

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 736 OF 2018**

**BETWEEN**

**LILIAN NDEYA ..... APPLICANT**

**VERSUS**

**MWANANCHI COMMUNICATION LIMITED ..... RESPONDENT**

**JUDGMENT**

**Date of Last Order 13/03/2020**

**Date of Judgment 24/04/2020**

**A. E. MWIPOPO, J.**

The applicant one Lilian Ndeya have preferred this application for Revision against the Commission for Mediation and Arbitration Award in **Labour dispute No. CMA/DSM/KIN/R.311/16/246** before Hon. Nyagaya, P. Arbitrator dated 14/09/2018. The application was made under Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and Rule 28 (1) (a)(b)(c)(d)(e) of the Labour Court Rules, GN. No. 106 of 2007 and Section 91 (1)(a)(b), (2)(b)(c), (4)(b)(i) and section 94(1) (b)(i) of the Employment and Labour Relations Act, No. 6 of 2004.

The applicant herein is praying for the following orders:-

- i. That the Honourable Court be pleased to call for records of the proceeding and the award from the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.311/2016, to revise and set aside the award of the Commission dated 14<sup>th</sup> of September, 2018 delivered by Hon. Nyagaya, Arbitrator.
- ii. That the Honourable Court be pleased to grant cost of the application.
- iii. That the Honourable Court be pleased to make such any other orders as it may deem fit.

The applicant have two grounds of Revision. Those grounds are as follows hereunder:-

- a) That the arbitrator grossly erred in fact and in Law for dismissing the matter suo moto for the ground of filing the mater out of time while it was not a fact in dispute between parties.
- b) That the arbitrator erred in law and fact for not taking into account evidence tendered before the Commission which clearly indicated there was unfair termination.

The brief background of this Revision is that the applicant was employed by the respondent Mwananchi Communication Ltd in a three months contract as a freelancer Business Executive on 01/08/2015 following termination from her employment for a gross misconduct. The applicant continued to work with the respondent up to 08/03/2016 when she was informed by the Respondent that the freelancing service contract have expired from 01/01/2016 thus the applicant is no longer a Freelancer Business Executive for the respondent.

The applicant was not satisfied with the respondent decision and she decided for refer the matter to the Commission for Mediation and Arbitration (CMA) on 08/04/2016. The CMA heard both parties and suo moto decided to dismiss the labour dispute for being filed out of time. The applicant was aggrieved by CMA decision thus she filed the present Revision application.

When the Revision application came for hearing on 24/02/2020 the applicant who was not represented prayed for the hearing of the matter to be by way of written submissions and Advocate Iman Dafa who appeared for the respondent Mwananchi Communication Ltd did not object to the prayer. Then, this Court ordered the applicant to file her written submission

by 28/02/2020, the respondent to file his reply by 03/03/2020 and the applicant to file rejoinder if any by 13/03/2020.

Unfortunately the applicant filed her application in Court on 02/03/2020 and served Respondent on the same date at 13:18 hours. The respondent was able to file the reply submission as ordered by this court on 03/03/2020. The applicant did not file rejoinder submission. Despite the fact that the applicant filed the submission in chief out of time, I have decided to proceed to consider it as it appears not to affect the respondent who replied and filed his submission on time.

The applicant in her written submission submitted on the first ground of revision that the matter was before the Commission for almost two years but only to dismiss it for the ground which was not raised during the hearing of the dispute. The applicant is of the view that the matters of preliminary objection should be brought at earliest possible stages before commencement of hearing.

On the second ground of revision she submitted that the act of the Hon. Arbitrator to neglected all the facts and evidence which was presented before the Court which indicates that reasons for termination was not fair and the respondent was at fault terminating the service of the applicant were not justifiable. She averred that since both parties presented their

case and the commission proceeded to hear all witnesses and evidence was produced, then this court shall proceed to set aside CMA decision and decide accordingly on the evidence available.

In reply, the respondent submitted on the first ground of revision that the arbitrator was correct to dismiss the complaints after examining the evidence tendered and found that the commission have no jurisdiction to entertain the dispute before it. He was of the view that the proceedings in page 30 shows that the applicant referred the dispute to the CMA after expiry of 32 day which is contrary to rule 10(1) of the Labour Institutions [Mediation and Arbitration] Rules, 2007. The respondent prayed for dismissal of the revision for lack of merits. The respondent did not submit on the second ground of revision as submitted by the applicant.

