

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

REVISION NO. 222 OF 2023

*(Arising from an Award issued on 29/08/2023 by Hon. Kiangi, N, Arbitrator in Labour Dispute No.
CMA/DSM/ILA/680/20/361 at Ilala.)*

MFAUME SALUM LWAUPA APPLICANT

VERSUS

PRIME FUELS TANZANIA LIMITED RESPONDENT

RULING

*Date of last Order: 11/12/2023
Date of Ruling: 14/12/2023*

B. E. K. MGANGA, J.

Facts of this application are that on 01st August 2018, Prime Fuels Tanzania Limited, the herein respondent, employed the applicant as a driver. On 13th August 2023, respondent terminated employment of the applicant on allegation of theft. Dissatisfied with termination of employment, applicant filed labour dispute No. CMA/DSM/ILA/680/20/361 before the Commission for Mediation and Arbitration (CMA) claiming that he was unfairly terminated. On 29th

August 2023, having heard evidence of the parties, Hon. Kiangi, N. arbitrator, issued an award in favour of the respondent that termination was fair both substantively and procedurally fair. Aggrieved by the award, applicant filed this application seeking the court to revise the said award.

In support of the application, applicant filed his affidavit in which he raised two grounds namely:-

- 1. That, the arbitrator erred in law and fact in holding that applicant drove a motor vehicle of another driver while paragraph 11 of the respondent's work policy does not cover the driver who was handled the motorvehicle.*
- 2. That, the arbitrator erred in law and facts in dismissing the dispute while Mariamu Kambarage, the chairperson of the disciplinary hearing committee is the one who initiated charges against the applicant.*
- 3. That, the arbitrator erred in law and fact in confirming termination of employment of the applicant while the "policy and OBC" of the respondent discloses neither offence nor punishment for the person handled a motor vehicle.*

Respondent resisted the application by filing the counter affidavit sworn by Mr. Solomon Rwangabwoba, her Human Resource Manager.

When the application was called on for hearing, before the parties have submitted to the above grounds raised by the applicant, the court raised *suo motu* a procedural issue relating to admission of exhibits at CMA and asked the parties to submit thereto hence this ruling.

Addressing the court on the issue raised suo motu, Mr. Jimmy Mnkeni from CHAWAMATA, a trade union, on behalf of the applicant submitted that, at CMA, exhibits were not properly admitted because the other party was not asked to comment before the said exhibits were admitted in evidence. Brief as he was, Mr. Mnkeni prayed the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo*.

Responding to the issue raised by the court, Mr. Johnson Kachenje, a learned counsel for the respondent, concurred with Mr. Mnkeni that exhibits were not properly admitted. Counsel for the respondent submitted further that, though respondent prayed to tender exhibits D1 to D11, but the arbitrator did not ask the applicant whether he had objection or not before the said exhibits were admitted as evidence. Counsel for the respondent concurred with Mr. Mnkeni for the applicant on the remedy available namely nullification, quashing and setting aside the CMA award and order trial *de novo* before a different arbitrator.

It is true as was correctly submitted by the parties that during hearing at CMA, witnesses for the respondent prayed to tender exhibits but the arbitrator instantly admitted the said exhibit as evidence without

affording the applicant right to comment whether he has objection or not. This is evident in the evidence of Ndamzi Abdallah(DW1) as the CMA record shows:-

"Sababu Hamadi alikuwa na udhuru ambao hautambuliki kiofisi.Naomba barua ipokelewe.

Tume – Barua ya kupeleka gari ya Ahmad Depot Oryx imepokelewa kama kielelezo D1 bila kupingwa.

...

Utaratibu wote huo Mfaume alipewa na alisaini kumpokea, naomba ipokelewe kama ushahidi.

Tume – Maelekezo ya kazi yalipokelewa kama kielelezo D2 bila kupingwa.

...

Mfaume alipewa induction ya mfumo wa OBC na alipewa fomu ya sera za kampuni. Naomba sera ipokelewe.

Tume – On Board Computer Policy ilipokelewa kama kielelezo D3 bila kupingwa.

..."

When Mariam Kambarage (DW2) was testifying, the arbitrator recorded inter-alia:-

"...Nina hati ya mashtaka ambayo ilisainiwa na pande zote mbili.

