

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LABOUR REVISION NO. 28 OF 2021

*(Arising from the Commission for Mediation and Arbitration of Dodoma in Labour
Dispute No. CMA/DOM/3/2019)*

YOUNG JAI PRIMARY SCHOOL.....APPLICANT

VERSUS

EMMANUEL MAKULASI DAVID.....RESPONDENT

RULING

15/08/2022 & 27/9/2022

KAGOMBA, J

YOUNG JAI PRIMARY SCHOOL, (“the applicant”) has filed an application for revision moving this Court to call for and examine the records of the proceedings before the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DOM/3/2019 for purpose of satisfying itself as to its legality, correctness, rationality and propriety of the decision delivered by the Mediator on 26/07/2019 concerning the application for setting aside *ex-parte* award dated 10/05/2019.

The applicant further enjoins the Court to revise and set aside the impugned award believing that there is good cause so to do, and prays for costs of this application as well as any other relief(s) this Court will deem fit to grant.

The application is made under section 91(1)(a) and 91(2)(c) of the Employment and Labour Relations Act, No. 6 of 2004; 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. The application is supported by an affidavit of CATHERINE ANICETH WAMBURA, advocate for the applicant.

According to the supporting affidavit, the gist of this application is a labour dispute instituted at CMA by the respondent against the applicant for unfair termination. That, on 1/4/2021 when the matter was scheduled for mention to ascertain the outcome of a settlement out of the Commission, the Arbitrator ordered the matter to be heard *ex parte* against the applicant for reason of non- appearance. However, the applicant didn't appear before CMA on the set date, but managed to send her representative to notify the Commission the reasons for non-appearance of the applicant and her advocate.

Additionally, it was averred that after the matter was heard *ex parte*, the applicant was served with the *ex parte* award whereupon she filed an application to set it aside but the application was dismissed for lack of sufficient reasons. Still adamant to see justice is done, the applicant decided to file a revision application in this Court which, however, was struck out for improper citation of the law. Hence, she later filed an application for extension of time to file revision which was granted and finally this application for revision was lodged for Courts consideration.

According to the filed affidavit, one of the irregularities in the impugned award is that the respondent's witness adduced evidence without taking an oath. Also, the Arbitrator dealt with the dispute of breach of contract as a labour dispute basing on unfair termination, while the appellant argues that the two were different legal concepts.

When this matter was set for hearing before this Court, the respondent was nowhere to be seen and continued to enter no show despite publication of summons to call him for hearing. For this reason, the application was heard *ex parte* vide Court's order dated 28/6/2022.

During hearing Ms. Catherine Wambura, learned advocate for the applicant reiterated the shortfalls which marred the impugned award as was deposed in the supporting affidavit. She submitted that the omission in the CMA proceedings which allowed the witness to adduce his evidence without taking an oath was fatal and the same should be quashed. She cited the decision of the Court of Appeal of Tanzania at Mwanza **in Catholic University of Health and Allied Sciences (CUHAS) vs. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020.

Ms. Wambura further submitted that the failure of the CMA to grant adjournment even after having been notified by the applicant's representative one Emmanuel Sollo that the advocate for applicant was absent was tantamount to failure to afford the applicant her right to be heard as guaranteed by the Constitution of United Republic of Tanzania under Article 13(6)(a). To cement her contention, she referred the Court to the

case of **Ngesela Keya Joseph @ Ismail and 2 Others vs. The Republic**, Criminal Appeal No. 116 of 2021, Court of Appeal of Tanzania at Bukoba.

She further faulted the award for being improperly issued in the eyes of law for a reason that the CMA dealt with the dispute as breach of contract while the respondent's complaint before the CMA was on unfair termination. She winded up her submission by praying the Court to grant orders sought in the chamber application and set aside the decision of the CMA.

Having heard the submission by the learned advocate for the applicant, and after perusal of the records, there are two issues for determination. Firstly, whether the applicant was denied a right to be heard by CMA and secondly, whether the application has merit. In this application, the most significant complaint made by the applicant is that of denial of right to be heard, which I shall start examining owing to its significance in the administration of Justice.

