IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 222 OF 2019

(Arising from the Award of the Commission for Mediation and Arbitration Dar es Salaam Zone, in Labour complaint No: CMA/DSM/KIN/1030/09/1182)

BETWEEN

STANBIC BANK (T) LTD.....APPLICANT

VERSUS

AMIRI DAUDI MALIKI.....RESPONDENT

JUDGEMENT

Date of Last Order:30/06/2021

Date of Judgement: 16/07/2021

M.MNYUKWA,J

The applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 03/08/2015 in labour dispute No. CMA/DSM/KIN/1030/09/1182. The application is made under Section 91 (1) (a) (b) 91 (2) (a) (b), 91 (4) (a) (b) together with 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] and Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and Rule 28 (1)

(c) (d) (e) of the Labour Court Rules GN. 106 of 2007 (herein GN. No 106 of 2007) and order of Hon. Wambura, J dated 13th March 2019. The application is supported by the affidavit of JULIANA KOMBE, the applicant's legal manager.

The respondent challenged the application through the counter affidavit of AMIRI DAUDI MARIKI.

The matter proceeded orally. At the hearing, Ms. Neema Ndosi learned counsel appeared for the applicant whereas Mr. Twahir Burhan, learned Counsel represent the respondent.

Brief background facts of the dispute are as follows; the respondent was employed by the applicant as Team Leader IT on 1st January 2006. He was terminated by the applicant on 23rd November 2009 for the reason that he breached the applicant's policy and procedure on internal security regarding the use of an unauthorized USB flash disk. Dissatisfied by the applicant's decision to terminate him from employment, the respondent referred the dispute to CMA. The CMA decided in favour of the respondent by awarded compensation of 24 months' salaries. Being aggrieved by the CMA award, the applicant

approached this court with this application seeking to revise and set aside the said award on the following grounds:-

i. *The Commission for Mediation and Arbitration had no mandate to arbitrate this dispute as it was not referred to the commission by either party to the dispute.*

ii. *That the arbitrator erred in law and in fact taking into account matters which he ought not to consider in reaching the award hence arrived at a wrongly premised award.*

iii. *That the arbitrator erred in law and in fact by deciding among others that disciplinary hearing against the respondent was unfairly procured since it was not conducted by impartial committee members.*

iv. *That the arbitrator unjustifiably exceeded his discretion by awarding twenty four months salaries to the respondent without justification*

v. *That arbitrator erred in law and fact by arbitrarily allowing the respondent to abandon his earlier on prayers in CMF 1 and introduced new prayers during proceedings which resulted to abandoning his previous dispute and introduce a new one.*

Arguing in support of the application, Ms. Neema Ndosi submitted that they have raised four issues for determination, but she prayed before the court to withdraw one issue and to argue on three issues.

Ms. Ndosi submitted that, the first issue is whether the commission for mediation and arbitration (henceforth CMA) had a mandate to arbitrate a dispute which was not referred to the CMA by either party to the dispute. Ms. Ndosi stated that after mediation marked failed, on 5th May 2010, neither party referred the matter to arbitration instead the arbitrator assumes power that was not vested upon him and arbitrated the dispute. She submitted that section 86 (7) (b) (i) of the Employment and Labour Relations Act, Cap 366 R.E 2019 (herein to be referred to as ELRA) requires a dispute to be referred by the parties after the failure of mediation. She supported her argument with the following cases; **Nicodemus Kajungu vs Bulyankuhu Gold Mine**, Civil Appeal No 110 of 2008, CA at Dar es Salaam, **Stanbic Bank vs Jacquiline Mushi,** Labour Revision No. 380 of 2018, and Stanbic Bank vs Rajesh Das, Revision No 859 of 2019 at Dar es Salaam. The learned counsel for the applicant concluded that, based on the above authorities it is clear that the arbitrator violated the said provisions of the ELRA and acted beyond its power because he was not vested with the jurisdiction

to do so. She, therefore, prays the Arbitral proceedings to be revised and set aside.

