

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

**REVISION APPLICATION NO. 57 OF 2020**

**BETWEEN**

**TANZANIA LEAF TOBACCO COMPANY LIMITED.....APPLICANT**

**AND**

**THOMAS MARTIN MBENA .....1<sup>ST</sup> RESPONDENT**

**EMMANUEL JUMA MSENGI..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 23/06/2021*

*Date of Judgement: 30/6/2021*

**Z. A. Maruma, J.**

This application filed by the former employer of the respondents against the decision of the Commission for Mediation and Arbitration emanated from the Labour Dispute No. RF/CMA/83/18. The application is brought by notice of application under section 91 (1) (a), 91 (2) (b) and (c) of The Employment and Labour Relations Act No. 6 of 2004 as amended by written Laws (Miscellaneous amendments) Act No. 6 of 2004, section 94 (1) (b) (i) of the employment and Labour Relations Act No. 6 Of 2004: Rule 24 (1), (2), (a), (b), (c), (d), (e) and (f), Rule 24 (3) (a), (b), (c) and (d) and Rule 28 (1), (c), (d) and (e) of the Labour Court Rules, GN.

No.106 of 2007. This application is requesting this court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) by Arbitrator Mr. Katto, J.R. dated 10<sup>th</sup> January 2020.

The application filed is in support of an amended affidavit filed on 23<sup>rd</sup> November 2020 and contained a statement of legal issues arising from material facts under part B of which for the purpose of determination of this application is produced verbatim here under that:-

- (a) Arbitrator erred in law in reaching conclusions based on his view and opinions contrary to the evidence on record;
- (b) In alternative, but without prejudice to the foregoing, the Arbitrator erred in law and fact by failing to analyze properly the evidence on record hence reaching conclusions;
- (c) The Arbitrator erred in law by applying double standards when analyzing the evidence on record;
- (d) The Arbitrator erred in law and fact by finding that the respondents were not given a right to be heard where there was evidence showing that the respondent were informed of the charges facing them as required by the

law and were given sufficient time to prepare for the hearing;

- (e) The arbitrator erred in law and in fact in awarding twelve months salaries as compensation where there was evidence on record to show there were valid reason for termination;
- (f) The arbitrator erred in law and fact by ordering payment of one month salary to each of the respondents in lieu of notice while the respondents were terminated following misconduct;
- (g) The arbitrator erred in law and fact by awarding to both respondents 14 days salary for unpaid leave while the same did not form part of the respondent's claim under the CMA F1;
- (h) The arbitrator erred in law and fact by awarding severance pay for ten years while the respondent were terminated following misconduct;
- (i) The arbitrator erred in law and fact by ordering the applicant to issue the respondents with certificate of service while there was evidence that the same was issued to the respondents at time of termination.

That it is the interest of justice the decision of CMA be revised and set aside to the extent set out above.

The brief background to this application was that, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were employees of Tanzania Leaf Tobacco Company Limited, employed at different periods. The 1<sup>st</sup> respondent was employed way back in 2004 as a leaf buyer and classifier. On 8<sup>th</sup> May 2008 he was promoted to blending classifier position and worked on a permanent basis. The 2<sup>nd</sup> respondent was employed as a leaf classifier and later on promoted to senior buyer from 12<sup>th</sup> March 2002 on permanent basis. Both respondents' employments were terminated on 11<sup>th</sup> April 2018 on the basis of gross misconduct by being negligent and dishonesty. Aggrieved with the termination, the respondents filed a complaint of unfair termination before the Commission for Mediation and Arbitration in Morogoro on 11<sup>th</sup> May 2018.

On 10<sup>th</sup> January 2020, the Commission entered a decision to the effect that the termination was both substantively and procedurally unfair and issued an award of TZS 14,351,371/= to the 1<sup>st</sup> respondent comprising twelve months salaries, one month salary in lieu of notice, 14 days unpaid leave and severance pay. The 2<sup>nd</sup>

respondent was awarded the sum of TZS. 34,977,878/= which comprised twelve months salaries, one-month salary in lieu of notice, for 14 days unpaid leave and severance pay.

Dissatisfied by part of the award the applicant preferred this revision for grounds and prayers which will be as discussed later in this revision. The applicant herein had the service of Mr. Gaspar Nyika, Ms. Samah Salah, Mr. Jonathan Wangubo and Ms. Miriam Bachura advocates from IMMMA Advocates. On the other hand, the respondents had the service of Mr. Jamael Ngowo, Mr. Noel Nchimbi, Mr. Elibahath Akyo, Mr. Samwel Gilbert, Ms. Mwanakombo Chaponda and Mr. Boniface Kigosi all from TUICO headquarters - legal department.

On 23<sup>rd</sup> June 2021, the date of hearing of this application, Mr. Jonathan Wangubo appeared for the applicant and Mr. Elibahath Akyo for the respondent entered appearance holding brief for Mr. Jamael Ngowo. Prior to the commencing of the hearing and making the necessary prayers, the counsel for applicant wanted to know whether the court order given on 4<sup>th</sup> March 2021 was complied with for the respondent to file counter affidavit on amended affidavit filed on 23<sup>rd</sup> November 2020. The court informed him that the court record

is silent and that the last document filed in court was an amended affidavit filed on 23<sup>rd</sup> November 2020. The counsel for the applicant went on to make a prayer that the fact their application was not controverted, it deemed to be admitted. To support this, he cited the case of **Martin D. Kumalija & 117 Others Vs. Iron & Steel Limited** Court of Appeal Civil Appeal Application No. 70/18 of 2018, Misc. Application No.42 of 2016 between **East African Cables (T) Limited Vs Spencon Services Limited** At page 7 laid the principle that in law affidavit is evidence it has to be controverted on oath and deemed to be admitted. He also prayed for this court to invoke rule 37 of the Labour Court Rules and enter default judgment, as the respondents did not show good cause.

