the respondent is stopped from blaming that he was not represented. Equally the Arbitrator was not justified to hold so. He

asked this court to re-evaluate this evidence and find that the respondent was accorded the right to be represented or accompany a representative or employee of his choice.

For annexure YARA 4 found at page 9 of the CMA Proceedings it is the argument by Mr. Mkumbukwa that the notice was not properly recorded by the Arbitrator to have been admitted. He supported his argument by citing the case by ***SALHINA MFAUME AND 7 OTHERS VS. TANZANIA BREWERIES LIMITED***, Civil Appeal No. 111 of 2017 page 6 it was stated:-

> *"... it is crucial to restate the principle that this being a first appeal the court is mandated by law to re-evaluate the evidence before the trial court as well as the judgment and may, arrive at its conclusion".*

Regarding ground 7 Mr. Mkumbukwa submitted that based on what they have submitted at the introductory part and in the foregoing grounds, the Award by CMA which is sought to be challenged to revise it as is based on irrational, improper, unreasonable, unsolicited, excessive and unlawful contrary to section 91 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019].

He said basing on the strength of evidence adduced by the applicant at the trial, the respondent was not entitled to the reliefs

which was issued by the Arbitrator. Even if he was so entitled but still the said relief was, in the circumstance of the case excessive. He prayed to this court to see merit in this application and proceed to quash and set aside the Award by CMA.

In her reply submission counsel for the respondent Ms. Eva Msandi first prayed for their counter-affidavit to be adopted and form part of her written submission. She said, after been served and extensively read the applicants submission in chief along with the supporting affidavit the same raise some issues of law that the arbitrator failed to adhere to the requirements of law provided under Order XIII Rule 7(1) and (2) of the CPC relating to the admission of documentary evidence and that if this court is so satisfied should order a retrial being the remedy as stated in the case of ***M/SSDV TRANSAMI (TANZANIA) LIMITED VS. MS STE DATCO***, Civil Appeal No. 16 of 2011.

Alternatively, to consider their grounds for revision. The respondent's advocate submitted that the applicant's advocate submitted on what he stated in his ground as to what extent and how the arbitrator erred in delivering his award rather has committed himself that the only reasons that the arbitrator reached his decision is that he failed to analyze the evidence provided before the honourable tribunal. The learned counsel submitted that the commission did not error in deciding the issue of unfair termination done by the applicant. It is crystal clear that, the trial Tribunal, as shown in the Award analyzed the

entire evidence as given by both parties as shown in the entire Award that is why the arbitrator reached the fair decision. She said the CPC under Order XIII Rule (1)(2) states that documents not admitted shall not form part of the record and shall be returned to the persons producing them. The trial Arbitrator never returned any document to the parties. It is crystal clear that the evidence adduced was well analyzed by the commission and reached a fair decision that the termination of the respondent was unfair. The learned counsel argued that the advocate for the respondent failed to show to what extent as he proved that the trial Arbitrator erred by stating that the respondent was not accorded with proper guidance in reaching his target and that the employer must set the target which is clear and can be easily reached by the employee. To that she sought support from the court of South Africa in the case of ***WHITE VS. MEDPRO PHARMACEUTICAL [2000] BALR 1182.***

Regarding the 3rd, 4th and 6th issues the learned counsel submitted that though were not properly explained by the applicant to what extent the trial Arbitrator erred to state that the respondent was not given proper training and enough time to improve rather the applicant put his effort in point out the error of the Award given by the trial commission. She said the advocate being the officer of the court has the right to provide information which will help the court to reach a fair decision but again he has the right to defend his case fairly whereby not proving to what extent the trial Arbitrator erred in giving his decision that is to say

the applicant failed to prove his case and gave rise to issues which were not adduced in his reason for revision contrary to what the law requires and discussed in the case of ***ABDUL – KARIM HAJI VS. RAYMOND NCHIMBI AND JOSEPH SITA JOSEPH [2006] TLR 420***, that he who alleges is responsible to prove his allegations. The learned advocate prayed to this court to find that the applicant's argument that the trial commission erred in deciding the issue of unfair termination has no merit, as the trial commission was right and justified in deciding the issue of unfair termination done by the applicant.

