

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT MWANZA**

**REVISION APPLICATION NO. 50 OF 2018**

**(Arising from CMA award in the Labour Dispute No. CMA/MZ/MAGU/550/2017)**

**LION OF JUDAH ACADEMY.....APPLICANT**

**VERSUS**

**JUMA SAMSON.....RESPONDENT**

**JUDGMENT**

Hearing concluded.....30/10/2018  
Judgment delivered...31/01/2019

**Gwae, J**

Before me is an application brought under section 91 (1) (a) and (b) and section 94 (1) (b) of the Employment and Labour Relations Act, Cap 366 R. E, Rule 24 (1) (2) (a) (b) (c) (d) (f) and ((3) (a) (b) (c) (d) and 28 (1) (c) (d) and (e) (3) of the Labour Court Rules GN. No. 106 of 2007 praying for revision of the CMA's award dated 21<sup>st</sup> December 2017 by setting it aside or alternatively by ordering a retrial of the labour dispute in question.

Facts giving rise to the respondent's complaint against his employer now applicant are briefly as follows; that on 9<sup>th</sup> January 2017 respondent was employed by the applicant on three months probationary period at the salary of Tshs.400,000/=, That on 1<sup>st</sup> June 2017 the applicant terminated the employment contract. That on 5<sup>th</sup> June 2017, the respondent filled a referral Form No. 1 complaining about a breach of employment contract without sufficient reason and following the purported breach of contract, he prayed for two reliefs, payment of terminal benefits and 7 months remaining salaries out of one year contract of service period.

In its conclusion the CMA gave its verdict in favour of the respondent by awarding him the following reliefs,

- i. That the employer shall issue a certificate of service to the respondent
- ii. To pay complainant/respondent compensation of 8 months salaries which is equal to Tshs. **4,920,000/=**
- iii. That, the employer to repatriate the employee/respondent from Magu to Mwanza where he was recruited (Tshs. 240,000/=)

The applicant's application is supported by an affidavit of advocate **Silas John** who had also the conduct of the matter before Commission for

Mediation and Arbitration for Mwanza at Mwanza (CMA). There are four grounds set in the applicant's application for the sought revision, these are;

- a) That, the arbitrator acted illegally when she departed from the CMA Form No. 1 that, indicatea a case of breach of contract but instead she referred the award on termination of probationary employment which was not indicated in the CMA Form No. 1 of the respondent
- b) That the arbitrator committed an error material to the merit of the matter by rendering an award on extraneous matter that occasioned injustice
- c) That, the arbitrator acted illegally when she awarded the awarded compensation based on an extraneous matter
- d) That, the arbitrator acted illegally by failing to answer the issues before her instead she acted extraneously by doctoring her own issues which the parties had never a chance to be heard on her modified issues

At the hearing, the applicant was represented by **Mr. Boman Paul**, the learned advocate whereas the respondent appeared in person, unrepresented.

In essence, the learned counsel for the applicant reiterated the applicant's grounds for revision contained in the applicant's affidavit however he added that the arbitrator through her judgment departed from the complainant indicated in the referral form, thus amounting to injustice as the applicant was not afforded an opportunity to defend the case on termination of probationary contract.

According to Mr. Boman, the CMA has no jurisdiction to deal with new issues. He cited a decision in Joachim **Mwamkwa v. Golden Tulip Hotel**, Revision No. 268 of 2013 with approval of a case of **Power Load (T) Ltd v. Haji Omari Ngomero**, Revision No. 36 of 2007

Responding to the submission of the applicant's advocate, the respondent resisted the application by stating that there were four issues framed by the CMA unlike the applicant's assertion. He then argued that the arbitrator was justified to award him compensation under fourth issue framed as he was not given any warning letter nor was the disciplinary proceeding conducted against him. The respondent also stated that this application is defective on the ground that the same is not accompanied with a copy of CMA award.

The respondent finally argued that whatever was granted was within his complaint as per his referral form.

Rejoining to the respondent's oral submission, the applicant's counsel stated that the certified copy of judgment is on the former Revision Application withdrawn with leave to re-file.

Before determining the merit or otherwise of this application, it is requirement of the law that I should first determine a legal issue raised during hearing of this application, notably; effect of the applicant's failure to accompany his application by a copy of the CMA decision subject of this revision. Though the Labour Court Rules, 2007 is silent on this particular requirement, I find it mandatory to attach a copy of decision or order subject of the intended revision as the case in the appeals originating from district courts or Resident Magistrate's Courts (see Order xxxix rule 1 (1) of Civil Procedure Code Cap 33 R.E, 2002).

