THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 85 OF 2021

BETWEEN

EZEKIEL NEHEMIA MASAWE ..... APPLICANT

VERSUS

ACCESS BANK TANZANIA LIMITED ..... RESPONDENT

EXPARTE JUDGMENT

Date of the last order: 10/12/2021
Date of judgment: 2/3/2022

B.E.K. Mganga, J

Applicant was employed by the respondent as micro-team leader at Access Bank dealing with loans. His employment was terminated on 3rd April 2019 as he was alleged that he was involved in gross misconduct by accepting TZS 500,000/= from one of the clients of the respondents. Aggrieved by termination of his employment, on 3rd May 2019, applicant filed labour dispute No. CMA/DSM/KIN/332/19 to the Commission for Mediation and Arbitration henceforth CMA. On 29th January 2021, Kiangi, N, arbitrator, delivered an award that there were valid reasons for termination but that the procedure for termination was not adhered to. The

arbitrator therefore awarded applicant to be paid TZS 6,450,000/= that is equivalent to three months gross salary.

Applicant was further aggrieved by the CMA decision and the award thereof, as a result, he filed this application seeking the court to revise the said award. In the affidavit supporting the notice of application, applicant advanced two ground namely:-

1. *Whether the Arbitrator erred in law by holding that the Respondent had valid reason to terminate the employment contract of the applicant basing on testimony of the respondent witness DW1 whose testimony was closed for none appearance and without the Applicant being given the right to cross examine DW1.*
2. *Whether the arbitrator erred in law by awarding the Applicant a three (3) months Compensation.*

The respondent resisted the application and filed the counter affidavit of Humphrey Mwasamboma, advocate.

I should point out at this moment that the application was heard exparte. The reason for that, is that, when the application was scheduled for hearing on 3rd November 2021, respondent did not enter appearance as a result, Dismas Raphael, Advocate for the applicant prayed to proceed exparte as there was proof of service. On this day, I gave benefit of doubt to the respondent and adjourned the application ordering reservice so that respondent can enter appearance on 11th November 2021. On the later

date, respondent did not also appear though she signed summons. I therefore granted the application by the applicant to proceed exparte.

Arguing the application on behalf of the applicant, Mr. Dismas Raphael, counsel for the applicant, submitted that Arbitrator erred in law by holding that termination was fair based on evidence of DW1 who was not cross examined. He submitted that respondent called Kinanila Nsolo (DW1) who testified only in chief thereafter the matter was adjourned, but the witness did not appear for cross examination on ground that he has some assignments. Counsel argued that, this led the dispute to be adjourned several times and thereafter, after failure of DW1 to appear, arbitrator closed respondents' case and opened applicants (PW1) case. Counsel for applicant submitted that, in composition of the award, the arbitrator considered evidence of DW1 who was not cross examined. He referred to Rule 25(1) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 that requires *inter-alia* a witness to be cross examined. Counsel for the applicant cited the case of ***Hena Afro Asia Geo Engineering Co. Ltd v. John Mihayo Jandika and Others,*** Labour Revision No. 30 of 2020 to stress a point that evidence of a witness who was not cross examined cannot be considered

by the court. He therefore concluded that arbitrator erred in law in considering evidence of DW1.

In the second ground, counsel for the applicant submitted that arbitrator erred in law by awarding applicant three months compensation. Counsel cited this Court's decision (Aboud, J), in ***Higher Education Students's Loan Board v. Yusufu M. Kisare,*** Consolidated Revision No. 755 of 2018 and 858 of 2018, (unreported), that 12 months is the minimum and arbitrator cannot go beyond that. Counsel concluded by praying the award be revised and order applicant to be paid 36 months.

I have carefully considered both the affidavit in support of the application and counter affidavit opposing the application and submissions made on behalf of the applicant and find that, the bizarre and closure of evidence of the respondent before DW1 was cross examined, was contributed by the applicant as I will demonstrate herein below.

In this exparte judgment, I will start with the complaint that the arbitrator considered and used evidence of DW1 who was not cross examined. After careful examination of evidence in the CMA record, I have found that this complaint is justifiable. As hinted hereinabove, applicant contributed to that situation. I am of that view because CMA record shows

that on 17th September 2020, the matter was before Kiangi, N, arbitrator as a result Kinanila Nsolo (DW1) was called to testify. While DW1 was still testifying in chief, Mr. Humphrey, counsel for the respondent prayed for adjournment as he had a case before the High Court at 12:00 hrs. Mr. Benson, counsel for the applicant had no objection to the prayer as a result, the arbitrator adjourned the matter to 21st October 2020. It appears that the matter was called on **12 October 2020** before **Kefa P.E,** arbitrator in a special session but respondent was not present. There is no proof in the CMA record that respondent was notified. It was then scheduled to **15 October 2020** before **Kefa,** arbitrator, who was informed by counsel for the respondent that witnesses for the respondents are indisposed. Reasons that were advanced by counsel for the respondent for absence of witnesses on that date was accepted by Kefa, arbitrator, as genuine as some lost their relatives. Due to absence of witnesses for the respondent on 15th October 2020, the matter was returned to the in charge for directives. No date of next hearing was fixed on 15th October 2020. The matter then came on 5th November 2020 before Kiangi, Arbitrator, for hearing. On this date, applicant and his advocate appeared but there is doubt as to whether respondent was notified as there is alterations on the coram and no proof that she was served. The

