

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

**REVISION NO. 491 OF 2021**

**BETWEEN**

**EVERWELL CABLE & ENGINEERING CO. LTD ..... APPLICANT**

**VERSUS**

**NASSORO S. NASSORO ..... 1<sup>ST</sup> RESPONDENT**  
**SAMWEL D. GETARO ..... 2<sup>ND</sup> RESPONDENT**  
**ELIAS D. MWAGO ..... 3<sup>RD</sup> RESPONDENT**  
**MUSSA J. DIBWE ..... 4<sup>TH</sup> RESPONDENT**  
**PAUL I. MILANZI ..... 5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

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

Being dissatisfied by the Award of the Commission for Mediation and Arbitration for Mkuranga ("CMA") dated 11<sup>th</sup> November, 2021 in Labour Dispute No. CMA/PWN/MKR/58/5/2021; the applicant has filed the present application on the grounds which will be apparent hereunder. But before embarking on the merit or otherwise of this application, I find it important to narrate the brief facts leading to this revision as gathered from the records. The respondents were employed by the applicant on different dates and capacities. On 03/05/2021 the respondents were arrested and arraigned at police after being suspected with stealing of BVVB Cables worth Tshs. 60 million. Upon their release from police custody they reported back to work and met with the Human Resource Manager who orally terminated them from their

employment. Aggrieved by the oral termination, they referred the dispute of unfair termination to the CMA. After considering the evidence of both parties the CMA found the termination to be unfair and ordered each respondent to be paid 12 months' salaries as compensation.

Being dissatisfied by the CMA's award, the applicant filed the present application on the following grounds: -

- i. That the Arbitrator erred in law by relying on affidavit of authentication filed on 15<sup>th</sup> September, 2021 which was not listed to the list of documents the respondents relied upon as filed to the Commission for Mediation and Arbitration, and the said affidavit was not served to the applicant, hence the applicant lacks the right to examine it.
- ii. That the Arbitrator erred in law by admitting and relying on exhibit P3 in delivering a decision in favour of the respondents while exhibit P3 was not filed or/and pleaded on the list of documents to be relied upon by the respondents as filed with CMA on 06<sup>th</sup> July, 2021.
- iii. That the Arbitrator erred in law by relying on exhibit P3 in delivering a decision while there is no any proof that exhibit P3 is a sound of the Human Resource Officer and was made in relation to

the respondents' employment, and the Arbitrator at page 7 of her award said the sound in exhibit P3 is alleging to be of Human Resource Officer.

- iv. That the Arbitrator erred in law and facts by relying on the testimonies and evidences tendered by PW1 on behalf of other complainants while PW1's testimonies and evidences are hearsay as PW1 failed to testify on how much one of the complainant – Samwel D. Getaro was receiving per month, and date or month for commencement of employment for two complainants namely Musa J. Dibwe and Paul Isaya Milanzi.
- v. That the Arbitrator erred in law by relying on evidences and testimonies of PW1 in making her decision without considering on whether the PW1 was properly mandated and authorized to act on behalf of other complainants and whether PW1 was eligible to tender any documents or to make any testimonies on behalf of other complainants.
- vi. That the Arbitrator erred in law by reaching the decision on the first issues of the case which were the main issue of determination without giving any legal stand to his decision as far as the law is concerned.

vii. That the Arbitrator erred in law by awarding Tzs 10,938,308/= to all the respondents without considering that the respondents failed to prove that their employment contracts were terminated in anyhow by the applicant.

The application proceeded by way of written submissions. Before this court the applicant was represented by Mr. Manyama Nyambasi, Learned Counsel whereas Mr. Fortunatus M. Maricha, Learned Counsel appeared for the respondents.

As to the first ground, Mr. Nyambasi submitted that the right to examine the documents is among the rules of natural justice. He stated that exhibit P3 was not on the list of documents pleaded by the respondents therefore the Arbitrator erroneously relied on such exhibit.

On the second and third grounds, Mr. Nyambasi reiterated his submissions on the first ground and added that the contested exhibit P3 was not even in the list of additional documents to be relied upon hence the applicant had no knowledge of its existence. That the sound recording in exhibit P3 was not verified that it is of the applicant's Human Resource Officer.

As to the fourth ground, he submitted that the evidence tendered by PW1 on behalf of other respondents was hearsay evidence hence the

Arbitrator ought to disregard the same. To support his submission, he the court to the case of **Subraminium v. Public Prosecutor** [1956] W.L.R 965 where the same position was held. He went on to submit that the issue of employment contract and payment of the respondents were of essence but PW1 failed to testify on the same.

Concerning the fifth ground, Mr. Nyambasi submitted that the Arbitrator erroneously relied on the evidence of PW1 who testified on behalf of others without proof that he was mandated to testify and tender documents on their behalf contrary to Rule 5(2), (3) of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 ('GN 64/2007'). He argued that the applicant was not served with any document proving that PW1 was authorised to testify on behalf of others.

Turning to the last ground, Mr. Nyambasi submitted that the Arbitrator erroneously awarded the respondents a sum of Tsh. 10,938,308/= without proof of termination of employment. He submitted that the respondents did not prove that they reported back to work after being bailed from the criminal charges. He maintained that the respondents only served the applicant with CMA F1 without first reporting to work. He concluded that the respondents are not entitled to

the reliefs awarded, praying that the court quash and set aside the CMA award.

