

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 117 OF 2023

(Arising from an Award issued on 14/4/2023 by Hon. Igogo M, Arbitrator, before the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/R. 763/18/232 at Kinondoni)

LSG SKY CHEFS APPLICANT

VERSUS

BADILI MGAMBO RESPONDENT

RULING

*Date of last Order: 03/08/2023
Date of Ruling: 09/08/2023*

B. E. K. Mganga, J.

Brief facts of this application are that, Badili Mgambo, the abovenamed respondent was an employee of LSG Sky Chefs, the abovenamed applicant. It happened that on 19th June 2018, applicant terminated employment of the respondent allegedly that respondent stole four (4) towels and spoons. Aggrieved with the said termination of her employment, on 18th July 2018, respondent filed Labour dispute No. CMA/DSM/KIN/R. 763/18/232 before the Commission for Mediation and Arbitration at Kinondoni complaining that she

was unfairly terminated. In the Referral Form (CMA F1) respondent indicated *inter-alia* that applicant violated the principles of natural justice and prayed to be reinstated.

On 14th April 2023, Hon. Igogo, M, Arbitrator, having heard evidence and submissions of the parties issued an award that termination was unfair and awarded respondent to be paid TZS 19,883,952/=.

Applicant was aggrieved with the award, as a result, she filed this application seeking the court to revise it. In the affidavit of Elia Mshana, the Human Resources Manager, in support of the Notice of Application, the deponent raised two (2) grounds namely: -

- 1. That the Hon. Arbitrator erred in holding that there was no valid reason for termination.*
- 2. That the Hon. Arbitrator erred in holding that respondent is entitled to TZS 16,240,296/=being 12 months salaries compensation and TZS 3,643,656/= being severance pay.*

When the application was called on for hearing on 3rd August 2023, Ms. Blandina Kihampa, learned advocate appeared for the applicant while Mr. Evans Nzowa, learned advocate appeared on behalf of the respondent.

Before allowing the parties to submit on the abovementioned grounds of revision, I perused CMA proceedings and find that on 19th September 2019, Hon. Chacha, Arbitrator partly recorded evidence of Jennifer Alloyce Ngatara

(DW1) thereafter the matter was handled by Igogo M, Arbitrator, but no reason for re-assignment was recorded. The matter thereafter changed hands from Hon. Igogo, M, Arbitrator, to I. Adam, Arbitrator. The record bears no reason for transfer of the dispute from Hon. Igogo to Hon. Adam, arbitrator. Hon. Adam arbitrator, instead of hearing evidence of the parties, tried to mediate them and recorded matters that were supposed to be recorded in mediation. Mediation failed but the arbitrator kept in the file matters that were stated by the parties in the aborted mediation. The dispute thereafter changed hands to Igogo M, Arbitrator, again without assigning reason for re-assignment. Hon. Igogo M, Arbitrator, recorded evidence of DW1 from the stage it was recorded by Chacha, Arbitrator, and received exhibit D1 without asking respondent to comment thereon. Hon. Igogo, Arbitrator also recorded evidence of Juhudi Katilimba (DW2) who and marked exhibit D2. She also recorded evidence of Yolanda Mark Temba (DW3) and marked exhibits D3, D4, D5 and D6. She further recorded evidence of Helen Ngowo (DW4) and marked exhibit D7. She further recorded evidence of Elphas Ochola (DW5) and marked exhibit D9. The same arbitrator recorded evidence of Badili Ridhiwani Mgambo (AW1) who tendered exhibit A1 without objection and Hamis Uledi Makumbuli (AW2) and finally issued the award that is the subject of this revision application. I noted that, all exhibits save for AW1 were tendered without affording the other party right to comment

whether there is an objection or not. I further noted that, in the award, the Arbitrator considered all exhibits that were tendered. With those observations, I asked the parties to address the court as to whether; the procedure adopted by the arbitrators in this application was proper and whether; exhibits were properly admitted in evidence and the effect thereof.

Responding to the issue of admission of exhibits raised by the court, Ms. Kihampa submitted that, exhibits were not properly admitted as proceedings does not show whether witnesses prayed to tender them, and the other party was not asked to comment on before admission. She added that, some exhibits were not admitted at all. She submitted further that, the irregularity is fatal and vitiated the whole CMA proceedings such that, those exhibits cannot be relied upon in this application. To support her point, she referred to the case of ***Mhubiri Rogega Mongáteko vs MAK Medics Ltd***, Civil Appeal No. 106 of 2019, Court of Appeal at Mwanza (unreported). She concluded her submissions by praying the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo*.

On the other hand, Mr. Nzowa, learned counsel for the respondent, concurred with submission made by Ms. Kihampa and the prayer to nullify CMA proceedings, quash, and set aside the award and order trial *de novo* before a different arbitrator.

