

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 69 OF 2023

(Arising from CMA Award issued on 04/06/2021 by Hon. Joyce, L.C, Arbitrator in Labour dispute No. CMA/PWN/KBH/4/2021 at Pwani)

ESTER HAYUKA..... APPLICANT

VERSUS

SHULE YA SEKONDARI SAMBU..... RESPONDENT

RULING

*Date of last order: 20/07/2023
Date of Ruling: 27/07/2023*

B. E. K. Mganga, J.

Facts of this application briefly are that Ester Hayuka, the herein applicant was an employee of Shule ya Sekondari Sambu, the herein respondent. On 27th January 2021, applicant filed Labour dispute No. CMA/PWN/KBH/4/2021 before the Commission for Mediation and Arbitration (CMA) at Kibaha complaining that on 25th January 2021, respondent unfairly terminated her employment. In the Referral Form (CMA F1) applicant indicated that she was claiming to be paid 12 months' salary compensation, notice pay, unpaid annual leave and

severance pay to the tune of TZS 7,942,310/= . Applicant further prayed that the respondent be ordered to issue a clean Certificate of service.

At CMA, respondent argued that, she did not unfairly terminate employment of the applicant, rather, employment relationship between the two came to an end in compliance with Government secular No. 7/1998 that required all teachers to bear certificates from recognized Institutions.

On 04th June 2021, Hon. Joyce, L. C, Arbitrator having heard evidence of the parties issued an award in favour of the respondent that termination was both substantively and procedurally fair and dismissed the dispute.

Aggrieved with the said award, applicant filed this application for Revision. In support of the Notice of Application, applicant filed her affidavit in which she raised four grounds namely: -

1. *Whether the Arbitrator properly considered and analyzed the evidence adduced by both parties.*
2. *Whether the Arbitrator properly interpreted and applied the Labour Laws while making her decision.*
3. *Whether the decision of the Arbitrator based on the evidence she manufactured for herself and the same which was made on business is justified in law.*

4. *Whether the respondent proved it's case to the standard required by the law.*

In resisting the application, respondent filed the counter affidavit sworn by Janeth Johannes Mbuge, her Principal Officer.

When the application was called on for hearing, applicant was represented by Abraham John Mkenda, learned Advocate, while respondent was represented by Aliamani Daniel, learned Advocate.

In perusing the CMA record I noted that when Reuben Emmanuel Dasema (DW1) was testifying prayed to tender Government Secular No. 7 of 1998 as exhibit S1 but applicant was not asked to comment whether she has objection or not. Not only that but also, the arbitrator did not indicate that the said document was admitted as exhibit. Again, when Misheki A. Mwandunga (DW3) was testifying, he prayed to tender termination letter and a document titled "FORMU YA MAOMBI NA MALIPO YA FEDHA" as S2 and S3 respectively. At this time, applicant was also not asked to comment, and proceedings does not indicate that these documents were admitted. I further noted that, when Ester Boniphace Hayuka (PW1), the applicant was testifying, she prayed to tender application letter for teaching at the respondent school, her leaving certificate and termination letter as exhibit E1, E2 and E3 respectively. I noted that respondent was not asked to comment

whether she objects or not and the record does not show that these documents were admitted. I noted that, in the award, the arbitrator considered those documents as evidence. With those observations, I asked both counsel to address the court whether the procedure that adopted by the arbitrator was proper or not and the effect thereof.

Responding to the issue raised by the Court, Mr. Mkenda learned counsel for the applicant conceded that all exhibits were not properly tendered because the other party was not afforded right to comment whether there is objection or not before the said exhibit was admitted as evidence. When asked by the court as to the remedy thereof, counsel for the applicant submitted that proceedings were vitiated and prayed CMA proceedings be nullified and the award arising therefrom be set aside and order trial *de novo* before a different arbitrator.

Responding to the issue raised by the court, Mr. Daniel learned counsel for the respondent, concurred with submissions and prayer made on behalf of the applicant that the court should nullify CMA proceedings and order trial *de novo*.

