IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

LABOUR REVISION NO. 11 OF 2021

(Arising from the Award of the Commission for Mediation and Arbitration of Dodoma in the Labour Dispute No. CMA/DOM/102/2020/45 before Hon. Matalis, R, an Arbitrator) dated on 18th April, 2021.)

EZEKIAH TOM OLUOCH .... APPLICANT

VERSUS

CHAMA CHA WALIMU TANZANIA .... RESPONDENT

RULING

10/01/2022 & 04/04/2022

KAGOMBA, J

Through chamber summons filed in this Court on 24/5/2021, **Ezekiah Tom Oluoch** (henceforth "the applicant") sought an order of this Court to call for records, proceedings and an award of the Commission for Mediation and Arbitration (CMA) at Dodoma (Hon. Matalis, R, Arbitrator) dated 28/4/2021 for revision and setting aside the whole award.

The application which is made under rule 24(1), 24(2) (a) (b) (c) (d) (e) & (f), 24 (3) (a) (b) (c) & (d) and Rule 28 (1) (a) (b) (c) (d) & (e) of the Labour Court Rules, 2007 (GN No. 106 of 2007) and section 91(1) (a), 91 (2) (b) and 94(1) (b) (i) & (f) of the Employment and Labour Relations Act, 2004 (Act No. 6 of 2004) arises from the award of CMA aforesaid, in Labour Dispute No. CMA/DOM/102/2020/45, which held that the applicant

had failed to prove his case against Chama cha Walimu Tanzania (CWT) (Henceforth "the respondent").

Briefly before CMA, the applicant claimed that the respondent had authored and published a defamatory letter against him through email and WhatsApp. For that reason, the applicant claimed for an apology for being defamed, damages to the tune of Tsh. 700,000,000,000/= for defamations cost and other relief (s) the CMA would deem appropriate to grant. According to the impugned award, the applicant who testified before CMA as PW1 adduced evidence to the effect that in the course of vying for election to the position of Secretary General of the respondent, among other foul play, the respondent wrote a defamatory letter dated 28/5/2020. That, the said letter had an annexure showing 229 names of all candidates who had qualified to contest and those who did not qualify and it was circulated by the respondent to its secretaries for 26 regions with a view to be delivered to candidates who were approved to contest in the said elections. The applicant was among the contestants, with his name appearing as number 10 on the list appended to the said defamatory letter.

It was the applicant's contention that the said letter published wrong and malicious information about him, calculated to lower his reputation in the eyes of the voters. He connected such publication of the defamatory letter with another letter he received on 2/6/2020 signed by one Deus G. Seif who was the Secretary General of the respondent notifying him of his lack of qualification to vie for the post of the Secretary General but without specifying any reason for such disqualification.

Some of the particulars the applicant considered defamatory were the allegation that some of members of the respondent who had endorsed the applicant's nomination form were not members and that the applicant was terminated from employment by his employer, the Teacher Service Commission. The applicant also alleged that the Secretary General was spreading information on the termination of his employment while he lacked privity to the matter.

In dismissing the claim, CMA found that the applicant did not comply with the requirements of section 18 of the Electronic Transactions Act, 2015 on admissibility of the said document which was alleged to be defamatory.

The impugned award of CMA reveals further that the applicant, during cross examination did concede that;

(i) he did not state in CMA F.1 that he was defamed through internet/email.

(ii) He does not recognize the publisher of the defamatory letter in the Internet.

(iii) The mails were for regional secretaries and the applicant would not be able to access the same.

(iv) Those who gave him the publication did not tell him where they got it from, rather he came to see it on 28/5/2020 after it was published.

(v) He did not open the Internet when adducing his evidence in CMA and that he did not know the sender.

(vi) He has no ability to hack emails from respondent's account but he only knew the existence of the defamatory letter because he was a contestant.

It was the applicant's claim that Mr. Deus G. Seif is the one who authored the defamatory letter and *ipso facto* he published the same.

