

TANZANIA / JUDGMENT

REV NO 2334 OF 2024 EFC TANZANIA MICROFINANCE LIMITED VRS ADVERA N

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT PAR ES
SALAAM REVISION APPLICATION NO. 2334 OF 2024 (Arising from the Labour Dispute No. CMA/
DSM/KIN/R.325/17/518 Hon. Makanyaga, A.A. Arbitrator) BETWEEN EFC TANZANIA
MICROFINANCE LIMITED.....APPLICANT VERSUS ADVERA N.
KAMUZORA..... RESPONDENT

JUDGEMENT

Date of Last Order: 11/6/2024 Date of judgement: 02/07/2024 OPIYO, J. Respondent was employed by the applicant in different positions since August 2014 being paid TZS 3,413,293/= monthly until when their employment relationship ended on 25th February 2017 when she was terminated from her employment while stationed as a Corporate Legal Manager. Aggrieved, she referred a labour dispute at the Commission for Mediation and Arbitration (CMA) which was registered as CMA/DSM/KIN/R.325/17/518, heard by Hon. Makanyaga, A.A. Arbitrator. On 22nd January 2024, the award was pronounced in favour of the respondent in which applicant was ordered to pay to the respondent TZS 49,624,029/= being a summation of 12 month's salaries compensation for unfair termination (40,959, 516), one moth salary in lieu of notice (3,413,293/=), one month salary as leave allowance (3,413,293/=) and severance allowance (1,837,927/=). The application is supported by the affidavit sworn by Frola Felician, Human Resource Officer, of the applicant stating grounds for revision to be: -

- (1) Whether it was proper for the honorable Arbitrator to find that, there was irregularity in terminating the Respondent;
- (2) Whether it was proper for the Honourable Arbitrator to proceed with hearing of the dispute despite the fact the applicant requested for her recusal/disqualification;
- (3) Whether it was proper for the trial arbitrator to proceed with hearing without starting with mediation upon the order of trial denovo;
- (4) Whether it was proper for honorable Arbitrator to declare that there were no justifiable reasons for termination of employment of respondent and

- (5) Whether it was proper for trial arbitrator to award the respondent 12-month compensation while the respondent was in fixed term contract. Whereas in disputing the application, respondent filed her counter affidavit. 2 By the order of this court of 20th May 2024 the hearing proceeded by way of written submissions. Both parties were represented by Learned Advocates. Cleophas James and Stephen Mayombo appeared on behalf on the applicant, whereas Sylvanus Mayenga Appeared and argued on behalf of the respondent. For the application, starting with the ground 3 as to whether it was proper for the trial arbitrator to proceed with hearing without starting with mediation upon the order of trial de novo. They stated that, on 06/07/2021 before Hon. Ngunyale, J, this court nullified CMA proceedings set aside ex parte award dated 24th January, 2020 and ordered for the dispute to be heard de /70w?inter parties. Upon the matter being set for retrial at CMA, the arbitrator proceeded with arbitration without commencing with mediation. For them, this was a serious error which vitiated the whole proceedings. They went on stating that, as the whole proceedings were nullified by this court on 6th January 2021, the status of that is as if no hearing was ever conducted before and that the court cannot rely on the proceedings which has been nullified. He supported his point by referring to the case of Barclays Bank (T) Limited Vs. Ayyam Mattesa Civil Appeal No. 481 of 2020, CAT for the authority that arbitration is a process that comes after a matter is referred for the same under section 86 @) of the Cap. 366 RE 2019 and the case of Adjane Abubakar Vs. Republic, Criminal Application No. 40 of 2021, CAT (unreported) where the court of Appeal defined the term re-trial to mean:- "In its natural meaning however, it entails in effect that, the matter should be heard afresh as if no hearing at all had been made in respect thereof. The court went further and held that, "An order for a retrial or a new trial or trial de novo or venire de novo is an Order that the whole case should be tried de novo or tried anew as if no trial whatsoever had been had in the first instance. Therefore, to them, starting afresh entailed starting from mediation stage before referring the matter for arbitration stage, something which was not done by the CMA as it started straight with arbitration stage, upon the matter being ordered for trial de novo. They then went on to submit on ground 2 in which they stated that, on 20th April 2022 the trial arbitrator refused to recusal/disqualify herself from re- hearing the same dispute twice despite of being rejected by the applicant for being impartial. For them, the act resulted to miscarriage of justice on part of applicant two aspects. Firstly, that records shows that 04th February, 2022, the trial arbitrator was absent and left instruction to her fellow arbitrator (Kokusiima) whom instructed the applicant to withdraw the preliminary objection which was filed on 28th January, 2022 and to proceed with hearing the main dispute claiming to be the instructions from the presiding arbitrator. They submitted further that, despite the applicant refusal to withdraw the said preliminary objection the trial arbitrator proceeded to order the date of hearing of the main dispute. For them the act denied the applicant right to be heard also violated duty of court to fully engage the parties in the proceedings and finally was contrary to the rule that preliminary objection has to be determined first. On grounds as to whether the termination was fair and the procedures of termination were followed by the applicant (1st, 4th and 5th grounds), they submitted jointly that, there were sufficient grounds warranting termination of the respondent from

