

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

**REVISION APPLICATION NO. 139 OF 2023**

*(Arising from the award of the Commission for Mediation & Arbitration of DSM at Temeke issued by Hon.Nyanguye, H. A: Arbitrator Dated 12th May, 2023 in Labour Dispute No. CMA/DSM/TEM/211/2022/142/20222)*

**TANZANIA OCUPATIONAL HEALTH SERVICES.....APPLICANT**

**VERSUS**

**DR. ROSE CHENGO.....RESPONDENT**

**RULING**

12<sup>th</sup> Sept- 25<sup>th</sup> Oct. 2023

**OPIYO, J.**

This application is seeking for the court to call for and revise, quash and set aside the award of the Commission for Mediation and Arbitration (CMA) No. CMA/DSM/TEM/211/2022/142/2022, Hon. Nyang'uye H. A. (Arbitrator) dated 12<sup>th</sup> May, 2023.

Brief facts of the case is that the respondent was employed by the applicant on a fixed term contract as a Specialist Doctor (Paediatrician) until her contract was terminated. Dissatisfied, the applicant filed for a labour dispute at CMA claiming for unfair termination. The matter was heard and the decision thereto was in favour of the respondent. Aggrieved, the applicant preferred this

application with the affidavit in support stating the following grounds for revision:-

1. That, the arbitrator erred in law and facts by concluding that the respondent was unfairly terminated
2. That, the arbitrator erred in law and in facts by awarding damages (general damages) contrary to law.
3. That, the honourable Arbitrator erred in law and facts by deciding the matter which he had no jurisdiction to entertain.
4. That, the honourable Arbitrator erred in law and facts by failing to properly analyse the evidence contrary to the principle of balance of convenience.
5. That, the honourable Arbitrator erred in law and facts by failing to apply standard of proof before awarding damages to the respondent.

Both parties were represented. Mr. Kikondo Maulid, learned counsel represented the applicant while the respondent enjoyed services of Ndurumah Keya Majembe, Jesse Joseph Manisawa and Martin Godfrey Sangira, learned counsels. The matter was argued by way of written submissions. However, in the course of composing a judgement, my eyes caught a third ground hereinabove relating to

lack of jurisdiction of CMA in trying the matter. As this ground is concerning lack of jurisdiction of the trial commission (CMA), I thought prudent to determine it first. This particular matter was argued both by way of written submissions and orally after the court asked the parties to address it for more clarification in addition to the written submissions that was already filed on this issue of jurisdiction of the CMA.

Mr. Majembe submitted that as officers of the Court they have to make sure that they assist the Court in reaching a just and fair decision. He stated that, it is on record that they represented the Respondent before the Commission and for that fact they have clear records of what transpired in the Commission making them confident to pinpoint the concern on jurisdiction of the commission very strongly. However, Kikondo Maulid, Advocate Counsel for the applicant who prepared the documents for the Revision did not appear before the Commission at all. Thus, they are confident that either out of ignorance or reasons which they cannot attribute to anything, he deliberately decided to throw these allegations without proof. He submitted that, these are false and unfounded allegations thrown to the Hon. Arbitrator who did not have any room to

appreciate the concern and evidence by the Applicant if the applicant had brought such evidence. No evidence came from the applicant that the applicant was a public institution. Thus, the CMA lacked jurisdiction to hear the dispute on account of the applicant being a public organization or the Respondent being a civil servant. All the parties to the dispute participated in the proceedings under the understanding that the Commission had jurisdiction. Therefore, from the facts before her, without the applicant eluding such fact, it was unfair to blame the arbitrator for not raising the issue of jurisdiction *suo motu*.

He argued that, facts regarding jurisdiction could have been rebutted by the Respondent at the commission and the Arbitrator could have had the opportunity to determine that issue at first instance. Therefore, he implored the Court to reject the idea of swimming in these baseless and unfounded allegations thrown to the Commission for lack merits.

