IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAAM

REVISION NO. 712 OF 2019

BETWEEN

NAIUNGISHU SOIKAN MOLLEL............................ APPLICANT

VERSUS

ENERGY & WATER UTILITY REGULATOR AUTHORITY (EWURA)....................................... RESPONDENT

JUDGMENT

Date of Last Order: 18/11/2020

Date of Judgment: 30/11/2020

Z.G. MURUKE, J.

Naiungishu Mollel (applicant) was appointed by the respondent to the post of the Director of corporate affairs effective from 18th November, 2013 by virtue of agreement dated 19th November, 2013. The appointment was for five years, subject to the terms and conditions including confirmation upon successful completion of probation, satisfactory performance and vetting clearance. The respondent being public institution and the position to which the applicant was appointed in terms of public service management circular No. C/AC/45/257/01/TEMP 27 of 10th November 2009, requires successful vetting, prior to confirmation to such position. Respondent had to undergo a vetting process prior to confirmation thus she was to be confirmed once, she was cleared through vetting. The applicant as a public servant was subject to vetting process. Unfortunately, the vetting results did not clear the applicant. The Board of

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Directors of the respondent upon receipt of the vetting, results had no other option than not confirming the applicant in that position. Upon being served with the letter on non-confirmation, on 27th November, 2015, referred her non-confirmation matter to Commission for Mediation and Arbitration, challenging the same and claiming number of reliefs.

At stage of arbitration following issues were raised for consideration

(i) Whether the complaint's termination on the ground of non-confirmation due to failed vetting results was fair.

(ii) Whether the vetting process was followed.

(iii) To what relief are the parties entitled.

Upon hearing both parties, arbitrator decided in favour of the respondent, same dissatisfied applicant, thus filed ten(10) grounds of revision, first one being

(i) Arbitrator erred in law when in the process of writing decision created own issues, answered them and determined the matter on the basis of those issues in respect of which, the parties have not led evidence to prove or disapprove them.

On the hearing date, Thobias Laizer represented applicant while Kessy Mgonela and Kelvin Kidifu represented respondent. By consent hearing was ordered to be by way of written submission. On ground one, applicant counsel submitted that the arbitrator erred in law and in fact in holding that the dispute before the commission was not of termination of employment but was of non-confirmation. At page 15 of the typed award at third paragraph arbitrator wrote as follows:

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"Baada ya tume kusikiliza ushahidi wa pande zote mbili imeng'amua kwamba mgogoro uliopo mbele yake sio mgogoro unaohusu kuachishwa kazi (termination of employment) isipokuwa unahusu kutothibitishwa kwa mlalamikaji katika ajira yake, kwa kuwa mlalamikaji hakuwa mwajiriwa wa mlalamikiwa kwa kipindi hicho. Kwa maana hiyo mlalamiaji hawezi kupata nafauu zozote zilizoanishwa katika sehemu ndogo E ya sheria ya Ajira na mahusiano No. 6/2004 kwa kuwa hakuwa mwajiriwa wa mlalamikiwa isipokuwa alikuwa bado katika kipindi cha uangalizi yaani probation period."

Applicant counsel insisted that the issue as to whether or not the dispute before the arbitrator was of non-confirmation of employment on ground of the applicant, then being not an employee of the respondent, was completely a new issue raised by the arbitrator suo motto in the course of composing the award. This issue was not among the three issues listed above which were raised and recorded by the commission for parties to lead evidence to either prove or disprove them, citing case of Court of Appeal in Civil Appeal number 7 of 2002 **between Juma Jaffer and Manager PB2 Ltd and two others (unreported)** in which appellant had included in his appeal a ground on payments of interest which was not one of the issue framed by the trial court, Court held that;

Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on such issues. This issue was not before the trial court and hence it was not dealt with. The first appellate judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place.

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It was submitted further by applicant counsel that arbitrator decision to raise the issue and decide the dispute on basic of that new issue without hearing the parties by affording them with an opportunity to lead evidence, to either, prove or disprove them, did not only offend the above established precedent of the effects that parties and courts are bound by the pleadings and issues framed, but, it did also deprive the applicant its basic and natural right of being heard, referring this court to the case of **David Nzaligo Vs. National Microfinance Bank PLC** (unreported) where it was held that;

> "The right to be heard in any proceedings is para mount and this cannot be overstated enough. The right of the party to be heard before adverse action or decision is taken against him/her has been stated and emphasized by the court in numerous decision"

In totality applicant counsel prayed to quash and set aside the award, and remit the record, back to CMA, to hear the parties on the issue whether the dispute was non-confirmation of employment on ground of the applicant not being an employee of the respondent and then arbitrator compose a fresh award based on the new issue along with other three issue previously framed.

Respondent on the other hand on the first two ground submitted that, no substance in the applicants allegations that the arbitrator erred in law while preparing the decision by framing a new issue and determine it, ie the dispute before the commission was not of termination of employment but was of non-confirmation, by making reference to page 15 of the Award, the applicant's counsel did misconceive/misinterpret the

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arbitrator's statement when she concluded her findings after analysis of the parties' evidence her conclusion was very clear as shown below;

> .... Baada ya Tume kusikiliza ushahidi wa pande zote mbili umeng'amua kwamba mgogoro uliopo mbele yake sio mgogoro unaohusu kuachishwa kazi (termination of employment) isipokuwa unahusu kutothibitishwa kazini kwa mlalamikaji katika ajira yake.

The wording quoted above which were also quoted by the applicant counsel are very straight forward and do not create the situation whereby the arbitrator is seen to have created a new issue and decided on it. The wording indicates clearly that the arbitrator after hearing the parties, and analyzing evidence submitted by them, the commission was certain that the dispute before it, was not one of termination but non-confirmation of employment of the applicant. It is respondent submission that this is not new issue that was framed and determined by the arbitrator but rather it was finding by arbitrator.