employment and all procedures were followed. On the reason for termination, they stated that it was valid as the respondent being a corporate legal Manager, had a duty to reduce the court cases for 20%. For that, they cemented their point by referring to rule 17 of GN No. 42 of 2007 and added that, respondent did not meet the performance standards and failed to explain as to why she failed to meet the standard required despite the fact that she was afforded an opportunity to meet the performance standards. They added that, respondent was required to reduce cases by 20% from 01/07/2016 to 31/12/2016 (6 months) and not from 13/12/2016 up to 31/12/2016 (2 weeks). That, the arbitrator made her decision with assumption that the cases were to be reduced within just 20 days and it was wrong for her to hold that applicant failed to prove poor performance of the respondent without considering her testimony and evidence tendered. On procedure, they submitted that, it was properly followed by the applicant. They stated that, respondent was duly served with the notice of hearing (exhibits A15 and A16) on 17/02/2017. They added that, the respondent had enough time to prepare her defence as per rule 13(3) of GN No. 42 of

2007. For them, it was wrong for the arbitrator to hold that, respondent was not given sufficient time to prepare her defense. Finally, they prayed for the award of CMA to be set aside for being illegal. Against the application, advocates for the respondent on the 3rd ground, submitted that, the term retrial as defined in the case of Adjane Abubakar (supra) does not cover mediation. For that he supported his point by referring to definition of trial as defined in the oxford Learner's Dictionary to mean "a formal examination of evidence in court by a Judge to decide". He added that, basing on that definition, mediation does not form part of trial. He went on stating that, applicant was disputing the ex parte hearing of the dispute at the arbitration stage and not mediation proceedings, since mediation proceedings were conducted inter parties in terms of rule 7 of GN No. 67 of 2003. He submitted further that, mediation proceedings do not produce or result into granting an award. For him mediation being not part of grievances, no trial in the sense of the term was required upon this court ordering trial denovo of the matter from the mediation stage. For that he prayed for the court to find the first ground has no merit. On ground 2, he submitted that, there is no reason raised to justify the recusal of the arbitrator. He argued that, the argument by the Applicant is the lack of impartiality by the Arbitrator for re-hearing the same matter twice that it resulted to miscarriage of justice lacks basis as those complaints are nowhere to be found in the CMA proceedings. He went on stating that the preliminary objection, if at all, was withdrawn at applicants wish as the arbitrator could not refuse to hear the objection. He continued that, on the request, for recusal, since it is a very serious allegation, it needs tangible materials supporting it and the reason that the arbitrator heard the dispute twice is not one of the tangibles one's and that no order from the High Court directed for it to be heard by another arbitrator. To cement on his point, he referred to cases of Khalid Mwisongo Vs. M/s Unitras (T) Limited, Misc. Labour Application No. 298 of 2016, Laurean G. Rugaimukamu Vs. Inspector General of Police and another, CAT Civil Appeal No. 13 of 1999 and Senso Maswi and Mwita Wambura s/o Marwa Vs. R. Criminal Appeal No. 518 of 2019, (CAT -unreported). He added that, grounds raised in this