PW2 Emmanuel Martin Samara, adducing evidence for the applicant told the CMA that he saw the election date, the list of approved candidates and the disqualified ones and reasons for their disqualification via whatsApp. He was then a District Secretary of respondent and thus one of the recipients of the defamatory letter. He confirmed to see the reasons for disqualification in the impugned letter. He also supported the applicant's claim that his disqualification was unjustified.

During cross examination, PW2 Emmanuel Martin Samara, among other things, told CMA that the email he received was confidential and he was duty bound to keep secrets of the office. He conceded lack of knowledge whether the applicant was joined in the whatsApp groups which were formed. He said the impugned letter was for intended recipients. He did not produce copy of it the but maintained that the same is in WhatsApp. He also stated that it is that letter dated 28/5/2020 which should be produced to prove defamation.

On the respondent's side, the CMA award reveals that DW1 Pasian Aloyce Siaw, a Human Resource Officer for the respondent, gave evidence to oppose the applicant's claims. Mr. Siaw told CMA that the applicant was one of the contestants in the election held in June 2020 but the respondent did not defame the applicant by a letter dated 28/5/2020 with Ref. No. AB 277/308 05/16 because they did not write a letter to regional executives and the respondent did not send defamatory information against, any persons

vide CWT office. In brief the testimony of DW1 Pasian Aloyce Siaw was challenging the applicant to prove defamation.

In its award, the CMA cited the case of **Godfrey Benedict and Seme Benedicto vs Dorothea Benedicto**, High Court Civil Appeal No. 43 of 2019 (unreported) which defined defamation as "the act of harming the reputation of another by making false statement to a third person".

The CMA in its impugned award having quoted, *in extenso*, the provision of section 18 of the Electronic Transactions Act, 2015 concluded as follows;

> *"Hivyo basi, Kulingana na matakwa ya kifungu tajwa hapo juu ni dhahiri kwamba mlalamikaji ameshindwa kuthibitisha madai yake* ***kwa sababu chanzo cha mgogoro huu kinatokana na nyaraka iliyokuwa katika barua pepe na whatsApp****. Katika mazingira haya nalazimika kutupilia mbali mgogoro huu..."* ***[Emphasis added]***

It is this award which the applicant is not happy about and now seeks this Court to revise and set the whole of it aside.

In his application the respondent has adduced the following grounds:

(i) The Arbitrator erred by upholding respondent's submission with material irregularities that the respondent did not have documents mentioned in the notice to produce, while some of those documents were used by the same respondents in decision making against the applicant in document tendered by respondent before the

Commission as D1. Among other document which was written, published and communicated by the respondent to its local offices through internet country wide.

(ii) The Arbitrator erred in law and facts with material irregularities by holding that a letter with reference No. AB 277/308/05/16 (Annexure OL-5) which was tendered by the applicant before the Commission as secondary evidence as "Kiambatanisho OL-01" was not admissible as it was tendered in violation of the Electronic Transactions Act, 2015 while the said law was not applicable.

(iii) The Arbitrator while rejecting "Kiambatanisho OL-01" which was tendered by the applicant as secondary evidence acted with illegality and with material irregularity basing on new reason raised by the respondent during a rejoinder without affording the applicant the right to be heard.

(iv) The Arbitrator's award is alleged to have been illegally procured by fraud through the respondent's alleged perjury evidence and fraudulently with holding documents.

(v) The arbitrator acted illegally by condemning the applicant unheard through the respondent's fraudulent withholdings documents and through procedural irregularities.

(vi) The Court be pleased to grant applicant's prayer to add a new additional document which was tendered before the Commission as

"Kiambatanisho OL-01" but was illegally and with irregularities rejected for being contrary to the Electronic Transactions Act, 2015 without affording the applicant the right to be heard while the aforesaid law was not applicable.

(vii) The arbitrator erred in law and fact with material irregularities by accepting evidence of DW1 that a letter with Ref. No. AB 277/308/05/16 (Kiambatanisho OL-5) dated 28th May, 2020 and the subject of the controversy before the Commission was not written by the respondent's General Secretary Mr. Deus G. Seif while he was not the author or the addressee of the said letter he admitted under oath before the Commission that he was not aware on how the General Secretary of the respondent communicated to members of the respondent who vies for various positions prior to the National Election which was conducted on 5/6/2020.

