

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 31 OF 2021

(CF Original Dispute No. CMA/ARS/ARS/558/2020)

DAGENO GIRLS CENTRE.....APPLICANT

VERSUS

OSTENCIANA SANGA.....RESPONDENT

EX-PARTE JUDGMENT

21/11/2021 & 28/02/2022

GWAE, J

In this application, I am asked to revise the ruling delivered on the 12th day of April 2020 by the Commission for Mediation and Arbitration of Arusha at Arusha ("the Commission") in favour of the respondent.

The Basis for the sought revision by the applicant is as follows; that the Commission wrongly dismissed the applicant's application to set aside the impugned ex-parte arbitral award as the mediator assumed a role of a witness and judge of the matter which he was aware, the acts which are in violation of the principle of natural justice namely; rules against bias and right to be heard.

Now, therefore it is for the court's determination as to whether the Commission erred in law and facts for not setting aside the ex-parte award. As rightly held by the learned mediator that the applicant ought to have given sufficient cause as to her absence when the matter was called for mediation.

The respondent had not opposed this application despite the fact that he was summoned and he entered appearance on the 5th July 2021. Therefore, the respondent did not enter appearance on the following court's sessions as a result the hearing proceeded ex-parte.

Arguing for the application and adopting his sworn affidavit, Mr. Qamara stated that, the Commission wrongly refused to set aside ex-parte award as the mediator failed to control the mediation process as a result the applicant's director went out of the chamber as a result the mediator proceeded with arbitration. Praying for grant of this application, the applicant's respondent argued that the mediation was not conducted pursuant to the provisions of the Labour Institutions (Mediation and Arbitration) Guidelines GN 67/2007 especially Rule 5 & 6.

It was the observation of the Commission mediator that, the applicant's representative, one Andie Trotter was not only unmannerly and abusive but also contemptuous.

Having examined the CMA record, it is true as complained by the applicant that, the mediator (Mr. Maurice-Esq) who attempted to mediate the parties on the 26th November 2020 was, the one who also assumed a role of arbitrator immediately after the applicant's representative had worked of the mediator's chamber. The mediator may in law assume the role of arbitrator in the event of non-appearance of either of the parties as provided under section 87 (3) of the Employment and Labour Relation, Cap 366, Revised Edition, 2019 which reads;

- (3) In respect of a complaint referred under this Act,
the mediator may-
 - (a) dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing;
 - (b) decide the complaint if the other party to the complaint fails to attend a mediation hearing.

In my view, statutory exercise of the above discretion depends on the circumstances of each case, in our instant case, the mediator equated the walking out by the said applicant's representative her abusive words

during mediation as non-appearance. I think that was wrong move on the part of the mediator since the applicant's representative was present but there was no consensus that was reached. In my firm view, the mediator ought to have marked the mediation as having failed and to have referred the dispute for arbitration by another arbitrator as per section 87 (3) of the Act or briefly adjourn mediation as per section 87 (1) (b) of the Act taking into account that patience on the part of the mediator was necessary. More so, it is plainly clear from the record that, the learned mediator did not even observe the principle of confidentiality of mediation by his acts of recording what transpired during mediation (Page 1 of the typed proceedings).

The mediator in this case is observed to have heard the parties during mediation, hence it was quite unfair for him to proceed with arbitration since he had already been aware of the case. His subsequent act of assuming a role of arbitrator, in my view, violation of rule against bias. In my considered opinion, the mediator would not be impartial considering what transpired during mediation and the fact that, he heard the parties during mediation. in the circumstance of this case, I am persuaded by the holding of my sister, lady justice Sekela Moshi, J In the

case of **Azizi Ally Aidha Adam vs. Chai Bora Ltd.**, Labour Division at Iringa Rev. No. 4 of 2011, 16/11/2011 where it was held;

"It is upon the commission to appoint the arbitrator. The parties have no right to choose the arbitrator; as in this case where the same person had been a mediator to the case. The practice undoubtedly leads to breach of fundamental principles of natural Justice; a principle against bias. As submitted by the respondent, surely the arbitrator had already have an informed opinion".

That said and done, this application is granted. The CMA' ex-parte award in favour of the respondent and its decision dismissing the applicant's application to set aside ex-parte award are quashed and set aside. Parties to undergo due process to wit; mediation before another mediator and if mediation fails, the matter shall be arbitrated by a different arbitrator Each party to bear its costs



M. R. GWAE
JUDGE
28/02/2022