

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 96 OF 2020

BETWEEN

MKURUGENZI WHIPAS..... APPLICANT

AND

SHABAN SALUM & 2 OTHERS..... RESPONDENT

RULING

Last order 24/02/2022
Date of Ruling 11/03/2022

B.E.K. Mganga, J

It is said that the applicant and the respondents had employment relationship. It happened that their relationship did not go well as a result the respondents filed labour dispute No. CMA/PWN/KBH/755/16 complaining that their employment were unfairly terminated by the respondent. on 10th September 2018, Hon. Mwangata Mkwawa, arbitrator, issued an award that respondents were unfairly terminated. The arbitrator therefore, ordered the applicant to pay the respondent Eight Million Six Hundred Fifteen Thousand Tanzanian Shillings (TZS 8,615,000/=) only being one month salary in lieu of notice, Severance pay and 12 months' salary compensation.

Applicant was aggrieved by the said award as a result she filed the notice of application supported by an affidavit seeking the court to revise the said award. On the other hand, respondents filed a joint counter affidavit resisting the application. On 13th March 2020, the court sent a calling for record so that the CMA record can be forwarded to the court ready to hear and determine the application. Unfortunately, the CMA record was not brought. On 4th February 2022, a reminder call for the record was sent to CMA as the application was scheduled for hearing on 1st March 2022 in a cleanup session, yet the CMA record was not called.

When the parties appeared in court on 1st March 2022, while being alive in my mind the position taken by the Court of Appeal in the case of ***Robert Madololyo v. the Republic, Criminal Appeal No. 486 of 2015*** (unreported) on what should be done in case the record is missing, I asked Mr. Saiwelo Kumwenda, counsel for the applicant and Shaban Salum, the 1st respondent who appeared before me whether they have anything that can help the court in reconstruction of CMA record or not. Mr. Kumwenda counsel for the applicant informed the court that he has nothing because at all time, he was relying on the recorded of the arbitrator. On his part, Mr. Salum was of the similar view

that he was not recording what was testified at CMA as such he is not in position to construct the record. Facing the said challenge, the application was adjourned to 4th March 2022, hoping that the record may be traced at CMA and brought before the court.

On 4th March 2022, the officer in-charge of CMA at Dar es Salaam filed an affidavit stating that the said CMA record is untraceable. The content of the affidavit of the officer In-charge of CMA at Dar es Salaam was put to the attention of the parties and required them to submit as what should be done. Mr. Kumwenda, counsel for the applicant submitted that, in absence of the CMA record, this court cannot make any finding on this revision application. Counsel submitted that in order for the court to deal with the issues raised in the affidavit in support of the application, it has to go through the evidence in the CMA record and the award itself, but it cannot do so in absence of the CMA record. Counsel concluded by praying that the CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial *de novo*.

On his part, Mr. Salum, the 1st respondent objected the suggestion of ordering trial *de novo* and prayed the court to uphold the CMA award that termination was unfair. Mr. Salum conceded that, CMA record is

untraceable and that he has nothing that can prove what transpired during hearing of the dispute at CMA.


It is undisputed that the CMA record is untraceable. It is also undisputed that the applicant, the respondent and the CMA itself, who are key persons in reconstruction of the record at hand according to ***Madololyo's case***, (supra), are not in a position to reconstruct the record. It was correctly submitted by Mr. Kumwenda, in my view, that, in absence of the CMA record, all issues raised by the applicant in the affidavit in support of the application cannot be determined by the court. It is my considered view that the invitation by Mr. Salum that the court should proceed to uphold the CMA award cannot be accepted. Mr. Salum made that submission understandably, as he is a lay person, and knowingly that, now he has an award in his hands after losing his job, but uncertain of what will happen if the matter is remitted to CMA for rehearing. Whatever the case, this court cannot be a rubber stamp of upholding whatever decision reached by CMA as it has been invited by Mr. salum. Acceptance of Mr. Salum's view, will be an attraction for other people in future, who will have the CMA award in hand but unsure of the result of the revision application before this court, to make all efforts for the CMA record to go missing knowingly that the court will

uphold the award. This court is not there for that, rather, it is there to determine disputes of the parties on merit and in accordance with the law. This court can only determine the dispute of the parties in revision stage after examining evidence in the CMA records and apply that evidence to the law and not otherwise.

That said and done, I agree with submission of Mr. Kumwenda, counsel for the applicant and hereby nullify CMA proceedings, quash and set aside the award arising therefrom and order that parties should go back to CMA so that their dispute can be heard *de novo* without delay, if they are still interested. I further direct that CMA should treat this dispute as urgency because the parties found themselves in this situation due to mishandling of the file that occurred at CMA and not on their own wish.

Dated at Dar es-Salaam this 11th March 2022.




B.E.K. Mganga
JUDGE