

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION NO. 13 OF 2021**

**BETWEEN**

**MACAU ENTERTAINMENT LIMITED.....APPLICANT**

**AND**

**KHADIJA ABDALLAH.....RESPONDENT**

**JUDGMENT**

Date of Last Order: 02/9/2021

Date of Judgment: 11/10/2021

**B. E. K. Mganga, J.**

The respondent was employed by the applicant as Texas casino supervisor. The relationship between the two broke out on 31<sup>st</sup> October 2019 when the respondent's employment was verbally terminated. Due to that broke out of relationship , on 27<sup>th</sup> November 2019 respondent referred to the Commission for Mediation and Arbitration henceforth CMA Labour dispute No.CMA/DSM/ILA/928/19/426/19 claiming to be paid terminal benefit on ground that there were no valid reasons for termination and further that procedures for termination were not followed. On 23<sup>rd</sup> December 2019, mediation failed before Mahindi, Mediator, as a result the

mediator signed CMA form No. 6 i.e., Mediators Certificate of non-settlement. On 27<sup>th</sup> December, Masawe. Y, signed and issued a notice to attend arbitration (CMA F.3) informing the parties that they should appear on 23<sup>rd</sup> January 2020 at 11:00hours. This notice was received by the applicant on the same date it was issued. On 23<sup>rd</sup> January 2020, only the respondent appeared before Ng'washi. Y, arbitrator, and no reasons were assigned for non-appearance of the applicant as a result the matter was adjourned to 6<sup>th</sup> February 2020. On 23<sup>rd</sup> January 2020, Ng'washi. Y, arbitrator, signed and issued another notice to the parties to attend arbitration on 6<sup>th</sup> February 2020 at 9:00hrs. This notice was received by the applicant who stamped his official rubber stamp but no date of reception. She only endorsed time of reception. Again, applicant did not enter appearance on 6<sup>th</sup> February 2020. The dispute was therefore adjourned to 12<sup>th</sup> March 2020. On the later date, applicant did also not attend as a result arbitrator ordered the respondent to prove the dispute ex-parte on 3<sup>rd</sup> April 2020. On 10<sup>th</sup> July 2020, Ng'washi. Y, arbitrator delivered an award in favour of the respondent and ordered the applicant to pay the respondent a total of Thirteen Million Tanzanian Shillings (TZS 13,000,000/=) only.

On 29<sup>th</sup> July 2020, applicant filed a notice of application seeking to set aside the said ex-parte award. The notice of application was supported by an affidavit of Richard Pumpuni Kitambi who deponed *inter-alia* that, applicant was not served with CMA F-8 showing that the respondent has referred the matter to arbitration and that there were no service of summons to the applicant.

The application was opposed by the respondent who filed a counter affidavit deponing that applicant deliberately chose not to appear at CMA as she was properly served. Respondent annexed to her affidavit notices to attend arbitration on **23<sup>rd</sup> December 2019 and 12<sup>th</sup> March 2020**. On 6<sup>th</sup> November 2020, Matalis. R, arbitrator, issued a ruling dismissing the application to set aside ex-parte award for reasons that applicant was duly served and failed to give satisfactory reasons for her failure to appear on 23<sup>rd</sup> January, 2020, 6<sup>th</sup> February 2020 and 12<sup>th</sup> March 2020.

Applicant was aggrieved by that decision and decided to file this present application seeking the court to revise the ruling that dismissed application to set aside an ex-parte award. Applicant filed a Notice of Application supported by an affidavit of Richard Pumpuni Kitambi. The Affidavit of Richard Pumpuni Kitambi in support of the

notice of application contains four legal issues for determination as follows;

1. *(i) Whether the respondent proved that the applicant was duly served with the summons for arbitration hearing when the Commission ordered the dispute to proceed ex-parte.*
2. *(ii) Whether the respondent gave false information during the hearing of the dispute before the Commission about her monthly salary.*
3. *(iii) Whether there was sufficient reason for non-appearance of the applicant on 12<sup>th</sup> March 2019 when the Commission issued order for the dispute to proceed ex-parte.*
4. *(iv) Whether it was proper for the Commission to reject the application for setting aside ex-parte award.*

Respondent resisted the application and filed both a Notice of Opposition and a Counter Affidavit.