Tume – Hati ya mashtaka imepokelewa kama kielelezo D4.

Baada ya Mfaume kupokea hati ya mashtaka, siku ya 30/7/2020 tulikaa kikao cha nidhamu. Waliohudhuria hudhuria kikao cha nidhamu ni Liberatus Rujangi, Aggrey Elia, Mdanzi Abdallah, Zacharia Patrick, Oscar Chiluba, John Chipinduka. Mfaume Lwaupa pia alihudhuria.Naomba fomu ya kusikilizwa ipokelewe.

Tume – Fomu ya kusikilizia shauri imepokelewa kama kielelezo D5.

...

Baada ya kikao cha nidhamu Mfaume/mlalamikaji huyu alipewa matokeo ya shauri la nidhamu. Naomba Tume ipokee matokeo hayo kama kielelezo.

Tume – Matokeo ya kikao cha nidhamu yamepokelewa kama kielelezo D6.

...

Nina hairisho la kwanza na la pili, naomba yapokelewe kama vielelezo.

Tume – Barua ya tarehe 24/7/2020 na ya tarehe 27/7/2020 kuhusu kuhairisha kikao cha nidhamu zimepokelewa kwa pamoja kama kielelezo D7.

...

Nina barua ya kukata rufaa & mwenendo wa shauri.

Tume – Fomu ya kukatia rufaa & rufaa ya kupinga maamuzi ya kamati ya nidhamu zimepokelewa kwa pamoja kama kielelezo D8.

Baada ya hapo barua ya kusitisha ajira yake iliandaliwa tarehe 13/8/2020. Mlalamikaji alipewa na kusaini barua hiyo, naomba ipokelewe kama kielelezo.

Tume – Barua ya kusitisha ajira yako imepokelewa kama kielelezo D9.

...

Nathibitisha alifanya clearance & alilipwa final dues na aliwekewa kwenye akaunti na alipewa na cheti cha utumishi.

Tume – Cheti cha utumishi, clearance form na Final Dues Computation zimepokelewa kwa pamoja kama kielelezo D10.

...

Mabadiliko haya yalifanyika Disemba 2019 na tukio la upotevu wa matela lilitokea Juni 2020.

Tume – Tangazo kwa wafanyakazi wote, Barua ya kukubaliwa kuachia nafasi ya usimamizi, Barua ya kuomba kubadilishiwa kitengo zote zimepokelewa kwa pamoja kama kielelezo D11.”

It is clear from the foregoing that, some of the exhibits were admitted by the arbitrator without prayer by the witness to tender them

as exhibit. The procedure adopted by the arbitrator is not proper. For an exhibit to be admitted in evidence, there must be a prayer by the witness to tender it. See the case of [Total Tanzania Ltd vs Samwel Mgonja](#) (Civil Appeal 70 of 2018) [2021] TZCA 265 (25 June 2021). Technically, those exhibits were not tendered as evidence and cannot form part of evidence. See the case of [Sharaf Shipping Agency \(T\) Ltd vs Bacilia Constantine & Others](#) (Civil Appeal 56 of 2019) [2022] TZCA 291 (17 May 2022) and [Crescent Impex \(T\) Limited vs Mtibwa Sugar Estates Limited](#) (Civil Appeal No.455 of 2020) [2023] TZCA 17501 (16 August 2023). In fact, documents not tendered in evidence cannot be acted upon by the court. See the case of [Mhubiri Rogega Mong'ateko vs Mak Medics Ltd](#) (Civil Appeal 106 of 2019) [2022] TZCA 452 (20 July 2022).

It is also clear that all exhibits were admitted by the arbitrator without first affording applicant right to comment whether he has objection or not. That failure by the arbitrator denied applicant right to be properly heard. I have read the award and find that the arbitrator considered exhibits D7, D8 and D11 that were improperly admitted by denying applicant right to be heard. It is my view, as it was correctly submitted by the parties that the omission is fatal and vitiated the whole

CMA proceedings. I therefore nullify CMA proceedings, quash, and set aside the award arising therefrom and order trial *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam on this 14th December 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 14th December 2023 in chambers in the presence of Jimmy Mnkeni, Personal representative of the Applicant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE

