IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 173 OF 2022

Arising from an Award issued on 29/4/2022 by Hon. P.M. Chuwa, Arbitrator in Labour dispute No. CMA/DSM/TEM/504/2017/229/17 at Temeke)

CHARLES SAMWEL KOJA ..... APPLICANT

VERSUS

KOBIL TANZANIA LIMITED ..... RESPONDENT

JUDGMENT

Date of last Order: 30/11/2022
Date of Judgment: 12/12/2022

B. E. K. Mganga, J.

Brief facts of this application are that the parties had employment relationship since 2014 but on 21st August 2017, applicant filed Labour dispute No. CMA/DSM/TEM/504/2017/229/17 before the Commission for Mediation and Arbitration(CMA) at Temeke complaining that respondent breached the contract of employment. On 29th April 2021, Hon. P.M. Chuwa, Arbitrator issued an award ordering respondent to pay TZS 1,300,000/= to the applicant being salary for two months' and 18 days.

Applicant was aggrieved by the said award hence this application. In in his affidavit, Charles Samwel Koja, the applicant raised three grounds namely:-

i. *Arbitrator erred to hold that respondent did not breach contract.*
ii. *That arbitrator erred to hold that applicant failed to prove that he was terminated unfairly there was breach of contract.*
iii. *Arbitrator failed to analyze and examine evidence.*

On the other hand, respondent filed the counter affidavit of Yuda Mosha, her Managing Director to oppose the application.

When the application was called on for hearing, Mr. Elinihaki Kabura, Advocate, appeared and argued for and on behalf of the applicant, while Mr. Sylivanus Mayenga, Advocate, appeared and argued for and on behalf of the respondent.

Before parties have conversed the grounds of application advanced by the applicant, I asked that them also, in their respective submissions, to address whether, proceedings were properly conducted at CMA because the matter was handled by three different arbitrators without assigning reasons thereof.

Mr. Kabura learned advocate for the applicant opted to argue the application submitting that section 37(1) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rule 8(1)(c) and (d) of the

Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 provides that in order to terminate contract of employment, the employer must have valid reason and fair procedure must be followed. Counsel for the applicant submitted that, it was alleged that applicant absented himself from work as per letter of termination (exhibit P7) but in the award, the arbitrator held that applicant was terminated due to misconduct, which was not an issue between the parties. He went on that; applicant was neither heard in the Disciplinary Hearing on the alleged absenteeism nor charged or served with notice showing that he absconded from work. It was submissions of counsel for the applicant that, applicant was not afforded right to be heard. Counsel submitted further that, in his evidence, applicant testified that he failed to attend at work after being prevented by the Chief Security Officer who was armed. He submitted further that, the allegation that applicant absconded was an afterthought because applicant was served with termination letter based on abscondment after he (applicant) has complained at CMA. He added that, Arbitrator based his findings on theft and misconducts while there was no disciplinary hearing conducted.

Mr. Mabura submitted further that applicant attended the disciplinary hearing relating to misconduct but he was not given findings of the

disciplinary hearing committee. He cited the case of ***John Kanjeli v. Tanzania Revenue Authority,*** Consolidated Revision No. 626 & 817 of 2019, HC (unreported) to support his submissions that the employer had a duty to tender disciplinary hearing minutes and serve the employee with the outcome of the disciplinary hearing committee.

Responding to the issues raised by the court, counsel for the applicant submitted that proceedings were irregular because it is not recorded as to why the file moved from one arbitrator to the other. He added that, the effect thereof is that proceedings are a nullity and prayed CMA proceedings be nullified, the award be quashed, and set aside and order trial *de novo*.

Resisting the application, Mr. Mayenga, advocate for the respondent submitted that Section 37(1)(c) and (d) of Cap. 366 R.E. 2019(supra) and Rule 8 of GN. No. 42 of 2007(supra) cannot apply in the circumstances of this application. He argued that those provisions relate to unfair termination while the dispute between the parties was on breach of contract. He went on that, in a letter dated 24th July 2017(exhibit C3), applicant admitted that he was not terminated. He added that, during cross examination, applicant admitted that he was never terminated or suspended by a responsible officer of the respondent and that, the alleged

Security Officer had no power to terminate his employment. Counsel for the respondent strongly submitted that respondent did not terminate employment of the applicant, rather, applicant absented himself as per exhibit D5 and that he was given time to show cause. He concluded that no letter was issued by the respondent terminating applicant.

Responding to the issues raised by the court, Mr. Mayenga submitted that the CMA record shows clearly that the dispute was handled by three different arbitrators and that there is no reason assigned for the dispute to move from one arbitrator to the other. He concurred with submissions by counsel for the applicant that proceedings were irregular.

In rejoinder, counsel for the applicant reiterated his submissions in chief.

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 there is no reason assigned as to why the dispute moved from one arbitrator to the other among the three arbitrators namely, Hon. Kokusiima, Batenga and P.M. Chuwa. It is my view that, for the arbitrator to arbitrate the dispute, he /she must be assigned by the Commission. This applies also at the time of taking over of the dispute from one arbitrator to another. I am of that view because,

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 above two cited provisions of the laws, an arbitrator must be appointed and assigned the dispute to arbitrate. There is no room for an arbitrator to take proceedings from another arbitrator and continue with arbitration without being assigned. It is undisputed that for some unforeseen event, an arbitrator may not arbitrate the dispute to its conclusion, but reasons must be on record as to why another arbitrator is taking over. There are no reasons on the CMA record as to why the dispute between the parties was handled by three different arbitrators. That in my view, was contrary to the 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 plethora of case laws explaining the importance and effect of a successor judge/magistrate/arbitrator to assign and record reasons for taking over the file from the predecessor. 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 Oder 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 failure of the arbitrators who handled the dispute between the parties at CMA to assign reason for taking over the dispute amongst them amounted 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. I therefore hereby nullify the whole proceedings, quash and set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.

Dated in Dar es Salaam on this 12th December 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 12th December 2022 in chambers in the presence of Charles Samwel Koja, Applicant and Rosalia Ntiruhungwa, Advocate holding brief of Silvatus Silvanus Mayenga, Advocate for the Respondent.

B. E. K. Mganga
JUDGE