THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION NO. 02 OF 2020.

(Arising from Labour Dispute No. CMA/IR/39/2019, in the Commission for Mediation and Arbitration, at Iringa).

BETWEEN

POWER AND NETWORK BACK UP LTD..... APPLICANT

AND

FARAJI IDDI ..... RESPONDENT

RULING

3rd March & 25th April, 2022.

UTAMWA, J.

The applicant in this application, POWER AND NETWORK BACK UP LTD, was aggrieved by the award of the Commission for Mediation and Arbitration, at Iringa (the Commission) in Labour Dispute No. CMA/IR/39/2019 delivered on 5th February, 2020. She is now moving this court for a revision of the proceedings of the Commission and for setting aside the award.

The brief background of this matter goes thus: the respondent, FARAJI IDDI complained against the applicant before the Commission. He claimed that, the applicant, as his employer, had breached the terms of the contract of his employment. The Commission decided in favour of the respondent and ordered the applicant to pay him a total sum of Tanzanian Shillings (Tsh.) **20,343,560/=** being payment of salaries for 13 months, airtime of 20 months and health allowances. The applicant was dissatisfied by that award, hence the present application.

The application is preferred by way of chamber summons made under Sections 91(1) (b) and 91(2) (b) of the Employment and Labour Relations Act, Cap. 366 R.E 2009 (henceforth the Act), Rules 24(1) (2), (a), (b), (c), (d), (e), (f) and (3)(a), (b), (c), (d) and 28(1), (c), (d) of the Labour Court Rules G.N No. 106 of 2007 (hereinafter called the LCR). It was supported by an affidavit sworn by one Zephania Darema, the applicant's Human Resource Consultant.

The grounds for the application as contained in paragraphs 7 - 9 of the affidavit, were as follows:

a) That, the award is unlawful and illogical as it failed to take into account that, in February 2018 TIGO Tanzania mobile services providers changed the mode of providing airtime to its client's (Power & Network Back-Up Ltd) employees from cash payment every month to 800 minutes per month. This was done through a system called Closed User Group (CUG) whereby the respondent enjoyed actual airtime instead of cash. But the arbitrator still included the communication allowances in the award.

b) That, in October 2018, the Company (applicant) changed the Health Insurance policy after consultation with all employees including the respondent. The change was to the extent that, the employer contributes 3% (of medical costs) and an employee contributes the same percentage making a total of 6% contribution of the same. This policy is as per the government policy.

c) That, the process at the Commission in Iringa was full of irregularities. Arbitration process usually falls under five stages according to the Mediation and Arbitration Rules, GN. No. 67 of 2007, but in the matter at hand the process took only one day. It was conducted on 11/11/2019 and the date for the award was set to be on 29/11/2019. Considering the importance of the matter, there was no time at least on the side of the applicant to frame issues, give evidence and conduct proper arbitration process.

On the other hand, the respondent filed his counter affidavit sworn by his advocate, Mr. Omary Khatibu Salehe, learned counsel. The same essentially resisted the application and disputed the facts which constituted the cause of the applicant's complaint embodied into the affidavit.

At the hearing of the application, the applicant was represented by Mr. Nicodemus Ezekiel, her Human Resource Consultant whereas the respondent was represented by his counsel mentioned above. The application was argued by way of written submissions.

In the applicant's written submissions in chief, it was argued that, the award by the arbitrator contains payments which are against the law. This is because, they fall outside the scope of the jurisdiction of the Commission

and lack merits on the subject matter. In 2018 the applicant made a mandatory change on Health Insurance policy upon consultation with all employees including the respondent. The change was that, the employer will only contribute 3% (of the medical costs) and the employee has to contribute the same amount making a total of 6%. This is the requirement under Section 8 and 9 of the National Health Insurance Fund Act, Cap. 395 R.E 2019 and its policy as per its regulations. However, the respondent refused to adhere to this change of the policy.

The applicant further submitted that, the awarded payment is also contrary to Rule 28(1)(a) of the LCR. It was also unlawful and illogical since it failed to take into account that in February 2018 Tigo Tanzania mobile service providers changed the mode of providing airtime to its client's (Power & Network Back Up Ltd) employee from cash payment every month to 800 minutes per months. This was through a system called Closed User Group (CUG). However, the arbitrator included the communication allowance in his award as the respondent enjoyed airtime instead of cash as per the changes which affected all the employees in the company.

