IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO 443 OF 2018

GAIA ECO SOLUTIONS (T) LTD..... .....APPLICANT

VERSUS

FADHILI M. ULAYA ..... RESPONDENT

JUDGMENT

Date of last Order: 05/06/2020
Date of Judgment: 08/06/2020
Z.G.Muruke, J.

This application was filed by the applicant **GAIA ECO SOLUTIONS (T) LTD,** seeking for revision of the proceedings and award issued by Commission for Mediation and Arbitration, (herein to be referred as CMA) on 26th July, 2019, in Labour dispute no. CMA/DSM/ILA/R/.954/17/1072 by Hon.G.W. Massawe- arbitrator decided in favour of the respondent. Application is supported by affidavit of Mayuri Solanki, the applicant's Human Resource and Administrative Manager. Challenging the application the respondent filed his affirmed counter affidavit.

With leave of the court, the case was disposed by way of written submission, I thank both parties for adhering to the schedule hence this

judgment. The applicant was represented by Advocate George Ambrose Shayo, while the respondents was unrepresented. Briefly are the facts of the case. On 1st January, 2017 the respondent was employed by the applicant as a Battery breaker.

He worked with the applicant until 10th August, 2017 where he was terminated on ground of misconduct. Aggrieved with the termination, the respondent knocked the CMA's doors where the award was on his favour. Being resentful with the CMA award, the applicant filed the present application seeking revision on the following grounds;

i. Whether it is correct for the Hon. Arbitrator to reproduce and answer his own issues contrary to the issue framed by the parties and the CMA on 14/12/2017.

ii. Whether it is correct for the Hon. Arbitrator to find that the respondent committed a misconduct of abusing his superior but it was not strong enough to warrant termination.

iii. Whether it is correct for the Hon. Arbitrator to consider evidence of a purported applicant's defense witness (DW-1) who is not known by the applicant and who was not produced to testify by the applicant.

iv. Whether or not it should not be held that the arbitrator vividly expressed biasness in handling the case for holding that:-

   (a) The purported DW-1 testified that he has no evidence of disciplinary hearing as it was informal.

   (b) The Disciplinary hearing procedures were not adhered basing on uncorroborated respondent's evidence that he was denied to cross examine the complainant.

v. Whether it is correct for the Hon. Arbitrator to award the respondent be paid a tune of TZS 1, 393,269/= without basis of calculation.

Submitting on the 1st ground, the applicant's counsel submitted that the arbitrator denied the parties their right to be heard as she decided the issues which were not framed by the parties and the same were not argued by parties. He added that, courts and CMA are required to decide each and every issue that has been framed, failure to do so then the judgment or award is nullity, referring this court the case of **Alnoor Shariff Jamal v Bahadur Ebrahim Shamji,** Civil Appeal No.25 of 2006,CAT (unreported)

On the 2nd ground Mr. Shayo contended that, it was also the arbitrator's finding at page 8 of the award that, the respondent committed the offence by abusing his superior. However she ended up arguing that the offence is not sufficient to warrant the respondent's termination. The reason for that decision was failure of the applicant to tender the rules that have been breached by the respondent. The analysis is weak as the misconduct is provided under the Guidelines for Disciplinary , Incapacity and Incompatibility Policy and Procedures, under guidelines 4(11) a,b,(ii),(iii),v,9(5),(3) and 9(2) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007. If the rules were necessary for her in deciding the matter, then she could have ordered the applicant to produce the same as provided under Rule 5(2) (c) of the Labour Institutions (Mediation and Arbitration Guidelines) GN 67. She failed to exercise the power vested on her as arbitrator.

It was submitted on 3rd ground that the arbitrator considered the evidence of one purported DW1 Mayor Solange who was never brought by the applicants. Dw1's name was Mayuri Solanki as properly wrote in the applicant's final submission. This shows that the applicant's evidence was not properly considered hence the illegality of the award referring the case of **Agakhan Education Foundation v Jacquiline Kavuma**, Rev, No.133 of 2012.

