

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

**REVISION APPLICATION NO. 603 OF 2019**

**BETWEEN**

**FAIRMONT RESORT COMPANY LTD.....APPLICANT**

**VERSUS**

**ADAM JUMA MOHAMED.....1<sup>ST</sup> RESPONDENT**

**BARAKA KIVIKE.....2<sup>ND</sup> RESPONDENT**

**MICHAEL WILSON.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 24/08/2021*

*Date of Judgment: 19/11/2021*

**I. Arufani, J.**

On 4<sup>th</sup> August, 2017 the respondents knocked the door of the Commission for Mediation and Arbitration (herein referred as the CMA), and filed a Labour Dispute No. CMA/DSM/KIN/R.908/17/1118 claiming to have been unfairly terminated from their employment by the applicant. Upon hearing the parties, the arbitrator found the respondents were not terminated by the applicant rather they were suspended from their employment pending disciplinary proceedings. The arbitrator ordered the applicant to pay the respondents the sum of Tshs. 11,500,000/= being their salaries for the time they were suspended, and to continue paying the respondents' salaries until when their suspension will be revoked.

The applicant was aggrieved by the award issued by the CMA and filed the present application in this court to challenge the award basing on the following grounds:-

- i. That the arbitrator delivered the award on 31<sup>st</sup> May, 2019 while the arbitration proceedings were concluded on 13<sup>th</sup> March, 2019 without assigning good cause for delaying to deliver the award.*
- ii. The amount awarded to the respondents is colossal as the arbitrator never considered the evidence of the applicant submitted as it was true that, due to intolerable behaviours of the respondents they were notified and called before the disciplinary committee.*
- iii. The award neither elaborates nor analyses the evidence adduced by the applicant nor spoke about it.*

The brief background of the matter as can be found in the records of the application is to the effect that, the respondents were employed by the applicant on diverse dates and on different capacities from 2014. While the first respondent was employed as a cook the second and third respondents were employed as waiters. They continued with their employment relationship until 6<sup>th</sup> June, 2017 when they were suspended from their employment pending disciplinary hearing on ground of misconducts. Before disciplinary hearing being conducted the respondents decided to file the dispute

before the CMA alleging that they were unfairly terminated from their employment and as stated earlier in this judgment the CMA determined the matter in their favour.

While the applicant was represented in the present application by Mr. Ferdinand Masoy, Learned Advocate the respondents were represented by Ms. Amina Mohamed Mkungu, Learned Advocate. The counsel for the parties prayed and allowed to argue the application by way of written submission.

Submitting on the first ground of revision the applicant's counsel argued that, the award was delivered on 31<sup>st</sup> May, 2019 which is almost three (3) months from the conclusion of the arbitration proceedings which ended on 13<sup>th</sup> March, 2019. He argued that, the arbitrator has not advanced any reason for such delay contrary to the law. The counsel for the applicant referred the court to Rule 27 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. 67 of 2007 which provides that:-

*"The arbitrator shall write and sign a concise award containing the decision within the prescribed time with reasons."*

He also cited in his submission Rules 8 (2) and 14 (4) of Labour Institutions (Ethics and Code of conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007 together with section 88(9) of Employment and Labour Relations Act, CAP 366 RE. 2019 which generally requires that, after completion of arbitration hearing the arbitrator to write a definite, certain, concise and reasoned award and deliver the signed award to the parties within thirty days. He submitted that the arbitrator failed to observe the above stated requirement of the law as he neither considered the evidence of the applicant nor assign reason for the delay to deliver the award.

As for the second ground of revision the counsel for the applicant stated that, the amount awarded to the respondents is colossal amount. He argued that, the arbitrator never considered the applicant's evidence that, following the respondent's intolerable behaviours they were notified and summoned to appear before the disciplinary hearing committee.

Concerning the third ground of revision it was submitted by the counsel for the applicant that, the award does not contain the applicant's evidence as adduced during trial of the dispute. He argued that, the evidence adduced by the applicant clearly explains

what transpired at the disciplinary hearing. Counsel for the applicant supported his argument by citing in his submission Rule 8 (2) of GN. No. 66 of 2007 prayed for the award be revised and set aside for being illogical or irrational.

Responding to the applicant's submission, the counsel for the respondents argued in relation to the first ground of revision that, they are acknowledging the requirement of the law on issuance of an award after conclusion of hearing of a dispute as provided under Rule 27 (3) of the GN. No. 67 of 2007 read together with Rule 8 (2) of the GN. No. 66 of 2007. She went on arguing that, according to the record of the CMA the arbitrator complied with the mandatory requirements provided in the above cited provisions of the law.

She argued that, section 88 (9) of the ELRA cited by the counsel for the applicant which was requiring award to be issued within thirty days after the conclusion of the arbitration proceedings has already been revised and is no longer providing for period of issuing award, hence it is irrelevant in the present application. She however submitted that the late delivery of the award was neither contributed by the respondents thus it should not be used as a shield to prejudice the respondents' statutory rights.