I entirely agree with submissions of the parties. The CMA record shows, as correctly submitted by both counsel, that at the time of tendering exhibits, the other party was not asked to comment whether

she objects the intended exhibit to be admitted as evidence. In short, the other party was not afforded right to be heard. Not only that but also, the purported exhibits were not admitted as evidence. The arbitrator was supposed after the prayer of the witness to tender a document as exhibit, ask the other part if he/she objects or not, and record the response thereof. If there was no objection, then, arbitrator was supposed to admit and mark the document as exhibit. If there was objection, the arbitrator was supposed to determine the objection and either overrule or sustain it. The document or an object can only be admitted after the objection is overruled. In the application at hand, arbitrator chose a procedure not known under the law. I will demonstrate what was recorded by the arbitrator in this application.

When Reuben Emmanuel Dasema (DW1) was testifying, the arbitrator recorded: -

"Kwa mujibu wa Waraka No. 7/1998 umeelekeza kuwa walimu wasio kuwa nav yeti waondolewe mashuleni. Naomba kutoa waraka huo kuwa kielelezo S1, na huo ni mwisho wa Ushahidi wangu."

When Misheki A. Mwandunga (DW3) was testifying, the arbitrator recorded as hereunder: -

"Mlalamikaji tulimkabidhi barua inayoelezea kuhusu ukomo wa ajira yake uliotokana na maelekezo ya udhibiti ubora wa elimu. Naomba barua hiyo

itumike kama kielelezo S2. Mlalamikaji alilipwa jumla ya Tsh 1,500,000/= kama kiinua mgongo chake na ilikuwa ni tarehe 25/01/2021. Naomba kutoa hati ya malipo kuwa kielelezo S3, nae mwajiri alimuahidi pindi atakapopata vyeti atamrudisha kazini."

On the other hand, when Ester Boniphace Hayuka (PW1), the applicant was testifying, the arbitrator recorded as hereunder: -

"...sababu za kupangiwa masomo hay ani kutokana na nyaraka nilizokuwa nimewakabidhi. Naomba kutoa barua hiyo kama kielelezo E1. Mkuu wa shule nilimkabidhi vyeti vyangu vya IV, VII, result slip ya chou cha ualimu Pamoja na leaving certificate. Chuo nilichosoma ualimu ni Morogoro Teachers College. Naomba kutoa leaving certificate ya chou kuwa kielelezo E2. Nilianza ajira yangu hiyo kwa mashahara...Mnamo tarehe 25/01/21 niliripoti kazini na kuendelea na majukumu na baadae kuitwa na kukabidhiwa barua yenye ukomo wa ajira yangu. Barua hiyo haikuwa imeeleza stahiki nazopaswa kulipwa. Naomba kutoa barua hiyo kuwa kielelezo E3. Wakati mwajiri anasistisha ajira yangu alinipatia barua..."

It is clear from the quoted evidence of the parties that at the time the witness was praying to tender exhibit, the other party was not asked to comment. Not only that but also, exhibits were not admitted in evidence. The arbitrator was too casual so to speak in recording proceedings. I am of that view because, it is the arbitrator who was supposed to dictate and mark the exhibit number. It was not the duty of the witness to direct the arbitrator that he/ she wants the document to be marked as exhibit so and so. To say the least, proceedings in this application are unreliable.

With those misfortunes, this court cannot properly determine issues raised in this application. It is my view, that the irregularities in the CMA proceedings are fatal because all allegations relating to those exhibits could have been avoided at that stage. It is my view further that, the procedure adopted by the arbitrator, denied the parties a fundamental right to be heard. In short, the omission occasioned injustice to the parties. In fact, 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..."

A similar position was held by the Court of Appeal in 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 this Court in the case of **Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd** (Rev. Appl 253 of 2022) [2023] TZHCLD 1170 and **Zambia Cargo & Logistics Limited Versus Emmanuel Wilbard** (Revision

Application 65 of 2023) [2023] TZHCLD 1259. In all these cited cases, the Court of Appeal and this Court nullified proceedings and ordered trial *de novo*.

Guided by the above authorities, I 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.

Dated at Dar es Salaam on this 27th July 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 27th July 2023 in chambers in the presence of Ester Hayuka, the Applicant and Ridhiwani Mbaga, Advocate holding brief of Eliamani Daniel, Advocate for the Respondent.



B. E. K. Mganga
JUDGE