

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR APPLICATION NO. 9 OF 2021

(Arising from CMA/ARS/261/20/126/20

BETWEEN

AMON MOLLEL..... APPLICANT

VERSUS

SUNNY SAFARIS LTD..... RESPONDENT

Date: 28/9/2022 & 30/9/2022

BARTHY, J.

JUDGMENT

The applicant Amon Mollel moved this court by way of revision to set aside the award of CMA (commission) from the dispute No. CMA/ARS/261/20/126/20 delivered by Hon. Lomayan Stephano dated 22/1/2021. The application for revision is made under section 91(1)(a)(b)(c), (2)(a)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act as amended by Written Law (Miscellaneous Amendment Act) Act No. 3 of 2010 and Rule 24(1)(2)(a)(b)(c)(d)(e)(f) and (3)(a)(b)(c) and (d) and 28(1)(a)(c)(d) and (e) of the Labour Court Rules GN. 106 of 2007 and any other enabling provision. The chamber summons is supported by Notice of Application and the affidavit of the applicant.

The brief background of this matter is that, the applicant was the employee of the respondent whose contract was terminated on



13/5/2020. The complaint was filed before the CMA and the award was delivered on 22/1/2021 in favour of the respondent.

Displeased with the decision of the arbitrator, the applicant filed the application for revision before this court. During the hearing of this application the respondent despite being served with the summons, she did not appear on this matter.

The hearing therefore proceeded in her absence; the applicant enjoyed the representation of Mr. Herode Bilyamtwe the learned counsel who made his oral submission in support of the application by addressing it in three questions;

1. Whether the CMA had failed to evaluate the evidence on record as a result it arrived at erroneous decision.
2. Whether the CMA did not consider the time limit to give its award
3. Whether the CMA did not consider other prayers made by the applicant before it.

In addressing the first question as to whether the CMA had failed to evaluate the evidence on record as a result it arrived at erroneous decision, Mr. Bilyamtwe argued that, the commission only relied on exhibit D1 in determining that the applicant had absconded from work for five days consecutive.

He went on to submit that, the applicant was not at work from 17/4/2020 on the date which all employees reported back from the leave. It is therefore not true that he was not at work at the period of March.

He added that, according to Exh. D4 which is the termination letter it shows that the staffs were on leave on the period of March and it's not true that the whereabouts of the applicant were unknown.

Mr. Bilyamtwe went on to submit that other testimony of the respondent's witness was contradicting itself on the dates which the applicant was said to be absent from work.

He further contended that the award of the CMA did not clearly consider the evidence tendered by the parties and therefore contradicts with rule 27(3)(a)(d) of the Labour Court Rules GN. 106 of 2007 which requires to contain the details of the parties, summary of the evidence and the arguments.

Mr. Bilyamtwe addressed this court to the representative of the respondent identified as advocate Keneth Ochina as seen on page 1 of the award. He was of the firm view that there was no advocate by the name of Keneth Ochina.

To amplify his point, he made reference to Application for Revision No. 74 of 2021 between **Isabela Tarimo v Sojema Pre and Primary School** where the court quashed and set aside the matter for having the representation of a person not authorized. Also, the court stated on page 3 that, the person not authorized to practice shall not act as an advocate and commence or defend any suit.

He therefore prayed to this court to expunge all submissions made by him and the same ought to be considered to have not been adduced before CMA.

On the second question as to whether the CMA considered the time limit in giving out its award, he pointed out to section 88(11) of Labour Relations Act 366 of 2019 and rule 27(1) of Labour Institutions (Code of Conduct for Mediators and Arbitrators) GN. 67 of 2007 which requires the award to be delivered within 30 days from the date of final submissions.

However, he contended that, the dispute before the CMA was delivered after 30 days and therefore it become unlawful as there is no law giving the justification for the same.

Under rule 14(2) of the The Labour Institutions Act (Code of Conduct for Mediators and Arbitrators) Rules, 2007 (GN No. 66 of 2007) it requires mediators and arbitrators not to delay the matters and consider the time schedule.

He was of the view that, it would have been best if the parties were summoned and communicated on the reason as to why the award will not be determined within the required time for it to be meaningful.