After reading submissions from both parties, the CMA award and the proceedings the main issue for determination in this revision is as follows:-

- i. Whether CMA decision to dismiss the dispute on the matter it raised suo moto without giving the parties right to address the Commission was justified.

The evidence available in the record shows that the Arbitrator dismissed the dispute before it for being referred to the CMA out of time contrary to Rule 10(1) of GN No. 64 of 2007. The Commission raised the

issue suo moto as it is seen in page 6 last paragraph of the Award. The CMA held that the dispute was referred out of time provided by the law as it was filed after 32 days have passed from the date of the dispute. The arbitrator was of the view that as there is no application for condonation which was instituted then the commission have no jurisdiction to entertain the matter and decided to dismiss it.

The applicant have submitted that the issue of the dispute to be referred out of time was never raised by parties or the commission during hearing. Thus, the commission was not justified to dismiss the dispute on matters not disputed by the parties. On the other hand, the respondent was of the view that the commission decision to raise the issue of jurisdiction suo moto was justified as the issue of time to refer the dispute to the Commission was raised while cross examining the applicant.

It is my view that the act of the Arbitrator to raise issue of jurisdiction in the course of writing an award without giving both parties the opportunity to be heard on respective issue is wrong. It is a procedural irregularity as both parties were denied right to be heard on the issue. The court of Appeal in the case of Ex-B.8356 S/SGT **Sylvester S. Nyanda Vs. The Inspector General of Police and Another**, Civil Appeal No. 64 of 2014 [unreported], held that:-

***"There is similarity no controversy that the trial judge did not decide the case on the issues which were famed, but her decision was anchored on issue she framed suo motu which related to the jurisdiction of the Court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that court of law must limit themselves to the issues raised by parties in the pleadings as to act otherwise will result in denying of the parties the right to fair hearing."***

Also in the case of **Wagesa Joseph Nyamaisa Vs. Chacha Muhoga, Civil Appeal No. 161 of 2016, Court of Appeal of Tanzania at Mwanza**, [unreported], it was held that:-

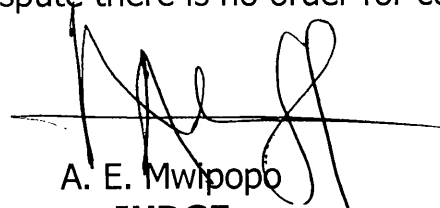
***"The way the first appellate court raised two jurisdictional matters suo motu and determine them without affording the parties an opportunities to be heard, has made the entire***

***proceedings and the judgment of the High  
Court a nullity and we hereby declare so."***

In the present revision, the arbitrator in the cause of writing an award raised suo motu the issue of jurisdiction to entertain the dispute and dismissed the dispute before it. It is my finding that the arbitrator erred to raise the issue suo motu and proceed to determine it without affording the parties right to be heard. Therefore, I am satisfied that parties were denied right to be heard on the issue raised on the question of time to refer the dispute before the CMA. As a result the whole award before the CMA is vitiated.

Thus, I hereby quash the CMA Award and set aside the orders arising therefrom. The CMA record shall be remitted to the commission and be assigned to another arbitrator who shall proceed to set down the judgment. If the arbitrator finds the issue of time limitation for referring the matter to the CMA is necessary, then parties must be afforded the right to be heard. From the above, the revision is found to have merits and is allowed.

As this is a labour dispute there is no order for cost.

  
A. E. Mwipopo  
**JUDGE**  
24/04/2020



**Date: 24/04/2020**

Coram: Hon. A. E. Mwipopo, J

Applicant: Present in person

For Applicant:

Respondent:

For Respondent: Ms. Halima Somanda, Advocate for the Respondent

CC: Neema

**Court:** The Judgment was delivered in the presence of Lilian Ndeya {the Applicant} and Ms. Halima Somanda, Advocate for the respondent this 24/04/2020.

A handwritten signature in black ink, appearing to be 'A. E. Mwipopo', written over a horizontal line.

A. E. Mwipopo

**JUDGE**

24/04/2020