I should point out that counsel did not submit on the issue relating to taking over of the dispute by the arbitrators without assigning reasons and keeping matters discussed in the aborted mediation in the same file in which arbitration proceedings were recorded.

From the start, I totally agree with submissions by the parties that the irregularities in the CMA proceedings are fatal and vitiated the whole proceedings. I will start with the manner on how the matter changed hands from one arbitrator without recording reasons thereof. It is my view that, in order the arbitrator to arbitrate any dispute, the said arbitrator must be appointed by the Commission to do so. In fact, Section 15(1)(b) of the Labour Institutions Act [Cap.300 R.E.2019] is clear on the point as it provides:-

"15(1) In the performance of its functions, the Commission may-

*(b) **assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law;**"*

Similarly, Section 88(2)(a) and (3)(a) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] provides:-

"88(2) Where the parties fail to resolve a dispute referred to Mediation under section 86, the Commission shall-

*(a) **Appoint** an arbitrator to decide the dispute;*

(3) Nothing in subsection (2) shall prevent the Commission from-

*(a) **appointing** an arbitrator before the dispute has been mediated;”*

From the wordings of the above two cited provisions, an arbitrator must be appointed and assigned the dispute to arbitrate. There is no room for one arbitrator to hijack proceedings from another arbitrator and continue with arbitration without being appointed and assigned by the Commission. I am aware that due to some unforeseen events, an arbitrator may not arbitrate the dispute to its conclusion. But if that happens, reasons must be recorded. To the contrary, there are no reasons in the application at hand as to why the matter changed hands from Hon. Chacha, to Hon. Igogo then to Hon. Adam and thereafter to Hon. Igogo again. What happened in the application at hand was a total violation of the provisions of section 88(2)(a) and (3)(a) of Cap. 366 R.E. 2019(supra) and Section 15(1)(b) of Cap.300 R.E.2019(supra).

There is a litany of cases laws explaining why the successor judge/magistrate/arbitrator must assign and record reasons for taking over the file with a view of increasing transparency in administration of justice and avoid chaos or complaint that the matter was hijacked from one judicial officer or quasi-judicial officer to the other without knowledge of the officer who was initially handling it. See for example the cases of ***Priscus Kimario***

vs Republic, Criminal Appeal No. 301 of 2013 (unreported), [Charles Chama & Others vs the Regional Manager TRA & Others](#), Civil Appeal No. 224 of 2018 [2019] TZCA 417, [National Microfinance Bank vs Augustino Wesaka Gidimara T/a Builders, Paints & General Suppliers](#) (Civil Application No. 154 of 2015) [2016] TZCA 209, [M/S Georges Center Limited vs The Honourable Attorney General & Another](#), Civil Appeal No. 29 of 2016 [2016] TZCA 629, [M/s Flycatcher Safaris Ltd vs. Hon.Minister For Lands & Human Settlements Developments & Another](#), Civil Appeal No. 142 of 2017 [2021] TZCA 546, [Leticia Mwombeki vs Faraja Safarali & Others](#), Civil Appeal No. 133 of 2019 [2022] TZCA 349, [Hamisi Miraji vs Republic](#), Criminal Appeal No. 541 of 2016 [2018] TZCA 237, [Daniel Mugittu and Another vs Lonagro Tanzania Limited](#) (Labour Revision No. 684) [2020] TZHCLD 399, [Tulipo Mwereke vs Mihan Gas Co.Ltd \(now Taifa Gas Tanzania Limited](#) (Revs Appl No. 65 of 2022) [2022] TZHCLD 1086 and [Charles Samwel Koja vs Kobil Tanzania Ltd](#) (Revs Appl No. 173 of 2022) [2022] TZHCLD 1100 to mention but a few. In ***Miraji case*** (supra), the Court of Appeal quoted its earlier decision in ***Priscus Kimario's case*** (supra) as follows: -

"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for

personal reasons could just pick up any file and deal with it to detriment of justice. This must not be allowed”.

In ***M/S Georges Center’s case*** (supra) the Court of Appeal having considered the provisions of Oder XVIII rule 10 of the Civil Procedure Code [Cap. 33 R.E. 2019] held: -

*“ The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised”.***

Guided by the above cited Court of Appeal decisions, I hold that changing of hands of the dispute at CMA amongst the aforementioned arbitrators without assigning reasons amounted to procedural irregularity. The Court of Appeal in the case of **[Mariam Samburo vs Masoud Mohamed Joshi & Others](#)**, Civil Appeal No. 109 of 2016 [2019] TZCA 541 held that: -

"...in the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity."