She went on arguing that, even if it is true that there was the alleged delay, the court is required to consider the degree of lateness and how the applicant was affected by alleged delay. She argued that, although it is true that the law requires an award to be issued within thirty days after the conclusion of the arbitration proceedings but the law does not compel the arbitrator to give reasons for the delay to deliver the award out of thirty days prescribed by section 88 (11) of the ELRA. She submitted that, the record of the CMA is very clear that all evidence adduced by all parties were properly scrutinized and stated the first ground is baseless and invited the court to disregard the same.

Concerning the second ground it was argued by the counsel for the respondent's that, it is a trite law that where an employee is suspended from his employment on misconduct the employer is required pay him his full remuneration pending investigation of the alleged misconduct. To support her argument, she cited in her submission Rule 27 (1) of the Employment and Labour Relations (Code of Good Conduct) Rules, GN. No. 42 of 2007. She submitted that it was right for the arbitrator to award the respondents the sum of Tshs. 11,500,000/= being their salary for the 23 months as the

applicant failed to determine their fate even after the disciplinary hearing.

As regard to the third ground of revision the counsel for the respondents argued that, the ground lacks merit and should be disregarded. She submitted that, the award was properly procured and the reason for the decision were clearly stated by the arbitrator to the effect that, the applicant shall continue to pay the respondent their full remuneration until the finality of their suspension. In fine she prayed the court to uphold the award issued by the CMA.

Having keenly considered the rival submission from the counsel for the parties and after going through the record of the matter and the laws applicable in the matter at hand the court has found the issues to be determined in this matter are:-

- 1. Whether the award was issued out of time prescribed by the law. If the answer is in affirmative whether it renders the award irrational or illogical.*
- 2. Whether the Arbitrator properly evaluated the evidence adduced by the parties and it was proper to award 23 months' salary to the respondents.*

Staring with the first issue, the court has found proper to state at this juncture that, it is a requirement of the law as provided under

Rule 27 (1) of the GN. No. 67 of 2007 that, arbitrators are required to write and sign a concise award containing the decision and the reasons for the decision and deliver the same to the parties within the prescribed period of time. The prescribed time for issuing an award was initially provided under section 88 (9) of the ELRA Act No. 6 of 2004 cited by the counsel for the applicant. However, after the issuance of current Revised Edition of the law of 2019 which came into operation in 2020 the provision of the law providing for limitation of time for issuing award of the CMA is section 88 (11) of the ELRA which states as follows:-

*"Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator".*

The court has found the applicant's counsel argued the award was issued on 31<sup>st</sup> May, 2019 which is almost three (3) months from the conclusion of the arbitration proceedings on 13<sup>th</sup> March, 2019 and stated there is no any reason advanced by the arbitrator for the said delay. First of all, the court has found it is true that, the hearing of the arbitration proceedings was concluded on 13<sup>th</sup> March, 2019. However, the arbitration proceedings show after conclusion of hearing the dispute the Arbitrator ordered the parties to file their final



submission by 30<sup>th</sup> April, 2019 and fixed the date of issuing the award to be 31<sup>st</sup> May, 2019.

The court has found that, although the Arbitrator fixed the date of issuing award to be 31<sup>st</sup> May, 2019 but the arbitration proceedings show on that date all parties did not appear before the CMA and the award was delivered to the parties on 4<sup>th</sup> June, 2019. If it will be counted from 30<sup>th</sup> April, 2019 when the parties were required to file their final submission up to when the award was delivered on 4<sup>th</sup> April it will be found there was a delay of about five days and not three months as argued by the counsel for the applicant.

That being the position of the matter the court has found that, it is not only that the counsel for the applicant has not told the court which provision of the law requiring Arbitrators to give reason for the delay to issue an award but the arbitration proceedings show clearly that the parties did not appear before the CMA on 31<sup>st</sup> May, 2019 which had been fixed for delivery of the award. Even if it will be taken 31<sup>st</sup> May, 2019 which had been fixed for delivery of the award of the CMA was out of thirty days provided by the law but the court has found that cannot be a sufficient reason for invalidating the award.

The court has arrived to the above finding after being of the view that, the aim of legislating the cited provision of the law was not to invalidate awards delivered after passing thirty days but was intended to limit Arbitrators to deliver awards timely as justice delayed is justice denied. The above stated view of this court is getting support from the view taken by my learned sister Abood, J in the case of **Lucas Mkolomi V. Holiday Inn Hotel**, Rev. No. 562 of 2019, HCLD at DSM (unreported) where when she was determining the issue of an award delivered after passing thirty days prescribed by the law she stated that:-

*"In my view the essence of such provision is to limit Arbitrators to deliver awards timely as justice delayed is justice denied. However, I do not find it reasonable to fault an award just because it was delivered out of the prescribed time because that will even necessitate more delay and cause inconvenience to the parties".*

