IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 684 AND 753 OF 2018

BETWEEN

DANIEL MUGITTU.....1ST APPLICANT

HASHIMU MILANZI.....2ND APPLICANT

AND

LONAGRO TANZANIA LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 27/03/2020 & 21/07/2020

Date of Judgment: 02/10/2020

A. E. MWIPOPO, J

This consolidated Revision application arise from the decision of Hon. A. Kazimoto, Arbitrator dated 21st day of September, 2018 in Consolidated Dispute No. CMA/DSM/KIN/R.1260/16/209 instituted by Employees namely Daniel Mugittu and Hashimu Milanzi (Applicants herein) against their employer LONAGRO TANZANIA LIMITED (Respondent). The applicants were employed by the respondent on 2015 as Branch Managers. The first

applicant Daniel Mugitu was employed in 13th May, 2015 as Sumbawanga Branch Manager whereas the second Applicant Hashimu Milanzi was employed on 1st June, 2015, as Iringa Branch Manager. The applicants were terminated on 30th November, 2016, following retrenchment exercise conducted by the employer. Aggrieved by the termination the applicants referred the dispute to the Commission for Mediation and Arbitration which delivered the award in applicants favour and order the employer to pay shillings 58,891,284 to the 1st Applicant and shillings 57,545,784 to the 2nd Applicant being 12 months' salary compensation for unfair termination, repatriation cost and repatriation allowances. Both parties were not satisfied with the Commission Award they filed revision applications in this Court. The Applicants filed Revision No. 684 of 2018 while the Respondent filed Revision No. 753 of 2018. The two Revision Applications were consolidated by this court on 1st March, 2019 following parties' prayer that the two Revisions to be consolidated and heard by the same Judge.

The grounds for revision in Revision No. 684 of 2018 are as follows:

1. That the Arbitrator erred in law and facts when she ordered that the employees were not expected to sit down and counting days accumulated in proportional with the subsistence allowance, forgetting

that they were in foreign land where it was difficult to have alternative employment after termination.

2. That the Arbitrator erred in law and facts by suggesting that employees should have used the NSSF contributions during the period when they were waiting for their benefits.
3. That the Arbitrator erred in law and facts by denying the employees payment of bus fare for the employees and their families. The Arbitrator only ordered payment for transportation of employee's transportation of personal effects only.
4. That the Arbitrator did not indicate any legal reasons for diverting from the law of the land by granting 6 months subsistence expenses instead of the exact period of 21 months the employer delayed to settle employees' bills.

The Revision No. 753 of 2018 contains seven grounds for revision. The grounds are as follows hereunder:

1. Whether the CMA has jurisdiction to entertain a dispute on allegations of unfair while the same was termination by retrenchment which resulted to an agreement.

2. Whether the employer cannot proceed with the retrenchment process when some of the employee refuses to cooperate by executing the agreed terms and conditions of the retrenchment agreement.
3. Whether the procedures laid down under section 38 of the Employment and Labour Relations Act, 2007, should be followed as checklist.
4. Whether it was correct for the Arbitrator in holding that the terminations for both employees were substantively fair.
5. Whether it is correct for the CMA to issue an award after expiration of 30 days without adducing the reason for the delay.
6. Whether it is correct for the Award to be written in English while the proceedings were conducted in Swahili.
7. Whether it was right for the Arbitrator to award the remedies without the presence of collaborating evidence.
8. Whether it was right for the dispute to be heard and entertained by the Arbitrator who was neither appointed by the Commissioner nor consented in writings by the parties.

Both parties to this application were represented, Mr. Sammy Kateregga, Personal Representative appeared for the applicants, whereas the respondent was represented by Mr. Gilbert N. Mushi, Advocate. The

hearing of the application proceeded by way of written submission following the Court order.

Mr. Sammy Kateregga, Personal Representative for the employees submitted that the trial Arbitrator ignored to award the applicants with subsistence allowances while they were waiting to be paid repatriation cost for the period after 24th November, 2016 when the applicants were retrenched. The Arbitrator despite of being aware of section 43 (1) (c) of the Employment and Labour Relations Act, 2004, she decided not to pay the applicants 21 months subsistence allowances from the date of retrenchment to the date of the of the delivering the award on 21st September, 2018, for the reason that the applicants were supposed to find any means to relocate from their duty station to their place of domicile immediately after they were terminated. The arbitrator reasoned that the applicants were supposed to use other money sources from social security schemes or terminal benefits to transport themselves. The applicants submitted further that the Arbitrator denied the applicants repatriation allowance for themselves and their family. It is mandatory for the employer to pay repatriation cost together with subsistence allowance for the period the employees were waiting to be transported to their place of domicile which in the present case is 21 months. To support this position the applicants cited the case of **Zita Agphapity vs.**

Kiliflora, Revision No. 83 of 2010, LCCD, 2015, part II at page 23; and the case of **World Vision Tanzania vs. Zahara Rashid**, Revision No. 17 of 2015, LCCD, 2015 part 1 at page 21.

The applicant prayed for the Court to set aside part of the Commission Award and order the applicants to be paid 21 months subsistence allowance and repatriation allowance for the applicants and their families.

In reply, the respondent submitted that the Applicant has mentioned in several times that the Applicants were denied their substance allowance. The respondent admitted that Section 43(1) (c) of ELRA, Act No. 6 of 2004 requires that the respondent should pay subsistence allowance to employees terminated outside place of recruitment. The 2nd applicant (Hashimu Milanzi) was at the place of recruitment when the retrenchment process was conducted, according to the evidence in record, in fact he was the chairman of the consultation meeting which was held at Dar Es Salaam. Also, both applicants filed the dispute in Dar Es Salaam. Section 43(1) of Employment and Labour Relations Act, 2004, is subject to exception where an employee's contract of employment is terminated at a place where the employee was recruited as it was in the present case. The 2nd applicant was at the place of recruitment when retrenchment process took place as result the entire

provisions of Section 43(1) (c) (Supra) on payment of the subsistence allowance is inapplicable.

The Respondent is of the view that the Applicant failed to justify why he should be awarded such amount prayed and as the reasonable man what measures did applicants employ to do with the situation. Thus, the applicant's allegation is unfounded and lack merit. The case of **Word Vision Tanzania vs. Zahara Rashid** cited by the applicant is distinguishable to the case at hand as circumstances are different.

The respondent prayed for the Court to find that the allegations advanced by the applicants are unfounded and lack merits and that the Applicants did not deserve even the 6 months subsistence allowances awarded by the Commission.

In rejoinder, the Applicants retaliated his submission in chief.

Then, the Counsel for the respondent proceeded to submit on the respondent's grounds for revision in respect of Revision no. 753 of 2018. He started his submission by addressing the legal issue on whether it was correct for the Arbitrator in holding that the terminations of both respondents were substantively unfair. Section 39 of the Employment and Labour Relations Act, Act No. 6 of 2004 provides that in any proceedings concerning

unfair termination of an employee by an employer, the employer shall prove that the termination is fair'. However, to substantiate the fairness of termination the issues are deliberated as follows, firstly as to whether there was valid reason (s) for retrenching the complainants. This was made eloquently clear from the testimonies of both parties to the dispute, as it has been established by DW1 and DW2 that the complainants' retrenchment was fair and valid as the reason was justified. The testimony of witnesses is supported by Exhibits D2 and D3 which is the email that notified all respondent's employees including the complainants about the retrenchment attaching therein the notice for the said retrenchment providing the agenda, date and palace of consultation meeting.

The evidence from exhibit D2 briefed what was agreed on the first retrenchment exercise, notice dated 19th July, 2016 and agreement reached thereafter on 26th July, 2016, on the number of employees to be retrenched and the number of the employees already retrenched as per the date of notice. The notice provided clearly that it was for the second phase of the retrenchment exercise and the e-mail went further to notify that the employees at the respondent branches (up countries) will be given Skype link for that purpose. Retrenchment exercise first was on progress and second will be conducted on the date specified on the notice. This means

that, they knew clearly without doubts that there was previous retrenchment conducted and some of fellow employees were affected by it. The claim that the complainants were not aware of the exercise is an afterthought and they were intended to deceive the CMA as they were both engaged in the whole retrenchment process. If at all the complainants had objection on how the previous and current retrenchment were conducted they would have challenged the same before continuing with the meeting as the avenue was given to every person present to ask whatever thought to be reasonable and relevant with the meeting as Exhibit D6 shows.

In the case of **Tanzania Building works Ltd. vs. Ally Mgomba & 4 others**, [2011-2012] LCCD 103, the Court had this to say with regards to consultation;

> *"as regards consultation, the law puts the duty to engage in a consultation in good faith is put on both the* ***employer and the employee. Once the employer gives notice to the employee, the duty moves to the employee to respond****. If the time of notice is too short, the response could merely state so, and seek more time. The respondents in this case did neither made response nor sought for more time" (emphasis is ours).*

The respondent was of the view that it is established that the reason for retrenchment was understood and agreed as well by the parties to the retrenchments exercise since there no one who challenged the same and no one also requested for any document or evidence to establish that the respondent was under financial constraints. At this juncture, it is late for the complainants to challenge the fairness of the reason while in their first and second consultation meetings they didn't ask anything about it. Thus, the reason for retrenchment and that exercise was not just a mere sham. The Hon. Arbitrator erred in law and fact by holding that there were no proof of respondent financial constraints because it was never an issue before the parties. It is the applicants' beliefs that the reason for retrenchment was valid and fair as per section 39 of the employment and Labour Relations (code of Good practice) G.N No.42 OF 2007.

In the case of **Moshi University College of Cooperative & Business Studies (MUCCOBS) v. Joseph Reuben Sizya, [2013] LCCD, at page 44,** it was held that Retrenchments or termination for operational grounds are defined under section 4 of the Employment and Labour Relations Acts, 2004, to includes requirements based on the economics, technological, structural or similar needs of the employer. In balance of probability the respondent has established the reason apparently

as per rule 9(3) of the Employment and Labour Relations (Code of Good Practice) G.N NO.42 of 2007.

As to whether the procedure for retrenching the complainants adhered to, the respondent submitted that it is through section 38 (1) (a) (b) (c) and (d) of the Employment and Labour Relations Act, Act No.6 of 2004, and rule 23 (4) (5) and (6) the Employments and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, of which provides for procedures to be complied with in effecting the whole process of retrenching the complainants were adhered with accordingly.

To establish that all procedures where adhered to, the notice (Exhibit D2 and D3) to the intended retrenchment was given on 10th November, 2016 and the meeting fixed on 16th November, 2016 which is almost 6 days given for preparation of the said meeting. The meeting was convened in the head office of the respondent at Dar Es Salaam on the 16th November 2016 and attended by all employees in Dar Es Salaam and on branches (Sumbawanga) through Skype of the administrator (Elisia David). This is proved by words written at the back of the attendance of the meeting - Exhibit D4. What was discussed and agreed on the consultation meeting was written on the minutes tendered as Exhibit D6 signed by Hashimu Milanzi as a chairperson representing other employees. Thereafter the management selected the

employees according to what was agreed in the meeting, where Hashimu Milanzi was selected, since the Iringa branch was not doing well and the company was going through financial challenges. It was reasonable for a manager who is paid handsomely to be retrenched and remain with other officers whose payments are very low without allowances.

On the part of the 1st Applicant Daniel Mugittu, he was retrenched as the company needed to close the Sumbawanga branch, and started by reducing his duties and salary but that didn't work as the branch was still going down, all these were done to rescues the situation of the respondent from collapsing taking into account the number of employees it had and government revenue it is generating.

In the case of **Bernad Gindo & 27 others** vs. **Tol Gases Ltd, [2013] LCCD 20,** this Court held that;

"section 38 of the Act read together with rule 23-24 of the Employment Labour Relations (Code of Good Practice) Rules, GN 42/2007 (the code), provide various stages which are not meant to be applied in a check list fashion, rather are meant to provide guidelines to ensure That consultation is fair and adequate. The law that is section 38(1) of the act provides for vital information to be exchanged; procedures for Consultation but in law,

such consultation does not have to result in a Signed agreement. The employer complied with substantive aspect of the law which is to ensure consultation".

The respondent was of the view that the termination of the applicants' employment contracts was both substantively and procedurally fair on balance of probabilities as per rule 9(3) of the Employment and Labour Relations (code of Good practice) Rules, G.N. No. 42 of 2007, which provides that;

> *"The burden of proof lies with the employer but it is sufficient for the employer to prove the reason on a balance of probabilities"*

Further, the respondent submitted that the CMA erred in law by awarding the complainant a total of 116,437,068/= being 12 months compensation for unfair termination, repatriation cost and subsistence allowance. On 30th November, 2016 both complainants had their retrenchments letters and terminal benefits as well as repatriation arrangements to Dar Es salaam the place of recruitments was made. The PW1 was given his fare through tigopesa account, as all properties he was using in Sumbawanga was the respondents' and the PW2 was transported back with his family also, that's why the case was lodged at Dar Es salaam and hand over was done to all properties including the house they were

residing. This justified that the procedures were complied with accordingly as per the Exhibits D2, D3, D6, D7A, D7B, and D7C & D7D. The respondents were both repatriated to the place of recruitment and this can easily be seen, by the dispute was initiated in Dar es Salaam and not Iringa or Sumbawanga, the consultation was done in Dar Es Salaam and chaired by the Respondent and lastly the respondents were and still in Dar Es Salaam from the date of retrenchment to date. For this reason, the complainants are not entitled for any relief from the respondent; the only remedy available is for this Honourable to quash and set aside CMA award dated 21st September 2018 by Honourable Anita Kazimoto (Arbitrator) in consolidated dispute no. CMA/DSM/KIN/R.1260/16/209.

The Respondent submitted on the ground of illegality that the CMA had no jurisdiction to hear and entertain this dispute and the Award was not delivered according to the law. Under section 38 (2) of the Employment and Labour Relations Act, 2004, any party to the consultation meeting is required by the law to refer to CMA if he/she is not agreeing on how retrenchment consultation has been conducted. The applicants never referred this matter or even attempted to refer this matter to CMA for mediation as provided for under section 38 (2) of the Act, in that view the Applicants (employees) and the Respondent reached an agreement on the reason of retrenchment,

formula to be used, measures to avoid retrenchment, number of people to be affected and benefits. As the parties agreed on retrenchment, then the employees had no locus to refer the dispute of unfair termination but rather they were supposed to sue for specific performance on what was agreed. The CMA had no jurisdiction to hear and entertain unfair termination dispute since the respondents were estopped by agreement they reached in consultations meeting.

The respondent is of the opinion that the Court have to revise CMA award is it contains material irregularities. The Commission Award does not reflect the language of the proceedings. The language of proceedings is Swahili while the Award is written in English. It is trite law that during proceedings at CMA parties may choose either Swahili or English to be used as language in the proceedings, however the language of the award must be the same as language of the proceedings. This irregularity renders the whole proceedings a nullity and should be quashed out.

Another irregularity is that the proceedings do not identify who ask or responds to questions. Pages 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 26, 27, 28, 29, 30, 31, 33 and 34 of the typed proceedings does not indicate or identify who asks or responds to questions. Thus, the whole proceedings and CMA award should be quashed and set aside.

The last irregularity is that the Award was delivered by Arbitrator who was appointed by the commissioner and the parties did not consent in writing for her to proceed with the dispute. It is trite law than when mediation failed the commissioner will appoint the Arbitrator to arbitrate the dispute, in house arrangements are not allowed, and arbitrator need to be appointed by a qualified authority to do so. In the case of **NIC Bank Tanzania Limited** vs. **Princess Shabaha Company Limited and 2 Others,** Court Of Appeal Of Tanzania, Civil Appeal No 248 of 2017, (Unreported), it was held among other things that when there is no proper appointment of the Arbitrator it renders the proceedings and decision a nullity. Also, in this dispute, the arbitrator proceeded with the case while parties had started giving evidence before Honourable Belinda. It is not in record how Hon. Anita Kazimoto was appointed to handle this dispute at CMA or whether parties consented to proceed where was left by Honourable Belinda.

In **Mariam Sambura vs. Masoud Joshi and Others,** Civil No. 109 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), it was held that;

> *"a successor Judge or Magistrate has an obligation to put on record why he has to take up a case that is partly heard by another. Recording of reasons for taking over the trial of the suit by a judge is a mandatory requirement, this means failure*

to do so amount to procedure irregularity which cannot be cured by the overriding principle."

From the above authorities, it is the respondent submission that CMA award and proceedings are bound to collapse.

