IN THE HIGH COUR OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 626 OF 2018

BETWEEN

ROVVENPEC RESORT.....APPLICANT

AND

EDSON CHITA NYONDO..... RESPONDENT

JUDGMENT

Date of the Last Order: 08/09/2020

Date of the Judgment: 18/09/2020

A. E. Mwipopo, J

In the present application for revision the applicant namely ROVVENPEC Resort is applying for the order of the Court to call for, inspect, revise and quash the proceedings and findings of the Commission for Mediation and Arbitration in labour dispute no. CMA/DSM/KIN/R.490/16 delivered on 27th August, 2018. The applicant is also praying for the Court to set aside the Ruling and declare that the Hon. Mediator erred for disregarding facts which if considered the Commission would have reached a fair, rational and decision to both parties.

The grounds of revision which are provided in paragraph 5 of the affidavit in support of application are as follows:-

1. That, the Mediator erred when she arrived at conclusion that the applicant had no good reason to set aside *exparte* award.
2. That, the Mediator erred for not considering the fact that the respondent worked for only two months.

The brief background of the application is that the respondent namely Edson Chita Nyondo was employed by the applicant as the Hotel Manager on 29th February, 2016, and was terminated on 21st May, 2016. The respondent referred the dispute to the CMA which was heard in exparte and the Commission Award was delivered in favour of the respondent. The applicant became aware of the Commission Award on March, 2018 and file application to set aside the experte award but the same was dismissed. The applicant was aggrieved by the Commission decision and he filed the present application.

In this application, the applicant was not represented, whereas the respondent was represented by Mr. Saulo Kusakalah Advocate. The hearing of the application proceeded by way of written submissions following the prayer from both parties.

The applicant briefly submitted on the first ground of the revision that the Mediator wrongly dismissed the application for the reason that the application have failed to adduced good reason to pursued the Commission to set aside the exparte ward. The applicant failure to appear before the Commission was for the reason that he was not given summons to appear before the Commission. Thus, the applicant was punished without being given an opportunity to be heard.

The Applicant's second ground of revision is that the arbitrator did not consider the fact that the respondent worked with the applicant for 2 months only. As the respondent worked for only two months, the provision relating to the fairness of termination does not apply to an employee with less than six months employment according Section 35 of the Employment and Labour Relations Act, 2004.

The Applicant prayed for the applicant to be allowed.

In response, the respondent submitted that the applicant was properly served with summons on diverse dates and those summons were served to applicant's employees on behalf of the applicant namely Christopher who was applicant's Manager, Miss Catherine who is the applicant's receptionist and also the applicant owner himself was also served with the summons but rejected to receive it. Therefore it is not true that the applicant was not

aware of the existence of the suit before the Commission. The applicant submitted in the application to set aside exparte award that his non - appearance during hearing of the arbitration was for the reason that he was sick. However, the applicant was represented as a reason his sickness was not supposed to bar his representative from appearing and prosecuting the dispute before the Commission.

The Employment and Labour Relations Act, 2004, provides in section 87 (5) that the Commission may reverse a decision made under the section if the Commission is satisfied that there are good grounds for failing to attend hearing. The applicant failed to show good reason for failure to appear before the Commission in the fixed dates. The respondent is of the view that the applicant is playing a delay technique as the applicant was duly informed of the Case but choose not to appear. The respondent cited the decision of the Court of Appeal in **Efficient Internationa Freight Ltd and Another vs. Office Du the Burundi**, Civil Application No 23 of 2005, Court of Appeal of Tanzania, to support the position. Then, the respondent prayed for the application be dismissed.

The applicant did not file rejoinder submission.

From the submissions, the pleadings and the CMA records, the issue for determination is whether the applicant have sufficient reason for the

Court to grant his application to set aside the ex parte award of the Commission.

It is a trite law that application to set aside an ex parte award is granted where the applicant constitute sufficient ground for the Commission or the Court to set aside the ex parte award. This Court in the case of **Mbeki Teachers Sacco's V. Zahra Justas Mango, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (Unreported)**, held that sufficient reason is pre – condition for Court to set aside experte order.

The applicant have submitted that the Mediator wrongly dismissed the application for the reason that the applicant have failed to adduced good reason to pursued the Commission to set aside the exparte ward. In contention, the respondent argued that the applicant was properly served with summons on diverse dates and it is not true that the applicant was not aware of the existence of the suit before the Commission.

The reason for the application to set aside Commission Exparte Award is that the applicant was sick and as result he lost track of the case hence he failed to appear before the Commission. The second reason is that the arbitrator did not consider the fact that the respondent worked with the applicant for 2 months only, thus he was not covered by procedure for unfair

termination of employment as provided in Sub-Part E- of the Employment and Labour Relations Act, 2004, according to section 35 of the Act.

The evidence available in the record shows that the applicant failed to prove before the Commission that he was sick as he asserted in his affidavit before the Commission. The applicant alleged that he lost track of the dispute before the Commission because he was sick but nothing in the record shows that he was sick at that particular moment. Also, the evidence available in record did show that the applicant was served with summons to appear which means that if he was sick he had a chance to inform the Court of his sickness at the time he was served with those summons. Therefore, I agree with the Mediator that this reason adduced by the applicant is not sufficient to prove that there was valid reason for setting aside exparte Commission Award.

The second ground that the employee was employed for just two months thus he was not covered by the provisions for unfair termination. The Employment and Labour Relations Act, 2004, provides in section 35 that the provisions for unfair termination shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts. I have read the exparte Commission Award and I find that the Commission held in page 4 of the Award that the applicant is not covered

by the provision for unfair termination. This is exactly what the law provides. The Commission further held in page 5 of the Award that the termination of the respondent was supposed to be in accordance with the fair labour practices.

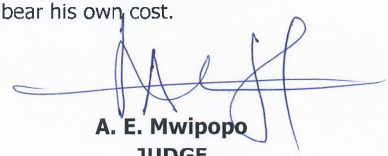
I agree with the Mediator that the employee under 6 months is not covered by provision for unfair termination. However, the termination of employee with less than 6 months employment is covered under Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. 42 of 2007. Under Rule 10 (8) of G.N. No. 42 of 2007, there are three procedure to be followed before the employee is terminated. The procedure includes that the employee has to be informed of the employer's concern to terminate him; the employee to be given opportunity to respond to the concern; and the employee has to be given a reasonable time to improve performance or correct behavior.

It is clear from the record that since the applicant forfeited his right to defend his case then there is no evidence whatsoever from the applicant to prove that the above mentioned three steps of terminating the probationary employee were adhered by the applicant. As a result the Commission rightly held that the procedure for terminating probationary employee, who is the respondent in this case, was not adhered. Therefore,

the second reason adduced by the applicant application to set aside the exparte award for lack of jurisdiction to hear and determine the matter has no basis.

Consequently, the revision application is hereby dismissed for want of merits and the Commission Award is upheld.

Each party to bear his own cost.



A. E. Mwipopo
JUDGE
18/09/2020