Moreover, the applicant submitted that, the award failed to mention that the applicant understands and agrees to pay the 13th salary cheque. The only disagreement was on the mode of payment as the company was undergoing financial constraints. All the employees were made aware of that fact and the applicant promised all the employees, including the respondent that the payments would be made by instalments.

The applicant's counsel thus, prayed for this court to set aside the decision of the Commission and grant other reliefs which this court may deem fit to grant.

In his replying written submissions, the learned counsel for respondent submitted that, the contract of employment that was signed on 27th April, 2017 was a permanent contract. There was no any clause in the said contract that gave right to the employer to change the terms in future. The award by the Commission was thus, proper according to the labour laws and according to the evidence adduced during the hearing of the matter before the commission. The applicant has not cited the law violated by the Commission which has jurisdiction in all matters arising from labour relations.

It was further argued by the respondent's counsel that, the basis of the respondent's claim before the Commission was the provisions of the employment contract. They provide all the rights, and they were not disputed by the applicant. The applicant also failed to prove her allegations before the Commission as she did not call any witness to testify on her behalf. On the issue of change from the provisions of 800 minutes airtime instead of cash payment, the learned counsel submitted that, every party to the contract should fulfil his obligations according to the contract.

The respondent's counsel added that, the failure by the applicant to summon any witnesses in the Commission justified his claim before it. The respondent should thus, be compensated by the applicant due to the breach of contract as provided by Section 73(1) of the Law of Contract Act.

The applicant also failed to prove that she was not in breach of contract. The learned counsel thus, urged this court to uphold the Commission's decision.

By way of rejoinder, the applicant reiterated the contents of her submissions in chief and added that, she did not dispute that there was a contractual agreement. However, the same was legally terminated as stipulated under paragraph 10 of the employment contract between the two parties and both parties signed it. The same formed part of the Commission proceedings as a supportive document. On the change of benefits on airtime, the respondent was consulted. Even though he refused the changes, he still enjoyed the benefits until the termination of the contract. Paragraph 5.1 (c) of the employment contract also clearly states that, the employee will be bound by any statutory requirements for contributions.

I have considered the applicant's affidavit, the respondent's counter affidavit, the submissions by both sides, the record and the law. In deciding this matter I will firstly consider the complaint by the applicant related to the irregularities in the hearing of the matter before the Commission. If need will arise, I will also consider other grounds of revision as narrated above. This plan is based on the understanding that, in case the complained of irregularities will be established, the proceedings before the Commission might be at stake. This reason alone might thus, dispose of the entire matter without even considering the merits of the award.

The irregularities complained of by the applicant are mainly found under paragraph 9 of the affidavit supporting the application. Under such paragraph the applicant essentially states that, the Commission conducted the arbitration on the 11th November, 2019 in a rush and fixed the date for the award on 29th November, 2029. In so doing, the applicant was not afforded ample time for framing issues, giving evidence and conducting a proper arbitration session. The respondent reacted against this complaint under paragraph 6 of the counter affidavit which basically refuted the fact that the Commission did not give opportunity for a fair trial to the applicant. It also stated that, the applicant herself did not have any witness on the date of arbitration. The parties' respective submissions also strived to underline such complaint and reaction respectively. The respondent's counsel added in his replying submissions that, the applicant neglected to testify before the Commission and failed to call witness on the reason known to herself. The applicant, who was respondent before the Commission had to begin in testifying before it, but failed to do so for want of witnesses.

The important issue before me is therefore, *whether or not the applicant was afforded a fair trial in the process of arbitration under the circumstances of the case*. In my view, this issue may be safely resolved throught consulting the record of the Commissions. This is because, the law is trite that, court records are presumed to be serious and genuine documents representing what happened in court unless there is evidence to the contrary; see the case of **Halfani Sudi v. Abieza Chichili [1998] TLR. 527.** The holding in the case of **Paulo Osinya v Republic [1959]**

E.A 353 also supports this stance on the respect to court records. In the case at hand, no scintilla of evidence has been adduced to impeach the record of the Commission which has in law the status of court records. I will therefore, proceed to consider such record as genuinely reflecting what had happened before the Commission. Court records cannot therefore, be easily impeached,

Now, according to the record of the Commission it is clearly shown from the beginning that the applicant was resisting the respondent's claim. On the 26th August, 2019 for instance, when the matter came before the Commission for mediation, the representative of the applicant (Mr. Zephania Darema) was recorded as present before the Commission. He was identified as the HR Consultant of the applicant (this apparently meant he was Human Resource Consultant). It was recorded on the said date that, Mr. Zephania was resisting the claim on the grounds, *inter alia* that, it had been brought before the Commission out of time (see at page 1 of the typed and certified version of the proceedings of the Commission).