The Respondent's last ground of Revision is that the Commission decision was improperly procured. Section 88 (9) of Employment and Labour Relation Act, 2004, provides that the arbitrator shall issue an award with reasons signed by the arbitrator within thirty (30) days of the conclusion of the arbitration proceedings. This means that if an award is issued after the expiration of 30 days will be improperly procured and shall be revised and set aside. In the present award the Arbitrator delivered the Award out of 30 days without indicating any reason for the delay. To support the position the respondent cited the case of **Serengeti Breweries Limited** vs. **Joseph Boniphace,** Civil Appeal No. 150 of 2016, Court of Appeal of Tanzania, at Mbeya, (Unreported).

The respondent prayed for the Court to revise the CMA decision and set aside the Award.

The Applicants responded to the submission of the respondent in respect of the respondent's grounds of revision contained in Revision No.

753 of 2018. The Applicants first did put the records correct that both Daniel Mugittu and Hashim Millanzi were Branch Managers at Sumbawanga and Iringa Branches of the Respondent Company. Mr. Daniel Mugittu was not a Sales Representative as it was alleged by the respondent. There was an attempt to re-designate Mr. Mugittu in August 2016 which aimed at reducing his salary from Tshs 3.15m/- to 0.725m/- per month, an attempt that aborted due to the fact that it was done without consultation to the employee and the intended letter that was addressed to Daniel was never served upon him.

The applicants proceeded to submit that the exercise of retrenchment that was done by the Applicant – Lonagro was not proper as respondent is trying to state it in his submission. The evidence and exhibits presented before the CMA during the hearing indicates that there was no proper consultation done. During the process Mr. Hashim Millanzi was on two week's leave in November 2016 with the knowledge of the Employer, so it was a coincident that he happened to be in Dar Es Salaam. He knew of the alleged meeting when he reported to Headquarters of Lonagro in Dar es Salaam to collect his official vehicle after availing his 2 week's leave as he was preparing to go back to his working station. That is when the Applicant break the news to Mr. Hashim Millanzi that he should over stay his leave until 30/11/2016

when he is required to report to the office to take his retrenchment letter. Mr. Millanzi was not transported back to Dar Es Salaam to date since he was retrenched. He used his own transport and some of his belongings are still at Iringa to date. The Employer had promised sometime to transport Mr. Millanzi's personal belongings but to date this has not been done.

On part of Daniel Mugittu, he was retrenched while on medical treatment at Dar Es Salaam. When he reported back to Sumbawanga after treatment, he met all his belongings thrown out of the house and were under unsecured shade. He made arrangements with MUZIA - Sumbawanga Saccos to accommodate him and his belongings.

The Respondent tried to narrate the theoretical retrenchment procedure but this is NOT what was implemented by the Employer in this case. The evidence and exhibits presented at CMA enabled the Arbitrator to decide the dispute in the employee's favour. What was referred to as a meeting through Skype (video Call) was just done to deliver the information to the complainants and not as a consultation meeting as the employer tries to put it. The employer failed to produce any evidence to the effect during the Arbitration hearing. The Applicant claims that applicants were repatriated back to the place of engagement which is Dar Es Salaam due to the fact that the action of terminating the employees was conducted by the Lonagro Head

Office in Dar Es Salaam and also coincidentally the employees during the exercise were in Dar Es Salaam.

In regard to the point of establishing the reason for retrenchment, the Applicants submitted that there was no agreement at all as the respondent tries to put it forward. The complainants were just informed of the decision not consulted and that is why the Applicant had no details of the financial constraints for reference. If there was a consultation meeting as claimed by the Applicant, then the Applicant was bound, in good faith, to provide all the evidences he had to support his act of retrenching. The main reason according to the employer to back up the retrenchment process was financial constraints. Therefore, the main evidence that the employer was expected to produce in the consultation meeting and indeed before the Commission for Mediation and Arbitration (CMA) was the annual financial report that included the Management proposals that would have meant to minimized or divert the intended retrenchment of employees. What the employer did was a "smokescreen to mask unfair termination". There is no proof that the consultation prior to retrenchment was conducted adequately.

