

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 26930 OF 2023

*(Arising from Award issued 08/11/2023 by Hon. Wilbard G.M., Arbitrator, in Labour Dispute No.
CMA/DSM/KIN/R.463/18/153 at Kinondoni)*

MORRIS D. NG'ONDO & 29 OTHERS APPLICANTS

VERSUS

DAIKIN TANZANIA LTD RESPONDENT

RULING

*Date of last Order: 27/02/2024
Date of Ruling: 07/03/2024*

B. E. K. Mganga, J.

Applicants were employees of the respondent. On 30th April 2018 applicants filed labour dispute No. CMA/DSM/KIN/R.463/18/153 before the Commission for Mediation and Arbitration's (CMA) complaining that respondent terminated their employment unfairly. On 8th November 2023 Hon. Wilbard G.M., Arbitrator, issued an award that termination was fair both substantively and procedurally. Applicants were aggrieved with the said award as a result they filed this application for revision.

On 27th February 2024 when this application was called on for hearing, upon perusal of the CMA record, I noted that when Adam Moshi (DW1) was testifying, arbitrator received and marked a document as

exhibit D1 but there was no prayer by DW1 to tender the said document. More so, the other party was not asked to comment before admitting the said document as exhibit D1. Not only that but also, when Ismail Khalfan Mushi (PW4) was testifying, the arbitrator received and marked a document as exhibit P6 but there was neither a prayer to tender the said document as exhibit nor there was comment from the other side. I also noted that, when Teswigis Chrispian Ndimbo (PW5) was testifying, the arbitrator received and marked a document as exhibit P7 but there was no prayer by PW5 to tender the said exhibit as evidence. Also, when Neema Jonathan Luta (PW11) was testifying, the arbitrator received and marked a document as exhibit P17(b), but the other party was not asked to comment before admitting the said document as exhibit. Not only that but also, I noted that, when Morris Daniel Ng'ondo (PW15) was testifying, the arbitrator received and marked a document as exhibit P21 but there was no prayer by PW5 to tender the said document and the other party was not asked to comment. I further noted that, in the award, the arbitrator considered those exhibits. With those observations, I asked the parties to address the court whether exhibits were properly tendered, admitted and the effect thereof.

Responding to the issue raised by the court, Mr. Jonas Kilimba, advocate, for the applicant submitted that, it is true as we have also read the CMA file, that, the arbitrator did not follow procedures of admitting exhibits. It is true that there was no prayer to tender them as exhibits and further that some of the exhibits were received without affording parties right to comment. Learned counsel for the applicant initially submitted that, there is no effect because those documents are in the CMA record should be considered and prayed that the court should apply the overriding objectives and consider all those exhibits and determine this application. But, upon reflection, learned counsel for the applicant submitted that, CMA proceedings are a nullity. He therefore prayed CMA proceedings be nullified, the award be quashed and set aside and order trial *de novo* before a different arbitrator.

On the other hand, Mr. Adam Mushi, the Human Resources officer of the respondent, submitted that, according to the CMA record, some of the exhibits were received without a prayer to tender them as exhibit. He added that, according to the CMA record, some exhibits were received without affording parties right to comment. He went on that, to his recollection, before documents were admitted as exhibits, parties asked to tender and the other had no objection. He concluded that,

since exhibits were not properly admitted, he prayed CMA proceedings be nullified and order trial *de novo*.

It is common ground to the parties that, CMA record shows that some of the exhibits were received but there is no indication that the witnesses prayed to tender them as part of their evidence. It is also common ground that some of the exhibits were received and marked by the arbitrator without first affording the other party right to comment whether he or she had objection or not. In short, exhibits were improperly admitted into evidence. For exhibit to be properly admitted, (i) there must be a prayer by the witness seeking the said exhibit to be part of his or her evidence, (ii) to ensure fair hearing, the other party must be asked to comment whether the exhibit should be admitted or not and (iii) the exhibit must be admitted and marked. If one of the three is omitted, then, the exhibit is wrongly admitted into evidence and cannot be acted upon by the court. See the case of [**Total Tanzania Ltd vs Samwel Mgonja**](#) (Civil Appeal 70 of 2018) [2021] TZCA 265 (25 June 2021), [**Mhubiri Rogega Mong'ateko vs Mak Medics Ltd**](#) (Civil Appeal 106 of 2019) [2022] TZCA 452 (20 July 2022) and [**Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others**](#) (Civil Appeal 295 of 2019) [2020] TZCA 1919 (18 December 2020) to mention just a few. In the application at hand, procedures for tendering and admitting

exhibits were not adhered to as a result there was violation of right to fair hearing. With those violations, the exhibits that were improperly admitted but relied on by the arbitrator in the award, cannot stand or form part of evidence of the parties. I am of the settled view that the omission cannot be severed by the overriding objective principles.

For the foregoing, I hereby nullify CMA proceeding, quash and set aside the award arising therefrom and order the parties to go back to CMA so that the dispute can be heard *de novo* before a different arbitrator.

Dated at Dar es Salaam on this 7th March 2024.



B. E. K. Mganga
JUDGE

Ruling delivered on 7th March 2024 in chambers in the presence of Adam Moshi, the Human Resources officer of the respondent but in the absence of the applicants.



B. E. K. Mganga
JUDGE