Despite the fact that it is lucidly clear that the applicant had not accompanied his application with the copy of the decision/CMA award however it goes without saying that in the former application of this nature (Revision Application No. 11 of 2018) which is with this later application,

the CMA arbitral award is attached. In the circumstances of this case and in line of the overriding objective as far as labour disputes are concern, the noted defect is curable by the former file in which the copy of the arbitral award is attached and the same is attached to this later application.

Now, in determining this application, I find it apposite to start with **fourth** ground for revision, it is quite clear from the CMA record, typed proceedings at page 3 in particularly, as correctly submitted by the respondent that, there were four issues framed as opposed to the applicant's contention that there were three issues. The issues framed were;-

- i. "Kama kulikuwa na mkataba wa ajira"- (whether there was breach of contract)
- ii. "Kama mkataba wa ajira ulivunjwa"- (Whether the employment contract was breached)
- iii. "Kama kuna madhara yaliyojitokeza kuvunjika kwa mkataba"- Whether there are damages for breach of contract
- iv. "Ni nini stahiki kwa kila upande" What reliefs parties are entitled.

The learned arbitrator however when she negatively answered the first issue above in that there was no contract of employment since the

respondent was still on probation as he was not yet to be confirmed by the applicant. Her respectful holding in this issue was guided by the decision of this court (**Rweyemamu, J**), in **Commercial Bank of Africa (T) Ltd vs. Nicodemus Mussa Igogo**, Revision Application No. 2 of 2012 (unreported) where it was held that an employee who is on probation remains with such status until confirmed by an employer since in law, there is no automatic confirmation.

The learned arbitrator, after her finding that there was no contract of employment that existed between the parties, consequently found herself compelled to ascertain if the fair labour practice provided for under Rule 10 (7) (8) (9) of GN. No. 42 of 2007 was complied with, under the rule herein an employer is obliged to give an employee a notice of a disciplinary proceeding against him relating to the employee's performance, finally the employee to be given an opportunity to improve his performance.

This issue as to whether the applicant adhered to termination procedure of respondent's probation is vividly observed to be **not** only one of the issues framed during arbitration but also the same is not featured in the Referral Form No 1. Hence the arbitrator is found to have seriously

departed from the contentious issues that were framed and she eventually arrived at the decision basing on the issue doctored by herself without giving the parties an opportunity to address the court as complained by the applicant's counsel, this is noted so for very obvious reason that the issues framed and depicted herein are not the ones which formed basis of the arbitral award.

The purported departure from the issues framed must have affected the applicant since she might have directed her mind in establishing that the respondent's was notified of the disciplinary proceedings or if he was given sufficient time to enter his defence and whether or not the respondent was given time to improve his performance. If one carefully looks at the way the arbitration was conducted and the basis of the decision of the CMA, he or she will inevitably hold that the decision is not a reflective of the parties' testimonies, issues framed and Form No. 1.

Despite the fact that the arbitrator attempted to evaluate the documents and admitted during arbitration (DE2, DE3, DE4, DE5 and DE6) but without father particulars in the Form No. 1, particularly whether the respondent's probationary period was procedurally terminated, that, to my



firm view, led to a denial of a right of being heard. Right to be heard is a fundamental right which has consistently been emphasized by our courts, for instance in **Mbeya–Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** (2003) T.LR 251 in which the English case of Ridge v. Baldwin (1964) AC 40 was considered, the Court of Appeal emphasized that;

“In this country, justice is not merely a principle of common law. It has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law...”

In our case the learned arbitrator would have entertained the parties or their representative on that issue which she found to be vital during composition of the award so that the Commission would have been adequately addressed by the parties.


In view of the above finding, I don't have to dwell to other grounds for the revision as doing so can amount to prejudicial to the re-arbitration which is going to be ordered herein below.

For the foregoing reasons, the applicant's application is granted, the arbitral award is hereby revised to the extent that the dispute to be re-heard by a different arbitrator with competent jurisdiction and if the

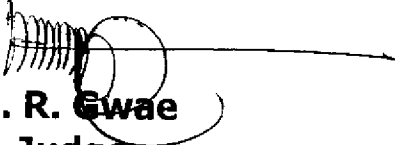
respondent is of the formed mind that his complainant is grounded in non-compliance of Rule 10 (7) (8) (9) of GN. No. 42 of 2007, he shall make further and better particulars in Form No. 1. I shall not make any order as to costs of this application.

It is so ordered.



  
**M. R. Gwae**  
**Judge**  
**31/01/2019**

**Court:** Right of appeal to the Court of Appeal is open for any aggrieved party.

  
**M. R. Gwae**  
**Judge**  
**31/01/201**