Submitting in respect to the second issue on whether the arbitrator was correct by taking into account matters which he ought not to consider in reaching the award hence arrived at a wrong premise Award. The applicant's counsel submitted that, the arbitrator held that the respondent was terminated unfairly both substantive and procedurally but the decision was reached after taking into consideration irrelevant matters. She referred to page 10 of the Arbitral award in which the arbitrator agreed that there was a reason for termination but he analyzed that the punishment was too high, which is irrelevant.

She further submitted that, the applicant's policy and procedure admitted as exhibit D6 provides clearly that the punishment for the person who breaches the said policy includes termination of employment. The suggestion that the respondent could have been given a warning while the respondent was issued with a final written warning on 2/2/2009 which was not disputed was not the right path for the respondent. The applicant's counsel added that on page 9 of the Award, the arbitrator agreed that the procedure for termination was followed. However, in the end, he stated that there were some members

in the Disciplinary Committee who were not impartial. The applicant's counsel submitted that exhibit D5 shows clearly those members who appeared on the committee as witnesses. She supports her argument with the case of **Jacob Ichode vs R**, Criminal Appeal No 462 of 2016, CAT at Mwanza in which the court held that failure to take into account matters which should have been taken into consideration, is considered an abuse of discretion. Therefore she prayed this court to revise and set aside the CMA Award because the arbitrator took into account irrelevant matters and step into the shoes of the respondent.

On the last issue as to whether the arbitrator had the discretion of awarding 24 months' salaries to the respondent, Ms. Ndosi submitted that, the arbitrator has the discretion to award compensation based on the circumstances of each case. However, the award of 24 months' salaries was not justifiable since the arbitrator was duty-bound to hold that the termination was fair. She submitted that section 40 (1) of the ELRA provides the remedies for unfair termination. The word used in that section is may which imports discretion under the ambit of section 53 (1) of Cap 1 R.E 2019. She further submitted that the circumstances to look at before awarding any compensation are stipulated under Rule 32 (5) of Labour Institutions (Mediation and Arbitration Guideline) GN

No 67/2007. The counsel for the applicant submitted that, since the arbitrator held that the termination was fair, it was not proper to award the respondent 24 months' salaries. The arbitrator was supposed to consider the consequences of unfair termination for the parties including the extent to which the employees were able to secure alternative work. In this case, the arbitrator on page 13 admitted that the respondent had secured alternative employment. She further submitted that, the arbitrator was supposed to consider the amount of employees' remuneration in which he was paid 1,600,000 per month, therefore awarding him 24 months' salaries was quite a substantial amount. She supports her argument with the cases of **Lemala Camp T/A Grumet Expeditions Tanzania LTD vs John Kingazi**, Labour Revision No. 26 of 2019, and **Felician Rutwaza vs World Vision Tanzania**, Civil Appeal No 213 of 2019, CAT at Bukoba. She, therefore, pray the court to revise and set aside the award of 24 months remuneration.

Responding to the first issue Mr. Twahir Burhan submitted that the matter was duly adjudicated by the arbitrator because at the time of adjudication both parties were represented, the applicant tendered the evidence before the arbitrator, if there was any procedural irregularity, the applicant's representative was expected to raise a preliminary

objection to that effect. This matter cannot be raised at this juncture because when the matter was arbitrated, the applicant proceeded to conduct the case by bringing their witnesses, and finally, the arbitrator reached the judgment.

Responding to the second ground, Mr. Twahir Burhan submitted that even though the applicant followed the procedure for termination but the applicant terminated the respondent without having sufficient and justifiable reason to do so. He added that the termination was not fair because the principles of natural justice were not followed. The parties who initiated and raised the dispute, Mr. Rajesh and Ms. Lightness were not impartial members as they were also composed of the panel members in the disciplinary committee which determined the fate of the respondent on termination. Therefore the disciplinary committee was not impartial. To support his argument he referred to pages 12 and 13 of the CMA's proceedings which shows that the respondent was given the right to be heard but not by impartial members.