As to whether the respondent was not accorded with the right to be represented at the disciplinary hearing, Eva Msandi submitted, the argument by the applicant's advocate that the respondent was given right to be represented and referred to YAR 4 which is the notice for hearing, she said for proper record, the document and page referred is YARA 19, where it is only the email for calling the respondent to the meeting where the notice clearly stated that he can appoint the representative where the respondent did the same as provided under page 9 of the CMA proceedings but the company did not afford him the means how his representative will be available at the hearing given the fact that the respondent (applicant) was provided by the company means to attend the hearing. The same was expected to be done to the representative as he was also the employee of the company. She said that was discussed by this court in ***ALLIANCE ONE TOBACCO***

TANZANIA LIMITED VS. GRAYSON MCHARO, Revision No. 54 of 2019 High Court Labour Division at Morogoro, in which it was held:-

> *"... it is on record that the applicant did not call any witness before the disciplinary hearing as a result the respondent was denied his right to question them this omissions are fatal as they infringe respondent's right for fair hearing".*

The learned counsel called upon this court to hold that the respondent was not give right in his defence thus hearing was unfair.

Regarding complaint that the Arbitrator gave the award which was biased, irrational, improper, unreasonable, unsolicited, excessive and unlawful, it is the submission by Eva Msandi that the Arbitrator gave fair compensation to the respondent after a thorough and clear evaluation of the evidence that the termination was unfair whereby apart from the prayer of the respondent to be given 12 month salary but the law also provides clearly that statutory termination benefits under section 40(1)(c) of the Employment and Labour Relations Act, are remedies when termination of employment contract is unfair. She also supported her argument by citing the case of ***LEZA ALLY MNUKWA VS.***

MTIBWA SUGAR ESATES LTD [2014] LCCD 148 where it was held that:-

> *"Section 40(1) of the ELRA provided for remedies if the Arbitrator or Labour Court finds termination is unfair to either reinstate the employee or to pay compensation to the employee of not less than twelve months remuneration apart from other terminal benefits paid'.*

The learned counsel prayed to this court to hold that the trial commission for Mediation and Arbitration did not error by declaring that the applicant fairly deserve to be paid a 12 month salary as compensation for unfair termination and prayed to this court to dismiss the application.

In rejoinder, the learned counsel for the applicant basically reiterated what he submitted in his submission in chief.

Having carefully read the rival submissions by the advocates for the parties and upon going through the court records including the CMA record, as it was submitted by the learned counsel for the applicant this court is required to look at two issues and determine the same. The first issue is hinged on the point of law and the second issue relates to grounds of revision.

However in my discussion I will start with the point of law because if this is sustained then it suffices to dispose of the application as there will be no need to discuss on the grounds of revision, which as can be gathered from the applicant's submission they were preferred in alternative.

The point of law revised is that the impugned Award makes reference to exhibits that were neither tendered or tendered but not admitted by the Commission in accordance with what the Civil Procedure Code and the Labour Institutions (Mediation and Arbitration Guidelines) Rules G.N. No. 67 of 2007 provides, and thus rendered the entire award a nullity. The learned counsel for the Applicant has listed documents which were neither tendered or tendered but were not admitted by the Commission as exhibits. In her reply submission learned counsel for the respondent while citing Order XIII Rule 7(2) of the CPC, insisted on the question of returning the documents not admitted in evidence which do not form part of the record. She argued that as there is no any document returned to the parties, it means that the same were well analyzed by the commission and thus reached to the fair decision that the termination of the respondent was unfair.

That submission by the respondent's advocate probed the advocate for the applicant to rejoin to effect that the respondent does not dispute the fact that the commission failed to adhere to the rules for admission of documentary evidence as stipulated under Order XIII Rule

(1) and (2) of the CPC and Rule 27((3)(d) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007.

In his submission in chief counsel for the applicant has categorically mentioned the documents which were not tendered or tendered but not admitted by the Commission.

