

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LABOUR REVISION NO. 28 OF 2020**

(Originating from Employment Dispute No. CMA/ARS/ARB/202/2018)

**KENYA KAZI SECURITY COMPANY LIMITED..... APPLICANT**

**VERSUS**

**MOKAMI CHACHA.....RESPONDENT**

**JUDGMENT**

1/9/2021 & 27/10/2021

**ROBERT, J:-**

The Applicant herein seek to revise the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/ARS/ARB/202/2018 dated 27<sup>th</sup> March, 2020. The application is supported by an affidavit sworn by **Mr. Elias Mgonja**, Principal Officer of the Applicant and resisted through a counter affidavit filed by the respondent.

The respondent was employed by the applicant on 17/4/2014 as a Security Guard until 27/5/2018 when she was suspended for insubordination after allegedly fighting with a colleague at work, one

Godfrey Lumumba. She lodged a dispute at the CMA alleging constructive termination against the applicant on the basis that she was being abused at work with a male counterpart without protection from her employer, the applicant. The last time is when she was beaten and hospitalized and when she got better and reported at work the employer suspended her and at the end of the month she was not paid salary. On the other hand, the applicant resisted the claims for constructive termination claiming that the respondent had not exhausted internal remedies. The CMA decided that the respondent was unfairly terminated and noted that she was discriminated and subjected to gender based violence. The CMA proceeded to award her general damages, compensation and terminal benefits. Aggrieved, the applicant filed this application seeking to revise the CMA award.

The applicant raised three legal issues at paragraph 4 of the affidavit in support of this application to the effect that:-

- i) Whether the said Award is based on substantive and procedural law.*
- ii) Whether the said award is capable of determining rights enforceable in law.*
- iii) Whether the relief accorded to the Respondent in the said award are legally justifiable.*

At the hearing of this application, the applicant was represented by **Mr. Fidel Peter**, learned advocate whereas the respondent was represented by **Ms. Aika Kweka**, Personal Representative from TUPSE. The application was argued by way of written submissions.

Submitting in support of the application, counsel for the applicant submitted that, the respondent's allegations that having been allegedly beaten by Godfrey Lumumba she reported to the supervisor and no action was taken was not true and exhibit C2 (*taarifa ya kazi ya tarehe 14/5/2018*) did not prove the same. The learned counsel argued that while the respondent reported the alleged incident at the police station as shown in exhibit C3 (RB NO. 457/2018), there is no evidence that she reported the matter to her employer. Further to that, no evidence was tendered to prove that the applicant refused to pay her medical bill. He maintained that both the respondent and her male counterpart were suspended from work for insubordination after the alleged fight. Thereafter, they were issued with a letter to attend a disciplinary hearing and the respondent refused to appear. Thus, the matter was prematurely filed at the CMA as the local remedies were not exhausted.

He argued further that, the **Employment and Labour Relations (Code of Good Practice) Rules** G.N. No. 42 of 2007 requires the

employee to exhaust local remedies prior to launching the matter at the Commission. The said argument was supported by the case of **Barclays Bank (T) Ltd vs Kombo Ally Singano**, Misc. Labour Application No. 9 of 2021 (unreported) **and Paschal Mwaja vs Medical Store Department**, Revision No. 332 of 2016 (Unreported) where the court emphasized the need of exhausting local remedies before referring the matter to the Commission. In the end, he prayed for the court to revise the award of the Commission.

Opposing this application, the respondent's representative on behalf of the respondent contended that, the respondent having been beaten at work she reported the matter to her employer but no action was taken. She referred the court to exhibit C2. She also maintained that the respondent's PF3 (exhibit C4) is a proof that she was beaten but there no evidence to establish that the applicant paid her medical bills. Further to this, she argued that the applicant suspended the respondent after forcing her to settle the criminal case against the male counterpart who had beaten her.

Submitting further, the respondent's representative, stated that the CMA award considered the evidence adduced by both parties. She referred the court to page 6 paragraph 2 of the impugned award. She

emphasized that the CMA had jurisdiction to determine the matter as the applicant had created an intolerable situation for the respondent at the place of work.

Lastly, the respondent's representative submitted that the applicant's submissions did not address issues raised in the affidavit supporting this application. Thus, she prayed for this application to be dismissed for lack of merit.

Having heard the submissions of both parties, this Court will now make a determination on the merit of this application.

Starting with the point raised by the respondent in her reply submissions that, the applicant's submissions did not argue the grounds of application as stated in the affidavit supporting this application which means, the applicant's submissions are not supporting the application at hand. Having revisited both the affidavit in support of this application and the applicant's submissions in chief, the Court is in agreement with the concern raised by the respondent's representative. As noted earlier in this judgment, the legal issues raised in the applicant's affidavit are three and the submissions made by the learned counsel for the applicant did not make reference or reflect issues deposed in the affidavit. The learned counsel simply narrated what transpired at the CMA and added that the

CMA lacked jurisdiction to entertain the matter as the respondent did not exhaust the local remedies before referring the matter at the CMA. However, the issue of jurisdiction was not raised in the affidavit supporting the application.

This Court is aware that submissions from the learned counsel is not evidence but a summary of arguments on what has been advanced in the affidavit. In the case of **TUICO at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and Another** (2005) TLR 41 the Court of Appeal of Tanzania when handling a similar situation observed that:


*"It is now settled that submission is a summary of argument. It is not evidence and cannot be used to introduce evidence..."*

Guided by the principle in the cited case, this Court will not be tempted to consider issues raised in the submissions of the learned counsel which are not part of the matters deposed by the applicant in the affidavit supporting this application. Thus, submissions made by the applicant which are considered to be out of the issues deposed in the affidavit are hereby expunged from the records of this matter. Having expunged issues raised by the learned counsel, the Court is left with narrations of what transpired at the CMA which cannot form the basis of

determination of this matter in the absence of legal issues for determination. In the circumstances, this application cannot be spared, it is bound to miss the mark. As a consequence, this application is hereby dismissed for want of merit.

It is so ordered.



  
K.N. ROBERT  
JUDGE  
27/10/2021