Mr. Shayo submitted on 5th ground that arbitrator awarded the respondent Tshs. 1,393,269/= without any basis of calculation. The arbitrator found the respondent was unfairly terminated and granted the respondent TZS,1,260,00/=. However, on the following paragraph she ordered the applicant to pay the respondent Tshs 1,393,269/= without showing to what benefit the respondent was entitled to, and what salary was used in computation of that same. He prayed for the court to set aside the CMA award for the reasons that the award is full of anomalies which makes the award defective.

In response the respondent prayed to adopt his counter affidavit to form part of his submissions. He contended that his termination was both substantively and procedurally unfair hence CMA relief was ordered accordingly. The award was according to the laws, procedures and rules. He prayed for dismissal of the application.

Having gone through the rival arguments of the parties, this court is called upon to determine the following issues;

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?

Starting with the determination of the first issue, Rule 22 (2) of the Labour Institution (Mediation and Arbitration guidelines) Rules, GN. No. 67 of 2007.(herein to be referred as GN 67). The rule 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.

From the above citation, the arbitrator has a duty to comply with the arbitration stages as stated in that law when determining the labour dispute. Narrowing of issues is the second stage of arbitration. The stage is crucial as 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), I quote;-

"24(4) at the conclusion of the opening statement, the arbitrator shall narrow down the issues in dispute as much as possible and explain to all parties that the purpose of doing so is to eliminate the need of evidence in respect of factual dispute."

From records it is clearly divulged that on 14th December, 2017 before the same arbitrator who determined the matter, the following issues

were framed and agreed by the parties for determination. The framed issues were:

a) **Whether the reasons for termination was a valid one,**

b) **Whether the procedures for termination were valid, and**

c) **Reliefs to both parties**

However, after the testimony from both parties Arbitrator suo motto raised three issues for determination namely;

a) **If there was employer-employee relationship between the parties.**

b) **If there was termination**

c) **Relief of the parties.**

From records, I find that in determination of the dispute, the arbitrator decided the dispute basing on the issues framed on her own whims, and abandoning the issues which were framed and narrated to the parties for court determination. This was contrary to the law as per the above cited rules and it amounts to procedurally irregularity.

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."**

Likely in the case of **Kukal Properties Development Ltd Maloo and others**- 1990-1994 E.A 281, Court Appeal of Kenya; It was held that;

> "A judge is obliged to decide of each and every issue framed. Failure to do so constituted a serious breach of procedure."

This position was emphasized in the case of **People's Bank of Zanzibar vs. Suleiman Haji Suleman** [2000] TLR 347 where the Court stated that:-

> **"It is necessary for a trial court to make a specific finding on each and every issue framed in a case** even where some of the issues cover the same aspect."

Since the issues decided upon by the arbitrator were not among the issues which were argued by the parties, this implies that the parties were not bestowed with a right to be heard. The right to be heard is one of the fundamental principles of natural justice, denial of the same is considered to be violation of natural justice as emphasizes in various Court of Appeal decisions, including **Abbas Sherally & another Vs. Abdul S.H.M. Fazalboy**, Civil Application No.33 of 2002; and **V.I.P Engineering and Marketing Limited and Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006(unreported) where it was stated that;

> "**The right to be heard** before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decision. 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"**

It is my settled view that, the parties were deprived of the right to be heard on the issues 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 issues which were not in dispute as seen on the 1st issue of whether there was employer-employee relationship.

The consequence of that omission is to render that impugned award fatally defective as decided in the case of **Barclays Bank (T) Ltd Vs. Ayyam Matesa**, Civil Appeal, No.255 of 2017, CAT.

Basing on the above finding, I find no need to labour 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 and matter to be determined by another Arbitrator. It is so ordered.

Z.G. Muruke
JUDGE
08/06/2020

Judgment delivered in presence of George Shayo for the applicant and respondent in person.

Z.G.Muruke
JUDGE
08/06/2020