

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MUSOMA

LABOUR REVISION NO. 05 OF 2023

IRASANILO GOLD MINEAPPLICANT

VERSUS

GOSBERT STANSLAUS RESPONDENT

JUDGMENT

14 & 16 June, 2023.

M. L. KOMBA, J.:

The applicant herein is seeking for the following orders;

1. **THAT**, this honourable Court be pleased to call for original records of the Commission for Mediation and Arbitration's Award and revise the same on the ground that the Award was improperly procured and the same is unlawful, illogical or irrational.
2. **THAT**, upon revising the said Award this Honourable Court may be pleased to make orders as follows:-
 - a) Overrule and set aside the Award of the Commission for Mediation and Arbitration dated 14th November, 2022 in Labour Dispute No. CMA/MAR/MUS/39/2022; and

b) Order that the Proceedings in the Commission for Mediation and Arbitration be quashed and set aside.

The application is preferred by way of chamber summons made under Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) and 28 (1) (c), 28 (1) (d), 28 (1) (e) of the Labour Court Rules, 2007 GN. 106/2007 read together with Section 91 (1) (a), 91 (2) (b), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 Revised Edition 2019 and any other enabling provisions of the law. The chamber summons was supported by an affidavit deposed by the applicant's advocate.

In his affidavit specifically at paragraph 8 the applicant raised issues as follows;

8. (a) whether the Arbitrator was legally correct to proceed with arbitration while the mediation was not conducted within the prescribed time by law.

(b) Whether the arbitration award was not improperly procured.

(c) Whether the arbitration award was not unlawful, illogical or irrationally procured.

On the other side Mr. Mhagama deponed and avers that as far as mediation is concerned, no formal proceedings are required and a mediator can mediate a dispute on his own way. Further, irregularity of the mediation if any, can be cured by Oxygen principle due to the fact that the same did not infringe the rights of any party and the issue to be discussed according to the counsel for respondent is whether the applicant had fair and valid reasons to terminate the respondent and whether the procedures were followed in such termination.

The factual brief of the matter is that; the respondent was the employee of the applicant whose employment was terminated on 31/03/2022 on medical grounds. Respondent challenged the same on account that the employer did not conduct medical examination warranting him to terminate the employment. Respondent was employed on contractual basis and had one year contract which ended on 06/01/2021 and he continued with duties until 31/03/2022 when applicant terminate his monthly salary. Respondent challenged his termination via labour dispute No.CMA/MAR/MUS/39/2022.

Applicant informed the Commission for Mediation and Arbitration (the Commission) that after the expiration of the contract, respondent did not

perform any duty and he was sick. After hearing the parties, that is, in arbitration the Commission found that the respondent termination was unlawful and awarded in favor of the respondent that he should be paid his entitlement. Applicant was dissatisfied by the said Award hence this application.

When the matter was called on for hearing, the applicant had the service of Mr. Paul Mng'arwe while Mr. Ernest Mhagama represented respondent, both being learned advocates.

Mr. Mng'arwe prayed his affidavit be adopted by this court and submitted that there was irregularity during mediation as it was conducted contrary to S. 86 (4) of Employment and Labour Relations Act, [Cap 366 R. E. 2019] (the Act). He said that mediation was conducted out of 30 days provided by the law, that mediator spent 55 days. He further submitted that the dispute was filed on 29/04/2022 but was mediated till 22/06/2022 when it was marked unsettled. There was no party agreement to extend time of mediation rather mediator proceeded *suo motto* and that, according to him this make the proceedings nullity.

On the use of oxygen principle as deponed by the respondent, he submitted that when the law uses the word "shall" the oxygen principle is inapplicable. The same position was held by the Court of Appeal in **Martin D. Kumaliya & 17 Others vs. Iron and Steel Ltd**, Civil Appeal No. 70 of 2018 at page 9 second paragraph when the court said the principle will not help the party to circumvent the mandatory. It was his submission that the law should be followed as it is and prayed this court to nullify the proceedings and remitted the matter to the Commission for them to abide with the law.

