

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

REVISION APPLICATION NO. 65 OF 2022

(Arising from an Award issued on 12/2/2019 by Hon. P.M. Chuwa, Arbitrator, in Labour dispute No. CMA/DSM/ILA/12.197/494 at Ilala)

TULIPO MWEREKE APPLICANT

VERSUS

MIHAN GAS CO. LTD now TAIFA GAS TANZANIA LIMITED RESPONDENT

RULING

Date of Ruling: 18/11/2022

B.E.K. Mganga, J.

Tulipo Mweleke, the herein applicant, was employed by the respondent as Technical Sales representative stationed in Dar es Salaam. Facts of this application are that on 1st March 2016, the parties entered two years fixed term contract expiring on 30th April 2018. On 23rd July 2017 before expiry of their contract, respondent terminated employment of the applicant allegedly due to poor performance. Dissatisfied with termination, applicant referred Labour dispute No. CMA/DSM/ILA/12.197/494 before the Commission for Mediation and Arbitration (CMA) at Ilala complaining that respondent terminated her employment unfairly.

On 21st December 2018, Hon. P.M. Chuwa, Arbitrator, having heard evidence and submissions of the parties, issued an award that termination was fair substantively but unfair procedurally. The arbitrator awarded applicant to be paid TZS 3,550,000/=. Aggrieved with the award, applicant filed this application beseeching the court to revise and set aside it. In the affidavit in support of the Notice of Application, applicant raised three issues namely:-

- 1. Whether it was proper for the trial Arbitrator to hold that applicant contributed for her termination of her employment.*
- 2. Whether the trial Arbitrator properly granted the reliefs sought by the applicant.*
- 3. Whether the trial Arbitrator properly evaluated evidence of the parties.*

In opposing the application, respondent filed both the Notice of Opposition and the counter affidavit sworn by Stella Lyimo, Human Resources Manager.

By consent of the parties the application was argued by way of written submissions. In the said written submissions, applicant enjoyed the service of Frank Killian, advocate while respondent enjoyed the service of Sosten Mbedule, advocate.

At the time of composing my judgment I perused the CMA record and find that only two witnesses testified namely, Analdo Kishumu

(DW1) and Tulipo Mwereke (PW1). I noted that CMA proceedings does not show as to when DW1 testified and before whom. The record only shows that PW1 testified on 20th September 2019 before Hon. P.M. Chuwa, Arbitrator. The record shows that initially the dispute was arbitrated by Hon. Mgendwa M, Arbitrator, but the record does not show that the said arbitrator recorded evidence of DW1 though there are papers showing that DW1 testified. In short, the record does not show that Mgendwa M, arbitrator, recorded evidence of the parties. In the award, Hon. P.M. Chuwa, arbitrator, who also it is not indicated how he happened to arbitrate the matter, referred to evidence of DW1 and dismissed the dispute. With that observation, I summoned learned advocates of the parties to address the court on whether the dispute was properly arbitrated or not and the effect thereof.

Responding to the issue raised by the Court, Mr. Killian, learned advocate for the applicant conceded that the record does not show how Hon. Chuwa P.M, Arbitrator, chipped in the proceedings and when Hon. Mgendwa, arbitrator, ceased to arbitrate the matter. Counsel for the applicant submitted further that in terms of section 88(2)(a) of Employment and Labour Relations Act [Cap. 366 R.E. 2019] arbitrator must be assigned by the Commission to arbitrate the dispute after the

initial arbitrator has failed to finalize it. He added that there is no indication and reasons thereof as to why Hon. Mgendwa, M, arbitrator, did not finalize the dispute between the parties.

As to when evidence of DW1 was recorded, Mr. Kilian submitted that it is not clear as to when evidence of DW1 was recorded and before whom. He went on that section 88(2)(b) of Cap. 366 R.E. 2019(supra) was violated. Counsel for the applicant concluded his submissions by submitting that the irregularities vitiated the whole CMA proceedings and prayed that CMA proceedings be nullified, quash the award arising therefrom and order trial de novo

On the other side, Mr. Mbedule, learned counsel for the respondent, also conceded that CMA proceedings has some irregularities. He submitted that there is no reason as to why the file was transferred from Hon. Mgendwa to Hon. Chuwa arbitrator. He added that, the dispute was heard by Hon. Chuwa arbitrator in contravention of the provisions of section 88(2)(a) and (b) of Cap. 366 R.E. 2019(supra). He went on that the integrity of the said CMA proceedings is questionable because Hon. Chuwa arbitrator hijacked the file and proceeded to arbitrate the dispute between the parties.

On recording of evidence of DW1, counsel for the respondent submitted that the record does not show as to when and before whom that evidence was recorded. Mr. Mbedule learned advocate for the respondent submitted that the cumulative effect of these irregularities is that CMA proceedings were vitiated and prayed that CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial *de novo*.