The right to be heard is one among the principles of natural justice to enhance fair hearing. The same is enshrined in our Constitution under article 13(6)(a), thus;

(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

*(a) **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. [Emphasis Added]*

With the above constitutional guidance, no doubt that the CMA being an institution which determines people's rights and duties is bound to abide with the cited constitutional provision when disposing matters before it.

Upon perusal of the CMA proceedings of 1/4/2019, it is evident that one Emmanuel Sollo, being a representative of the applicant, notified the Commission about the absence of the applicant's advocate. Thereafter, one Justinha Timothy for the respondent prayed the Commission to hear the matter *ex parte* alleging that the respondent was not ready to ensure speedy determination of the dispute. Without seeking any proof of the allegation leveled against the respondent, the Commission went on to make an order for *ex parte* hearing. For clarity, the proceedings of 1/4/2019 are reproduced hereunder: -

"01/04/2019

MSULUHISHI: MATALIS, R

MLALAMIKAJI: YUPO

KWA NIABA: JUSTINHA TIMOTHY, KUTOKA CHAMA CHA WAFANYAKAZI CHODAWU

MLALAMIKIWA: EMMANUEL SOLLO, MSAIDIZI WA MKURUGENZI

HALI YA SHAURI

Kusikiliza Usuluhishi

EMMANUEL SOLLO

Wakili wetu amesafiri kwaajili ya shughuli za kikazi

JUSTINHA TIMOTHY

Tunaomba shauri liendelee kusikilizwa upande mmoja kwa sababu mlalamikiwa hayupo tayari kuhakikisha mgogoro unaisha kwa wakati.

CMA

Shauri litasikilizwa upande mmoja.

AMRI

*Shauri litaendelea kusikilizwa tarehe 02/04/2019 saa 2:00
asubuhi.*

Sgd

Msuluhishi

1/4/2019"

In my opinion the approach and decision adopted by the Arbitrator leave much to be desired. First of all, there was an allegation raised by Ms. Justinha Timothy from CHODAWU who was representing the respondent herein. She alleged that the applicant was not ready to ensure the dispute was timely resolved. With this allegation made, justice required the CMA to seek proof from Ms. Timothy as to why she believed that the applicant was deliberately absenting herself. There ought to be justification for CMA to ignore the prayer made by applicant's representative, before ordering the matter to proceed *ex parte*.

Again, the applicant's representative was not given an opportunity to reply to the respondent's representative prayer for *ex parte* hearing. In my considered view, by the CMA not affording Emmanuel Sollo an opportunity to comment on the allegation made by Ms. Timothy, it amounted to denial of right to be heard on part of the applicant. The act of the applicant to send a representative to notify the CMA about the absence of her advocate obviously inferred that she had a firm intention to defend the case against her. That act could not be interpreted to infer delaying tack tick on part of the applicant.

Besides, the proceedings show that the dispute first came before the Arbitrator on 27/3/2019 where all the parties were present. It was adjourned to 1/04/2029 by consensus of both parties to enable the parties settle the dispute out of the Commission. Surprisingly, the date the appellant was accused of having no intention to speedily settle the dispute, was just the second time the matter was scheduled for hearing after being adjourned on 27/3/2019. This shows that there was no any previous record of delay on either side. It was the first ever request for adjournment.

Under the above circumstances, the refusal by CMA to grant adjournment was a clear travesty of justice and a denial of the right to be heard. The Court of Appeal has been outspoken about denial of right to be heard in number of its decisions such as in **Ngesela Keya Joseph @ Ismail** (Supra) and **Abbas Sherally and Another V. Abdul S. H. M. Fazal Boy, Civil Application No. 33 of 2002** (unreported). In the latter case, the Court of Appeal stated the following:

*'The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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.'* **[Emphasis added]**.

Having determined the issue of denial of right to be heard positively, I find insignificant to analyse other issues raised by the learned advocate for

the applicant. Therefore, the proceedings of the CMA in labour dispute No. CMA/DOM/3/2019 from 1/4/2019 onwards are nullified and the award thereof is set aside.

Accordingly, I order this matter to be heard inter parties by another Arbitrator with competent jurisdiction. No order as to costs.

Dated at Dodoma this 27th Day of September, 2022.




ABDI S. KAGOMBA
JUDGE