It is also on record that, the matter was adjourned to 23rd October, 2019. On that date, it was recorded that the respondent needed to be represented. The matter was adjourned for arbitration to 11th November, 2019 (this is in accordance to the typed and original proceedings of the Commission). On the said 11th November, 2019, it is also on record that, the same Mr. Zephania represented the applicant. The respondent was also in court represented by Mr. Eneles Kitta, learned counsel. Three issues were recorded by the arbitrator. He then endorsed as follows:

"Examination

Upande wa mlalamikiwa hauna ushahidi, upande wa mlalamikaji una shahidi mmoja"

The above endorsement by the arbitrator simply meant that, an examination had been conducted. It also meant that, the respondent before the Commission (now the applicant) had no evidence.

Upon endorsing as above, the arbitrator proceeded with the arbitration by receiving the evidence of the claimant before it (now the respondent). It is also shown that the respondent was cross-examined by Mr. Zephania, then re-examined by his counsel. The arbitrator then set the date for delivering the award. It is therefore, clear that the Commission did not record the defence or evidence of the applicant. This fact is indeed, not disputed by the parties. Their only squabble is that, the applicant claims that he was not afforded an opportunity to give the defence evidence while the respondent claims that he was given the opportunity, but he neglected it.

In my settled view, the applicant's contention gets support from the record of the Commission according to the circumstances of the matter. This view is based on the following grounds: in the first place, the endorsement by the arbitrator quoted above to the effect that the applicant had no evidence was in a reported speech by the arbitrator himself. It did not therefore, clearly indicate if that was the statement from the representative of the respondent, Mr. Zephania himself or it was the mere opinion of the arbitrator. The endorsement was also ambiguous because, it did not clearly show if the respondent had no witness or

evidence on that specific date of arbitration only or that he did not intend to tender her evidence at all.

In my further view, since the respondent had shown from the beginning through Mr. Zephania that she was resisting the claim from the begging, and since Mr. Zephania seriously cross-examined the applicant, it could not, under the circumstances of the case, be taken that the respondent had neglected to give his evidence on the date of arbitration and had decided not to adduce any evidence at all.

Furthermore, the said 11th November, 2019 was the date fixed for arbitration. According to rule 22 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 (the GN. No. 67 of 2007 in short), the process of arbitration involves five sequential stages as rightly put by the applicant. The stages include the following **i**) introduction, **ii**) opening statements and narrowing of issues, **iii**) evidence, **iv**) (closing) arguments and **v**) award. In the matter at hand however, though the arbitrator on the said 11th November, 2019 recorded the issues to be determined, and though the record shows that the respondent gave evidence, the record does not show that the stages of introduction, opening statements and closing arguments were followed in the course of the arbitration.

In my view, the above mentioned five sequential stages of arbitration are significant and not cosmetic. They were set by the law for purposes. The major purpose was to afford the parties a fair trial by *inter alia*, ensuring that they properly understand the proceedings so that they can effectively marshal their respective cases. Nonetheless, the law on the five

chronological stages was not observed in the matter under consideration as hinted above.

The importance of the five chorological stages in the process of arbitration can be explained as follows: In the introduction stage for example, the arbitrator is required to explain to the parties on the process of arbitration (especially when they have no previous experienced of the process) and ensure that they have a clear understanding of it; see rule 23(2) of the GN. No. 67 of 2007. This rule was thus, intended to make the parties understand the process so as to follow it properly for purposes of seeking their rights. However, this stage was not performed as hinted earlier.

In the stage of opening statement, the arbitrator is enjoined to explain to the parties, *inter alia*, that what is contained in their opening statements does not constitute evidence in respect of the issues; see rule 24 (2) of the same GN. No. 67 of 2007. In my settled opinion, this stage was intended to avoid confusion to the parties between their opening statements and the evidence so that they could not skip giving evidence on a wrong belief that the opening statement might have served as proof of the facts. Nonetheless, this stage was also skipped by the arbitrator in the matter hand as hinted before.

