

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

**REVISION APPLICATION NO. 504 OF 2021**

*(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 28<sup>th</sup> day of December 2020 in Labour Dispute No. CMA/DSM/ILA/R. 1025/17/095 by (Ng'washi: Arbitrator)*

**NASREEN HASSANALI..... APPLICANT**

**VERSUS**

**AGAKHAN HEALTH SERVICES TANZANIA.....RESPONDENT**

**JUDGEMENT**

**18<sup>th</sup> August 2022 & 09<sup>th</sup> September 2022**

**K. T. R. MTEULE, J.**

This Revision application originates from the decision of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA) in **Labour Disputes No. CMA/DSM/ILA/R.1025/17/095** dated 22<sup>nd</sup> January 2021 Delivered by Hon. Ng'washi, Y. The arbitrator. The Applicant **NASREEN HASSANALI**, is seeking for this Court to call for the CMA records, revise, quash and set aside the award made therein and make any other order that the Court deems just and equitable to grant.

The brief background of the dispute leading to this application is grasped from CMA record, affidavit and counter affidavit filed by the parties as stated hereunder. The applicant was employed by the Respondent on a fixed term contract of two years as a Project Manager. On 30<sup>th</sup> August 2017 he was terminated on alleged poor performance. Challenging the respondent's decision, the applicant filed the labour dispute before the CMA.

In the CMA, the arbitrator formulated three issues for determination. However, having heard the matter on merit, the Arbitrator addressed one issue as to **"whether the Commission has been properly moved"**. The Arbitrator found that the Applicant wrongly filled the CMA form No. 1 to claim unfair termination while she was a probationer who cannot be covered by the provisions of unfair termination. It was the opinion of the arbitrator that the Applicant was to fill Part B of CMA Form No. 1 and not to fill the part concerning unfair termination. Consequently, the arbitrator dismissed the application.

The CMA decision aggrieved the Applicant hence the present application. At paragraph 9 of his affidavit, the Applicant advanced five grounds of revision which can be paraphrased as follows: -

- i) That the decision of the CMA dated 22<sup>nd</sup> January 2021 is unlawful, illogical and irrational because it offends the cardinal principle of fair hearing on account of a failure to afford the applicant a right to be heard before the said order dated 22<sup>nd</sup> January 2021 was issued.
- ii) That the award of Hon. Ngwashi, Y, Arbitrator in Labour Dispute **No. CMA/DSM/ILA/R.1025/17/095** dated 22<sup>nd</sup> January 2022 contains error material to the merit of the said award which has resulted injustice on the part of the applicant herein.
- iii) The Hon. Arbitrator erred in law and fact for failure to properly analyse the evidence on the records and therefore arriving into unjust decision.
- iv) The Hon. Arbitrator erred in law and fact to dismiss the claim while did not make a finding to the merit of the matters at issue.
- v) That the Honourable arbitrator erred in law and fact in adjudicating on non-issues of the parties.

Both parties to the application were represented. The Applicants were represented by Mr. Salmin Suleiman, Advocate, whereas the Respondent was represented by Mr. George Shayo, Advocate. Upon

prayers by the parties, the Court ordered for the application to be disposed of by a way of written submissions. I thank both parties for complying with the Court's schedule and for their industrious work done in their submissions.

Arguing in support of the application regarding the 1<sup>st</sup> ground Mr. Salmin Suleiman, having expounded extensively on the importance of right to be heard, he submitted that the arbitrator formulated and raised her own issue from page 12 to 14 of the CMA award which violated the constitutional right to be heard. Supporting his position, he cited the case of **Christian Makondoro v. The Inspector General of Police and Another**, Civil Appeal No. 40 of 2019, Court of Appeal of Tanzania, at Mwanza, (unreported).

On the second ground that the arbitrator erred in law and fact to dismiss the claim while he did not make a finding to the merit of the matter, Mr. Salmin submitted that the arbitrator should not have dismissed the matter without analyzing the evidence tendered including Exhibit AG-5 and AG-1 and make a finding in regard to the merit of the case. He challenged the raising of a new issue *suo motto* and rely on it to dismiss the application. He of the opinion that failure to analyze evidence tendered at CMA resulted to miscarriage of

justice. In support of this argument, Mr. Salmin cited the case of **Jackson Stephano @ Magesa and Another v. The Republic**, Criminal Appeal No. 130 of 2020, the Court of Appeal of Tanzania, at Musoma, (unreported).

