IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 253 OF 2022

(Arising from an Award issued on 30th June 2022 by Hon. Wilbard G.M, Arbitrator, in Labour dispute No. CMA/DSM/ILA/178/2020/107/2020 at Ilala)

IMRAN MURTAZA DINANI .... APPLICANT

VERSUS

BOLLORE TRANSPORT & LOGISTICS TANZANIA LTD .... RESPONDENT

JUDGMENT

Date of last Order: 08/11/2022
Date of Judgment:27/2/2023

B. E. K. Mganga, J.

Respondent owns a warehouse whereby one of her clients is Heinken. On 15th September 2014, respondent employed applicant as Clients Operations Manager for unspecified period. On 14th March 2015 respondent confirmed the applicant to that post and on 06th January 2017 respondent promoted the applicant to the post of supplier chain and projects Manager. On 20th April 2018, respondent further promoted the applicant to the post of transport and projects Manager. On 13th March 2019, Heineken Tanzania Limited forwarded a demand note to the

Labour Court Tz.

respondent complaining that her property valued at TZS 1,076,396,867/= got lost in hands of the respondent. Based on the complaint by Heineken Tanzania Limited, respondent drafted disciplinary charges against the applicant. On 31st January 2020, respondent terminated employment of the applicant allegedly due to (i) breach of trust, (ii) negligence, that resulted to damage, theft, or loss to the company property, and (iii) that applicant caused serious damage to the respondent.

Aggrieved with termination, applicant filed Labour dispute No. CMA/DSM/ILA/178/2020/107/2020 before the Commission for Mediation and Arbitration (CMA) at Ilala for unfair termination and prayed to be reinstated without loss of remuneration. On 30th June 2022, having heard evidence and submission of the parties, Hon. Wilbard G.M, Arbitrator issued an award dismissing the dispute filed by the applicant after finding that termination was fair both substantively and procedurally fair.

Further aggrieved with the award, applicant filed this application seeking the court to revise the said Award. In the affidavit in support of the application, applicant raised six issues for determination by the court namely.

Labour Court Tz.

1. *Whether Arbitrator was right to hold that reasons for terminating Applicant's employment contract was valid while the same were not established.*
2. *Whether the Arbitrator was right to ignore the fact that the charges against the Applicant were grossly misconceived, vague, and unclear to be responded to.*
3. *Whether failure on the part of the Respondent to avail to the Applicant a copy of the investigation report amounts to denying rights to be heard.*
4. *Whether failure on the part of the Arbitrator to record on the Award cross examination questions and answers against Respondent's witnesses DW1, DW2, DW3, DW4 and DW5 amounts to material irregularities occasioning injustice on the part of the Applicant.*
5. *Whether instructions on the suspension letter to handover office laptop, office keys, files and teach other employee Applicant's duties all suggested termination before disciplinary hearing.*
6. *Whether the Arbitrator was right to hold that Respondent's(sic) employer having a specific policy for certain conduct, may act upon any other or different provision without assigning any reason thereof.*

In opposing the application, respondent filed the counter affidavit sworn by Angeline Kavishe Mtulia, her Legal Manager and Company Secretary.

When the application was called on for hearing, Mr. Adam Mwambene, Advocate appeared and argued for and on behalf of the applicant while Mr. Emmanuel Msengezi, Advocate appeared and argued for the respondent.

Labour Court Tz.

During hearing I asked counsel for the parties to address the court as whether proceedings were properly recorded and can be relied upon and the effect thereof. I raised that issue because I found that exhibits were not formerly admitted in evidence and further that the Arbitrator used short forms of words without supplying the meaning thereof.

Responding to the issue raised by the court, counsel for the applicant submitted that proceedings are incomprehensible because the Arbitrator did not supply long form of the abbreviations used in the proceedings. Counsel submitted further that the defects are incurable as they have vitiated the whole proceedings. He went on that; proceedings shows that exhibits were not formerly admitted as evidence. He argued that all the so-called exhibits are not exhibits because they were not tendered and admitted as part of evidence hence they cannot be relied upon as exhibits. He argued further that if the said exhibits are expunged, it will be injustice to the parties because that were part of their evidence. He therefore prayed that CMA proceedings should be nullified and order trial *de novo* before a different arbitrator.

