

IN THE HIGH COUR OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 762 OF 2018

BETWEEN

KUNDUCHI BEACH HOTEL & RESORT.....APPLICANT

AND

ROSEMARY NYERERE.....RESPONDENT

JUDGMENT

Date of the last order 25/02/2021

Date of the ruling 19/03/2021

A.E. Mwipopo, J.

The Commission for Mediation and Arbitration delivered an ex-parte ruling in favour of Respondent namely Rosemary Nyerere in Labour Dispute No. CMA/DSM/KIN/R.32/16/270, on 3rd March, 2018, before Hon. J. Muhanika, Arbitrator. The Respondent who was employed by the Applicant namely Kunduchi Beach Hotel and Resort as Head Waitress from September, 2011 was terminated from employment on 19th December, 2015 for misconduct. The Respondent was aggrieved by the termination and she referred the dispute to the Commission for Mediation and Arbitration (CMA). The dispute was heard and determined in *Ex parte* following the failure of

the Applicant to appear before the Commission. The Commission delivered Exparte Award on 28th December, 2016 in favour of the Respondent. The Applicant was not satisfied with the Commission's *Ex parte* Award and filed before the Commission an application to set aside the *Ex parte* Award on 24th January, 2017. The Commission delivered its ruling on 8th March, 2018, against the Applicant. Dissatisfied by the Commission Ruling the Applicant filed Revision No. 159 of 2018 which was struck out for incompetence on 22nd October, 2018 with 14 days leave to file a fresh application. Then, the Applicant filed the present revision application on 30th October, 2018.

The Application is accompanied by Chamber Summons supported with the Affidavit of Joseph Mwingira, Principal Officer of the Applicant. The Applicant is praying for the Court to revise, quash and set aside the respective Commission for Mediation and Arbitration *Ex parte* award in Labour Dispute No. CMA/DSM/KIN/R.32/16/270 delivered on 28th December, 2016 and the Ruling delivered on 8th March, 2018.

The Applicant has three grounds of revision which are found in paragraph 12 of the Applicant's Affidavit. The grounds for revision are as follows hereunder:-

- i. Whether it was proper the trial Arbitrator to proceed in *ex parte*.
- ii. Whether it was proper the trial Arbitrator to proceed on merits in *ex parte* without disposing applicant's preliminary objection.
- iii. The Arbitrator erroneously delivered an award in *ex parte* illegally on the following:-
 - a. The Arbitrator failed to answer issue raised.

b. The award does not show evidence relied by the complainant.

Before hearing, the Applicant made several attempt to serve the Respondent without success and he prayed for the service to be by way of publication the prayer which was granted by this Court. The Applicant effected publication of the summons through Mwananchi Newspaper dated 5th July, 2019 but still the Respondent did not appear. Then, the Court ordered for the hearing to proceed *ex parte* where the Applicant prayed for the Court to invoke default judgment under rule 37(1) of the Labour Court Rules, G.N. No. 106 of 2007.

The Applicant alleged in the Affidavit that Arbitrator erred to proceed in *ex parte* for the reason that the Applicant raised P.O. which was not determined and also the reason for proceedings in *ex parte* were not sufficient.

It is a trite law that an application to set aside an *ex parte* award is granted where the applicant constitute sufficient ground for the Commission or the Court to set aside the *ex parte* award. This Court in the case of **Mbeki Teachers Sacco's vs. Zahra Justas Mango**, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (Unreported), held that sufficient reason is pre – condition for Court to set aside *ex parte* order. The Commission's *Exparte* Award is set aside if the Court or Commission is satisfied that the party was prevented from appearing by sufficient cause.

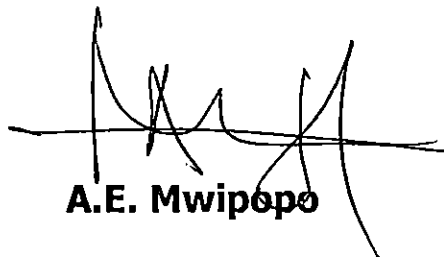
In the present application the Commission decided to proceed with the hearing in *ex parte* after the Applicant failed to appear on time during the hearing date which was on 31st October, 2016. The reason advanced by the

Applicant in his application before the Commission to set aside *ex parte* award is that he failed to appear on time before commission on the date of hearing because of traffic jam at vingunguti area along Nyerere road. The traffic jam was caused by the President of the United Republic of Tanzania who was travelling abroad. The Commission rejected the reason on ground that the traffic jam is common problem in Dar Es Salaam and the Applicant has to make proper plan to utilize his time and attend to the hearing within time. The Applicant had an ample time to inform the Commission that he will arrive late but did not do that. The trends of Applicant's appearance before the Commission shows that it was his habit to arrive late at the Commission. There is no evidence whatsoever which proves the time the President was travelling to Kenya as alleged. I'm of the same opinion that the Commission rightly dismissed the application to set aside *ex parte* award as the reason advanced was not sufficient. It was not proved the time which the president was allegedly travelling abroad also the Applicant was supposed to plan the utilization of time in order to arrive on time. The Arbitrator also rightly dismissed the P.O. raised by the Applicant for his failure to litigate his case. Thus, I find that the Arbitrator properly decided to proceed with hearing in *ex parte*.

The Applicant further alleged that the *Ex parte* award is tainted with two illegalities. First illegality is that the Arbitrator failed to answer issue raised, and the second one is that the award does not show evidence relied by the complainant. The CMA typed proceedings in page 3 and the award at page 2 shows that the Arbitrator framed three issues for determination. The first issue was whether there was fair reason for termination; the second

issue was whether the procedure for termination was fair; and the last one is the proper remedies to both parties. Reading the Commission award it is clear that the Arbitrator determined the first and the last issue. The second issue about fairness of procedure for termination was not determined. However, after the issue of fairness of termination was found to be unfair automatically the termination of the Respondent employment became unfair. And where the termination is found to be unfair substantively the employer is entitled for remedies for unfair termination under section 40(1) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019. The Respondent was awarded with 12 months' salary compensation which is among the remedies for unfair termination together with severance payment, notice payment and the salary for the work done before termination. Thus, I find that the award delivered by the Commission was proper and according to the law. There is no illegality whatsoever in the CMA *ex parte* award.

Therefore, I find the Revision to have no merits and I hereby dismiss it. The CMA *Ex parte* award is upheld. No order as to the cost of the suit.

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

A.E. Mwipopo

Judge

19/03/2021