On the **third** ground that "the arbitrator erred in law in adjudicating on issues not raised by the parties." Mr. Salmin submitted that at CMA three issues were framed including whether there was a valid reason for terminating applicant's employment, whether the procedure for termination was followed and lastly to what reliefs parties are entitled to. He stated that surprisingly the arbitrator raised new issue as to "whether the Commission has been properly moved" and addressed the same contrary to Order XIV Rule 1(1) and (3) of the Civil Procedure Code, Cap 33 R.E 2019 which guides framing of issues.

According to Mr. Salmin, the arbitrators have the powers of framing new issues or amend the same as so deem fit, but such amendment or introduction of new issues should afford the parties with the right to be heard. In supporting his position, he cited the case of **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited & Another**, Consolidated Civil Appeal No. 117 of 2016, Court of

Appeal of Tanzania, at Dar es salaam, (unreported) which insisted involvement of parties when a judge desires to frame issues.

On behalf of the applicant, Mr. Salmin thus prayed for the application to be granted and CMA award to be set aside.

Resisting the application in respect of the 1<sup>st</sup> ground as consolidated grounds, Mr. George Shayo submitted that the CMA award was delivered legally because both parties were afforded right to be heard and, in the process, they produced witness and exhibits in support of their cases. The award is therefore rational as it has considered the parties' evidence and law. He faulted the applicant's submission asserting it to have dwelled much on the right to be heard and has supported the contention with various authorities but she has failed to argue on whether or not the Commission's findings basing on the facts and evidence and law that the applicant could not sue for unfair termination considering the type of her employment contract.

Mr. George submitted that the allegations that the applicant was not in law allowed to sue for unfair termination is not a mere point of fact that would demand the parties to be heard on the same but runs to the core of the matter because it touches the jurisdiction of the CMA to adjudicate. He refuted the assertion that the applicant was not

afforded right to be heard while she has improperly moved the Commission by wrongly instituting her dispute.

Mr. George imposed the alleged legal question to the applicant on whether the CMA could process her dispute having taken note of the various decision of this honourable Court and Court of Appeal as cited by the Honourable Arbitrator in the cases of **(1) Stanbic Bank (T) Ltd vs. Irene Walala, Revision NO. 36 of 2012, High Court of Tanzania, Labour Division, S. A. N. Wambura, J. (as she then was) Dar es salaam, (2) Mtambua Shamte vs. Care Sanitation, Revision No. 154 of 2010, High Court of Tanzania, Labour Division, Hon. Rweyemamu R. J. (as she then was), and David Nzaligo vs. National Microfinance Bank PLC, Civil Appeal No. 61 of 2016, Court of Appeal of Tanzania, at Dar es salaam.**

Mr. George argued that the fact that the applicant's contract was conditional and fixed runs to the root of the contract itself on matters of enforceability and that pursuant to section 32 of the Law of Contract Act, [CAP 345 R.E. 2019]. In his view, contingent/condition contract cannot be enforced by law unless and until that event/condition has happened and in the absence of the fulfilment of

the condition the contract becomes void. He submitted that, it is on this basis this Court and the Court of Appeal has found it fit to hold that unconfirmed employee cannot sue by alleging unfair termination.

In respect of the 2<sup>nd</sup> ground, Mr. George insisted that the Arbitrator was right to dismiss the claim because the claim of unfair termination was not applicable to the applicant who is under fixed and conditional contract and whereby the condition was never fulfilled. Regarding the applicant's allegations that the Arbitrator did not discuss the applicant's evidence, he stated that the Arbitrator considered and discussed the parties' evidence and exhibits as can be seen on the typed award on pages 2,3,4,5,6,7,8,9,10 and 11 whereby the parties final/closing submissions were also considered by the CMA.