The application was disposed by way of written submissions whereas applicant was represented by Joseph Basheka, her Personal Representative while respondent enjoyed the service of Isihaka Yusuph, advocate.

Submitting in support of the application, regarding the first issue as stated in her affidavit, Mr. Basheka, argued that, applicant

was not served with summons to appear before the Commission on 12<sup>th</sup> March 2020 when the Commission proceeded with the matter ex-parte by relying on the summons issued on 6<sup>th</sup> March 2020 without proof of service. He submitted that, this was contrary to Rule 7(1)(a),(b), (c)(i), (ii) and (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N No. 64 of 2007. In bolstering his submissions, he cited the case of ***Polycem Tanzania Limited v. Jummanne Samnachilindi and 5 Others***, Revision No.5, High Court of Tanzania, at Dar es salaam(unreported).

On the second issue regarding salary, he submitted that the same had never been disputed by the respondent as the applicant's attached documents justify employee's salary including respondent. That respondent gave false information as to the amount of salary she was being paid. He stated that, giving false information before the Commission is irregularity which is sufficient ground for setting aside ex-parte award as it was decided in the case of ***Kampala International University v. James F. Simumba and 2 Others***, Revision No. 270 of 2019, High Court of Tanzania, Labour Division at Dar es salaam.

It was further argued that the Commission was erred to award respondent TZS 13,000,000/= without proof by the respondent. Basheka cited Section 110(1) of the Evidence Act,[Cap 6 2019] as to who has a burden of proof. Cementing his stand, he cited the case of ***The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura, Civil Appeal No. 149 of 2017***, CAT (unreported).

On whether, there was a sufficient reason for applicant's non-appearance, it was submitted by Mr. Basheka that, since there was no proof of service, and as applicant was not properly served, it was not have expected her to appearance on 12<sup>th</sup> March 2020. In making his argument strong, he referred this Court to the case of ***Kinondoni Municipal Council v. Robert Mwanga and 14 Others, Civil Appeal No. 15 of 2015***, High Court, Main Registry at Dar es salaam(unreported).

On the last issue, Mr. Basheka argued that, the Commission erred by not setting aside the ex-parte award as there was no proof of service of summons. That, service of summons was uncertain contrary to Rule 7(1)(a), (b), (c)(i), (ii) and (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N No. 64 of 2007 which is mandatory provision. Supporting his stand, he cited different

cases including the case of ***T. M Sanga v. Sadrudin G.A Albhai and 2 Others [ 1977] TLR P.51***. He thus prayed for the Court to set aside ex-parte award.

In response to the first issue, the respondent's Counsel, argued that, the arbitrator satisfied himself that applicant was duly served. Counsel submitted that, it is a settled principle of law that a Court record is always presumed to be accurate representing what actually transpired in Court. Bolstering his submissions, he cited the case of ***Emmanuel Denis Mosha and 3 Others v. Republic, Criminal Appeal No. 188 of 2018, CAT, (unreported)*** to that effect. For that reason, he was of the view that, applicant was dully served.

Counsel for the respondent opted to argue the 3<sup>rd</sup> and 4<sup>th</sup> issues together and submitted that applicant was duly served but for reasons only known to her failed to appear before CMA. That, the said non-appearance without reasonable cause, justified rejection of setting aside the ex-parte award. He added that, what was decided by the arbitrator is in accordance with well-established principle of presuming Court record to be accurate as was held in the case of ***Halfan Sudi v. Abieza Chichili [1998] TLR 527***.

Regarding the 2<sup>nd</sup> ground relating to false information, Counsel for respondent submitted that, applicant had a proper forum of disputing salary at CMA not at this stage of application for setting aside ex-parte award. Counsel submitted that no false information was given by the respondent on her salary as TZS 400,000/= was given without signing and TZS 600,000/= was given by signing salary register. He thus prayed for the application to be dismissed.

