

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

REVISION APPLICATION NO. 358 OF 2021

*(Arising from an Award issued on 30th August 2021 issued by Hon. Wilbard G.M, Arbitrator in Labour
Complaint No. CMA/DSM/ILA/941/20/22/21 at Ilala)*

BETWEEN

NUSRIYE MARHOON APPLICANT

AND

JABIR HAMDAN..... RESPONDENT

RULING

Date of Last Order & Ruling 30/06/2022

B. E. K. Mganga, J.

Jabir Hamdan, the respondent, filed labour complaint No. CMA/DSM/ILA/941/20/22/21 before the Commission for Mediation and Arbitration at Ilala complaining that his employment was unfairly terminated by the applicant. On 30th August 2021, Hon. Wilbard G.M, arbitrator, issued an award that applicant terminated employment of the respondent unfairly and awarded the respondent to be paid TZS. 2,034,615/= . Applicant was aggrieved by the said award as a result, on 16th September 2021, filed the Notice of Application for revision

supported by an affidavit raising three grounds of revision. The respondent filed both the Notice of Opposition and a counter affidavit.

On 22nd September 2021, the court sent a calling for record, but the CMA record was not brought. Other calling for record were sent on 25th April 2022, 19th May 2022, and 8th June 2022 respectively, yet the record was not brought. On 24th June 2022, the court received the affidavit sworn by Grace Wilbard Masawe, the arbitrator who issued the award, stating that she has made all efforts to trace the CMA record but the same is untraceable and that there is no possibility of the same to be obtained.

When the matter was called for hearing on 30th June 2022, Ms. Rudia Makanja, learned Advocate, appeared for and on behalf of the applicant, while Mr. Sabas Shayo, learned Advocate, appeared for and on behalf of the respondent. I informed counsels the predicaments the court was facing in obtaining the CMA record and drew their attention to the affidavit of the Arbitrator and asked them to address how this application will be determined in the absence of the CMA record.

It was submission by Ms. Makanja, adavocate for the applicant that, since the CMA file is missing, hearing of this application cannot proceed. She therefore prayed that CMA proceedings be nullified, the

award arising therefrom be quashed, and set aside and order trial *de novo*.

Mr. Shayo learned counsel for the respondent opposed that prayer submitting that parties should be given time to reconstruct the record. In his submissions, he conceded that parties were not supplied with copies of proceedings and that, apart from the award, he has nothing to show what was testified by witnesses during hearing at CMA. With all these, he resisted the prayer to nullify proceedings and maintained that parties should be allowed to reconstruct the record and proceed with the hearing of the application.

In rejoinder, Ms. Makanja, learned Advocate for the applicant, objected the prayer for reconstruction of the record submitting that, apart from the award they have nothing that can help them to reconstruct the record. She was firm that it is impossible for them to reconstruct the record because they were not supplied with copies of proceedings. She therefore reiterated her prayer of nullifying the CMA proceedings.

I have considered the rival arguments of counsels on whether proceedings should be nullified and order trial *de novo* or they should be allowed time to reconstruct the record and proceed with hearing. I have noted from their submissions that, there are two competing interests.

One in favour of nullification and the other for reconstruction. These conflicting interests are a result fear of the unknown result and pressures that always exists between litigants when the matter is before the court. But it is the duty of learned counsel to assist help parties to ease their pressure and fear. Counsels should always remember that they are officers of the court and owe a duty both to their clients and the court. One thing counsels should always know is that, their duty is to assist the court to reach a just decision and not to win a case at all cost. They are not there to impress their customers so to speak. They are always expected to advise properly their clients and in accordance with the law. They are required to tell their clients the truth whether that truth is bitter or sweet, it has to be communicated. As members of this noble professionals, advocates should not to turn a bitter truth into sweet ones in both the mouth and ears of their clients. Telling the naked truth of the possible outcome may serve both time and money of their clients. Obvious, this should be done in the confines of the law.

As pointed out hereinabove, counsel for the respondent objected the prayer of nullification of CMA proceedings and prayed that time be allowed for the parties to reconstruct the record. With due respect to counsel for the respondent, I don't see any possibility of reconstruction of the record in the circumstances of this application for two reasons.

One; both counsels conceded that they were not supplied with copies of certified proceedings reflecting what witnesses of both sides testified at CMA. As such, whatever is in their possession, cannot be ascertained to be proceedings of the CMA for the same to be acted by the court. In absence of the certified copies of proceedings, each party may prepare what he/she thinks can advance the case in his/her favour. Two; from submissions of both sides, there is no possibility that they will reach agreement before the arbitrator as to what will be regarded as the true record for the arbitrator to certify that the reconstructed record reflect what transpired during hearing for it to be used by the court in this application. In my view, in the circumstances of this application, parties will not manage to reconstruct the record. Reconstruction of the court record is a participatory process involving all stakeholders to the case. This is what the Court of Appeal emphasized in the case of **Robert s/o Madololyo v. The Republic**, Criminal Appeal No. 486 of 2015 (unreported). In reconstruction of the record, the court may be required to furnish a copy of the record and the parties have the final responsibility to ensure that the record is proper or; to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused and in addition, obtain a report from the presiding judicial officer. See the

holding in the South African case of ***Philip Daniel Schoombe v. The State*** [2016] ZACC 50 quoted in ***Madololyo's case*** supra. In my view, weighing the process of reconstruction and circumstances obtained in this application, I find it appropriate to order retrial than reconstruction of the record. That said and done, I hereby nullify CMA record, 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 30th June 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 30th June 2022 in the presence of Rudia Makanja, Advocate for the applicant and Sabas Shayo, Advocate for the respondent.



B. E. K. Mganga
JUDGE

