

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 793 OF 2018

BETWEEN

JUNIOR ACHIEVEMENT TANZANIA..... APPLICANT

VERSUS

MARIA A. NGOWI. RESPONDENT

JUDGMENT

Date of Last Order: 08/06/2020

Date of Judgment: 15/07/2020

Z.G. MURUKE, J.

Aggrieved by the award of the Commission of Mediation and Arbitration [herein to be referred as CMA] in the Labour Dispute No. CMA/DSM/KIN/99/R.613/16/60 dated 30thDecember, 2016 the applicant **JUNIOR ACHIEVEMENT TANZANIA** has filed this application seeking for revision of the award on the following grounds:

- i. The arbitrator erred in law and fact by contradicting herself in one holding that the respondent was not an employee of the applicant hence had no power to terminate her and on the other hand ordering the applicant to reinstate the respondent.

- ii. The arbitrator erred in law and fact by ordering the respondent to be reinstated while it was not her priority as she never prayed for reinstatement on the CMA F1 or during the hearing of this dispute.
- iii. That arbitrator erred in law and fact in failure to determine all of the framed issues.
- iv. The arbitrator erred in law and fact in one hand disqualifying the evidence of the respondent on the ground that her evidence was not credible and she deceit the CMA and on other hand she considered it in determining the dispute.

The application was supported by the affidavit of Mr. Hamis Francis Kasongo, General Manager. In oposition the respondent filed her sworn counter affidavit.

The brief background of the dispute is that, on 2007 the respondent was employed by a Junior Achievement World Wide (JAWW) and was posted to work as a volunteer to the applicant Juniour Achievement Tanzania (JAT). She worked with the applicant until 2015 when was terminated on several misconducts namely; gross negligence, gross inefficient, gross insubordination and gross dishonest. Being aggrieved with termination, the respondent referred the dispute before CMA where decision was on her favour. The applicant being aggrieved with the CMA award filed the present application.

Hearing was by way of written submission, the applicant enjoyed the service of Advocates from Law front Attorneys, while the respondent was served by Mr. Michael Deogratus Mgombozi - representative from TUPSE Trade Union.

The applicant's counsel submitted on grounds of revision that the arbitrator contradicted herself as she held that the respondent was not the applicant's employee and hence the applicant had no power to terminate her and on the other hand ordered the applicant to reinstate the applicant while the respondent never prayed for reinstatement. That the arbitrator having found that there was no employer –employee relation between the parties as the respondent had no employment contract with the applicant and that she was not depending on the applicant economically, the arbitrator ought to have dismissed the complaint as CMA has no jurisdiction to determine dispute which are not labour matters, citing the case of **Rock City Tours Ltd v Andy Murray** Rev. No. 69/201.

It was further submitted that the arbitrator reinstated the respondent while she did not pray for the same. The arbitrator is not allowed to change the prayers under the CMA F1 suo motto, referring the cases of **Power Roads (T) Ltd v Haji Omary Ngomero**, Rev.No. 36 of 2007 and the case of **International Medical and Technological University v Eliwangu Ngowi**, Rev. No.54 of 2008

It was further submitted that the arbitrator failed to determine all the framed issue, that the parties agreed on three issues namely;

- i. **Endaapo mlalamikaji aiachishwa kazi kihalali**
- ii. **Endapo mlalamikaji anastahili maombi yake**
- iii. **Endapo malalamikaji alikuwa muajiriwa wa mlalamikiwa.**

That the arbitrator in her decision did not determine the first issue without any reason. She ought to have determined all the issues citing Rule 27 (3) of GN 67. He, thus prayed for the award to be revised as it was improperly procured, unlawful, illogical and irrational.

In response to the applicant's averments, the respondent's representative submitted that the arbitrator was right to hold that, the applicant had no jurisdiction to terminate the respondent since she was employed by Junior achievement Worldwide and Junieur Achievement African ROC.