In disposing this application, for convenience, I will start with the 2<sup>nd</sup> ground of revision namely; whether the respondent gave false information during hearing of the dispute before the Commission about her monthly salary.

Applicant annexed to the affidavit a document called salary for July 2019 and salary for August 2019 signed by employees including the respondent showing that the respondent's monthly salary was TZS 600,000/=. Therefore, arguments by counsel for the respondent that she was paid TZS 400,000/= without signing and that she was signing TZS 600,000/= to make it TZS 1,000,000/= as total monthly salary is neither born out of her evidence at CMA nor her counter affidavit filed in opposing this application. As such, submissions made on her behalf that she was receiving TZS 400,000/= without signing



and that she was only signing for TZS 600,000/= are submissions from the bar which cannot be regarded as evidence. I will therefore ignore that argument and hold that parties need to be heard at CMA on this aspect. It is only at that time it can be ascertained the exact amount she was being paid as monthly salary. Both parties will have a room of cross examination and shake credibility of the opponent.

The main rival and centre of the all issue rests on the 1<sup>st</sup> ground of revision namely whether; there is proof that applicant was served before the matter proceeded ex-parte. I have carefully examined notices to attend arbitration as stated hereinabove and find that applicant was duly served with the notice requiring her to appear on 23<sup>rd</sup> January 2020 as she received the said notice on 27<sup>th</sup> December 2019 but she did not enter appearance. The notice requiring her to appear on 6<sup>th</sup> February 2020 was received by the applicant who stamped her official rubber stamp but no date of reception but endorsed time of reception only. She did not enter appearance. It is therefore unclear as to whether she received it before the date she was required to appear of after. The arbitrator adjourned the matter to 12<sup>th</sup> March 2020 and ordered that, that was the last adjournment. At this time, no summon was either issued or

served to the applicant as there is none in the CMA file as proof of issuance or service to the applicant. On 12<sup>th</sup> March 2020, arbitrator issued an order that the dispute will be proved ex-parte. The dispute was therefore adjourned to 12<sup>th</sup> March 2020. On the later date, applicant did also not attend as a result arbitrator ordered the respondent to prove the dispute ex-parte on 3<sup>rd</sup> April 2020. In my view, the arbitrator having ordered that 12<sup>th</sup> March 2020 was the last adjournment, applicant was supposed to be notified. Failure to serve or notify the applicant that the matter has been adjourned for the last time, in my view, defeated the whole intent and purpose of adjourning the matter and the last adjournment order itself.

The CMA file shows that respondent gave her evidence on 9<sup>th</sup> June 2020 and an order was issued that an award will be delivered on **10<sup>th</sup> July 2020**. I have noted that on **10<sup>th</sup> July 2020**, Ng'wash.Y, arbitrator, signed a notice informing the parties to appear on **16<sup>th</sup> July 2020** at 11:00hrs. Applicant was served with the said notice on 10<sup>th</sup> July 2020 at 11:19 hrs. I have further noted that, the ex-parte award shows that it was delivered on **10<sup>th</sup> July 2020** on the same date the same arbitrator signed a notice informing the parties to appear on 16<sup>th</sup> July 2020. More worse, the record does not

show who was present at the time the award was being read. There is no record showing that the award was delivered on 10<sup>th</sup> July 2020 apart from what is written on the award itself that it was delivered on 10<sup>th</sup> July 2020. As there is no proof of service before an order of ex-parte proof was issued and for the irregularities I have pointed out, I hold that the arbitrator erred in dismissing application to set aside ex-parte award. In short, all grounds of revision succeed. I therefore allow the application and set aside the ex-parte award. I hereby direct that CMA record be remitted to CMA so that the dispute can be properly heard and determined.

It is so ordered.



*E.K. Mganga*  
**JUDGE**

10/2021