

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

**AT ARUSHA**

**(LABOUR DIVISION)**

**REVISION APPLICATION NO. 25 OF 2022**

(Arising from Labour Dispute No. CMA/ARS/ARB/116/2018)

**BETWEEN**

**THE BOARD OF TRUSTEES ELCT-**

**NORTH CENTRAL DIOCESE.....1<sup>ST</sup> APPLICANT**

**THE SECRETARY GENERAL ELCT-**

**NORTH CENTRAL DIOCESE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

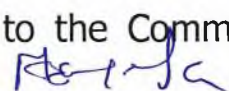
**AGNESS MREFU LUCUMAY..... RESPONDENT**

**JUDGMENT**

10.08.2022 & 21.09.2022

**MWASEBA, J.**

**Agness Mrefu Lucumay**, (the respondent) was employed by the 1<sup>st</sup> applicant on 19<sup>th</sup> day of June, 2014 as an internal auditor as per exhibit "D1" under permanent contract. The dispute between the parties started in 2018 when the respondent terminated his employment unfairly. Being aggrieved the respondent referred the dispute to the Commission for



Mediation and Arbitration (CMA) where after a full trial the Commission was satisfied that her termination was both substantively and procedurally unfair. Thereafter the applicants were ordered to reinstate the respondent to her position and empower her into acquiring the qualification needed as per their constitution.

The applicants were aggrieved by the award of the Commission and decided to file a Revision via Revision Application No. 42 of 2019 before this court claiming that they were denied a right to be heard regarding the post of the respondent. Having heard both parties the court was of the view that the issue of whether the applicant was internal auditor or not was not canvassed by the parties. The court went on quashing and setting aside the award of the Commission and ordered for retrial based on the issue of whether the respondent was an internal auditor or not and compose a new award in which all issues that were framed as well as the above one shall be considered in accordance with the evidence and the law.

When the file was remitted back at CMA, the commission heard the parties based on one issue of *"whether the applicant was an internal auditor"* and proceeded to award the respondent herein salary arrears to

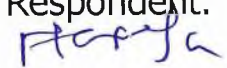
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the tune of Tshs 57,919,665/= after deciding that the respondent was employed as an internal auditor.

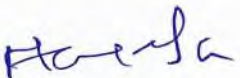
The said decision aggrieved the applicants who filed the present revision before this court based on the following legal issues:

- i) That, the Honourable arbitrator erred in fact and law by not considering that the award of 1<sup>st</sup> February 2019 was quashed and set aside by the judgment in the Labour revision No. 42 of 2020 and entertaining only one issue which was directed by the said judgment.
- ii) That Honourable Arbitrator erred in fact and law by answering an issue of salary arrears without giving parties a chance to address the same.
- iii) That the decision reached by the Arbitrator that the complainant is the internal auditor of the Applicants and that she had salary arrears is bad in law.
- iv) That Honourable Arbitrator erred in fact and law by not following the directives and the judgment of the High Court in the Labour Revision No. 42 of 2020.

At the hearing of the application which was done orally, Mr Gospel Sanava, learned advocate represented the applicants whereas Mr Sylvester Kahunduka, learned advocate represented the Respondent.



Supporting the application, Mr Sanava prayed to adopt their affidavit to be part of his submission. Further, he submitted on the first ground of revision that in 2018 the respondent filed two separate claims, the first one was for unfair termination and the other one was for salary arrears. They were consolidated by the CMA and determined jointly. When the award was delivered on 1/02/2019 by Hon Sekabila the respondent was aggrieved and preferred a revision to this court via Revision Application No.42 of 2019. He added that on 3/11/2020 the court delivered its judgment quashing the CMA award and ordering for retrial on the issue of whether the respondent was an internal auditor and other issues framed at the CMA. However, when they went back at the Commission, they determined only one issue of whether the applicant was an internal auditor and composed a new award contrary to what was directed by the court.

Responding to what was submitted by the counsel for the applicant, Mr Kahunduka agreed as to the irregularities in a CMA award however, he asked the court to determine the matter by evaluating the evidence instead of ordering the re-trial since the matter has been before the court and CMA for a long time. 

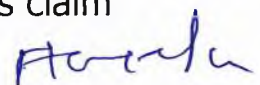
Having revisited the records of the application as to the legal issues raised by the applicant, and the submissions from both parties the issue for determination before this court is whether this application has merit.

Going through the submissions by both parties there is no dispute that the hon arbitrator has not complied with the directives of this court through Hon. Masara J who ordered that:

*"The award of the Commission for Mediation and Arbitration is hereby quashed and set aside. I hereby remit back the record to the Commission for it to hear and determine the issue whether the applicant was an internal auditor and compose a new Award in which all the issues that were framed as well as the above one shall be considered in accordance with the evidence and the law."*

The record reveals that when the case file was remitted back to CMA, the hon arbitrator partly complied with the directives of hearing and determining the issue of whether the applicant was an internal auditor. However, in composing a new award other issues that were framed before were not considered. The issues which were framed and determined before are:

- I. Whether the complainant has a valid salary arrears claim



- II. Whether there was a fair reason for applicant's employment termination
- III. Whether procedures for termination were complied with
- IV. What are reliefs.

According to the labour court directives, those issues were supposed to be determined too. However, the hon arbitrator determined only the issue of whether the applicant was an internal auditor and concluded by ordering the applicant to pay the respondent Tshs 57,919,665 as salary arrears without even ascertaining as to termination procedures and other claims as per the framed issues. Failure to comply with the high court directives is fatal which renders the award to be a nullity.

The counsel for respondent after conceding that there was noncompliance of the labour court directives urged this court being the first appellate court to re-evaluate the evidence instead of ordering for retrial. On the other side the counsel for the applicant said this court cannot re-evaluate the evidence as the proceedings of the CMA was quashed. With due respect, the labour court did not quash the proceedings of the CMA. It quashed the award and directed rehearing only on the issue of whether the applicant was an auditor as the CMA

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raised it *suo moto* without according parties right to be heard. Thus, the proceedings were still there and was to be used in determining the prior framed issues as directed by this court. The act of dealing with only one and leaving out all four issues against the directives of labour court can not be cured by this court by stepping into the shoes of the Commission for Mediation and Arbitration and assume that duty to determine the framed issues or rather evaluating the evidence as suggested by the counsel for the respondent. This was well stated in the case of **Truck Freight (T) Ltd Vs CRDB Ltd**, Civil Application No. 157 of 2007 (unreported) where the Court of Appeal held that:

*"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore allow the appeal and quash the decision..."*

Similarly, the Court of Appeal in the case of **Mantra Tanzania Limited Vs Joaquim Bona Venture**, Civil Appeal No. 145 of 2018 (unreported) observed that: -

*"On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to*

*Harsha*

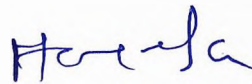


*remit the case to that court for it to consider and determine the matter."*

Being guided by the above position, it is therefore my considered view that the hon arbitrator did not comply fully with the directives of this court. Therefore, I quash and set aside the award of the CMA dated 25/01/2021. I remit the record to the CMA for the arbitrator to comply with the order of Hon. Masara J dated 3<sup>rd</sup> November, 2020 by composing a new award expeditiously which will incorporate all framed issues. Since this is the labour matter, no order as to costs.

Ordered accordingly.

**DATED at ARUSHA** this 21<sup>st</sup> day of September 2022.



**N.R. MWASEBA**



**JUDGE**

**14.09.2022**