In regard to the procedure for termination, Mr. Mgombozi submitted that the arbitrator correctly interpreted rule 13 of GN 42. The respondent has a right to be heard since it is a fundamental principle of natural justice, citing the case of **Sharifa Ahmed v Tanzania Road Haulage (1980) Ltd**, Rev. No. 299 of 2009 in support of the fact the applicant unfairly terminated the respondent. It was further submitted that since the applicant had no power to terminate the respondent, the arbitrator was right to order reinstatement as per Section 40 of Cap 366 RE 2019. That the award was properly procured hence prayed for dismissal of the application.

Having gone through submissions of both parties, here are the issues to be determined by this court;

- a) Whether the arbitrator adhered to the requirement of the law in procuring her award.
- b) Whether the arbitrator analyzed well the evidence of both parties.
- c) What are the reliefs of the parties

In regard to the 1st issue for determination the arbitrator when determining the labour disputes has a duty to comply with the arbitration stages as provided under the law. Rule 22 (2) of the Labour Institution (Mediation and Arbitration guidelines) Rules, GN. No. 67 of 2007, (GN 67) provides that;

22(2) the arbitration process involves the following five stages-

- a) introduction;
- b) opening statement and narrowing issues;**
- c) evidence
- d) argument; and
- e) Award.

[Emphasis is mine]

Narrowing of issues is a pressing stage which govern the parties to adduce evidence basing on the disputed facts. That is the reason why the arbitrator must explain to the parties as per Rule 24(4) of GN 67.

Applicant complained that the arbitrator failed to determine the issues which were framed during arbitration. According to the records on 5th April, 2017, the following issues were framed and agreed by the parties for determination at CMA:

a) Whether the respondent was unfairly terminated

b) Whether the applicant is entitled to her claims

In determining the dispute, the arbitrator determined only one issue of “whether the respondent was employed by the applicant”, and leaving other remained disputed issues undetermined. It is the requirement of the

law that the award shall contain the issues in dispute as stated under Rule 27(3)

Rule 27(3) (b) of GN 67 provides that;

An award shall contain;

- a) Details of the parties
- b) **Issue or issues in dispute.**
- c) Background information (i.e. information admitted between the parties)
- d) Summary of parties evidence and arguments
- e) Reason for decision, and
- f) The order(the precise outcome of the arbitration)

Failure of the arbitrator to determine the issues in dispute amounts to material irregularity which consequently renders the award fatally defective as decided in the case of **Barclays Bank (T) Ltd Vs. Ayyam Matesa**, Civil Appeal, No.255 of 2017, CAT.

It is my settled view that, the parties were deprived of the right to be heard, since the framed issues which were agreed by the parties were not determined by the arbitrator. The parties argued and evidenced basing on the issues which were framed and were carrying the essence of their dispute, but the same were not decided upon. The arbitrator decided on the issue of employment relationship between the parties, and the same was not properly determined as the arbitrator failed to observe the employer – employee relationship test as stipulated under Section 61 of the Labour Institution Act

In the case of **Bidco Oil Soap v Abdu Said and 3 Others**, Rev.No 11/2008 it was held that;

"The functions of arbitration are quasi-judicial, so arbitrators should insist on basic characteristics **of orderliness and regularity** in execution of their duties. Luckily the Commission has made elaborate rules (published as GN 64/2007 and GN 67/2007). **These rules of procedure are subsidiary legislation and arbitrators are bound to follow rules set therein.**" [Emphasis is mine]

In view of the above finding, I will not labour much on determining the remaining issues since the 1st issue has disposed the matter. I hereby quash the whole proceeding and set aside the CMA award, the records to be remitted to the CMA within 60 days from the date of the decision and matter to be determined by another Arbitrator. It is so ordered.


Z.G. Muruke

JUDGE

15/07/2020

Judgment delivered in the presence of Linda Mafuru for the applicant and Maiko Mgombozi of the respondent.


Z.G. Muruke

JUDGE

15/07/2020