The respondent's counsel further submitted that the misconduct committed by the respondent was done under the direction of his boss, Mr. Rajesh Das, the head of the department as shown on page 5 of the

CMA's Award. He added that the act of placing the CD in the desktop did not result into any threat to the company or institution. Therefore they maintained their position that the termination done by the applicant was unfair.

On the third issue as to whether the arbitrator had the authority to award the respondent 24 months' salaries, the counsel for the respondent submitted that it was right for the arbitrator to award 24 months' salaries to the respondent because the termination was unfair. He added that the provision of Rule 33(5) of GN No 67/2007 is a proper provision used to award the respondent the said amount.

In a rejoinder, the applicant's counsel submitted that since the respondent admitted that neither of the party referred the dispute to arbitration, the presence of the parties should not prejudice the procedure of the CMA. She added that the issue of jurisdiction can be raised at any point, and since the issue contested is the jurisdiction of the CMA, she prays this court to nullify the proceedings of CMA

On the issue of procedure as contested by the respondent counsel, the applicant's counsel submitted that Mr. Rajesh and Ms. Lightness appeared in the committee as witnesses and not the panel members of the disciplinary committee. The allegation that the respondent was given

permission by Mr. Rajesh was denied by the applicant as seen on page 5 of the CMA's Award. She added that, the fact that there was no threat incurred to the applicant when the respondent used the CD, is not a justification to breach policies since they were kept to prevent theft and the respondent was aware of the same.

On the issue of awarding 24 months' salaries, the applicant's counsel reiterated what she had submitted in chief because the respondent's counsel failed to show the justification of the 24 months' salaries.

Having gone through parties' submissions, labour laws, CMA, and court records, the issues for determination before this revision application are as follows;

(i) Whether the CMA had the power to arbitrate the dispute which was not referred by either party to the dispute

(ii) Whether there was sufficient reason for termination of the employment of the respondent and if the procedure were properly followed

(iii) Whether it was proper for the arbitrator to award 24 months' salaries

On the first issue as to whether the CMA had powers to arbitrate the dispute which were not referred by either party to the dispute. In this aspect, the law requires that once a dispute has failed at the mediation stage at the CMA, either party may refer the same to Arbitration. This is in accordance with section 86 (7) (b) (i) of the ELRA which provides that:

'Where the mediator fails to resolve a dispute within the period prescribed in subsection (4), a party to the dispute may

(a) N/A

(b) If the dispute is a complaint-

(i) refer the complaint to arbitration; or

(ii)Refer the complaint to the labour court"

In the application at hand, the applicant's counsel submitted that neither of the parties referred the dispute to arbitration and that the arbitrator assumes power that was not vested upon him and arbitrated the dispute. Thus, the arbitrator wrongly determined the matter without having jurisdiction thereto. The respondent counsel submitted that the matter was duly adjudicated by the arbitrator because at the time of arbitration both parties were represented and the applicant tendered the evidence before the arbitrator, if there was any procedural irregularity,

the applicant's representative was expected to raise the preliminary objection that the matter was conducted without adhering to the procedure.

I have keenly gone through the CMA records and I find CMA Form No.5 dated 5th May 2010, the title of the form is **MEDIATORS CERTIFICATE OF SETTLEMENT/ NON SETTLEMENT.** The mediator's comments in the above form reads as follows: **''Mediation has failed parties have agreed to refer the matter to arbitration stage.''** The next document in the CMA file after the CMA Form No.5 is the CMA Form No. 18 which is the notice from CMA to call the parties to attend arbitration hearing.

The argument raised by the respondent's counsel that if there was any procedural irregularity the applicant ought to have raised it during the arbitration, to my view that argument has no legal stance. It is trite law that the issue of jurisdiction can be raised at any time before the final verdict. This is also the position in the case of **Stanbic Bank Limited vs Juacquiline Mushi,** Revision 280 of 2018 in which the court among other things held that

'' I think it is a settled principle of law that a legal point may be raised at any stage of the hearing, be it during

trial, or on appeal or reference or revision, whatever the case, a valid legal point may be raised in court by either party, so long, the point of law has been passed the test set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West end Distributors LTD (1969) EA 694."

