

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT MOSHI**

**LABOUR REVISION NO. 36 OF 2021**

(Originating from Labour Dispute No. CMA/KLM/MOS/ARB/66/2020 of the  
Commission for Mediation and Arbitration)

**EDSON MCHOMBA ..... APPLICANT**

**VERSUS**

**PRASAVVAJJO TANZANIA LTD..... RESPONDENT**

***EX PARTE-JUDGMENT***

*13/7/2022 & 10/8/2022*

**SIMFUKWE, J.**

The Applicant Edson Mchomba filed the instant application after being aggrieved with the ruling of the Commission for Mediation and Arbitration (Commission) in Labour Dispute No. CMA/KLM/MOS/ARB/66/2020 of Moshi dated 25<sup>th</sup> June, 2020 which dismissed his application for non-appearance. The application was filed under **Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), 24(3) (a) (b) (c) and (d) and Rule 28 (1) (a) (b) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007; and section 91 (1)(a), Section 91 (2) (a) (b) (c) and Section 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366 R.E 2019** and any other enabling provisions of the Law.


The Applicant prayed for the following orders:



- a) That this Honourable Court be pleased to revise the Awards of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi in respect of Labour Dispute Number CMA/KLM/MOS/ARB/66/2020 delivered on the 25<sup>th</sup> day of June, 2020 by Hon. G. P. Migire-Arbitrator.*
- b) Any other order(s) and /or relief(s) this court may deem fit and just to grant.*

The historical background of this revision is straight forward. On 29<sup>th</sup> day of April, 2020, the Applicant filed a complaint before the Commission claiming that the respondent herein who was his employer unfairly terminated his employment. The mediation was conducted unsuccessfully, a certificate of non-settlement and a notice to refer a dispute to the arbitrator were issued by the mediator. The matter was referred for Arbitration whereby on 25/6/2020 the matter was dismissed for non-appearance of the Complainant (applicant herein). The applicant was not informed about the dismissal of his dispute. He made follow up and he was informed by the CMA clerk that the case file was missing, till on 20<sup>th</sup> January 2021 when it was found. By then the applicant was out of time to file revision, he successfully applied for extension of time. Hence, he filed this application on the following grounds:

- 1. That the Arbitrator erred in law and in fact by hearing the arbitration exparte and in the absence of the applicant contrary to the orders of the commission via summons to appear before the Commission for Mediation and Arbitration which required parties to appear on the 6<sup>th</sup> day of July, 2020 thus, by hearing the arbitration exparte the arbitrator infringed the applicant's constitutional right to be heard*



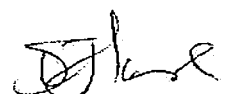
2. *The award by the Commission for Mediation and Arbitration is purely contrary to the requirements of the laws of the land. Hence, this instant application.*
3. *That, the trial Arbitrator erred in law and in fact by allowing busy bodies to have right of audience while in normal circumstances do not have such right to audience, thus, the Commission for Mediation and Arbitration was bias. Hence, this instant application.*

The court issued summons to the respondent unsuccessfully. He was served through substituted service which was issued vide Mwananchi Newspaper, dated 11<sup>th</sup> March 2022 at page 24 but he did not enter appearance. Hence Mr. Engelberth Boniface, the learned advocate for the applicant prayed the matter to proceed ex parte by way of written submission. The court granted the prayers.

The learned advocate for the applicant adopted the applicant's chamber summons together with the Applicants' affidavit. He gave the gist of this application which I will not summarize since the same has already been covered herein above.

In support of the application, Mr. Engelberth submitted to the effect that it is without shred of doubts that, the Arbitral Award was improperly procured as it was tainted with material irregularity and illegality.

Submitting on the 1<sup>st</sup> ground of Revision that the Arbitrator erred in law and in fact by hearing the arbitration ex-parte in the absence of the applicant contrary to the orders of the Commission, it was stated that the copy of the summons shows that the parties were required to appear on 6/7/2020. However, the trial arbitrator violated his order by hearing the arbitration ex-parte thus infringed the applicant's constitutional right to be heard.

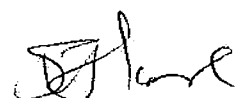


The learned counsel continued to state that, the right to be heard is very important component of the principle of Natural Justice, as it does not only give parties to the application an opportunity to present their case but also inculcates the confidence of deliverance of justice. He referred to **Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977** as amended from time to time which provides that:

*"...when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

Mr. Engelberth commented further that the act of the trial Arbitrator to conduct hearing of the arbitration exparte contrary to order of the Commission led to unfair and biased hearing and infringements of the Applicant's Constitutional right to be heard. He referred to the case of **Jebra Kambole vs The Attorney General, Miscellaneous Civil Cause No. 32 of 2015** (unreported), where Hon. J. Korosso-Judge, at page 23, quoted with approval the case of **Abbas Sherally & Another vs Fazalboy, Civil Application No. 33 of 2002(unreported)** where the Court of Appeal held that:

*"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the 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."*

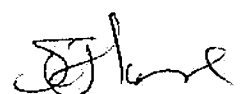


On the strength of the above authority, Mr. Engelberth prayed for the whole award to be quashed and set aside and order the matter to be tried de-novo before another Arbitrator for the sake of justice.