In reply, Mr. Maricha submitted that the applicant is misleading the court because exhibit P3 was filed at the CMA and served to the applicant. He urged the court to see the records as true records as it was held in the case of **Alex Ndendya vs Republic (Criminal Appeal 207 of 2018) [2020] TZCA 202 (06 May 2020)**; where it was held that: -

*"It is settled law in this jurisdiction that a court record is always presumed to accurately present what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."*

He submitted further that the applicant's submission is a total illusion as DW1 was afforded an opportunity to cross-examine PW1 but he never challenged the authenticity of exhibit P3. He insisted that the disputed exhibit was filed, listed and served to the applicant. Mr. Machira argued that in law, if a person does not exercise his right to cross-examine he is deemed to accept the testimonies of the other party. To support his submission, he cited the case of **Tom Morio vs**

**Athumani Hassan & Others (Civil Appeal 179 of 2019) [2022]  
TZCA 114 (16 March 2022).**

Mr. Maricha went submitting that the sole witness of the applicant (DW1) testified on hearsay evidence as evidence at page 3 of the impugned award. He added that the testimony of DW1 carry no weight since he was not yet employed at the applicant's company when the incident occurred.

Regarding the issue of representation, Mr. Machira submitted that PW1 was authorized to testify on behalf of other respondents. He added that the issue of other respondents' contracts and salaries was not raised at the CMA and that the applicant had a chance to cross-examine the testimony of PW1 but he did not do so. He argued that once a party fails to cross-examine when he/she is afforded the right to do so he/she is deemed to accept the testimony of that witness as it was held in the case of **Nyerere Nyague v. R, Criminal Appeal No. 06 of 2010** (unreported).

In conclusion Mr. Machira submitted that the respondents properly prosecuted their case and the Arbitrator rightly decided on the evidence on record. He therefore urged the court to dismiss the application for

lack of merit. In rejoinder the applicant's counsel reiterated his submissions in chief.

After considering the rival submissions of the parties, I find the court is called upon to determine whether the applicant properly represented the other respondents and whether the respondent's termination were substantively and procedurally fair .

In determining this application, the first, second and third grounds will be determined jointly as they all challenge the admissibility of exhibit P3. The contested exhibit is the CD which contains a voice recording alleging to be of the applicant's Human Resource Officer. The applicant is strongly contending that the said exhibit was wrongly admitted at the CMA because it was not filed as the list of documents to be relied by the respondents. In reply, Mr. Maricha argued that the applicant is misleading the court because exhibit P3 was filed at the CMA and served to the applicant. Having gone through the records of the CMA, I find Mr. Nyambasi is misleading the court because his arguments is not in line with the records available in court. Contrary to what he has alleged, The record shows that on 03/08/2021 the respondents filed the list of additional documents to be relied upon as rightly submitted by the respondents' counsel. Again, when the said exhibit was tendered during



the examination in chief of PW1 on 16/09/2021, the applicant was represented by Mr. Godbless Mtui whom the record further shows that he had no objection on admissibility of the contested exhibit. Under such circumstance, it is my view that the applicant is estopped to challenge the admissibility of the same as it was held in the case of **Nyere Nyague v. R** (supra).

On Mr. Nyambasi's contention that the affidavit of authentication of exhibit P3 was not among the list of documents to be relied upon by the respondents, again the same does not conform with the records. The contested affidavit was filed pursuant to section 18(1), (3), (4) of the Electronic Transactions Act, Act No. 13 of 2015. In the referred provision, there is no requirement to file the authentication document which in this case is the affidavit to be among the list of documents to be relied upon. After all, the applicant has not cited any provision of the law which was contravened by the respondents. As alluded earlier, when the said exhibit was tendered the applicant had no objection at all thus, he cannot challenge its admissibility at this stage.

However, it should be noted that since the disputed exhibit has been admitted, the applicant still has a right to challenge its weight. This position was held by this court in the case of **Edward Sijaona**

**Mwinamila v. Abdul Idd Almas Katende, Land Case Appeal No. 59 of 2019**, High Court of Tanzania, Bukoba Registry (unreported)

where it was held that:

*"But it should be noted that admitting an exhibit is one thing and an assessment of the exhibit to determine its weight/its probative value is another thing altogether. Thus, admission of the exhibits is not synonymous with its relevance. The weight and content of it can still be objected..."*

On my part, I took a liberty to listen to the recording in the alleged exhibit, the following are the words alleged to be uttered by the applicant's Human Resource Officer:

*"... nilikua napendekeza kama mtaliona ni pendekezo zuri kazi ishafika mwisho ..."*

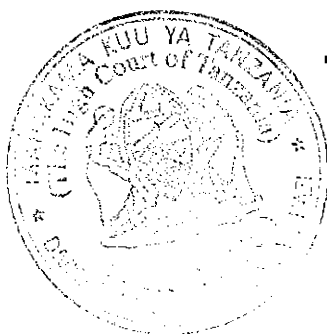
In the quotation above, the alleged Human Resource Officer was proposing termination to the respondents. There is no any other evidence to prove that the respondents were terminated from their employment apart from the words uttered above. In my view since there is no supporting evidence to prove that the applicant's human Resource officer uttered the quoted words to the respondents, I find it dangerous


to rely to the contested exhibit. There is no proof that the voice in the recording was of the applicant's human resource office. Even the means of transmission of their recordings is not trustworthy. Therefore, in the absence of any other evidence to prove that the respondents were terminated from their employment I find there was no termination in this case hence the dispute was pre maturely filed at the CMA before the respondents being terminated from their employment.

Since the first ground has the effect of disposing of the matter, I find no relevance to labour on the remaining grounds. In the result, I find the present application to be meritorious and consequently, the CMA's proceedings and subsequent award are hereby quashed and set aside.

It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> day of July, 2022.



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