Mr. Kikondo on the third issue submitted that, it is clear that the applicant in this revision is a government institution and the respondent is well aware of this fact. That during trial it was clearly

submitted before the commission, but the arbitrator chose to ignore the valid law of the land. Therefore, that being the case, the forum the respondent chose to pass through was not vested with jurisdiction as known to our laws. The applicant is falling under the title of public servant whereof, whenever there is labour dispute, the guiding procedures are provided by the Public Service Act, Cap 298. He continued that, the Public Servant or officer is defined under Section 3 of the Public service act cap 298 R.E 2019 to mean a person holding or acting in the public service office.

Therefore, it is clear from the above provision that, the applicant which is under Jakaya Kikwete Cardiac Institute is a public office and the respondent is also a public servant who is required by law to first exhaust local remedies before seeking any remedy provided under the labour laws as provided under section 32A of the Public Service Act (supra). The gist of the section is that, a public servant shall prior to seeking remedies provided for in labour laws, exhaust all remedies provided for under the Act as provided under section 25 of the same Act. Therefore, the respondent being a public servant, she was supposed to first follow the procedure under section 25(1)(a) and (b) of Cap 298 R.E 2019. He made reference to the case of **Tanzania**

**Ports Corporation v. Dominic A. Kalangi, Civil Appeal No. 12 OF 2022 Court of Appeal of Tanzania at Mtwara** to fortify his argument. In that case, according to him, it was held that the CMA had no jurisdiction to entertain the dispute between the appellant and the respondent who was a public servant.

The above submission is what was submitted by parties in their respective written submissions. Even with all that in place, this court still found it difficult to reach a well-founded and conclusive decision on the alleged jurisdictional issue because of lack of relevant documents proving that the applicant is a public institution. And if it is a public institution, then, when did it become a public institution? Was it before or after the institution of the current dispute? The court therefore, called the parties to address it to clarify more on the issue and if there is any, bring additional documents. I know that, this, as a revisional court, requiring for tendering of additional documents in proof of facts is restricted. However, the required documents are public documents for which the court is entitled to take judicial notice under section 59(1) (b) of the Evidence Act, Cap. 6 RE 2019. The section is to the effect that, if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and

until such person produces any such document as it may consider necessary to enable it to do so. Therefore, I find no harm requesting for the documents to enable the court to take judicial notice at any stage of the proceedings as they are the only documents that will help the court in forming a clear and reasoned opinion on the matter regarding the jurisdiction of trial court, but was ignored to be submitted by either side during trial.

Therefore, in addition to the written submission Mr. Kikondo started by giving historical background on how this institution was established as Dar Group Health Services in 1967 as a Government Institution and 20<sup>th</sup> June with Registration No 4150. It continued to be under the Government Until 23<sup>rd</sup> January 1981, when it changed to Tanzania Occupational Health Services as per certificate of change of name he submitted. According to him, that is when the Institution started to run as a private institution. He said that, when verification of Government properties during the late Magufuli's regime was initiated, it was revealed that the institution was actually a Government institution. They consulted those involved who were named as Directors as revealed by search from BRELA. These were Jones Brown Manyama, David Christopher Mchangila Albert Felix

Temu, Hamisa Rashid Kaganda, Elibariki Nakembetwa Kitundu, Grace Menrad Milanzi and Elisabeth Urban Fenko. A number of consultations followed thereafter. On 13<sup>th</sup> January 2021 the Institution's Board through special board resolution of 11<sup>th</sup> January 2021 (copy supplied) agreed to return it and all its properties and liabilities to the Government admitting in their declaration that indeed the institution was a Government institution.

