

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

**LABOUR DIVISION**

**AT ARUSHA**

**REVISION NO. 126 OF 2021**

(Originated from Labour Dispute No. CMA/ARS/ARS/292020)

**BETWEEN**

**FRANCIS SHENYAGWA.....APPLICANT**

**VERSUS**

**MOBISOL UK LIMITED.....RESPONDENT**

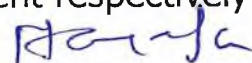
**RULING**

09/11/2022 & 17/11/2022

**MWASEBA, J.**

The applicant, **Francis Shenyagwa**, brought this application seeking for revision of the CMA award No. CMA/ARS/ARS/29/2020 so as to satisfy in its correctness, legality and propriety of the proceedings and orders made therein. The application is supported by an affidavit sworn by the applicant himself and opposed by the respondent, who filed a counter affidavit sworn by Mr Sheck Mfinanga, counsel for the respondent.

In this application Mr Allen Godian and Sheck Mfinanga, both learned counsels appeared for the applicant and respondent respectively.



Prior to the hearing of the application, counsel for the applicant raised an issue that it was the same Commissioner who acted as a mediator and arbitrator on this dispute at the CMA. The raised issue was argued orally.

Submitting in support of the raised issue, Mr Godian told the court that, it was the same person Mr Octavian Mwebuga who mediated the parties herein and proceeded to determine the Arbitration after the mediation failed which is contrary to **Section 86 and 88 of the Employment and Labour Relation Act**, Cap 366 R.E 2019 and **Rule 8 of the Labour Institutions (Mediation and arbitration) Rules**, GN 67 of 2007. The stated provisions provide for confidentiality between the mediator and the parties involved in mediation as what has been discussed therein need not to pass or being used during arbitration. He supported is arguments with the case of **Azizi Ally Aidha Adam vs Chai Bora Ltd**, Application No. of 2011 (reported at LCDL) and **Barclays Bank (T) Ltd vs Ayyan Matessa**, Civil Appeal No. 481 of 2020 (CAT-Unreported).

On the other side, the respondent's counsel seconded the argument raised by his fellow counsel that the Hon. Commissioner was not supposed to arbitrate the parties whose mediation was done before him. He prayed for the matter to be remitted back to CMA and commence afresh from the arbitration stage before another Arbitrator.



Having heard both parties herein and the record, there is no dispute that the arbitrator one Octavian Mwebuga is the one who mediated the dispute of the parties. That means he was ousted from arbitrating the dispute between the same parties.

**Section 88 (2) (a) of the Employment and Labour Relations Act,**

Cap 366 R.E 2019 provides that:

*"If the parties fail to resolve a dispute referred to mediation under section 86, the Commission shall—*

*(a) appoint an arbitrator to decide the dispute;"*

More to that **Section 86 (8)** of Cap 366 R.E 2019 provides that:

*"Notwithstanding the failure to resolve a dispute within the period stipulated in subsection (4), the mediator shall remain seized with the dispute until the dispute is settled and may convene meetings between the parties to the dispute in order to settle the dispute at any time before or during any strike, lockout, arbitration or adjudication."*

The same was held in the case of **Barclays Bank (T) Limited vs Ayyam Matessa**, (supra) that:

*"Under the provisions of Section 86 and 87 of the ELRA, the role of a mediator is, as rightly submitted for the appellant, to assist the parties to reach amicable settlement of the dispute. In view of his role, the mediator is in a position to*

*Atulya*

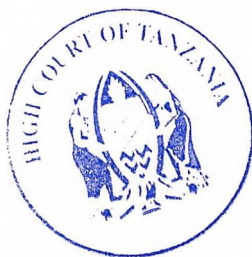
*receive factual information from the parties that would not ordinarily be made available in the arbitration phase. Besides, the mediation process may involve self-evaluation of weaknesses in the merits of the case which no doubt may be highly influential to a mediator who subsequently assume the role of an arbitrator."*

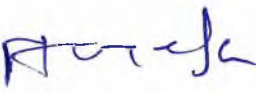
Guided by the cited authorities and the provisions of the law, this court concur with both learned counsels that it was wrong for the Mediator to act as an Arbitrator on the same case since his decision could be influenced with what he heard and recorded during the mediation session. More to that, if these kinds of practice will be entertained it will lead to breach of the rule against bias.

For the foregone reasons, the proceedings and award of the CMA is hereby quashed and set aside, the file is remitted back to the CMA for it to be determined before another Arbitrator.

Ordered Accordingly.

**DATED** at **ARUSHA** this 17<sup>th</sup> day of November, 2022.



  
**N.R. MWASEBA**

**JUDGE**

**17/11/2022**