Having heard both counsels submission on two first grounds, the issue before me is whether.

> "Whether it was proper for the arbitrator, in the process of writing her decision to create her own issues suo motto, answer them and decide the matter based on those issues in respect of which no evidence was led by the parties to either or disprove them."

From the records and submission of both counsels that issue raised at CMA for consideration were.

(i) Whether the complainant's termination on the ground of non-confirmation due to failed vetting results was fair.

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(ii) Whether the vetting process was followed, and

(iii) What reliefs are parties entitled.

The issue subject of dispute is as reflected at page 15 of the Award paragraph 3 when arbitrator said.

> ... after hearing evidence from both sides on termination of employment did realize (umeng'amua) that the dispute before her was not about termination of employment, instead it was about non-confirmation of the employment in respect of which no evidence was led to prove or disapprove.

From the holding of the arbitrator as quoted above, is not one of the issue raised for determination at CMA as reproduced earlier. In cause of composing Judgment, arbitration sees need of raising issue and resolving the same, ought to call parties and require them to address on the issue. That was not done by Arbitrator. Having ruled that the dispute before her was not that of termination of employment as was presented and argued, but it was non-confirmation of employment, the arbitrator should have required the parties to lead evidence on that new issue of non-confirmation raised suo motto by the arbitrator which issue was the basis of her award.

Failure to hear part of the dispute, is a serious breach of principle of nature justice. Right to be heard was insisted in the case of Court of Appeal of **Abbas Sherally Vs. Abdul Sultan Haji Mohamed Fazalboy** Civil application No. 133 of 2002 (unreported).

> 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 the principles of natural justice.

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Right to be heard is one of fundamental principals of natural justice, failure of which vitiate proceedings. Rule of natural justice states that no man should be condemned unheard and, indeed both sides should be heard unless one side chooses not to. **It is a basic law that, no one should be condemned to a judgment passed against him without** being afforded a chance of being heard. The right to be heard is a value right and it would offend all notions of justice if the rights of a part were to be prejudiced or affected without the party being afforded an opportunity to be heard.

To the best of my understanding, **the Principles** of natural justice should always be dispensed by the court, that is both parties must be heard on the application before a final decision. Failing which there is miscarriage of justice as it is wrong for the judge to impose an order on the parties and such order cannot be allowed to stand. **Implicit** in the concept of fair adjudication lie cardinal principles namely that no man shall be condemned unheard. Principles of natural justice must be observed by the court save where their application is excluded expressly or by necessary implication. It is un-procedural for a court to give judgment against the defendant without giving him an opportunity of being heard. **Every judicial or quasi-judicial tribunal must apply the fundamental principles of natural justice and natural justice will not allow a person to be jeopardized in his person or pocket without giving him an opportunity of appearing and putting forward his case.** The issue of denial of the right to a hearing is a point

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of law which underline the proceedings the effect of which is to render a proceeding a nullity.

In the case of Ridge Vs. Baldwin [1963] 2 All ER 66, it was insisted that the consequence of the failure to observe the rules of natural justice is to render the decision void and not voidable. Official of the court must comply with the rules of natural justice when exercising judicial functions. Right to be heard was insisted in the case of **Kijakazi Mbegu and five others Vs. Ramadhani Mbegu** [1999] TLR 174.

The above position was discussed in the case of Court of Appeal Civil Appeal number 300 of 2017 between **registered Trustee of Arusha Muslim Union Versus the Registered Trustees of the National Muslim Council of Tanzania** (Bakwata) where it was held that:

> It is evident in the present case that the parties were not heard on the issue whether the appellant is an unlawful society with no capacity to own land which was raised and determined by the High Court when composing the judgment. In fine, both the High Court Judgment and the decree thereof are hereby quashed and set aside. The record is hereby remitted to the High Court for it to hear the parties on the issue whether the appellant is an unlawful society with no capacity to own land then compose a fresh judgment in which all the issues that were framed as well as the above one shall be considered in accordance with the evidence and law.

From the records as found at page 15 arbitrator award raised new issue, and decided without giving parties to lead evidence to that effect.

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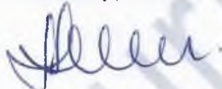
Thus, I quash and set aside the award and remit the record back to CMA to hear the parties on the issue considered suo moto, whether the dispute was not on termination of employment but rather of non confirmation of employment, then compose a fresh award based on the new issue along with other three issues previously framed. CMA file to be remitted back within 30 day from today. Dispute hearing started in 2015, at CMA, it is 5 years old dispute thus need to be expediated. For interest of justice, order of this court to determine issue raised suo motto be adhered to within 6 months from 4th January, 2021.



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VERSUS

ENERGY & WATER UTILITY REGULATOR

AUTHORITY (EWURA) .... RESPONDENT

Date: 30/11/2020

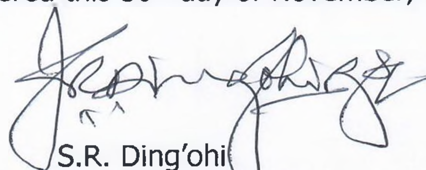
Coram: Hon. S.R. Ding'ohi, DR.

Applicant: }
For Applicant: } Mr. Evans Laswai, Advocate

Respondent: }
For Respondent: } Mr. Edwin Kidifu, Advocate

CC: Halima

Court: Judgment delivered this 30th day of November, 2020.



S.R. Ding'ohi

DEPUTY REGISTRAR

30/11/2020

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