THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
LABOUR REVISION NO. 72 OF 2017
(Originate from the Complaint No. CMA/MBY/34/2017)

CHINA CHONGQOING INTERNATIONAL CONSTRUCTION CORPORATION (CICO).....APPLICANT
VERSUS
LEONARD J. MGAKA.....RESPONDENT

JUDGMENT

Date of last order: *23/06/2020*
Date of Judgment: *28/08/2020*

NDUNGURU, J.

The applicant, China Chongqing International Construction Corporation through the service of Mr. Benedict Sahwi, learned advocate filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein to be referred as CMA) in Complaint No. CMA/MBY/34/2017 delivered on 16th day of October, 2017, by Honourable Naomi Kimambo, Arbitrator.

The application is pegged under Section 91 (1) (a) and (b), 91 (2) (b) and (c) and Section 94 (1) (b) (i) of the Employment and Labour Relation Act, 2004, Act No. 6 of 2004 as amended, Rule 24 (1), 24 (2)

(a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and Rule 28 (1) (a) (b) (c) (d) and (e) of the Labour Court Rules, 2007 G.N. No. 106 of 2007.

The applicant supported the application by the affidavit of Maowen Qin, the applicant's principal officer. On the other the respondent challenged the application through the counter affidavit which was sworn by the respondent himself.

To better appreciate the context of the application, it is pertinent to narrate the factual landscape albeit in brief: The respondent (the complaint at the CMA) was an employee of the applicant until 12th day of March, 2017 when his employment was terminated. Being aggrieved by the termination, the respondent referred the matter to the CMA. The CMA arbitrator, having found that the termination was unfair substantively and procedurally issued an award dated 16th day of March, 2017 by which the applicant was ordered to pay the respondent compensation in the form of twenty four months salaries of Tshs. 9,600,000/= and one month salary in lieu of notice of Tshs. 400,000/=.

Being aggrieved and dissatisfied, the applicant filed the present application for the Court to revise the award of CMA on five grounds as follows:

(a) That, the Honourable Arbitration erred in law and fact in finding that the respondent (complainant) was employed on unspecified time contract basis.

(b) That, the Honourable Arbitrator erred in law and fact in finding that the respondent was unfairly terminated both substantively and procedurally.

(c) That, the Honourable Arbitrator acted arbitrary and improperly exercised her discretion by awarding 24 months compensation to the respondent amounting to Tshs. 9,600,000/=

(d) That, the Honourable Arbitrator erred in law in granting one month wage in lieu of notice of Tshs. 400,000/= contrary to the evidence on record and without justification.

(e) That, the Honourable Arbitrator erred in law for not analyzing the evidence properly leading to the unjustifiable award.

When the matter placed before me for hearing, Mr. Benedict Sahwi, learned advocate appeared for the applicant whereas Mr. Isaya Z. Mwanri, learned advocate, appeared for the respondent. Upon request of the parties, this Court then allowed the application be argued by way of written submission and they complied with filing schedule.

Submitting in support of the application, Mr. Sahwi commenced his submission by adopting the contents of the affidavit. He went on to submit that, the failure to sign CMA Form 1 is a material irregularities which goes to the root of the dispute and schedule of claim is not part of the CMA Form 1. He cited Rule 12 91) and 92) (a) of the Labour Institution (Mediation and Arbitration) Rules G.N. No. 64 of 2007 to support his submission.

Again he cited the case of **Paul Kavulaye Mgonja vs. Tanzania Electric Supply Co. Ltd., Labour Revision No. 36 of 2013,** High Court Labour Division at Mbeya and Section 86 of the Employment and Labour Relation Act, 2004 No. 6 of 2004 to the effect that the dispute shall be referred to the CMA through prescribed form. He added that, if the said prescribed form has not been filed properly then, there is no any dispute which has been referred to the CMA.

Further, Mr. Sahwi raised another new ground that, the arbitrator erred in law to entertain the complaint because the CMA had no jurisdiction since the procedure to refer the dispute to CMA was not complained of as acknowledged by arbitrator at the first and third paragraph of the page 3 of the CMA proceedings.

On the grounds (a) and (b) of the revision, Mr. Sahwi argued that, the contract between the applicant and respondent was a contract for specific task and not the unspecified contract as decided by Honourable Arbitrator. He added that, the evidence available on the record shows clearly the applicant was employed for eight months to construct the road.

He continued to submit that, it is not true to say that there was unspecified contract because there is no road which may be built without a specified time. He added that, the applicant had no any single proof tendered to prove that he had unspecified contract with the applicant. To cement his argument he cited Section 110 and 111 of the Evidence Act (Cap 6 Revised Edition 2019).

He further contended that, the reason for retrenching the employees were because the project was reaching the end and also the applicant followed all procedure including consultation before termination and payment of terminal benefits to retrenched employees.