application considering recusal of the trial arbitrator is not covered among the grounds for recusal and still there is no vivid proof that the trial by the arbitrator was conducted with bias. On grounds 1, 4 and 5 together, they started by submitting in regards to reason for termination that, arguments by the applicant are unfounded. He stated that at page 10 of the award, arbitrator demonstrated reasons for reaching her findings which are that; in regard to the offence of poor performance none of the threshold set out under rule 17 for Employment and Labour Relations [Code of Good Practice] GN No. 42 of 2007 was tested by the applicant before invoking termination. He went on that, reducing of court case by 20% from 13th December, 2016 to 31st December 2016 was not a reasonable time to enable the respondent to meet objective assigned to her. He added that, court files were outsourced to different law firms and were not in respondent's possession and that respondent duty throughout was to make follow ups through respective appointed law firms on the progress of the outsourced court cases. There was no proof of cases handled to the respondent to be conducted in that very short period of time. On procedural aspect, he submitted that, the arbitrator found three faults including the fact that, the applicant did not accord respondent enough time to prepare her defence (the one applicant disputes), failure to conduct proper disciplinary hearing in terms of rule 13(4) and (5) of GN No. 42 of 2007 and there being no chance of representation accorded to the respondent in terms of rule 18(6), (7) and (8) of GN No. 42 of 2007. For him, the applicant only challenged one aspect of conduct of disciplinary proceedings, since there are other two aspects not challenged by the applicant, it is clear that award is not contested on those aspects. He submitted further that, item of rule 13(30) of GN No. 42 of 2007, employee is required to be given reasonable time not less than 48 hours, but in our case the respondent given less than 24 hours (From evening of 17th February, 2017 morning 18th February 2017) to prepare for her defence. For him, this is tantamount to no enough time was allocated to the respondent to state her case. He finalized by stating that, applicant has failed to demonstrate why the CMA award should be quashed and set aside, hence prayed for the application be dismissed with costs. Parties' submissions, records and relevant provisions of law have been considered. In disposal of the application, I will start with the second ground as to whether it was proper for the trial arbitrator to proceed with arbitration without starting with mediation upon the order of trial *denovo* being issued. As noted above, the gist of the applicant's argument is that, as the proceedings were nullified and award set aside, and the matter ordered to start afresh, it means the mediation process as the process preceding arbitration was also nullified. Therefore, trial *de novo* entails conducting fresh mediation as well. However, my view differs with them on the grounds that, the application leading to nullification of the award and proceedings of the CMA was against the *ex parte* award, therefore the proceedings that were nullified are proceedings resulting to the award challenged and its resulting award. The records show that, the Labour Revision no 90/2020, before Hon. Ngunyale, J. was not against the outcome of the mediation, as the alleged irregularity did not happen during mediation, but arbitration. The statement of legal problems in the previous labour revision was not on the setting aside of mediation proceedings, but the *ex parte* award and whatever proceedings leading to it, to give the parties a chance to be

