

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 400 OF 2022

*(Arising from an award issued on 3/10/2022 by Hon. Ngalika, E, Arbitrator in
CMA/DSM/PWN/MKR/97/2021/27/2021 at Mkuranga)*

JULIANO ROMANO MARO APPLICANT

VERSUS

ARAB CONTRACTORS & ELSEWEDY ELECTRIC JV RESPONDENT

JUDGMENT

*Date of last order: 08/03/2023
Date of Judgment: 20/03/2023*

B.E.K. Mganga, J.

Brief facts of this application are that on 20th July 2020 the parties entered a contract that was expiring upon completion of the task. It is said that applicant was employed as a mason. It is alleged by the applicant that on 18th August 2021 respondent unfairly terminated the said employment contract. On 13th September 2021, applicant filed Labour dispute No. CMA/DSM/PWN/MKR/97/2021/27/2021 before the Commission for Mediation and Arbitration (CMA) for unfair termination. Parties drafted five issues for determination namely, (i) whether there was valid agreement to terminate the contract; (ii) whether complainant is entitled to complain that the contract was unfairly terminated; (iii) whether there were valid reasons for termination; (iv) whether

procedures for termination were adhered to; and (v) to what relief(s) are the parties entitled to.

On 3rd October 2022, Hon. Ngalika, E, having heard evidence from both sides issued an award that the contract was terminated on mutual agreement by the parties. Having so held, the arbitrator did not consider the rest of the issues.

Aggrieved with the award, applicant filed this application for revision. In his affidavit in support of the application, applicant raised two issues namely: -

- 1. Whether it was proper for the arbitrator to hold that there was valid termination agreement between the parties.*
- 2. Whether it was proper for the arbitrator to ignore the rest of the issues.*

In opposing the application, respondent filed both the Notice of Opposition and the counter affidavit of James Fidelis.

When the matter was called for hearing, applicant was represented by Miriam Ndeserua learned Advocate while respondent was represented by David Kasanga learned Advocate.

Arguing in support of the application Ndeserua, submitted that at the time of signing an agreement to terminate employment (exhibit R4), applicant was not a free agent because he was forced to sign. Counsel added that applicant was threatened that failure to sign will amount to

misconduct that is punishable as it is reflected in termination letter dated 18th August 2021(exhibit R3). During submissions when probed by the court, she submitted that parties were not afforded right to comment before exhibits were admitted into evidence. In short, she submitted that exhibits were improperly admitted.

In response, Mr. Kasanga learned counsel for the respondent conceded to the question raised by the court submitting that proceedings do not show that there was a prayer for exhibits to be tendered and that parties were not afforded right whether to raise objection or not. He submitted that exhibits were improperly admitted and prayed that exhibits should be expunged, and the court proceed to determine the application. But upon reflection, after being probed by the court, he submitted that if exhibits will be expunged, in the circumstances of this application, there will be no evidence to be acted upon by the court. He therefore prayed that proceedings should be nullified, quash the award and order trial *de novo* before a different Arbitrator.

It is true as correctly submitted by counsel for the parties that proceedings in the CMA record does not show that prior tendering exhibits, witnesses prayed to tender them. Proceedings does also not

show that parties were afforded right to comment or raise objection before admitting those exhibits in evidence. More so, the record does not show that exhibits were admitted to form part of evidence of the parties. The omission was for all exhibits of the parties. That omission is fatal. The court of Appeal had an advantage to discuss the effect of that omission in the case of [**Mhubiri Rogega Mong'ateko vs Mak Medics Ltd**](#) (Civil Appeal 106 of 2019) [2022] TZCA 452 and held *inter-alia*:-

"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record... Therefore it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence..."

See also the case of [**M.S SDV Transami Limited vs M.S Ste Datco**](#) (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International Cooperation Agency vs. Khaki Complex Limited** [2006] T.L.R 343 and [**Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd**](#) (Rev. Appl 253 of 2022) [2023] TZHCLD 1170.

For the foregoing, I agree with submissions of both counsel and hereby nullify CMA proceedings, quash, and set aside the award arising

therefrom and remit the CMA record to CMA so that the dispute can be heard de novo before a different arbitrator without delay.

Dated at Dar es Salaam on this 20th March 2023.



B. E. K. Mganga

JUDGE

Judgment delivered on this 20th March 2023 in chambers in the presence of Victor Kassian, from NUMET, a Trade Union for the Applicant and David Kasanga, Advocate for the Respondent.



B. E. K. Mganga

JUDGE