It was submitted by the learned counsel for the applicant, and it is on record that at page 4 of proceedings DW1 requested to tender an Employment contract between the applicant and the respondent. The record shows that while DW1 testifying it was recorded as follows:

"**Swali**: Angalia waraka huu utuambie ni nini?

Jibu: Ni mkataba wa kazi kati ya mlalamikiwa na mlalamikaji na ningependa kuutoa kama kielelezo".

But the record is silent whether the said document was admitted as evidence as requested. This applies to the key performance indicator (K. P. T) as appearing at page 5 of the proceedings, minutes of inquiry meeting. But the said documents were referred by the Arbitrator in his award at page 4 as exhibit DW1(a) for a contract. The Award at page 7 makes reference to the key performance indicator without mentioning in analyzing the document.

The inquiry minutes which was referred in the proceedings at page 5 but not admitted, the same was referred as exhibit DW3 at paragraph 3 of page 4 of the Award.

Again page 7 of the proceedings makes reference to the email correspondence between Dionis and Narindwa dated 11th April, 2019. But that email was not admitted as evidence. However it was referred in the Award at page 5 paragraph 1 as exhibit DW16. At page 8 of the proceedings the Commission referred to the minutes of performance meeting which DW1 prayed to tender it. But there is nowhere indicated that the same was admitted as evidence. But at page 4 of the Award the Arbitrator referred to it as exhibit DW3. On the same page of the Commission proceedings there is reference to the document YARA 17. But there is no proper identification of the said document and there is no evidence to show that the same was admitted in evidence or not.

Again, at page 9 of the proceedings the following documents were referred, YARA 20, YARA 3 and YARA 19. As it was pointed out by the learned counsel for the applicant DW1 was asked if she would like to tender those documents. Her answer was yes but it was recorded:-

"**Jibu**: Ndiyo kielelezo PW1 (Exhibit 8(a)(b)(c)".

There is no evidence to show that the documents were admitted in evidence.

Order XIII Rule 7(1) and (2) of the CPC provides:-

> *"7(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.*
>
> *(2)* ***Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them****".*
>
> *(*Emphasis added*).*

The record of the CMA does not show that the complained of documents were admitted. But equally does not show that those documents which were not admitted were returned to the party who tendered them.

The Court Appeal of Tanzania in the case of ***JAPAN INTERNATIONAL COOPERATION AGENCY VS. KHAKI COMPLEX LIMITED (2006) TLR 343,*** had this to say:-

> *"This court cannot relax the application of order XIII Rule 7(1) of the Civil Procedure Code that a*

document which is not admitted in evidence cannot be treated as forming part of the record although it is found among the papers in the record.

Applying the settled position of the law in the present case, and as were settled that both the original record of proceedings and the record of the appeal leave no doubt that the purported will was neither tendered nor admitted in evidence, we hold that the trial court wrongly relied on it to come to the conclusion that it was invalid and enforceable in law".

This apply to the case at hand, the Commission (Arbitrator) considered and relied upon documents which were neither tendered before the commission or were tendered but were not admitted as evidence and thus did not form part of the record, which according to the above cited case and the reproduced court findings they are invalid and unenforceable in law.

As the Arbitrator relied upon the documents not part of the record of the Commission and thus invalid, its ward become a nullity, it follows therefore that the applicant has acted correctly to seek intervention of

this court by way of revision in order to rectify illegality and irregularity of the commission proceedings. Basing on the above mentioned irregularities the documents, Award by the Arbitrator and the proceedings thereof are quashed and set aside.

It is hereby ordered that the matter be heard afresh before the commission for mediation and Arbitration for Iringa but before another Arbitrator. It is so ordered.

F. N. MATOGOLO

JUDGE

13/05/2022

Date:	13/05/2022
Coram:	Hon. F. N. Matogolo – Judge
L/A:	B. Mwenda
Applicant:	
For the Applicant:	Absent
Respondent:	Present
For the Respondent:	Absent
C/C:	Grace

COURT:

Ruling delivered this 13th day of May, 2022 in the presence of the applicant in person but in the absence of the Respondent and both advocates.

F. N. MATOGOLO

JUDGE

13/05/2022