

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

REVISION NO. 101 OF 2021

MWANANCHI COMMUNICATIONS LTD APPLICANT
VERSUS
JACKSON NGASSARESPONDENT

JUDGEMENT

24th February & 01st March 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (the Commission) in Labour Dispute No. CMA/DSM/ILA/1206/18/195. This Court has been asked to call for the record of the proceedings of the CMA and thereby revise it.

Facts that brought about this application are briefly stated thus; the respondent was employed by the applicant as field sales executive. At the time of termination, the respondent had rose to the position of a regional sales manager. The reasons for termination were stated as due to dishonest and negligence. It was alleged that he was producing fake

receipts in order to retire the spent money. The conducted cause applicant to suffer pecuniary loss.

Investigation was conducted and the respondent was charged. The disciplinary hearing was conducted, he was found guilty and ultimately terminated from the employment. Being dissatisfied with the decision, the respondent appealed to the Managing Director of the company but was not successful. He then instituted a labour dispute at Commission for unfair termination and breach of contract. The matter was heard and the award came in favour of the respondent. The applicant was also aggrieved with the award hence this application.

Grounds for revision are as follows;

- i. Whether the Arbitrator made an error on points of law and facts in holding that the respondent was unfairly terminated.*
- ii. Whether the applicant herein had no genuine reasons to terminate the respondent employment and whether the burden of proof in employment cause is like that of criminal case.*
- iii. Whether the arbitrator erred in law and facts in ordering the applicant to pay the respondent Tshs. 51,212,000/= while there were genuine reasons for termination of the employment contract and the procedure were followed.*

At the hearing of this application Mr. Ambrose Nkwera and Mariam Mabina, learned advocates appeared for the applicant, whereas the respondent was represented by Mr. Benito Mandele and Mr. Lwijiso Ndelwa, learned advocates.

Before the application was heard, advocates were asked to address the court on the viability of the evidence of DW2 and DW3, which was taken without oath or affirmation in terms of rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines (GN No. 67 of 2007).

Mr. Ndelwa, based on the case of **North Mara Gold Mine Limited v Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 Court of Appeal, asked this court to expunge the evidence which was improperly recorded at the Commission. The effect of such action would render the entire award a nullity he commented. He therefore asked this court to set aside the award. On his part, Mr. Mkwera, for the applicant did not object. He added that the record should be remitted to the CMA for rehearing of the evidence not taken as per the law.

Having heard from both parties, I think the decision of the case of **North Mara v Khalid** (supra), as cited by Mr. Ndelwa is clear. The court of Appeal held;

"...we have careful given thought to the contending submissions. However, we are settled that according to the record of appeal, it is only PW1 and DW2 who did not take oath before they testified. We are therefore of the considered opinion that it is only the proceedings in respect of these two witnesses whose evidence should be nullified and quashed from the CMA's record of the proceedings..."

The Commission did not record properly as observed the evidence of DW2 and DW3. They indeed did not take oath before they testified. Their evidence therefore has no value. I therefore expunged from the record in Labour Dispute No. CMA/DSM/ILA/1206/18/195. Further, as submitted. The award is therefore nullified and set aside. The record is remitted to the Commission for rehearing of the evidence of DW2 and DW3 before another Arbitrator with competent jurisdiction. Parties to bear their own costs.



A.K. Rwizile

JUDGE

01.03.2022