Mr. Kikondo further submitted that, after they agreed to surrender it, it was handed over to Dar Es Salaam Regional Administrative Secretary (RAS) on 13<sup>th</sup> January 2021 for transition operations. On 20/09/2022 the hospital was handed over to the Ministry of Health. Employees were also transferred all along. There were also cases that were pending by then, both against and by the institution, which were all noted in the handover note dated 20/09/2022, this matter exclusive, proving that it was not among those which were initiated before transfer to the Government. After handover of the hospital to the Ministry, on 15<sup>th</sup> November 2022, the hospital was put in hands of Jakaya Kikwete Cardiac Institute (JKCI). JKC1 was issued with a letter on 27<sup>th</sup> April 2023 assuring them of 100 of its ownership. Upon production of the above documents in proof, he prayed for the



application to be dismissed, as the employee be directed to follow the Civil Servants Procedures in Labour disputes.

In reply to the concern, Mr. Sangira averred that it seems all the properties and ownership was handed over on 20<sup>th</sup> September in 2022 when this matter was already filed at CMA, as per CMA Form No. 1 which shows that it was filed on 15<sup>th</sup> May 2023. He insisted that when the matter was filed, TOHS was yet to be handed over to the Government. He said so because it was running its operations as a private institution. Therefore, as this was also a pending matter during handover, let the respondent be treated in the same basket like the others that were having matters instituted before handover. He insisted that, this was a private institution as per BRELA search as Government is not featuring anywhere in search report. On that basis, he believes that CMA had jurisdiction by the time the matter was filed before it.

In rejoinder Mr. Kikondo submitted that the records reveals that the handover of 20<sup>th</sup> September 2022 was handover from Principal Government Payee to Permanent Secretary, Ministry of Health not handover to the Government in the same document reference is

made 11<sup>th</sup> January, 2021 as the date the Board resolution to return the institution to the Government was reached. The other processes that followed were just further steps to complete the process. He then reiterated prayers he made in chief.

Parties' submission has dully been considered. The main issue for determination in relation to this ground is whether the CMA had jurisdiction to entertain the matter? From the above submissions, it is undisputed that on 11<sup>th</sup> January 2021 through Special Board Resolution the respondent was declared as the property of the government after management and Chairman being summoned to appear before the National Verifiers of the Government Immovable and Fixed Assets Committee for interrogation on the ownership of TOHS. That means, the matter was settled amicably. Hence, the Board surrendered TOHS to the government. It is also on record that, all liabilities and pending litigations were listed as per Annexure 4 (Special Board Resolution), by that time respondent dispute was not filed, as it was filed on 15<sup>th</sup> May 2022 as per CMA Form No.1 which shows that the dispute arose in 2022 after amendment of Section 32A of Public Service Act Reaping off CMA a mandate to determine disputes involving Government Institutions. In the case of **Tanzania**

**Posts Corporation versus Dominic Kalangi, Civil Appeal No.**

**12 of 2022** S. 32 A of the Public Service Act as amended in November, 2016 was interpreted to entail directing public servants to exhaust all internal remedies under the Act before resorting to external remedies. The section provides:-

*"A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act."*

Prior to the amendment CMA had jurisdiction to deal with the matter right away. The said amendment came into operation on 18<sup>th</sup> November 2016 by G.N No. 48 of 2016 while the record available reveals that the dispute arose in 2022 as per CMA Form No.1. As pointed out herein above, since the Institution was declared to be Government Institution in 2021, I agree with the applicant's Counsel that other processes that followed thereafter including handing over of properties in September 2002 were just further steps to complete the handover process. The dates cannot be the dates for the change that is of essence to our case. It follows therefore that, the dispute arose after declaration of the institution to be governmental. I am in agreement with counsel for the applicant that, the respondent is a government institution and at the time of such declaration, the

dispute by Rose Chengo was not yet instituted. Therefore, the respondent was supposed to follow procedure by Civil Servant in solving Labour Disputes. That means, indeed CMA had no jurisdiction to determine the dispute in terms of the Public Service Act. In such circumstances, their determination becomes a nullity. This consequently leads to nullification of the award and entire proceedings as I hereby do. No order as to costs this being a labour matter.

Application allowed.



A handwritten signature in black ink, appearing to be 'M. P. Opiyo'.

**M. P. OPIYO,**  
**JUDGE**  
**15/10 /2023**