

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

**REVISION NO. 36 OF 2020**

**BETWEEN**

**KIOO LIMITED ..... APPLICANT**

**VERSUS**

**MARCO FRANK MAHINYA ..... RESPONDENT**

**JUDGMENT**

**S.M. MAGHIMBI, J:**

The application beforehand is lodged under Section 91(1)(a), 2(a)&(b) and 94(1)(2)&(b)(i) of the Employment and Labour Relations Act, CAP 366 R.E. 2019 ("the Act") read together with Rule 24 (1), 24 (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(b)(c)(d)&(e) of the Labour Court Rules GN. No. 106 of 2007 ("the Rules"). The applicant is moving the court for the following:

1. That, the Hon. Court be pleased to call for records of the Commission of Mediation and Arbitration of Dar es Salaam at Temeke (hereinafter referred to as the Hon. Commission") in Labour Dispute No. CMA/DSM/TEM/343/2018/127/18 between Marco Frank Mahinya on

one hand and Kioo Limited on the other hand, to revise and quash and upon which;

- (i) Make a finding that the Hon. Commission did not carefully analyse and evaluate the evidence produced by the Applicant;
- (ii) Make further findings that the Commission awarded the sum of Tshs. 12,507,785.00 erroneously as no such evidence was tendered to warrant grant of such quantum.

2. Make an Order for setting aside the whole Award of the Hon. Commission [Hon. M. Batenga, Arbitrator] dated 24<sup>th</sup> December, 2019, and

3. That, this Hon. Court be pleased to make any other or further Orders as the Hon. Court may deem just to grant.

The application was supported by an affidavit of Mr. Nerei Massawe, Principal Officer of the Applicant Company, dated 31<sup>st</sup> January, 2020. The respondent opposed the application by filing a notice of opposition under Rule 24(4) of the Rules. Before this court, the applicant was represented by Mr. Datus Mutalemwa Novat, learned advocate while the respondent was represented by Mr. Hemedi Omari Kimwaga, personal representative. The

application was disposed by way of written submissions and both parties adhered to their schedule of admission.

From the gathered fact on record, the brief background of the matter dates back to the 24<sup>th</sup> September, 2010 when the Respondent was employed by the Applicant on Fixed Term Employment Contract as a "Quality Control Assistant" his salary being Tsh. 207,000.00 per month. On 24<sup>th</sup> May, 2018, the Respondent was terminated from employment by the Applicant due to serious misconduct. Aggrieved by the termination, on 4<sup>th</sup> June, 2018, the Respondent referred the matter to the Commission for Mediation and Arbitration (CMA) at Dar es Salaam. Subsequently on the 24<sup>th</sup> day of December, 2019, the Hon. Arbitrator issued an Award in favour of the Respondent, an award which aggrieved the applicant hence this revision on the following legal grounds:

1. That, the Hon. Commission grossly misdirected itself by not carefully analysing and evaluating the evidence tendered by the Applicant; and
2. That, the Hon. Commission awarded damages of Tshs. 12,507,785.00 erroneously as no such evidence was tendered to warrant grant of such quantum of damages.

Having considered the submissions of the parties and the records of this appeal, I will start with the first ground of revision, it is on an alleged misapprehension of evidence by the arbitrator. Mr. Novat submitted that the CMA did not evaluate and analyse carefully the Applicant's tendered evidence during the hearing of the Dispute. That during the hearing before the CMA, the Applicant produced three (3) witnesses to prove its case, i.e. Nerei Emmanuel Massawe, Shafii Stephan Shimkus and Captain Silus John Kilonzo. Captain Silus John Kilonzo, DW-3, testified that he is the one who interviewed Ismail Hussein who conspired with the Respondent in stealing the shrink film. DW3 tendered Exhibit K-9 which contains the Ismail Hussein's statement. He argue that it was wrong for the CMA to disregard DW3's testimony stated at page 8 of the Award. DW3's testimony ought to have been taken into account, analysed and evaluated carefully being oral evidence and there was no need for documentary evidence as was erroneously required by the CMA as indicated at page 8 of the Award. He supported his argument by citing the case of **Abas Kondo Gede vs. The Republic, Criminal Appeal No. 472 of 2017**, Court of Appeal of Tanzania, at Dar es Salaam (unreported) where at pg. 21 the Hon. Court of Appeal stated that:

*"We must emphasize that oral evidence being one of the methods of receiving evidence in a court of law; is crucial in proving a particular fact and the court is entitled to rely on it in reaching its conclusion. By oral evidence it means that a witness tells the court only a fact of which he has first-hand personal knowledge or that he perceived the fact from his senses.*

*Indeed, section 3 of the Evidence Act, Cap. 6 R.E. 2019 defines oral evidence as:*

*"All statements which the Court permits or requires to be made before it by witnesses in relations to the matter of fact under inquiry; such statement are called oral evidence".*

Therefore, oral evidence, if worthy of credit, like in the circumstances obtaining in the present case is sufficient without documentary evidence to prove a fact or title. Thus where a fact may be proved by oral evidence it is not necessary that documentary evidence must supplement that evidence as this is the other method of proving a fact".

He concluded that the CMA was obliged to rely on the DW3's testimony as the Applicant had substantive reason to terminate the Respondent's employment after having followed procedures for termination.

In reply, Mr. Hemedi questioned the applicant's omission to call one James Mbago, the driver of the vehicle that was found carrying the stolen goods and why the exhibit in question was not brought to court.

Having considered the submissions of parties and going through the records, it is apparent on the face of record that at the disciplinary hearing, only three witnesses were called and the respondent was given an opportunity to cross examine them. However, all witnesses testified on hearsay evidence of what they were told with a driver who was caught with the stolen goods. Surprisingly, as correctly submitted by Mr. Hemedi, the said driver witness was not called in the disciplinary hearing to testify therefore we have evidence that someone was caught with the goods, who did not come to testify and instead convict another person who there was no evidence (apart from the hearsay evidence of DW1 and DW2) to connect him with the offence.

The respondent was not caught with the stolen goods nor did the applicant show his connection to the crime apart from hearsay. It is trite law

that the hearsay evidence has to be corroborated otherwise it is no good evidence. Much as it was a disciplinary hearing and not a criminal case of proof beyond reasonable doubt, the applicant was still duty bound to at least show the connection between the alleged conduct with the accused person. Since that was not done, I join hands with the arbitrator that the reasons for terminating the respondent was substantively unfair hence I do not interfere with that finding.

The second ground is on the quantum of damages awarded, the applicant's submission was that she had substantive reasons to terminate the respondent's employment based on the evidence produced by the applicant before the CMA and a procedure was followed. He argued that it was unfair to award the respondent the sum awarded as she had substantive reason for termination.

On my part, having found concurrent with the CMA that the substance of termination was unfair, and since the applicant's grievance on the amount compensated is solely based on the argument that there was a fair reason for termination, then this ground lacks merits because under Section 40(1)(c) of the ELRA, when the termination is found to be substantively

unfair, then the employee is entitled to compensation which is what the CMA did.

Having so dismissed the grounds of revision for lacking merits, the entire revision is found to be lacking merits and it is hereby dismissed.

Dated at Dar es Salaam this 09<sup>th</sup> day of March, 2022.



  
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**S.M. MAGHIMBI**  
**JUDGE**