

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 562 OF 2016

BETWEEN

PUBLIC PROCUREMENT REGULATORY

AUTHORITY..... APPLICANT

VERSUS

RAYMONDI J. MBISHI..... RESPONDENT

JUDGMENT

Date of Last Order 09/07/2018

Date of Judgment 24/08/2018

NYERERE, J.

The applicant/**PUBLIC PROCUREMENT REGULATORY AUTHORITY** filed the present application seeking revision of the Commission for Mediation and Arbitration (CMA) decision and award issued by Arbitrator Wilbard, G. M in respect of the employment dispute No. **CMA/DSM/ILA/794/12/210**.

The brief history of this matter is as follows: The Complainant at the CMA, was employed by respondent on 16th July, 2012 as a Manager of

Contract Performance in the Monitoring and Compliance Division of the Public Procurement Regulatory Authority. Complainant Contract was for a fixed term, three years (3), subject to renewal, and Complainant was placed on a Six month's probation.

On 14th November, 2012 respondent terminated the Complainant's contract, on reason that there was negative vetting results by the vetting Authority. At the time, Complainant's contract was terminated, he had only served four months, and was yet to be confirmed. However, Complainant had already been supplied with appointment letter before the vetting results, thus violating the Standing Orders of the Regulatory Authority something which rendered the whole process null and void. As respondent failed to follow procedures when he decided to terminate Complainant's contract of employment.

Complainant was aggrieved, and instituted a claim of unfair termination to the CMA, claiming violation of fair procedure in his termination. Consequently the CMA awarded the remained period of the contract, which was equal to Tsh. 184,489,694/=.

That decision aggrieved applicant who file the present revision application faulting Arbitrator's award on four grounds as articulated under

paragraph 9 of the supported affidavit for easy of reference I quote them in verbatim.

- (1) That, the Honourable Arbitrator erred in law and facts for failure to exercise jurisdiction vested in it by law and further for failure to allow the Applicant to be heard on merit.
- (2) That, the Honourable Arbitrator subjected herself into an error material to the merits of the case and hence resulted or involved into injustices to the Applicant.
- (3) That, the Honourable Arbitrator erred in Law and facts for dismissing the Applicant's application for restoration of the case while the Applicant had reasons for failure to pursue her case at the Commission for Mediation and Arbitration.
- (4) That, the Honourable Arbitrator erred in law and facts for determining the complaint exparte and further for determining the complaint and awarding to the employee an amount of Tshs. 184,489,694/=. Without taking into account that, the employee worked only for 3 (three months) to the employer, to wit, the Applicant and without proof thereof.

In this revision the applicant had the representation of Mr. Mafuru, M.M Advocate while respondent was represented by Mr. Arbogast Mseke, Advocate. The matter proceeded by way of written submission.

Arguing the application Counsel for Applicant submitted that, the arbitrator conducted himself in error by proceeding to hear and to determine the matter ex-parte, denying the applicant right to be heard, despite Counsel for applicant advancing reasons for his absence/unavailability. Thus the ex-parte award was improperly procured, occasioning injustice.

Counsel for Applicant went on to submit that, the Tribunal proceeded to hear the matter ex-parte, despite Counsel for applicant advancing his reasons for not having witnesses.

That it, it is irregular for arbitrator, to conduct himself for non-attendance of the applicant's witness, that the presence of the advocate, amounts to representation. That conducting hearing ex-parte denied the right to be heard, contrary to Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1977.

Counsel for Applicant went on to submit that, arbitrator erred in determining the complaint ex-parte, awarding Tsh. 184,489,694/= without

taking into account that the employee worked only for three months. That respondent was employed on 16th July, 2012 and terminated on 14th November, 2012. The respondent was terminated on probation, thus he is barred under Section 35 of the Act, to bring an action of this nature. Therefore praying the award to be set aside and the matter be ordered to proceed inter parties, so that applicant can be heard.