On the second ground of revision, the applicant's advocate faulted the Award of the Commission for being contrary to the requirements of the laws of the land. He stated that according to **rule 22 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N No. 67 of 2007**, there are five stages of Arbitration process including the stages of introduction, opening statements and narrow issues, evidence, argument and an Award. Thus, the instant award was given without following proper procedure, it was done in the absence of the Applicant and caused injustice in procedure of handling the matter. He opined that the whole award qualifies to be quashed and set aside and costs of this application to be borne by the respondent herein.

On the last ground of revision, the learned advocate for the applicant condemned the Arbitrator for allowing busy bodies to have right of audience while in normal circumstances do not have such right of audience. It was Mr. Engelberth's argument that the law is very clear about right of audience before the court or tribunal. Thus, the so-called Mr. Mgaya has no such right as per **section 41 of the Advocates Act Cap 341 R. E 2019** which strictly prohibits unqualified person. That, the name of the said Mgaya does not appear in the roll of Advocates.

The learned counsel submitted further that he is aware of the requirement of **section 56 of the Labour Institution Act Cap 300 R.E 2019**. However, this law has been discussed in numerous decisions. He cited the case of **Julius Petro vs Cosmas Raphael [1983] TLR at page 364**, where the court made a distinction between an advocate and an agent as Mr. Mgaya and it was



decided among other things that, a person cannot act as an Advocate if he is disqualified under **section 41 of the Advocate Act Cap 341 R.E 2019.**

The learned counsel insisted that the act of the Arbitrator to allow busy bodies to have right of audience while in normal circumstances do not have such right to audience is contrary to the law. He reiterated that the said award should be quashed and set aside, and the matter be tried de-novo before another Arbitrator.

The learned counsel believed that he had exposed enough reasons and grounds sufficient for this Court to exercise its discretionary powers. He implored the court to allow the application.

This marked the end of the Applicant's submission as presented by Mr. Engelberth. Having considered this submissions and applicant's affidavit together with Commission's record, the issue ***is whether this application has merit.***

The commission's records are loud and clear that the employment dispute was dismissed for non-appearance of the applicant. The matter was not determined on merit. I have said so since I have noted that the learned counsel for the applicant blamed the Arbitrator for hearing the matter ex parte without according the applicant right to be heard while the matter was not heard on merit. There is a difference between dismissing the matter for non-appearance and hearing the matter ex parte. When the matter is heard ex parte, it will lead to ex parte judgment or ex parte ruling.

On the first ground of revision, Mr. Engelbert blamed the Arbitrator for conducting arbitration ex-parte contrary to the summons which required the parties to appear on 6/7/2020; thus, infringed the applicant's right to be heard.

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The law is very clear on this aspect, that if a party fails to comply with the direction of the Arbitrator, then the Arbitrator shall proceed to make the award. Also, if such party fails to appear the matter will be heard ex-parte. This is provided for under **section 88(8)(a)(b) of the Employment and Labour Relations Act** (supra) that:

*"8) Where a party fails to –*

*(a) attend any arbitration proceedings convened by arbitrator, the matter may be heard ex-parte as provided for under rule 28 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules; or*

*(b) comply with any direction made by the arbitrator, the arbitrator shall proceed to make the award.*

I have examined the proceedings of the Commission to ascertain if the applicant failed to appear or failed to comply with the direction of the Arbitrator. Indeed, I found that on 1/6/2020 the Arbitrator issued summons to appear for hearing on 6/7/2020 at 09:00hrs. However, the matter was mentioned on 18/6/2020, 19/6/2020, 24/6/2020 and 25/6/2020 before the set date of hearing in the summons. The matter was dismissed for non-appearance on 25/6/2020. This is a gross irregularity. The Commission curtailed right of the applicant to be heard simply by misleading itself. The summons issued to parties contradicts with the proceedings of the case.

In a number of occasions courts have insisted that right to be heard is so basic to the extent that any decision reached without according the parties right to be heard will be nullified. See the case of **Abbas Sherally and Another** (supra) and the case of **Pili Ernest vs Moshi Musani (Civil Appeal No. 39 of 2019) [2021] TZCA 297.**



In the instant matter, it is not true that the applicant did not comply to the direction given by the Arbitrator, rather the Arbitrator contradicted himself by dismissing the applicant's complaint even before the date scheduled for hearing in the issued summons. This is a gross irregularity which is fatal to the extent of nullifying the whole proceedings and order of the Commission. In the event, I will not discuss the rest of the grounds of revision as the first ground suffices to dispose of the application.

It is for that reason that I hereby nullify the whole proceedings, decision and order of the CMA and order the dispute to be determined afresh before another Mediator/Arbitrator according to the law. This being a labour dispute, no order as to costs.

It is so ordered.

Dated and delivered at Moshi, this 10<sup>th</sup> day of August, 2022.



**S. H. SIMFUKWE**

**JUDGE**

**10/8/2022**