(viii) The arbitrator erred in law and fact by not taking into consideration uncontested evidence from PW2 who attested under oath and one the addresses of the said letter dated 28/5/2020 with Ref. No. AB 277/308/05/16 (Kiambatanisho OL-5) that the said letter was sent by the respondent through email to the Shinyanga Regional Secretary of the respondent who also forwarded the same through the district email to Maswa District of the respondent where he was District Executive Secretary of the respondent.

The above grounds were replied to by the respondent to the effect that the application is baseless and unfounded and the same should be

dismissed in its totality with costs. The respondent pinned down the applicant for wrongly stating that the basis of the application was founded in Labour dispute No CMA/DOM/101/2020/45 instead of CMA/DOM/102/45. She called upon this Court to strike out the application for incompetence. She relied upon the case of **Mic Tanzania Ltd V. Hamisi Mwinyijuma and 2 Others**, Civil Appeal No. 64 of 2016 (unreported).

The respondent further argued that the applicant had failed to prove the tort of defamation. The respondent cited the case of **John Edward vs Standard Ltd.** for what constitutes defamation.

The respondent further supported the rejection by CMA of the letter dated 28th May, 2020 with Ref. No. AB 277/308/05/16 which the applicant intended to tender as exhibit. It was the respondent's argument that since the said letter was retrieved electronically from whatsApp groups of teachers, its admissibility had to comply with mandatory requirements of sections 18 of Electronic Transactions Act, 2015.

The respondent further opposed the allegation that the applicant was denied a hearing and branded the allegation as falsehood.

In his rejoinder, the applicant responded to some of the issues raised by the respondent as follows: -

Regarding wrong citation of the number of the dispute, he rejoined that the same can be cured by applying the slip rule and the overriding objective principle. He cited the case of **Transport Equipment Limited vs**

Devramp P. Valambhia, Civil Appeal No. 18 of 1993 CAT at DSM; **Yakobo Magoga Gichere Vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 (unreported) as well as the case of **Charles S. Kimambo vs Clement Leonard Kisudya and Another**, CAT Dodoma (2019) (unreported). Basing on these authorities, the applicant prayed the Court to allow the correction of clerical error by replacing 102 with 101 and add 45 after 2020, and proceed to consider the application on merit.

He also argued that since the citation error wasn't raised by the respondent in his counter affidavit but during her reply submission, the Court should reject.

Regarding his failure to prove defamation, the applicant conceded that based on the available evidence on records, he did not prove that he was defamed by the respondent. He argued that the only document he could use to prove his case is the respondent's letter and its attachment dated on 28th May, 2020 which the CMA rejected its admission. In this connection he prayed this court to allow admission of "Annexure OL-05".

On the other hand, the applicant argued that the respondent had not substantially refuted that the applicant was condemned unheard by both the respondent and the Commission. For this reason, the applicant maintained his submission in chief on this point.

On rejection of annexure OL-05, the applicant reiterated that the requirement for him to comply with section 18(1) (2) and (3) of the

Electronic Transactions Act, 2015 was raised at a stage where he did not have an opportunity to reply.

The applicant prayed that all issues he pleaded in the submission in chief which were not disputed by the respondent be considered as admitted. He mentioned such issues to include; that the respondent published false information for the purpose of defaming the applicant vide the letter dated 28th May,2020 with Ref. No. AB 277/308/05/16 which the CMA refused to admit in evidence. Other issues mentioned are; the unopposed applicant's prayer for adducing an additional document and the argument that the award was improperly procured on account of the respondent's fraudulent withholding of information. He added that the only option available before this Court is to quash and set aside the award.

Having gone through the proceedings and the award of the CMA, and after considering all the arguments submitted by the parties in a total of 111 pages of their written submissions, I think the following issues, once determined, will dispose of this matter sufficiently;

(i) Whether the application is incompetent for wrong citation of the reference number of the dispute at CMA.

(ii) Whether the applicant's right to be heard was violated.