The applicant ended his reply submission with observations to challenge that it is trite law that during proceedings at CMA parties may choose either Swahili or English language to express themselves but the law

does not coerce/ limit the Arbitrator to such a decision of the parties because both languages are admissible. It would have been an issue if there was a written statement that was mistranslated, and misled the Arbitrator arriving at a wrong decision, and then the point of nullity would have been considered. There is no doubt that this Dispute was assigned to Hon Belinda during the normal process, but it was re-assigned to Hon Anita Kazimoto during that specific period program. Hon. Anita Kazimoto commenced the hearing and gave the CMA's decision. The whole process of arbitration was done by Hon. Anita Kazimoto. The case of **Mariam Samburo vs. Masoud Mohamed Joshi and others** presented by the Applicant is distinguished as its scenario was that the some of the witnesses had already testified before the first Judge and then later on the case was re-assigned to another Judge before the completion of hearing. But, this is not the case with the present dispute. In this dispute there is a reason for the change under a specified period crash program to clear the aged disputes but the Arbitrator Hon. Anita Kazimoto who took over the dispute started the whole arbitration process herself. She did not take over any unfinished work for the Arbitration proceedings from Hon. Belinda but the whole file of the dispute to commence the arbitration sessions.

The Applicants prayed for the Court to disregard the Respondent submissions.

In rejoinder submission in respect of Revision No. 753 of 2018 the respondent retaliated his submission in chief. He emphasized that employee is entitled to repatriation cost and subsistence allowances only if he was terminated on the place other than the place of domicile, and the employee remained on the place of recruitment, entitled with the subsistence allowance for the period of remain. To support the position the Respondent cited case of **Paul Yustus Nchia vs. National Executive Secretary CCM and Another**, Civil Appeal No. 85 of 2005, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported); and the case **of Ibrahimu Kamundi Shayo vs. Tanzania Fertlizer Company (TFC)**, Labour Dispute No. 1 of 2014, High Court, Labour Division at Moshi, (Unreported).

The respondent also submitted that according to rule 35 (2) of the Labour Institution (Mediation and Arbitration) Rules, 2007, the award shall be delivered in the language of the proceedings. The Commission proceedings in the present application was recorded in Swahili but the award was written in English.

From the lengthy submissions from both parties there are five issues to be determined. The issues are as following;

i. Whether the Commission have jurisdiction to entertain the matter.

ii. Whether the Commission followed the proper procedures in determination of the dispute before it.

iii. Whether reason for termination of employer's employment by the applicant was valid and fair.

iv. Whether the procedure for retrenchment was fair.

v. What remedies are entitled to the parties?

The respondent submitted in regards to the first issue that the CMA had no jurisdiction to hear and entertain this dispute and the Award was not delivered according to the law. The CMA had no jurisdiction to hear and entertain unfair termination dispute since the respondents were estopped by agreement they reached in consultations meeting. The employees were supposed to sue for specific performance on what was agreed. On the other hand the applicants (employees) were of the view that the Commission have jurisdiction to entertain the matter as there was no agreement on their retrenchment.

I've different opinion from respondent submission that the Commission had no jurisdiction to entertain the matter after the agreement was reached between the parties to the retrenchment process. The Employment and Labour Relations Act, 2004, provides in section 88 (4) that the Arbitrator duly appointed by the Commission may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly. The same section in subsection (1) defines a dispute to means a dispute of interest if the parties to the dispute are engaged in an essential the fairness or lawfulness of an employee's termination of employment or any other contravention of the Act or any other labour law or breach of contract in which the amount claimed is below the pecuniary jurisdiction of the High Court or any dispute referred to arbitration by the Labour Court. From the provision, the Commission have jurisdiction to entertain any labour dispute on termination of the employment contract or breach of employment contract. Therefore, I find this issue answer is negative and the Commission have jurisdiction to entertain any labour dispute concerning termination of the employment Contract.

The second issue is Whether the Commission followed the proper procedures in determination of the dispute before it. The respondent was of the view that there was procedural irregularities in determination of the

dispute before the Commission. The irregularities include that the Commission Award does not reflect the language of the proceedings; the proceedings do not identify who ask or responds to questions; the Award was delivered by Arbitrator who was appointed by the commissioner and the parties did not consent in writing for her to proceed with the dispute; the arbitrator proceeded with the case while parties had started giving evidence before Another Arbitrator; and the Commission decision was improperly procured as the Arbitrator delivered the Award out of 30 days without indicating any reason for the delay.

In response, the applicants submitted that there was no irregularity in the Commission Award. The proceedings was recorded in Swahili and the Award was written in English and this is lawful as the Arbitrator have discretion to choose the language of the proceedings and the Award. The proceedings were properly recorded according to the guidelines. The reason for the change of Arbitrator was provided in the proceedings and that Hon. Anita Kazimoto started a fresh the arbitration process. And that the reason for the delay to deliver the Award was provided by the Arbitrator.

The Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, provides in rule 35 that the proceedings before the Commission may be conducted in either Swahili or English languages. The rule provides

further that the award shall be delivered in the language of the proceedings. The respondent is interpreting that language of the proceedings means the language used in recording the proceedings. This is not a proper interpretation of Rule 35 (2) of the G.N. No. 64 of 2007. From the rule, it is the discretion of the Commission to conduct the proceedings in either language between Swahili or English languages. The language of the proceedings as provided by rule 35 (2) of the Rules is either Swahili or English languages. Therefore, there was nothing wrong for the Arbitrator to record and conduct the proceedings in Swahili and deliver the award in English language.

On the respondent allegation that the proceedings does not indicate who was asking the question and who was answering, the evidence available in record shows that the Commission recorded in question and answer testimony of Thomas Baraka – DW1, but latter on after the change of trial arbitrator, the recording of witnesses testimony was in question and answers in cross examination and re- examination only. Reading the proceedings it is clear as to who was asking question and who was answering. Thus, on this allegation I do not see any contradiction arising from the Arbitrators style of recording the testimony of witnesses.

The respondent submitted that there was irregularity in the proceedings where the reason of the change of arbitrator was not recorded and the parties did not consent in writing for her to proceed with the dispute. The arbitrator proceeded with the case while parties had started giving evidence before Another Arbitrator. It is true that the record of proceedings before the Commission shows that the arbitration was assigned to Hon. Belinda, Arbitrator who drafted issues for determination and recorded in full the testimony of the Thomas Baraka John – DW1 on 8th March, 2018. However, on 2nd August, 2018, the matter was presided by Hon. Anita Kazimoto, Arbitrator, who proceeded to take witnesses testimony without giving the reason for the change of the Arbitrator and also there is no order whatsoever which shows that the dispute was assigned to Hon. Anita Kazimoto from Hon. Belinda. Hon. Anita Kazimoto did not ask the parties if they want to recall the witness namely Thomas Baraka John – DW1 who have already testified. She proceeded to record testimony of Erestia David – DW2, Daniel Mugittu – PW1 and Hashimu Milanzi – DW2. Therefore, it is clear that the procedure was not regular. The Commission being quasi-Judicial body it is supposed to act judiciously in order not to cause any injustice in procedure of handling the matter.

It is trite law that where a case has commenced before one judicial officer and the witness have testified, it can be transferred to another judicial officer after providing the reason for the transfer. The reason for the transfer will help in not compromising the transparency of judicial proceedings.

The Court of Appeal in the case of **M/S Georges vs. Hon. AG and Another**, Civil Appeal No. 29 of 2016, was of the same position where it held that:-

> *".....once a trial of case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that."*

Also the Court of Appeal was of the same position in the case of **Mariam Sambura vs. Masoud Joshi and Others,** (Supra), where it held that:

> *"a successor Judge or Magistrate has an obligation to put on record why he has to take up a case that is partly heard by another. Recording of reasons for taking over the trial of the suit by a judge is a mandatory requirement, this means failure to do so amount to procedure irregularity which cannot be cured by the overriding principle."*

In the present application, the record of proceedings is silent on the assignment of the matter to Hon. Anita Kazimoto. I'm of the opinion that the Commission being quasi-judicial body had duty to perform its adjudication functions judiciously which in this matter includes to provide for the reason

for transfer of the respective Arbitrator by putting in record the reason of taking up the matter that is partly heard. The Arbitrator also was supposed to give parties right to recall or to cross examine witness who have testified. This was not done in the dispute before the Commission. Therefore, it is my finding that there was procedural irregularity in the transfer of the file from one Arbitrator to another. As the result the whole proceedings before the Commission was a nullity.

Consequently, I hereby quash the proceedings before the Commission and set aside Commission award. The CMA file is reverted back to the Commission and I order that the Arbitration to start afresh before another Arbitrator within 60 days from the date of service of this award if the respondents are still interested with the dispute.

Since the second issue have disposed of the matter, I'm not going to determine the remaining issues. No order as to cost.

A. E. MWIPOPO
JUDGE
02/10/2020