On the third question that the arbitrator failed to consider other prayers of the applicant. On this issue he argued that the similar issue was raised before the CMA, but it was not determined.

The award is challenged before this court, because it has nowhere stating what reliefs are the parties entitled to. Also, no reasons were offered as to why they should or should not be granted. But instead, he gave the compensation for four months only which is contrary to s. 40(1) (c) of the Labour Relation No 6/2004, which requires the compensation to be for not less than twelve months.

Similar issue was addressed by Justice Robert in the Labour Revision No 56 of 2019, **Aaron Nekembetwa Jumbe v. KK Security (T) LTD**, on page 8 it was held that the compensation for six months was lower contrary to minimum allowance provided by the law. He therefore prayed the said award to be substituted with the compensation for remuneration of twelve months salary.

He concluded by stating that he prays to this court to grant the prayer as prayed by the applicant before the CMA.

Having heard the applicant's counsel submission, the court in order to determine this application the following issues will be addressed;

- 1. Whether the decision of CMA was contrary to the requirement of the law.*
- 2. Whether the representation before CMA was contrary to the law.*
- 3. Whether the CMA award did not contain the reliefs sought by the parties.*

Before embarking on the issues raised, in a nutshell I will address the issue brought up by Mr. Bilyamtwe during his submission in support of the application, that Mr. Keneth Ochina appeared before CMA as the advocate for the respondent as seen on the record of the award on page 1 while he was not the advocate.

The court having gone through the affidavit in support of the application the said fact was not pleaded but it was addressed by the counsel for the applicant. The court will not detain itself much in addressing this issue which was not brought up under the oath in the affidavit of the applicant. See the case of **Joseph Juma v. Nasibu Hamis**, Misc. Civil Application No. 48 of 201 High Court of Tanzania at Tabora.

Also, in the case of is **African Banking Corporation v. Sekela Brown Mwakasege**, Civ. Appeal No. 127 of 2017, High Court at Dar es salaam this court held that, "*there is a general principle that, the court cannot consider or deal with issues that were not canvassed and pleaded*".

I will now start to address the second issue first as to whether the decision of CMA was contrary to the requirement of the law. On this issue, the commission's award was said to be tainted with irregularities. The first and the foremost to be challenged was the delivery of the award after the lapse of 30 days contrary to section 88(11) of Labour Relations Act 366 of 2019 and rule 27(1) of Labour Institutions (Code of Conduct for Mediators and Arbitrators) GN. 67 of 2007 which required the award to be delivered within 30 days from the date of final submissions.

The records of the CMA shows that the last order for the parties was to bring their final submission on 30/10/2020 but the award was delivered on 22/1/2021 about 80 days later.

It was claimed the parties were not addressed on the reason for the delay. Under Rule 27(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. 67 of 2007 provides the arbitrator shall write and sign a concise award containing the decision *within the prescribed time with reasons*.

Also, under Rules 8(2) and 14(4) of Labour Institutions (Ethics and Code of Conducts for Mediators and Arbitrators) Rules, GN. No. 66 of 2007 together with section 88(9) of Employment and Labour Relations Act, CAP 366 R E. 2019 which generally require that, after completion of arbitration

hearing the arbitrator to write a definite, certain, concise and reasoned award and deliver the signed award to the parties within thirty days.

The provision of the law imposes the requirement to deliver the award within thirty days. The matter before the CMA was delivered after 80 days. On this issue, there are various decisions of court which I subscribe to their interpretation on the requirement of delivering the award within thirty days which is, to have timely justice without unreasonable delay.

The same was stated in the case of **Fairmont Resort Company Ltd V. Adam Juma Mohamed** and two others, Application Revision No. 603 of 2019, High Court Labour Division at Dar es salaam, citing with approval the case of **Lucas Mkolomi v. Holiday Inn Hotel**, Revision No. 562 of 2019, where the court held that,

...to faulting an award just because it was it was delivered out of the prescribed time because that will even necessitate more delay and cause inconvenience to the parties.

I therefore come to the findings that the award was delayed, but it did not occasion any failure of justice for being delayed after 30 days. The applicant also did not state or prove if the delay had occasioned any miscarriage to their side. Considering that there is no requirement of the law to address the parties on the delay, I find no reason to fault the award of the commission for being delivered after 30 days without notifying the parties or giving them any reason.