(iii) Whether admission of "Kiambatanisho OL-05" being the purported defamatory letter, was wrongly rejected by CMA and should be admitted at this stage.

(iv) Whether admission of "Kiambatanisho OL-05" will prove defamation claims.

(v) Whether the applicant is entitled to benefit from issues which were not addressed by the respondent by quashing and setting aside the award.

(vi) What are the entitled reliefs to the parties, if any.

Gleaning from the submissions made, the issue of incompetence of this application or otherwise, has been an early point of contention. The respondent has submitted that the wrong citation of the dispute number committed by the applicant is fatal and renders the application incompetent. She fronted the case of **Mic Tanzania Ltd V. Hamis Mwinyijuma and 2 Others** (Supra) to support the position that wrong citation of case number renders the application incompetent and the same is to be struck out.

As shown above, the applicant in his rejoinder attacked vehemently the respondent's submission on two major fronts: **One**, that such a clerical omission is very much within the powers of this Court to rectify by use of the slip rule and the overriding objective principle. **Two**, the issue of wrong citation was raised by the respondent during his reply submission instead of pleading it in the counter affidavit. In so arguing, the applicant invited this court to disregard the point raised for being a mere argument from the bar.

Suffice it to say that disputes dealt by courts are not between angles who are believed to commit no wrongs. The wise saying that "to error is

human" applies squarely in this situation. The applicant committed an error by wrongly submitting that the matter in dispute arises from Labour Dispute No. CMA/DOM/102/45 instead of CMA/DOM/101/2020/45. In this situation while all other particulars in the pleadings are able to identify properly the case in hand, the Court cannot hold such a slip to be fatal. Such an error is curable under the overriding objective principle. What matters is, whether the type of error committed is of such a magnitude as to cause confusion to the Court in its adjudication of the dispute.

Where, as is in this application, the Court can spot the error and find its correction from within the rest of the pleadings, it is the duty of the Court to invoke its jurisdiction to correct such an error for the purpose of pursuing substantive justice and expediency in the delivery of justice. In the case of **Charles Kimabo V. Clement Leonard Kisyuda and Another** (Supra) the Court of Appeal stated in its ruling as follows;

> *"On account of the identified uncertainty and confusion surrounding the documentation regarding this application we believe that it will not be in the interest of justice to strike out the application as this will make the applicant indulge in a hassle of pursing the entire process afresh which is not in line with the overriding objective principle geared at timely resolution of disputes".*

It is discerned that in the above cited decision the Court of Appeal allowed the applicant to amend the defective application. Since in this application the parties were allowed to proceed by written submissions, an order to amend the application is not conceivable at this stage, without causing prolonged delays in deciding this matter. Under these circumstances,

the Court orders the rectification of records by inserting the omitted year 2020 and the wrongly written number 102 and considers the same corrected for the sake of justice and expediency.

Regarding the second issue, it has been the applicant's contention that he was denied right to be heard "by both the respondent and the Commission". First of all, one cannot legally claim a right to be heard from a fellow contestant in a case. Such a right can be claimed from an authority empowered by law to determine rights or to adjudicate on disputes. That said, the applicant's complaint against CMA is that he was denied right to be heard before rejecting admission of "Kiambatanisho OL-01".

It was the applicant's contention that upon tendering the above-mentioned exhibit as secondary evidence, the Arbitrator acted with illegality and with material irregularity by basing on a new reason raised by the respondent during a rejoinder without affording him the right to be heard. As a general rule it is wrong to allow a new matter not pleaded to be raised in rejoinder, as a matter of procedure in trials. Since in the reply submission the respondent strongly denied the allegation, the Court shall address this issue conclusively when determining the third issue, shortly below.

The third issue is probably the most critical one in this application. The Court has to determine whether admission of "Annexure OL – 05" which was originally submitted to CMA as "Kiambatanisho OL-01" was unlawfully rejected by CMA. The Court has also to determine whether the said annexure should be accepted at this stage, the matter being under revision.