The court has also been of the view that, even if the award was delivered out of prescribed time but the applicant has not explained to the court how he was prejudiced by such a delay. The requirement for a party challenging award delivered after elapse of thirty days prescribed by the law was stated in the case of **Tanzania Breweries**

**Limited v. Leo Kobelo**, [2015] LCCD 49 where the court stated that:-

*"In the case of **2000 Industries Ltd. Vs. Halima Z. Giteta 7 Others**, Rev. No. 9 of 2009, High Court at Dar es Salaam (unreported), the Court held that the award delivered outside of the required 30 days but the same did not cause any miscarriage of justice to the applicants as they failed to adduce any facts to show that they were unduly prejudiced as a result of non-delivery of the award within 30 days".*

In the light of the above stated position of the law the court has found the first ground of revision which was used by the counsel for the applicant to invite the court to set aside the award of the CMA on the ground that it was issued out of time prescribed by the law cannot be upheld as the counsel for the applicant has not informed the court how the applicant was prejudiced by the delay to deliver the award within the prescribed time.

Coming to the second ground, it was the applicant's counsel argument that, the arbitrator failed to consider the applicant's evidence that the respondents were notified and summoned to appear before the disciplinary meeting. As a result, the arbitrator awarded the respondents a colossal sum. The stated argument was

vehemently refuted by the respondents' counsel who argued that the arbitrator considered the evidence from both parties to arrive to the decision stated in the award. He argued that, the amount awarded is not colossal as the applicant failed to state the respondents' fate for all the period they were put on suspension.

The court has found each side had one witness who testified before the CMA. The court has found the evidence adduced before the CMA by the said witnesses shows the respondents were suspended from employment on 25<sup>th</sup> May, 2017. The disciplinary hearing was conducted on 11<sup>th</sup> July, 2017 as per Exhibit A1 and thereafter the respondents were told to wait for the outcome of the disciplinary hearing. The record of the matter shows the outcome of the disciplinary hearing was not issued to the respondents. The CMA F1 shows on 4<sup>th</sup> August, 2017 the respondents decided to refer the matter to the CMA claiming for unpaid salaries and claimed they were unfairly terminated from their employment by the applicant.

The law as provided under Rule 27 (1) of GN. No. 42 of 2007 states that, where there are serious allegations of misconduct or incapacity an employer may suspend an employee on full remuneration whilst the allegations are being investigated and

pending further action. The impugned award shows the Arbitrator ordered the respondent to be paid 23 months' salaries from July, 2017 to the date of the award to wit May 2019.

It is undisputed fact that the respondents being on suspension were entitled to the salaries as per the provision of the law cited hereinabove. However, the court has found that, as the respondents decided to initiate a dispute before the CMA for unfair termination before the applicant determined their fate, it was impracticable for the applicant to proceed with anything relating to the fate of their suspension.

The court has found it is no disputed that the respondents were paid their salaries up to June, 2017 and it is not disputed that they referred their dispute to the CMA on 4<sup>th</sup> August, 2017. That being undisputed facts the court has found the respondents were entitled to be paid only the salary of July, 2017 which is the salary before taking their dispute to the CMA. They were not entitled to be awarded the salaries of the period from when they referred the dispute to the CMA until when the award was issued as they were the one frustrated the process of finalizing determination of the fate of their suspension.

In the premises the court has found the Arbitrator erred in awarding the respondents the salaries of 23 months while they were the one frustrated the process of finalizing determination of the fate their suspension. On that basis the application is hereby partly allowed. The award issued by the Arbitrator is hereby revised and the order of payment of 23 months' salaries to the respondents is set aside and substituted with an order of payment of the salary of one month of July, 2017. Since the outcome of the disciplinary hearing has not been delivered, the applicant is directed to facilitate the outcome of the disciplinary hearing to be delivered so that the respondent can know the fate of their employment. The respondents will be entitled to be paid their salaries from the date of this judgment to the date of delivery of the outcome of the disciplinary hearing. It is so ordered.

Dated at Dar es Salaam this 19<sup>th</sup> day of November, 2021.

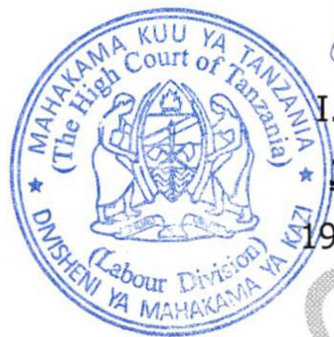


I. Arufani

**JUDGE**

19/11/2021

**Court:** Judgment delivered today 19<sup>th</sup> day of November, 2021 in the absence of the applicant and the first respondent and in the presence of the second and third respondents in person. Right of appeal to the Court of Appeal is fully explained to the parties. The Applicant to be served with the judgment of the court for compliance with the directives made by the court.



*Jesse*

I. Arufani

**JUDGE**

19/11/2021