Turning to the first issue as to whether the CMA failed to evaluate the evidence on record as a result it arrived at erroneous decision. In addressing this issue, the applicant in this matter is faulting the CMA to

have failed to evaluate the evidence on record as a result it arrived at erroneous decision.

In the affidavit in support the application and the submission by Mr. Bilyamutwe, it was argued that the commission has relied on respondent's evidence alone that the applicant was absent for more than five days. He also faulted the award of the commission on the ground that the termination was unfairly unprocedural.

It was also their claim that, his absence was at the time where all the employee were on leave. It was also said that according to paragraph 8 of the employment contract, as the driver he was not supposed to be at work every day, unless there was no safari, he will be contacted via mobile phone call to go to work.

However, the evidence on record before the commission it was stated that, after the annual leave other employee returned to work but the applicant did not. Even after making several calls to probe as to his whereabouts, but the efforts were futile.

The records of the commission shows that the arbitrator had found that the procedures to terminate the applicant was followed and lawful in accordance to s. 37(2)(a)(b)(c) of Labour Relations Act Cap 366 R.E. 2019. In support of the same was the case of **Institute of Accountancy Arusha v. Gideon Ngoro Kivuyo**, Revision No. 47 of 2015 which cemented on fair procedure for termination of employment.

Again, according to Exh. D4 termination letter, it clearly shows that the applicant absented from work from 17/4/2020 when all the employee returned from annual leave and not the period of March as submitted by

Mr. Bilyamutwe. The number of days he was absent are clearly seen on attendance register (Exh D1). Therefore, the claim that he was absent at the period of March 2020 was not substantiated with any proof.

The claim that the commission did not consider the evidence of the applicant in determining the award was unfounded. On page 5 and 6 of the award it reads;

*Kwa mujibu wa Ushahidi uliotolewa na upande wa mwajiri/mlalamikiwa kupitia kielelezo chake ilipokelewa kama Exh. D1 (Muster roll) kitabu cha mahudhurio kimeonyesha wazi ya kuwa mlalamikaji hakuhudhuria kazini kipindi cha mwezi machi, 2020 kuanzia tarehe 14 hadi 20 kwa muda wa siku 5 mfululizo na kwa mwezi April, 2020 hakuhudhuria kabisa na **mlalamikaji hakuweza kutoa uthibitisho wowote kuwa alikuwa kazini na akajibu maswali ya kudodoswa anakubali mwezi machi, 2020 hakwenda likizo** hivyo ni wazi kabisa ya kwamba hakuwepo kazini kwa muda wa siku 5 mfululizo kosa ambalo ni la mwenendo mbaya (misconduct) na adhabu yake ni kufukuzwa kazi. [emphasis is supplied].*

Therefore, given on the analysis of the evidence and law, with respect to this issue I am satisfied that the arbitrator was right to hold that the applicant's termination was substantially procedurally fair. Hence, I find no reason to fault the commission award.

Lastly, I will address the third issue as to whether the CMA award did not contain the reliefs sought by the parties. I will not detain myself much on this issue.



Regarding the submission of Mr. Bilyamtwe on this issue, he argued that the applicant was awarded the compensation for four months contrary to s. 40(1) (c) of the Labour Relation No 6/2004, which requires the compensation of not less than twelve months, to amplify the argument he cited the case of **Aaron Nekembetwa Jumbe**, Labour Revision No. 56 of 2019.

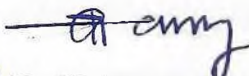
The provision of s. 40(1) of the Act covers the employees whose termination were unfairly. In the matter before the commission the applicant was fairly terminated. Therefore, the reliefs granted in the commission's award were justifiable.

In this application I find no reason to revise the award made by the arbitrator for the reasons stated. The award of the commission is upheld.

It is so ordered.

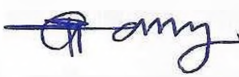
DATED at Arusha this 30th September, 2022.




G. N. BARTHLY
JUDGE
30/09/2022.

Delivered in the presence of the presence of Mr. Bilyamtwe the representative for the applicant and the absence of the applicant and the respondent.




G. N. BARTHLY
JUDGE
30/09/2022.