I have carefully perused the typed proceedings of CMA from page 7 where the applicant testified as PW1 to page 23 where his re-examination ended. Despite of the disparaged flow of the said proceedings, I have noted why the said annexure "OL-01" was not admitted in evidence, the reason being based on the Electronic Transactions Act, 2015. On page 17 of proceedings, CMA ruled on admissibility of the exhibits as follows;

> *"UAMUZI MDOGO WA PINGAMIZI LA AWALI"*
> *Kimsingi nyaraka zilizotolewa zilikuwa halali kuhusiana na mgogoro huu lakini utaratibu uliotumika kuzileta ili ziweze kukubaliwa kwa ajili ya kutumika hazikufautwa kwa sabau (sic) zimetolewa kwenye mitandao. Hivyo zimekiuka utaratibu ulioainishwa katika kifungu cha 18 cha Electronic Transactions Act ili zitumike katika kutoa uamuzi wa mgogoro huu. Hivyo, pingamizi lilitototolewa ni la msingi katika kutenda haki kwa kila upande nyaraka imekataliwa"*

To paraphrase the quoted excerpt of the CMA ruling, the CMA principally agreed that the documents which PW1 was intending to tender in evidence were relevant to the case. However, it was the view of CMA that admissibility of such documents was to conform with the provision of section 18 of the Electronic Transactions Act, because the documents were retrieved from some electronic storage or online source ("*mitandao*").

Obviously, the decision to reject the admission of the said exhibit, killed the soul of the applicant's claims before the CMA. The main question now is whether the CMA was right to reject it? Does section 18 apply? The answer,

in my opinion, is in the affirmative. The provision of section 18 of the Electronic Transactions Act, 2015 very much applies and CMA was right to hold as it did.

To appreciate the above holding, it is important to refer to the submissions made by the applicant before the CMA when he was tendering the exhibit. On page 16 to 17 of the typed proceedings of CMA it is shown that PW1 prayed to tender the exhibit. Mr. Nchimbi, the learned Advocate for the respondent objected to its admission for two reasons: **One**; the tendering of the exhibit was contrary to the provision of section 34 C (1) (a) (i) (ii) and (b) of the Evidence Act [Cap 6 R.E 2019], as PW1 was neither the maker nor the custodian of the said document. **Two**; the letter the applicant intended to tender was addressed to regional secretaries and he was not one of them. It was submitted that the applicant had no clean hands, as the letter was not his. Up to this point the issue was about tendering of secondary evidence.

In response to the above contention, the applicant replied that he had requested for documents under section 68 of the Evidence Act, but the respondent refused to provide the same without any sound reason. He further replied that the requirement that a document should be tendered by either its maker or its custodian does not apply to defamation cases. (**See page 16 of the typed proceedings**). The applicant further submitted to the effect that so long as his name was written in the document and he was defamed therein, he has a right to complain. Then he submitted;

"Mimi ni namba 10 ***nimepata kwenye mitandao****. Kwa msingi huo naomba nyaraka ipokelewe kwa sababu sheria iliyotumika haitumiki katika kesi ya defamation".*

[**Emphasis added**]

Since it was Mr. Nchimbi who raised the objection to the admission of the tendered document, he had the right to rejoin. In his rejoinder he addressed the issue raised in the reply submission of the applicant that he got the letter from online sources. Mr. Nchimbi said, if that is the case the applicant got the information from online source (*"mitandao"),* there is a procedure set by the Electronic Transactions Act, section 18 on how such a document can be tendered in Court. He said, there should be certificate of authenticity. He concluded by praying the document to be rejected.

It is from the above flow of arguments by both parties that the CMA made what it termed "*UAMUZI MDOGO WA PINGAMIZI LA AWALI*". (Ruling on Preliminary objection). The said tittle is a misnomer as there was no preliminary objection raised but an objection to the admission of a tendered document. Notwithstanding the slight error in the title, the CMA's ruling is unassailable. The ruling concurred with the argument that section 18 was to be observed since the document which was obtained from online sources ("*mitandaoni*") as the applicant himself so submitted.

This Court holds that section 18 particularly sub-section (2) is applicable to the case in hand, and CMA was right to be guided by this provision in rejecting the admission of exhibit OL-05. Section 18(2) of the Electronic Transactions Act, 2015 provides:

"18(2) in determine admissibility and evidential weight of a data message, the following shall be considered;

(a) The reliability of the manner in which the data message was generated stored or communicated.