Mr. Elibahath Akyo was given fifteen minutes by the court to consult his colleague on the position. His reply was that he was in court just for holding the brief of Mr. Jamael Ngowi who should be given right to be heard to explain the court what exactly happened on the failure by him to file counter affidavit. He further informed the court that the reason for the delay to file a counter affidavit was the fact that Mr. Jamael has been taking care of his father's illness. He submitted that Mr. Jamal is praying for this court not to enter default

Judgment, instead give him more time to file counter affidavit so that the rights of the respondents may not be denied.

Having gone through proceedings of this court, it transpires that on 4<sup>th</sup> March 2021 the respondent requested seven days to file counter affidavit. However, he failed to do so until 23<sup>rd</sup> June 2021 when the matter came for hearing when the ground for the failure given as submitted by Mr. Elibahath Akyo. He informed the court that Mr. Jamael has been taking care of his sick father and requested for more time to do so. I agree with the arguments raised by the applicant's counsel that the reasons given in seeking extension of time to file counter affidavit is not sufficiently proved. Even if the reason could be accepted, the record shows there are three representatives from the same legal department to represent the respondents, as shown in the notice of presentation. One among them is Mr. Elibahath Akyo who appeared in court. Therefore, since the last date of order which was 4<sup>th</sup> March 2021 till 24<sup>th</sup> June 2021 prudently they could take any action either to comply with the order or to inform the court the reason for failure to do so. Moreover, it was on court initiative to find out what happened on the failure of respondent to file counter affidavit.

this is an abuse of court process resulting from the negligence of counsel for the respondent's which cannot detain this court from proceeding to the substantive issues before it.

Coming back to the main application, it is apparent that it is an undisputed fact that the respondents' employment was terminated on 11<sup>th</sup> April 2018. Also, it is clear that, the applicant is against part of the award in the decision of the CMA to the extent of legal issues arising from material facts adduced in paragraph 1 item (a) to (i) of the notice of application supported by the amended affidavit of Josephine Mworira, the senior Human Resources Officer of the applicant. These are the issues subject to determination before this court.

Starting with the issue that Arbitrator erred in law in reaching the respondents were not given a right to be heard where there was evidence showing that the respondent were informed of the charges facing them as required by the law and were given sufficient time to prepare for the hearing.

The record and decision of CMA revealed that there were procedural irregularities in the process of termination of respondent's



employment such as there was no involvement in the investigation process where the presence of the respondents were important, no copy of investigation report were given to them. This is reference to the evidence of PW1 at page 7 - 8 and PW2 at page 8 from paragraph 4 continued to para 2 at page 9 of the proceedings. The evidence confirmed by DW1 when she was cross-examined at page 19 I quote " *Swali: Baada ya uchunguzi huo baada ya kufanyika matokeo yalitolewa Jibu: yalitolewa.... Swali: Walalamikiwa walipewa nakalahizo Jibu: Hapana*". This was also said by DW3 at page 47 and 48 that respondents were not involved and given the investigation report. This is contrary to section 13 (1) of the Employment and Labour relations (Code of good practice) Rules of 2007 that, there must be an investigation conducted. Therefore, I find this issue fair is baseless and has no merit.

The issue that the arbitrator erred in law and in fact in awarding twelve months salaries as compensation where there was evidence on record to show there were valid reason for termination. Based on the above finding that there was unfair termination as the record transpires on the evidence of DW1 and DW3 on page 18, 20, 43, 44, 45, 46, 47 and 48 based on irregularities' procedure. It is the

finding of this court that, employer, the applicant herein failed to prove that the termination was fair as required by the law under section 39 of the E&LRA of GN. No. 6 of 2004 and Rule 9 (3) of the GN. 42 of 2007. Thus, the Arbitrator was correct in law to rule that there was unfair termination under section 37 (2) of E&LRA of GN. No.6 of 2004 and the award of twelve (12) months compensation to the respondent.

On the issue of payment on severance pay for ten years, It is the finding of this court that the payment was correctly awarded by the Arbitrator as required under section 42 (2) (a) and (b) of E&LRA of GN No.6 of 2004 based on the fact that the respondents have worked with the applicant for more than ten years and the employer terminated the employment. Therefore, this issue has no merit as well.

On the issue of payment of one month salary, 14 days salary for unpaid leave and certificate of service. These are entitlements upon termination of employment as provided under section 44 (1) and (2) of the E&LRA of GN. No. 6 of 2004 which an arbitrator can award upon finding of unfair termination as stipulated under section 40 (1) of the E&LRA of GN. No. 6 of 2004.

Based on the above discussed findings, I find no need to fault the findings of the arbitrator on the issues in dispute. In the end result, this application has no merit and is accordingly dismissed.



Z.A. Maruma

**JUDGE**

30/06/2021

Labour Court TZ.