On his part, counsel for the respondent concurred with submissions by Counsel for the applicant on both aspects. He added that the so-called

Labour Court Tz.

admitted exhibits, were merely marked because in the proceedings there are no prayers by the witnesses to tender the exhibit and or consent or objection raised by the other party and the order thereof. In short he submitted that there is no exhibit that was legally admitted as evidence. counsel for the respondent submitted that the. omission was fatal as it affected the root of the case and the award itself. Counsel for the respondent joined hand with counsel for the applicant by praying that CMA proceedings be nullified and order trial de novo before a different arbitrator.

I have considered submissions of the parties and evidence in the CMA record. In disposing this application, I will start with the issues raised by the court suo motto.

It was correctly submitted by both counsel that in the proceedings the arbitrator used short form of the words without supplying long form thereof. It was correctly submitted by both counsel that in so doing, the Arbitrator made CMA proceedings incomprehensible. Some of the words used in the proceedings are such as "**Wr** supervisor anareport to **wrhs mngr** anareport to supply chain & project **mngr, yy, "**Ushahidi upo na

Labour Court Tz.

conversation was **btn** supervisor wa **WH** & **WH Mngr**", "**ss yy** binafsi ndiye Ballore alipaswa achukue hatua as **yy** ni **WH Mngr**", **IT Mngr & SCM** – wapo same level" just to mention a few. The bolded short forms may have different meaning depending on the circumstances of each case and professional. In my view, those short forms don't mean exactly what the parties testified. I am of that view because no long form of those words was supplied by the arbitrator in the proceedings. I once again remind arbitrators that they are in public office performing sensitive work of dispensation of justice to the parties with labour disputes. They should therefore, at all times, not take proceedings casually and use languages they use in normal communications with their colleagues in social media. Official duties and the calling of their office require them to use decent language in the proceedings. Arbitrators should avoid use of words that can best be used by persons enjoying nocturnal drinking sessions. That is to say, the languages and words that can be used by person whose speaking and thinking capacity has been impaired after consumption of alcohol the whole night and who has become drunk and find difficult to pronounce words. Always arbitrators should bear in mind that the shortcut they take may occasion injustice to the parties as it has happened in this

Labour Court Tz.

application. Because of the improper recording of proceedings that has made the said proceedings incomprehensible as correctly submitted by counsel for the parties, this court cannot know exactly what was testified by the witnesses. When taking proceedings, we should remember that the same is subject to scrutiny on appeal or revision. More importantly, those proceedings are for consumption of the parties and the public. They are not only for our consumptions.

It was also correctly submitted by both counsel that exhibits were not formerly tendered but were merely marked as exhibit so and so. Proceedings does not show that prior marking them as exhibits, there were prayers by respective witnesses seeking to tender them as exhibit or not. There is also no indication that parties were asked to comment whether they have objection or not. More so it is not indicated that they were admitted as exhibits. In the award, the arbitrator acted and used the so-called exhibit to decide the dispute between the parties. I agree with the parties that since the so-called exhibits were not formerly admitted in evidence, they cannot qualify to be evidence. The Court of Appeal had an advantages of discussing a similar issue in the case of ***Mhubiri Rogega***

Labour Court Tz.

Mong'ateko vs Mak Medics Ltd (Civil Appeal 106 of 2019) [2022] TZCA 452 and held *inter-alia*:-

> *"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record… Therefore it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence…"*

In ***Mhubiri's case*** (supra) the Court of Appeal found that the omission vitiated the whole CMA proceedings consequently quashed the award, the judgment of this court and ordered trial de novo. In the application at hand, there are two irregularities namely incomprehensible proceedings and failure to admit exhibits. As correctly submitted by counsel for the parties, the irregularities are fatal rendering proceedings a nullity.

Since the issues raised by the court has disposed the whole application, I will not consider issues raised by the applicant.

For the foregoing, I am inclined to the submissions of the parties and being guided by the above Court of Appeal decision, nullify CMA proceedings, quash, and set aside the award arising therefrom and order

Labour Court TZ

that the file should be remitted to CMA so that the dispute can be heard trial de novo before a different arbitrator without delay.

Dated in Dar es Salaam on this 27th February 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 27th February 2023 in chambers in the presence of Issa Mrindoko, Advocate for the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE

Labour Court Tz.