(b) The reliability of the manner in which the integrity of the data message was maintained.

(c) The manner in which its originator was identified and

(d) Any other factor that may be relevant in assessing the weight of evidence.

The words "data message" have been directly defined under section 3 of the Act, as follows;

> *"Data message" means data generated, communicated received or stored by electronic, magnetic optical or other means in a computer system or for transmission from one computer system to another".*

Under the same section the words "electronic communication" are defined to mean any transfer of sign, signal or computer data of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic photo optical or in any other similar form, and the words "electronic record" are defined to mean a record stored in an electronic form.

Applying the above concepts to determine whether the letter the applicant intended to tender before CMA was "data message" or not, and whether section 18 of the Electronic Transactions Act, was rightly applied by CMA, this Court finds that in so far as the letter was received by the applicant from online sources (*mitandaoni*) and he sought its admission in evidence, the CMA was right to invoke section 18, particularly subsection (2) since it was important to ensure reliability of the manner in which the said exhibit was generated and maintained, and had to know the manner in which its originator was identified.

In **Onesmo Nangole Vs. Dr Stephen Lemomo Kiruswa & Others**, Civil Appeal No. 117 of 2017 [2017] TZCA 137 (31 August, 2017) the Court of Appeal observed on page 19 of the typed judgment of the Court as follows;

> *"Therefore, from the very nature of electronic transactions, the law had to undergo significant changes in order to embrace the development* ***to ensure that, electronic transaction entries by use of computers and other related devices are not only recognized but protected and the users are not exposed to risk".*** [Emphasis added]

One such risk which the law intended to guard the users against is a possibility of unscrupulous people to temper with data message during its generation from one source, transmission and retrieval (receipting) at the other end. It is for this reason section 18(2) of the Act requires any authority charged with the duty to receive evidence to consider reliability of the manner the data was generated, stored and communicated as well as

maintenance of its integrity and how the originator was identified. For this reason, CMA would not have admitted a letter purported to have been received from some online sources and retrieved as print out from either a computer or a WhatsApp message from a phone whose source was not shown before it.

It would have been a different scenario if the applicant testified that he had a hard copy of a defamatory letter signed by the respondent, and which defamed him but he had no primary evidence of the same. He could this way justify non application of the Electronic Transactions Act, 2015.

Section 18 of the said Act, is supported by section 64A of the Evidence Act [Cap 6 R.E 2019] which provides under subsection (2) that the admissibility of and weight of electronic evidence shall be determined under section 18 of the Electronic Transactions Act, 2015.

Subsection (3) of section 64A aforesaid defines electronic evidence to mean "any data or information stored, in electronic form or electronic media or **retrieved from a computer system**, which can be presented as evidence". [Emphasis added].

The letter the applicant intended to tender in evidence was, according to the applicant, retrieved from a computer system be it emails of the regional or district secretaries or WhatsApp messages from teachers' groups formed towards elections as testified by PW1 and PW2.

Having determined this crucial issue in the affirmative, determination of the rest of the issues becomes an academic exercise. This is because the main contention is whether CMA correctly rejected the admission of the alleged defamatory letter. Without the said defamatory words being proved, the entire applicant's case is inconsequential. For purpose of clarity the remaining issues are whether admission of exhibit "OL-05" will prove defamation claims. This issue depended upon the third issue being answered in the negative, which is not the case. As such the fourth issue lacks oxygen to breath in and dies naturally.

The fifth issue is whether the applicant should benefit from issues he raised in his submission which were not traversed by the respondent. Again, since rejection of exhibit OL-05 has been supported by this court for being lawful, the same argument can no longer stand. For this reason, even if the rest of uncontroverted arguments were to be considered as admitted by the respondent, nothing will change without proof of the alleged defamation.

In the upshot, the application lacks merit and is accordingly dismissed. I make no order as to costs.

Dated at Dodoma this 04th day of April, 2022.

ABDI S. KAGOMBA

JUDGE