In rebuttal, Counsel for respondent submitting in regard to the CMA ex-parte award, arguing that respondent filed breached of contract claim against the applicant, claiming salaries of the remaining period of the contract. That in the course of the matter, applicant was severely absent in defending the matter. That before the ex-parte order was issued, on 21st April, 2015 , applicant's Advocate was absent, and Legal officer, Irene Makundi appeared, and gave excuse, the hearing was re-scheduled to 26th May, 2015, yet applicants Advocate never appeared. That the matter was adjourned to 9th and 10th July, 2015 however could not proceed as presiding arbitrator was absent.

That hearing was scheduled on 25th and 27th August, 2015 Counsel for Applicant did not appear, instead Irene Makundi appeared, giving excuse that Proscovia, Advocate had been bereaved, while the matter was

being handled by Mr. Mafuru. Once again the matter was adjourned for hearing on 29th September, 2015, again applicant defaulted. Again the matter was scheduled to 24th November 2015 and Applicants Advocate was absent and matter was re-scheduled to 20st January, 2016 however could not proceed, hence scheduled for hearing on 21st March 2016.

Counsel for respondent argued further that, the matter was ordered for last adjournment on 1st June, 2016, and on that day Proscovia, Advocate appeared however could not proceed as he had no witness, alleging witness had been bereaved. That CMA had enough of applicant's absence hence proceeded ex-parte.

Counsel for respondent contended that applicants application is meritless, that applicant failed to set aside the ex-parte order as he could not account for the reason for his failure to appear before the commission. Further Counsel for respondent argued applicant has adduced nothing new from what was advanced at the CMA in attempt to set aside the ex-parte order.

That CMA correctly considered Section 87(5) (a) (b) of the Employment and Labour Relations Act, read with Rule 29(1) (a) and 30(1) of GN No. 64/2007 in dismissing the CMA application to set aside ex-parte

order. In that regard respondent prays the court to dismiss this application for want of merit.

The issue for determination is whether there are sufficient reasons to set aside the ex-parte award.

In the first instance this matter was heard by the CMA but CMA denied setting aside the ex-parte Award, as the application was unsuccessful. Further it was conceded by both parties that, the ex-parte order was issued, after the matter could not proceed for hearing at CMA as the prepared witness was bereaved.


Based on above reasoning, I disagree with arbitrators reasoning that, there had not been good reason to set aside ex-parte award, I am of the view the Commission ought to apply itself in deciding whether applicant had sufficient cause for not proceeding with the hearing on that particular day, and exercise its discretion judicially upon consideration of all facts. And not to dwell on the past experience of non attendance of the applicants Counsel in this application.

Further to the above observation, despite applicant's immediately attempt to set aside the ex-parte order at CMA though unsuccessfully. My close examination of the CMA records has revealed that applicant had not

been diligent in defending this matter. However I find the arbitrator erred in exercising jurisdiction so vested in him by law on that particular day when the witness was bereaved and another one was on safari. Prudence demands the arbitrator to consider this as good cause for an adjournment in order to avail the applicant an opportunity to bring his witnesses.

In the circumstances I invoke powers of this court under Section 91 (4) (b) of the Employment and Labour Relation Act, No. 6 of 2004 and set aside the CMA exparte Order, and order the matter to proceed interparties before a different and competent arbitrator.

It is so ordered.


A.C. Nyerere
JUDGE
24/08/2018

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BETWEEN

PUBLIC PROCUREMENT REGULATORY

AUTHORITY,..... APPLICANT

VERSUS

RAMADHANI J. MBISHI..... RESPONDENT

Date: 24/08/2018

Coram: Hon. E.G. Mrangu, DR.

Applicant:

For Applicant: Mr. Stanley Mahenge Advocate holding brief for Advocate
Mafuru Mafuru.

Respondent: }
For Respondent: } Absent

C.C. J. Kalolo

Court: This Judgement delivered in Chamber this 24th day of August, 2018. In presence of Mr. Stanley Mahenge Advocate who hold brief for Advocate Mafuru for Applicant and in absence of Respondent. Court Clerk is Ms. Kalolo.


E.G. Mrangu

DEPUTY REGISTRAR

24/08/2018