heard inter parties. That, will not call the parties to conduct the mediation afresh, in the circumstances where mediation was not at all challenged. After all, as correctly argued by respondent, mediation was heard inter parties well before embarking on arbitration proceedings leading to ex parte award challenged in revision no 90/2020. In CMA F.6 (annexed as annexture TAB-4 in counter affidavit it is shown that the parties were mediated before Hon. Mkenda prior to arbitration. In all, mediation proceedings are usually confidential and they are not subject of revision. The mediation success means parties have reached settlement and it's failure is what opens up for arbitration proceedings. What can be challenged is an award from the arbitration proceedings. Therefore, outcome of mediation is not subject of revision capable of being nullified in revision application. It follows therefore that; the applicant's counsel has misconceived the import of the authorities he has cited. In the case of ADJANE ABUBAKAR (supra) by the Court of Appeal defining the term re-trial to mean hearing the matter afresh as if no hearing at all had been made in respect thereof concerns the challenged hearing leading to the challenged award. It does not encompass whatever previous hearings/proceedings that were not challenged. At CMA Mediation and arbitration are conducted at different stages. In the case of BARCLAYS BANK (T) LIMITED vs AYYAM MATESSA (Supra) it is provided clearly that arbitration is a process which comes after the dispute has been referred to arbitration under section 86(2) of the ELRA and that before a referral goes for arbitration, it must first undergo compulsory mediation. It is therefore, these subsequent proceedings after failure of mediation to succeed that is subject of revision under rule 24 (1) of the Labour Court Rules. Therefore, what is nullified and ordered to start afresh is what was challenged, in this case, the arbitration proceedings and award, not mediation. It is therefore, illogical to argue that the order for trial de novo 'mthe circumstances of this case should start from the mediation stage. On grounds 1,4 and 5 the applicants submitted jointly that, there were sufficient grounds warranting termination of the respondent from employment. On the reason for termination, they stated that, it was valid, that responded being a corporate legal Manager, had a duty to reduce the court cases for 20% which she failed as she did not meet the performance standards expected of her. Not only that, but also that, the respondent failed to explain the reasons for her failure to meet the standard required despite the fact that she was afforded an opportunity to meet the performance standard. They also accused arbitrator for basing his finding on assumptions that the respondent was required to reduce cases by 20% from 13/12/2016 up to 31/12/2016 which is just about 20 days instead of 01/07/2016 to 31/12/2.016, constituting 6 months. They added that, arbitrator made her decision with assumption that the cases were to be reduced within just 20 days and it was wrong for her to hold that applicant failed to prove poor performance of the respondent without considering her testimony and evidence tendered. On the procedure, they argued that it was properly followed by the applicant as the respondent was duly served with the notice of hearing giving her enough to prepare her defence. Respondent on the other hand argued that, the reason for termination for poor performance was not proven and unfounded. That, none of the threshold set out under the law was met by the applicant. The unreasonably short period expectation to achieve the performance standard set coupled

with the fact that she was not the one to handle the cases personally as the same were outsourced to different law firms, leaving her with coordination duty only made the standard unreasonable, they argued. The issue for determination is now whether the applicant proved the reason for the respondent's termination and followed the necessary procedures in doing so. Keener examination of the matter reveals that the reason for termination was poor performance only. Determining whether a termination for poor work performance entails looking at:-

- (a) Whether or not the employee failed to meet a performance standard;
 - (b) Whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (c) The reasons why the employee failed to meet the standard; and
 - (e) Whether the employee was afforded a fair opportunity to meet the performance standard
- Examining the above in terms of our case, the applicant did not indeed get to meet a threshold in its proof of the offence she charged the respondent with. This is because, in my considered view, there is no any valid standard that the respondent failed to meet. The alleged performance standard of reducing the cases by 20% within two weeks, sounds impractical. On the 14 employee's knowledge of the standards expected of him/her, from the applicant's submission, the respondent was well aware of the standard she had to meet as she had signed the objective form consciously. That means, if the respondent's knowledge is derived from objective form, as the applicant's counsels put it, then her knowledge is imputed from the date the form was signed, i.e. on 13/12/2016 not 1/7/2016 it supposedly started. Therefore, for the period covering 1/7/2016 to 13/12/2016 she is condemned for what she was not aware of. Practically, the only valid period for measuring her performance based on the objectives is the period she became aware of them. That goes only to two weeks from 13th -31st December 2016. In my view, putting such a high target to be achieved within such a short period makes the objectives illusive as correctly held by the arbitrator in the award. That being the reflection gotten from the available records, I would not subscribe to the applicant's argument that, by holding so, the arbitrator based the award on assumptions, rather I see that he based his award on what was presented as evidence before him. On the reasons for failure and whether the employee was given a chance to improve the performance, my take is that, the two factors we Dut to test by the applicant. Given the hastily way the respondent's termination was taken, the applicant never took time to conduct performance appraisal properly to find out the reasons for failure, if at all. It is on record that, the respondent was not the one attending the courts personally for the cases. She was just a coordinator to the outsourced legal service providers; thus, the non-completion of the case may not squarely fall on the coordinator as it depends on more than one factor, some of which are out of control of the respondent, in the circumstances, reasons for failure have to be ascertained before painting blame on anyone, alone. In law, even when the reason for failure to reach standard can be associated or imputed on one particular person, the law still requires that person to be given a chance to improve before