Resisting the application Mr. Mhagama submitted that the section cited by the counsel for applicant insists mediation to be done within 30 days. That means 30 days after the dispute had been filed or the longer period where parties agreed in writing. He said, mediation has no format and that the manner in which mediation is to be conducted is decided by the mediator as in S. 86 (5) of the Act. He further submitted that the action of parties to attend mediation even after expiration of the prescribed period means parties agreed by conduct although it was not in writing. He said parties were not prejudiced on mediation and that the failure to extend time

should not nullify the arbitration proceedings as the two (mediation and arbitration) are independent proceedings.

Mr. Mhagama distinguished the cited case of **Martin Kumaliya and 117 Others (supra)** on the ground that in that case there was a party who failed to institute an appeal on time and wanted to benefit over oxygen principle. He said the case at hand has different facts and the principle is applicable as the applicant conceded to extend time by his conduct and referred this court to paragraph seven (7) of counter affidavit which he prayed it to be party of his submission and court to adopted the same. He further prayed this application to be dismissed and the decision of CMA to be uphold.

When given time to rejoin, the counsel for the applicant lamented that they did not agree by conduct that's why they filed this application insisting that the law is clear when 30 days expires parties has to agree in writing. He explained further that. It is not always that effect of failure to abide with the law injure one party but the law should be followed as it is.

After careful consideration of the parties' competing submissions, read through the commission record and relevant law, I find this Court is called

upon to determine only one issue; whether the award was properly procured.

There are two different proceedings in the Commission, first is mediation which is provided under section 86 and 87 of the Act; and arbitration which is provided under section 88 to section 93 of the Act. Before going deep in analysing the issue as previous raised, I find pertinent to recite the relevant provisions of the law as follows;

'86.-(1) Disputes referred to the Commission shall be in the prescribed form.

(3) On receipt of the referral made under subsection (1) the Commission shall –

(a) appoint a mediator to mediate the dispute;

(b).....

*(4) Subject to the provisions of section 87, the mediator shall resolve the dispute **within thirty days of the referral or any longer period to which the parties agree in writing.***

*(7) Where the **mediator fails to resolve a dispute within the period prescribed** in subsection (4), a party to the dispute may—*

(a);

(b) if the dispute is a complaint-

*(i) **refer the complaint to arbitration; or***

*(ii) **refer the complaint to the Labour Court.***

It is undisputed fact that when the respondent referred the dispute to the Commission, the same was assigned to mediation as the law requires and that the mediation between the parties herein ended on 22 June, 2022. Applicant claim that mediation was conducted for 55 days contrary to the law because of that it affected the arbitration and the whole proceedings is nullity. Mr. Mhagama contended that even though the mediation was conducted out of prescribed time it does not prejudice any party as the award was based on arbitration which is different process from mediation and that, mediation has no connection of whatsoever with arbitration.

I agree with the counsel for applicant that the time fixed for mediation is 30 days as seen from the excerpt of the law. Further I agree with the counsel for the respondent that applicant conceded on extension of time by his conduct. Why am I saying this, the law under section 86 (7) provides way forward when mediator fails to solve the dispute within the prescribed time. Party is at liberty to refer the matter to arbitrator or to the labour court. For attending mediation more than prescribed period means each party conceded on the action of the mediator and that is, according to this court, agreed for extension of time.

A party which finds the mediation was conducted contrary to the law was supposed to notify the mediator and take action according to the law. I agree with the Mr. Mng'arwe that laws must be followed as they are, however, in the circumstances of this application parties participated in the conduct of mediator whose role was to reconcile them and not otherwise. Subsection (7) as reproduced above allows party to refer the matter to arbitrator, where the award originated. Be it what happened, parties were to be subjected to arbitration so that their dispute can be solved.

At this juncture, as the intention of the mediator was to solve the dispute and that mediation was conducted in attendance of the parties who did not raise any doubt till when the award is pronounced, I find section 3B (1) (c) of the Civil Procedure Code [Cap 33 R.E 2022] is applicable as this procedural irregularity does not go to the root of the case and what mediator did was to refer the dispute to arbitration after he noted that mediation failed.


I don't buy the idea of nullifying the whole process in the Commission as that will be against the interest of justice bearing in mind that the applicant is not complaining over arbitration process which determined right of the parties.

In the circumstances of this application, the arbitral award was correctly procured and I hereby dismiss the application.

It is so ordered.

Dated at **MUSOMA** this 16th Day of June, 2023.




M. L. KOMBA
Judge