Regarding third 3<sup>rd</sup> ground, Mr. George the Arbitrator correctly guided herself by considering decisions of the Court of Appeal and this Court in addressing shortfall of similar nature. He is of the view the CMA has adhered to the noble principle of *stare decision* and therefore the applicant's dissatisfaction cannot be the basis to object or question the proper legal guidance adhered by the CMA. He thus, prayed for the application to be dismissed.



Guided by the submissions made by both parties, the applicant's affidavit, the Respondent's counter affidavit and CMA record, I formulate one issue for determination which is **whether the applicants have provided sufficient ground for this Court to revise the CMA award.**

In approaching the above issue, the grounds identified in the affidavit will be considered one after another, but I will start with issue number **five** as to whether arbitrator formulate new issues in his findings outside the pleadings and evidence adduced by the parties. In addressing this issue, the applicant's Counsel averred that there was a framing of new issue on the part of the arbitrator without involving parties hence his award was tainted with illegalities. Resisting the applicant's assertion, the respondent's Counsel maintained that the CMA award was delivered legally as both parties were afforded right to be heard and opportunity to call witnesses and tendering exhibits. In his views the award was rational by considering parties' evidence and law.

In resolving this controversy, the applicable provision is **Rule 24(4) of the Labour Institutions {Mediation and Arbitration} guidelines Rules, GN. No. 67 of 2007** which provides that at the conclusion of the opening statement the Arbitrator shall frame issues

to narrow down the facts which need to be proved. From the rule, issues are supposed to be framed from the facts which need to be proved and not solely from CMA Form No. 1. In this matter the arbitrator noted that CMA form No.1 was not properly filled by the applicant contrary to the facts needed to be proved.

In the CMA award at page 2, it is shown that the Commission framed three issues for determination. The first issue before the Commission was whether there was valid reason for termination; the second one was whether procedure for termination was fair and the last one concerned remedy to each party. At page 11 paragraph 4 to page 12 of the award the arbitrator on his own motion decided to depart from deciding the merits or the substances of the case and raised a new issue as "***to whether the Commission has been properly moved.***" At page 13, the arbitrator raised the issue concerning the applicant's status as a probationer employee. The arbitrator ruled on these issues without affording parties with any opportunity to present their views.

It is apparent from **Rule 24 (4) of GN 67 of 2007**, that issues shall be derived from the parties' opening statements. When the arbitrator discovered a new issue not covered in the parties' opening

statements and framed as an issue from the beginning which was not addressed by the parties during hearing, he ought to have involved the parties so that they can make their cases for and against that particular issues. Failure to do so amounts to denial of right to be heard to the parties.

I will take precedence from the case of **Kumbwandumi Ndenfoo v. Mtei Bus Services Ltd**, Civil Appeal No. 257 of 2018, Court of Appeal of Tanzania, at Arusha (unreported). At page 6 of this case, the Justices of Appeal stated:-

*"Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court"*

Again, in the case of **Safi Medics v Rose Peter, Mganga Mussa and Richard Karata**, Revision No 82 of 2010, High Court of Tanzania Labour Division, at Tanga, (Unreported), the Court held that; -

*"A successful arbitration requires that both the arbitrator and the parties in the dispute have a common understanding of the issues in controversy".*

In light of the above authorities, the applicant's claim to have been denied with a right to be heard regarding the new issue framed by the arbitrator *suo moto* has legal stance. It is apparent that the Arbitrator framed a new issue without affording parties with an opportunity to address it. Hence the award is tainted with this irregularity. In my view, the irregularity goes to the roots of the substance of the matter for not having complied with **Rule 24 (4) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007**. From this finding, the first issue can be is answered affirmatively.

From the above finding, I see no need to labour much on other grounds of revision because since the first ground is answered affirmatively then it suffices to dispose of the application. In my view the best measure is to have that irregularity cured in the CMA.

In the result I find a reason to fault the Arbitrator's finding. Therefore, the revision application is allowed. The Commission for Mediation and Arbitration Award is hereby quashed and set aside with

an order to remit the record back to CMA for arbitration to be conducted afresh before another competent arbitrator. Each party to the suit to take care of their own cost.

It is so ordered.

Dated at Dar es Salaam this 09<sup>th</sup> day of September 2022.



**KATARINA REVOCATI MTEULE**

**JUDGE**

**09/09/2022**