the bigger consequence, like termination falls on him. In our current application, all these were not done. By this the offence of poor performance remained unproven. Unproven reason is as good as no reason at all. On procedural aspect, I agree with the respondent's argument that, there were several lapses leading to unfairness. The finding by the arbitrator that the respondent was not accorded enough time to prepare her defence and failure by the applicant to conduct proper disciplinary hearing are well founded. The law requires the accused to be given notice of hearing at least 48 minutes before the hearing, but in our case, the respondent was availed with notice of less than 24 hours. This constitutes violation in terms of rule 13(3). Also the respondent was not given enough opportunity to respond in terms of (5) of GN No. 42 of 2007 and there was no chance of representation accorded to the respondent in terms of rule 18(6), (7) and (8) of GN No. 42 of 2007. And as argued by the respondent, the applicant only challenged the first aspect in the current application, meaning that, he agreed with the remaining two procedural lapses. In essence therefore, the applicant has failed to demonstrate why the CMA award should be quashed and set aside, hence the application is dismissed. Being a labour matter, I make no order as to costs. On second ground, on the issue as to whether it was proper for the arbitrator to proceed with hearing of the dispute, after the applicant requested for his recusal, the main concern is the refusal by the arbitrator to recuse himself from the conduct of the matter when the same was remitted for retrial. Although in this application, the applicant did not say much on the ground by rather dwelling on issue of withdrawn preliminary objection, from the records, the reason the applicant had wanted the arbitrator to recuse himself from the conduct of the matter is that the same arbitrator had already sat in the same matter, in the proceedings of which were nullified and trial *denovo* ordered for they believed this impaired his impartiality. Given the fact that, the reason for ordering for retrial was not on any irregularity in the CMA proceedings, rather, as the matter was originally heard *ex parte*, it is the *ex parte* proceedings that were nullified to give opportunity for both sides to be heard *inter parties*, in essence, as correctly argued by the respondent counsels, the argument by the applicant on lack of impartiality of the Arbitrator for re-hearing the same matter twice, thus resulting to miscarriage of justice lacks basis. That is the reason, even the high court did not order for the matter to be heard by a different arbitrator when it ordered trial *de novo*. The cases of Khalid Mwisongo (*supra*), Laurean G. Rugaimukamu (*supra*) and Senso Maswi and another (*supra*) all cited by the respondent, asking for recusal of a decision maker is a serious allegation which needs tangible reason to grant. In our case, that was lacking. The mere fact that the arbitrator who heard the matter *ex parte* was the one hearing the same *inter parties* was not enough reason to impute partiality on him. He was therefore, right to refuse to recuse himself from the conduct of the proceedings on flimsy reasons that had been given by the applicant. This makes this ground for revision as well baseless. In the circumstances that all the reasons for revision have been found to be baseless, the whole application is in turn of no merit. The same is therefore, inauspiciously dismissed. Being a labour matter, I make no order as to costs.

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