I have pointed out hereinabove that, Hon. Adam attempted to mediate the parties and kept matters discussed in the aborted mediation in the file that later was taken over by Hon. Igogo who proceeded to record arbitration proceedings. It is my view that, in keeping in the file matters that parties discussed in the said aborted mediation was contrary to the provision of Rule 9 of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No. 66 of 2007 that requires the mediator or arbitrator not to disclose information obtained during mediation except where he is authorized to do so. In addition to the afore cited Rule, that was total violation of Rule 8(1), (2) and (4) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2007 that requires information obtained during mediation stage to be kept confidential. However good intention Hon. Adam had, namely, to help the parties to resolve the dispute amicably, he was not supposed to keep the information disclosed to him during the attempted mediation in the same file in which arbitration proceedings were recorded. I am of that view because that information might have influenced the successor arbitrator in one way or another.

It was submitted by Ms. Kihampa learned counsel for the applicant and concurred by Mr. Nzowa that exhibits were neither tendered nor properly admitted. I agree with them. The CMA record supports that conclusion. In fact, when Juhudi Katilimba (DW2) was testifying, the arbitrator recorded:-

"...Vile vitu tulivikabidhi kwa security ili asubuhi waweze kuwapa viongozi. Maelezo yangu niliyoandika, akirejea KIELELEZO D2 kilichothibitishwa na kupokelewa na Tume".

In the evidence of Yolanda Mark Temba (DW3) the arbitrator recorded *inter-alia*: -

"...hivyo nilimpa barua ya kumsimamisha kazi kupisha uchunguzi, ambapo barua ya kusimamishwa imepokelewa kama KIELELEZO D3 na ripoti ya uchunguzi iliyoambatana na vielelezo vya mahojiano na barua za maelezo zimepokelewa kwa pamoja kama KIELELEZO D4."

Evidence of Hellen Ngowo (DW4) shows as follows: -

"...Pia alipewa "notification of disciplinary findings" iliyopokelewa kama KIELELEZO D7 na Tume."

When Elphas Ochola (DW5) was testifying, the arbitrator recorded *inter-alia*: -

"Endapo wakiruhusu kuiba hivyo kidogo kidogo watasababisha uzoefu na wizi kidogo kidogo jambo ambalo litahatarisha mahusiano yao na mteja. Akirejea matokeo ya rufaa iliyopokelewa na tume kama KIELELEZO D9. Baada ya hapo uongozi ulichukua jukumu la ... kumwachisha kazi, akirejea KIELELEZO D10 collectively iliyopokelewa na Tume."

None of the aforementioned witnesses prayed to tender exhibit in his /her evidence. More so, none of the said exhibits were received and admitted by the arbitrator as evidence. Worse enough, the other party (the herein respondent) was not asked whether she objects those documents to be admitted as exhibit in support of the case of the herein applicant. In short, respondent was deprived her right to be heard because she was entitled to comment on those documents before they were received by the arbitrator. What happened, the arbitrator simply referred to the document and marked them as exhibit. At the time of composing the award, the arbitrator considered those documents as exhibits. The Court of Appeal was confronted with a similar issue in the case [Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others](#) (Civil Appeal 295 of 2019) [2020] TZCA 1919 and held *inter-alia*:-

"In our considered view, presentation or tendering of a document in court, infers to the document being presented or tendered in court in the course of the proceeding whereby, each of the party/parties to the proceeding, is/are availed the chance of discussing it. Where the chance to discuss the documents has not been given to the part/parties, using such a document in composing the decision is tantamount to condemning the party/parties unheard."

The effect of considering documents not tendered or admitted in evidence was also discussed by the Court of Appeal in the case of [Ismail Rashid vs Mariam Msati](#) (Civil Appeal No. 75 of 2015) [2016] TZCA 786, [Leonard](#)

[Dominic Rubuye t/a Rubuye Agrochemical Supplies vs Yara Tanzania Limited](#) (Civil Appeal 219 of 2018) [2022] TZCA 419 and [Mhubiri Rogega Mong'ateko vs Mak Medics Ltd](#) (Civil Appeal 106 of 2019) [2022] TZCA 452 to mention a few. In [Mhubiri's case](#) (supra) that was cited by Ms. Kihampa, learned counsel for the applicant, the Court of Appeal 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."

Both in [Zanzibar's case](#) (supra) and [Mhubiri's case](#) (supra), the Court of Appeal quoted its earlier decision in the case of ***Shemsa Khalifa And Others vs Suleiman Hamed Abdalla***, Civil Appeal No.82 of 2012 where it held:-

"We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in the case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice."

In the case of [Ismail Rashid vs Mariam Msati](#) (Civil Appeal No. 75 of 2015) [2016] TZCA 786 the Court of Appeal cited ***Shemsa's case*** (supra) and held:-

"It is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity."

Guided by the above cited cases, I entirely agree with submissions by both counsel and hold that CMA proceedings were a nullity. I therefore hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and direct the parties to go back to CMA so that the dispute can be heard *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam on this 09th August 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 09th August 2023 in chambers in the presence of Adam Mwambene, Advocate, holding brief of Blandina Kihampa, Advocate for the Applicant and Badili Mgambo, the Respondent.



B. E. K. Mganga
JUDGE