Therefore, I agree with the applicant's counsel that the issue of jurisdiction can be raised at any point since it is one of the issues which is contested in this revision. I believe that the CMA was duty-bound to check if they had jurisdiction to determine any issue before they assume the power to do anything. It is a trite law that the issue of jurisdiction goes into the root of the matter, and any decision done by either the tribunal, commission or court or anyone given the power to hear and determine any issue without having jurisdiction, the decision is considered as null and void.

The important question which needs to be resolved by this court is whether the agreement between the parties that the matter has failed in mediation suffice to state that the requirement of section 86 (7) (b) (i) of the ELRA have been complied with and impliedly gives jurisdiction to the arbitrator? In this aspect, my answer is No. The agreement of the parties cannot be treated as a compliance of the above section since the

section categorically requires any party to the dispute to refer a matter to arbitration. Nevertheless, it is a settled principle of law that the parties cannot consent to give to a tribunal, commission, or court jurisdiction which it does not possess. Therefore reference of the matter to arbitration by either of the party is a mandatory requirement that needs to be complied with.

In fact, I am aware of the amendments made by the Employment and Labour Relations (General) Regulations, 2017 which introduced a specific form of referring the dispute to Arbitration stage known as CMA Form No 8. Even if the records show that the matter at hand was instituted at the CMA on 23rd December 2009 before the introduction of that forms, that cannot be an excuse, because the ELRA under section 86 (7) (b) (1) requires either of the parties to have referred the dispute to the arbitration. Since there was no special form by then, any document of whatever format or manner could suffice to refer the matter to arbitration rather than arbitrator to assume power not vested to him *suo moto.*

The requirement of any of the parties to refer the dispute to arbitration was ever since emphasized in the case of **Makumbusho Cultural Centre vs Malende M. Kalosa & 2 others** Revision No. 270

0f 2013 as cited in the case of **Stanbic Bank (T) ltd vs Rajesh Das** in which the court stated that:

> *"Neither of the parties referred the dispute to arbitration therefore the CMA lacked jurisdiction to arbitrate it. The CMA ruling of 28th January, 2013 to the contrary is hereby quashed. The bottom line is that an arbitration should be referred to arbitration by the parties, to the contrary there is no proper dispute before the commission and as such the commission is not seized with power to trial it. The fact that the commission in this dispute referred the dispute to itself and arbitrate it amounts to an incurable illegality. CMA has never being one of the parties in this dispute."*

As I earlier stated, the records show that neither of the parties to the dispute referred the matter to arbitration. Therefore since issue number one touches on the question of jurisdiction of the CMA to arbitrate the dispute which was not referred by either party of the dispute, it is my considered view that CMA arbitrated the dispute contrary to the requirements of section 86 (7) (b) (i) of the ELRA, Cap 366 R.E 2019. Therefore, I shall not hesitate to conclude that CMA lacks jurisdiction to entertain the matter, therefore its decision is null and void. Thus, I hereby quash the CMA proceedings and nullify the award delivered by the CMA on 3rd August 2015 in labour dispute No.

CMA/DSM/KIN/1030/09/182 and remit the records to the CMA for arbitration to be conducted by another arbitrator.

That is to say, the matter stands as of the date of the issuance of the certificate on non-settlement of the mediation. CMA records to be returned within 60 days from today. I know that this dispute takes almost eleven (11) years since initiated through CMA Form No 1 at CMA, but still, we cannot go contrary to what does the law provides particularly when the irregularity is fundamental and goes into the root of the matter. The issue of jurisdiction of a particular body, commission, or court is normally defined either by the Constitution or the statutes creating it.

Since the first issue has an effect of disposing of the application, I find no need to labour much on the remaining issues.

No order to costs.

It is so ordered.

M. MNYUKWA
JUDGE
16/07/2021