Regarding the stage of evidence, rule 25(1)-(3) of the GN. No. 67 of 2007 guides that, parties shall prove their respective cases through evidence under oath. The procedure of giving evidence before the arbitrator according to these provisions of law involves among other things, examination in chief, cross-examination and re-examination. In the matter

at hand however, it appears that, the arbitrator wanted the applicant to begin in giving his evidence. This is also the stance supported by the learned counsel for the respondent in his submissions. The record does not however, show the reason why the burden of proof had to be shifted to the applicant though it was the respondent who had filed the dispute before the Commission. The general rule of evidence is that, he who alleges must prove; see section 110 of the Evidence Act, Cap. 6 RE. 2019. It is for this reason that the one who alleges has the burden to prove his case against the adverse party. The general principle must thus, be observed unless the law provides otherwise. In the matter at hand however, no reason was recorded for the arbitrator to divert from the general rule.

It was therefore, in my view, improper for the arbitrator to record that the applicant (respondent before the Commission) had no evidence even before the respondent (the applicant before the commission) could testify.

As to the stage of closing arguments, parties are entitled to restate the issues, analyse the facts, make submissions and address the arbitrator on legal principles or authorities to support their respective cases; see rule 26(3) and (4) of the same law. This stage was thus, intended to give opportunity to parties to challenge the adverse party's evidence and cite the law supporting their respective cases. However, the arbitrator in the matter under discussion avoided this stage for unrecorded reasons.

Owing to the reasons shown above, it cannot be said that the arbitrator in the matter at hand was justified to proceed to the stage of the

award without following the above discussed preceding stages which included the hearing of the applicant's evidence. The trend thus, offended the procedure and the Principles of Natural Justice, especially the right to be heard. It thus, amounted to a denial of the right to fair trial. The right to fair trial is well enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002 (the Constitution).

Courts of this land have in various cases emphasized on the significance of the right to fair trial and the right to be heard in particular (both discussed earlier). In the case of **Mbeya- Rukwa Auto Parts & Transport Limited v Jestina George Mwakyoma, Civil Appeal No. 45 of 2020** (unreported) the CAT, at Mbeya (unreported) emphasized 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) of the Constitution includes the right to be heard amongst the attributes of equality before the law. The CAT underlined this stance in the case of **Abbas Sherally and another v Abdul S.H.M Fazalboy, Civil Application No. 33 of 2002** (unreported).

It was also the guidance by the CAT in the **Abbas case** (supra) that, the right to be heard is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decisions would have been reached had the party been heard. This is because, the violation is considered to be a breach of natural justice.

Moreover, in the case of **Kabula d/o Luhende v. Republic, CAT Criminal Appeal No. 281 of 2014, at Tabora** (unreported) the CAT

also ranked the right to fair trial as fundamental and one of the corner stones of the process of adjudication in any just society.

The above discussed rights to fair trial and to be heard cannot thus, be violated by any court, let alone the Commission which offended them in the matter at hand.

Due to the reasons shown above, I am settled in mind that the irregularities discussed above were serious and fatal to the proceedings before the Commission. I accordingly answer the issue posed above negatively that, the applicant was not afforded any fair trial in the process of arbitration.

The finding I have just made above in relation to the issue posed earlier, is capable enough to dispose of the entire matter without considering the other grounds of the application at hand. I will not thus, consider them since by doing so I will be performing a superfluous or academic exercise of kicking a dead horse, which is not the core object of the process of adjudication like the one I am currently finalising. Instead, I will only make necessary orders according to the law as shown below.

Having observed as above, I order as follows: I nullify the proceedings before the Commission from the date when the arbitrator began the arbitration, i.e. on 11th November, 2019 to the date when he delivered the award. I further set aside the award. The dispute shall thus, be arbitrated afresh by following the law and before another arbitrator. I make no order as to costs since this is a labour matter and the arbitrator

was also instrumental in necessitating this application for the above discussed serious irregularities he had committed. It is so ordered.

J. H. K Utamwa

JUDGE

25. 04. 2022

25/04/2022.
CORAM; J. H. K. Utamwa, Judge.
Applicant: Mr. James Shayo (Zonal Manager).
For Respondent: Mr. Omary Hatibu, advocate.
BC; Ms. Gloria. M.

Court: Ruling delivered in the presence of Mr. James Shayo (Zonal Manager of the applicant) and Mr. Omary Hatibu, advocate for the respondent, in court, this 25th April, 2022.

J. H. K. UTAMWA
JUDGE
25/04/2022.