I have considered submissions made by both Counsels in which they are at once that the irregularities vitiated the whole CMA proceedings. I agree with submissions of both counsel that for the Mediator or arbitrator to mediate or arbitrate the dispute, must be assigned. This applies at the time of taking over of the dispute from one arbitrator to another. Section 15(1)(b) of the Labour Institutions Act [Cap.300 R.E.2019] is clear on the point as it provides:-

"15(1) In the performance of its functions, the Commission may-
(b) assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law;"

Similarly, Section 88(2)(a) and (3)(a) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] provides:-

"88(2) Where the parties fail to resolve a dispute referred to Mediation under section 86, the Commission shall-

*(a) **Appoint** an arbitrator to decide the dispute;*

(3) Nothing in subsection (2) shall prevent the Commission from-

*(a) **appointing** an arbitrator before the dispute has been mediated;"*

From the wordings of the two cited provisions of the laws above, an arbitrator has to be appointed and assigned the dispute to arbitrate. There is no room for an arbitrator to hijack proceedings, so to speak, from another arbitrator and continue with arbitration. I am alive that due to some unforeseen event, an arbitrator may not arbitrate the dispute to its conclusion, but reasons must be on record. To the contrary, there are no reasons as to why Hon. Mgendwa. M, arbitrator did not arbitrate the dispute to its finality or as to why, Hon. Chuwa, P.M, arbitrator took over. The record shows that initially the dispute was before Hon. Mgendwa. M, arbitrator, and that on 26th February 2018 the matter was scheduled for hearing of evidence of the respondent's witness. However, the record does not show what transpired on that day, but the dispute was adjourned to 04th April 2018 and later on it adjourned to 09th May 2019 for hearing before Hon. Mgendwa, arbitrator. The record show that parties were not heard on that date and the dispute was adjourned to 20th June 2018 but the record does not show what transpired. On 04th September 2018 the

parties appeared before Hon. Chuwa, P.M, arbitrator, who adjourned the matter for hearing on 19th September 2018. Surprisingly, the record shows that on 20th September 2019, Tulipo Mweleke(PW1) the applicant gave her testimony before Hon. Chuwa. P.M, arbitrator. The record is silent as to when Hon. Chuwa, arbitrator was appointed and assigned to take over the dispute from Hon. Mgendwa, arbitrator. As pointed herein above, taking over by Hon. Chuwa, P.M, arbitrator, was contrary to provisions of section 88(2)(a) and (3)(a) of Cap. 366 R.E. 2019(supra) and Section 15(1)(b) of Cap.300 R.E.2019(supra).

There is a range of cases which have explained the essence of a successor judge/magistrate/arbitrator to assign and record reasons for taking over the file with a view of increasing transparency in administration of justice and avoid chaos or complaint that the matter was hijacked from one judicial officer or quasi-judicial officer to the other without the knowledge of the officer who was initially handling it. See the cases of *Priscus Kimario vs Republic*, Criminal Appeal No. 301 of 2013 (unreported), [*Charles Chama & Others vs the Regional Manager TRA & Others*](#), Civil Appeal No. 224 of 2018 [2019] TZCA 417, **National Microfinance Bank vs Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of

2016 (unreported), [M/S Georges Center Limited vs The Honourable Attorney General & Another](#), Civil Appeal No. 29 of 2016 [2016] TZCA 629, [M/s Flycatcher Safaris Ltd Hon.Minister For Lands & Human Settlements Developments & Another](#), Civil Appeal No. 142 of 2017 [2021] TZCA 546, [Leticia Mwombeki vs Faraja Safarali & Others](#), Civil Appeal No. 133 of 2019 [2022] TZCA 349, [Hamisi Miraji vs Republic](#), Criminal Appeal No. 541 of 2016 [2018] TZCA 237 to mention but a few. In **Miraji case** (supra), the Court of Appeal quoted its earlier decision in **Priscus Kimario's case** (supra) as follows: -

"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to detriment of justice. This must not be allowed".

In **M/S Georges Center's case** (supra) the Court of Appeal having considered the provisions of Order XVIII rule 10 of the Civil Procedure Code [Cap. 33 R.E. 2019] held: -

" The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take

*up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised**".*

Guided by the above cited Court of Appeal decisions, I hold that Hon. Chuwa P.M took over the dispute and proceed with hearing evidence of POW improperly. Failure to assign reason for taking over the dispute amounts to procedural irregularity. The Court of Appeal in the case of [Mariam Samburo vs Masoud Mohamed Joshi & Others](#), Civil Appeal No. 109 of 2016 [2019] TZCA 541 held that:-

"...in the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity."

For the foregoing, I agree with submissions by both counsels that CMA proceedings were vitiated and their prayer to nullify the whole proceedings and quash the award. I therefore hereby nullify CMA

proceedings, quash, and set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam this 18th November 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 18th November 2022 in Chambers in the presence of Frank Kilian, Advocate for the Applicant and Sosten Mbedule and Helen Ngelime, Advocates for the Respondent.



B. E. K. Mganga
JUDGE