

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

REVISION NO. 26 OF 2021

JOSEPH D. MARINGO APPLICANT

VERSUS

ELDRIGE INVESTMENT (T) LTD RESPONDENT

(From the decision of the Commission for Mediation and Arbitration
at Kinondoni)

(Lemurua, Arbitrator)

dated 08th December, 2020

in

REF: CMA/DSM/MISC/21/2020

EXPARTE JUDGEMENT

23rd May & 01st July 2022

Rwizile J

In this matter, the applicant asked this Court to call for the records of the proceedings and ruling of the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/DSM/MISC/21/2020 and set aside the whole ruling

It has been factually stated that, the applicant was employed by the respondent as a manager in her ice cream production under permanent

contract from 10th March, 2015. It was not, until 17th March, 2016 when he was terminated.

Being aggrieved, he filed the labour dispute to the CMA claiming for unfair termination. The dispute remained unsolved at mediation stage and had to go to the arbitration stage. During arbitration stage, the matter was postponed several times due to different reasons until on 25th March, 2020 when it was set for hearing. On the day of the hearing the representative of the applicant on the way to CMA felt sick and went for treatment at the nearby dispensary.

By reason of his absence, the hearing went exparte. On 26th March, 2020 the applicant filed an application to set aside exparte order but it was rejected for being prematurely made and was told to wait until the delivery of the award.

On 11th May, 2020 the award was delivered with the order of the applicant to go back to his employer so as they conduct a disciplinary hearing. The applicant was aggrieved with the award and filed another application to set aside the exparte award. The ruling was delivered on 16th December, 2020 which dismissed. Aggrieved, this application has been filed.

The application is supported by the applicant's affidavit but opposed by the counter affidavit of Laurensia Nyoni, respondent's Principal Officer.

The grounds for revision raised by the applicants were: -

- i. That, the honourable arbitrator erred in law and facts to reject to set side an ex parte award while applicant adduced sufficient reasons.*
- ii. That honourable arbitrator erred in law and facts to reject to set aside ex-parte award which was containing miscarriage of justice.*
- iii. That honourable arbitrator erred in law and facts to exercise his jurisdiction without justifiable reasons.*
- iv. That honourable arbitrator erred in law and facts to deliver the ruling without answering some issues.*

The hearing was by way of oral submission. The applicant was represented by Edward Simkoko, Officer of TASIWU whereas the respondent was represented by Victoria G. Mgonja, learned Advocate.

When the application was set for hearing the respondent did not appear.

On 23rd May 2022, the application was heard ex parte.

Mr. Simkoko for applicant argued only two grounds as follows;

- i. That, the honourable arbitrator erred in law and facts to reject to set side ex-parte award while applicant adduced sufficient reasons.*

ii. That honourable arbitrator erred in law and facts to reject to set aside ex-parte award which was containing miscarriage of justice.

For the first one he submitted that the reason that he did not appear was because he was sick (ulcers). He stated that he went to the nearby hospital and stayed there until 4:00pm. He argued further that when he appeared in the next day, his application to set aside an ex-parte hearing order, was held to be premature. To his dismay, he added that, even his application after the judgement was issued ex-parte was rejected.

On the second point he submitted that the case was heard in the absence of the applicant who filed the application. He stated that the application was supposed to be dismissed as per Regulation 28(2) of G.N. No. 64 of 2007 but the respondent was heard ex-parte. In his view, it was not proper and so prayed for this application to be granted so that the main case may be heard.

After perusal of the grounds for revision on the affidavit, applicant's submission, CMA proceeding and award the Court found that there is only one issue to determine and that is: -

Whether it was proper in the eyes of the law for the arbitrator to proceed with ex-parte hearing on the side of the respondent.

The law governing arbitration at the CMA is Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007. In particular, rule 28(2) of the Rules, which provides that;

"An arbitrator is entitled to dismiss a complaint if the referring party fails to attend an arbitration hearing."

Going by the records, it is found that on 25th March 2020 the evidence of one Alykhan Zulfikarali Remtulla the operations manager of the respondent was heard and used to form the bases of the award. Further it is apparent at page 1 and 2 of the award that the dispute was heard exparte on the side of the respondent. In the words of the award, it is explicit as follows;

"Shauri lilipata kusikilizwa upande mmoja kwa kuwa upande wa mlalamikaji walishindwa kufika hata baada ya kupatiwa taarifa ya kufanya hivyo pasipo sababu ya msingi wala kutoa taarifa kwa Tume ilihali siku za awali walikuwa wakifika hivyo walikuwa na ufahamu wa shauri hili walilofungua wao wenyewe kama upande wa mlalamikaji, kwasababu hiyo Tume iliona ni vyema kuendelea na usikilizwaji wa shahidi wa mlalamikiwa..."

It is therefore vivid as submitted and based on the record that the party who referred the matter for arbitration was absent when the same was

arbitrated. I am aware that in cases of unfair termination, the employer has to start proving if there is fair termination in terms of rule 24(3) of Labour Institutions (Mediation and arbitration Guidelines) Rules GN 67 of 2007. But in the matter at hand the arbitrator decided to proceed to hear the matter ex-parte on the side of the respondent when the applicant did not show up at the hearing. I think, the arbitrator was not justified in terms of law and procedure to proceed to hear the dispute in the absence of the applicant.

For the foregoing reasons, this application is granted. The ex-parte award issued by the CMA is hereby set aside. The matter is remitted to the CMA for an interparte hearing. It should be done before another arbitrator with competent jurisdiction.



A.K. Rwizile

JUDGE

01.07.2022