doubt is high as there is further alteration in the order. Initially the order was showing "***wito umetolewa***" that was altered to read "***shauri litaendelea tarehe 24/11/2020 saa 4 Asubuhi kwa Ushahidi wa DW1 umalizike, na DW2 na Ushahidi wa upande wa malalamikaji.*** On the later date, Kiangi, N, arbitrator, was informed by counsel for the respondent that DW1 was in Mbeya at CMA giving evidence and prayed for adjournment. The prayer was objected by counsel for the applicant and upheld by the arbitrator on ground that CMA Mbeya is neither the Court of Appeal nor High Court that is above CMA Kinondoni. The arbitrator therefore, closed evidence of the respondent on ground that respondent on several occasions had been giving reasons for adjournment as a delay tactic. After closure of case for the respondent, arbitrator heard evidence of the applicant both in chief and cross examination and thereafter applicant closed his case.

It is unclear whether respondent and her witnesses were aware that the matter was scheduled for hearing on 5th November 2020 and other previous dates. In absence of proof of service, in my view, it was misconception for the arbitrator to conclude that prayer for adjournment by the respondent was intended to delay conclusion of the matter. The arbitrator had in mind expeditious disposal of the dispute and forgot the

importance of justice delivery. In fact the court of Appeal has reminded us in the case of ***Nyanza Road Works Limited v. Giovann Guidon***, Civil Appeal No. 75 of 2020 (unreported) when it held:-

> *"**Secondly,** while we agree with the learned Judge on the expeditious resolution of disputes, we think that expeditiousness must be subject to the dictates of the law and justice. As we had occasion to remark in **Independent Power Tanzania Ltd & Another v. Standard Chartered Bank (Hong Kong) Limited,** Civil Revision No. 1 of 2009 (unreported), speed is good but justice is best (at page 26). And by justice we mean justice to both parties to the dispute...We appreciate that in terms of rule 3(1) of the Labour Court Rules, G.N. No. 106 of 2007, the High Court exercising jurisdiction as a Labour Court is a court of law and equity which ought to have regard to the fact that the duty to act promptly is not a mere technical aspect without any consequences in case of failure by a litigant to exercise his remedy as it were".*

Guided by the above decision of the Court of Appeal in Nyanza Road Works Limited case, I find that the arbitrator forgot the dictate of law. I am of that view because arbitrator closed the respondent case before cross examination of DW1. This, in my view, was contrary to Rule 25(1)(a), (b), (c), (2) and (3) of the Labour Institutions (Mediation and arbitration) Rules, 2007, GN. No. 67 of 2007 that provide the procedure and stages in recording evidence of witnesses at CMA. According to this Rule, a witness has to (i) testify under oath or affirmation, (ii) be examined in chief, (iii) be cross examined by the

other party,(iv) be re-examined by the party calling that witness, (v) be asked questions for clarification by the arbitrator especially after cross examination, (vi) the party cross examining has to be given an opportunity to ask questions arising from the arbitrator's questions and (vii) the party conducting re-examination may take into account all questions asked by the other party and the arbitrator. In the application at hand, only (i) was fully complied with, and (ii) was partially complied as the dispute was adjourned while the witness (DW1) was under examination in chief. All other stages namely (iii) to (vii) were not complied with. In other words, the evidence of DW1 was not fully recorded by the arbitrator. I therefore join hand with the reasoning of my learned brother Kisanya, J, in ***Hena's* case**, supra, that evidence of a witness not cross examined cannot be acted upon by the court. I therefore hold that it was an error for the arbitrator to consider and use evidence of DW1 who was not cross examined to shake his credibility. I therefore allow this ground. As pointed out herein above, this was contributed by the applicant who, did not properly assist the arbitrator as he put pressure to the arbitrator for conclusion of the dispute forgetting the law.

In short, there was procedural irregularity and violation of the law at CMA. As evidence of DW1 was not fully recorded; and as that evidence cannot be acted upon; it is equally that, there is no evidence on CMA record on behalf of the respondent. To make any order at this moment will be condemning respondent unheard. The only remedy available in the circumstances of this application, is to nullify CMA proceedings starting from the evidence of (PW1) the herein applicant to conclusion, quash and set aside the award and order retrial starting from where DW1 ended. This should be done by different arbitrator without delay. I therefore direct that the CMA record be remitted back to CMA so that the parties can be properly heard without delay.

Dated at Dar es Salaam this 2nd day of March 2022.

B.E.K. Mganga
JUDGE