In relation to the grounds (c), (d) and (e) of the revision, Mr. Sahwi argued that, the award issued by the arbitrator lacked the background information, summary of the parties' evidence and

argument together with the reason for the decision. He added that, then that is not an award before the eyes of law.

He went on to submit that, the arbitrator awarding 24 months compensation without any justification. He added that, the arbitrator's award lacks the qualities of award because she did not put the information admitted between the parties as the required by the law. Finally, he prayed for the Court to allow the application, revise and dismiss the CMA proceedings and award.

In rebuttal, Mr. Mwanri submitted that, the parties are bound by their own pleadings. To buttress his argument referred this Court to consider the case of **Ngerengere Estate Company Limited vs. Edna William Sitta**, Civil Appeal No. 209 of 2016, Court of Appeal of Tanzania (unreported) where the Court quoted the case of **Ng'homango vs. The Attorney General**, Civil Appeal No. 114 of 2011, Court of Appeal of Tanzania (unreported).

Also he cited the case of **Astepro Investment Co. Ltd. vs. Jawinga Company Limited**, Civil Appeal No. 08 of 2015, Court of Appeal of Tanzania (unreported) to support the same position. Again he emphasized that, the applicant was required to submit on the basis of the pleadings filed in Court.

Reinforcing his argument, the counsel for the respondent invited this Court to consider the decision of the Court in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government and 4 others**, Civil Appeal No. 147 of 2006, Court of Appeal of Tanzania (unreported).

He continued to submit that the issue of signature on the CMA Form 1 was already resolved by the CMA, the applicant never took any further action and the said error is a matter of procedure which did not touch the substance of this labour dispute. He added that, the case of **Paul Kavvulaye Mgonja (supra)** is distinguishable in the present application.

In regarding to the ground (a) and (b), Mr. Mwanri replied that, the Section 110 and 111 of Evidence Act (Cap 6 Revised Edition 2002) are not applicable. He added that, in the labour law the burden of proof lie to the employer and not the employee. He went on to submit the employer has a duty supply the statement of particulars to the employee including the written agreement.

To cement his contention he cited Section 15 (1) and (2) and Section 15 (6) of the Employment and Labour Relation Act No. 06 of 2004. He added that, the applicant never tendered any documentary

evidence to prove the same. Again He cited the case of **One Products and Bottlers Ltd. vs. Flora Paulo & 32 others (2015) LCCD 134 and Tanzania Meat Company Ltd. vs. Mohamed Ghost & others (2013) LCCD 150** to bolster his submission.

Moreover, the counsel for the respondent referred this Court to the case of **Mwajuma Mbegu vs. Kitwana Amani**, Civil Appeal No. 12 of 2001, Court of Appeal of Tanzania and **Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited**, Civil Appeal No. 107 of 2004, Court of Appeal of Tanzania (both unreported) to the effect that the untendered document does not form part of the proceedings of the Court.

He further argued that, the justification for retrenchment has confusion because the employee for specific task is terminated upon the expiration of the task. He also submitted that, the respondent termination was unfair both substantively and procedurally.

In respect grounds (c), (d) and (e), Mr. Mwanri contended that, the award complied with the requirement of the law. He added that, there is no hard and fast rule on the format of the award.

On the issue of the arbitrator awarding 24 months as compensation, Mr. Mwanri argued that, the allegation raised by the

counsel for the applicant cannot be backed by any proof but by looking in the award. He added that, the employer has a duty to produce the written statement of particulars to prove or disapprove any allegation. In conclusion, he prayed for the Court to dismiss this application and order the applicant to pay the respondent.

In his rejoinder, Mr. Sahwi reiterated his submission in chief. He went on to submit that, the counsel for the respondent was not taken by surprise because the issue of signature on the CMA Form No. 1 is based on point of law the counsel for the respondent had ample time to reply. He added that, the law and precedent require arbitrator to provide reason on awarding more than 12 months remuneration as compensation. Also he reiterated his prayer in chief.

Having careful scanned the written submissions filed by the learned counsels for the parties and the record of the CMA; the issue calling for the determination of this application are followings:

(a) Whether the respondent was unfair terminated or not

(b) Whether the award did not comply with the requirements of the law or not.

(c) The reliefs entitled to each party.

Going through the written submissions filed by he learned counsels of the parties, I have found the counsel for the applicant has introduced new grounds in his submission. The grounds were not stated in his application. These grounds are:

(a) That, the Honourable Arbitrator committed the gross error by ignoring mandatory legal requirement to refer the dispute to CMA as per Rule 12 (1) and (2) (a) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007

(b) That, Honourable Arbitrator erred in law to entertain the complaint because the CMA had no jurisdiction since the procedure to refer the dispute to CMA was not complied.

Before I embark on the determination of the issues involved in this application, I feel obliged to discuss the new grounds raised by the counsel for the applicant in his submission. It is settled principle of the law that, the parties are bound to their own pleadings. The same position is well emphasized by the Court of Appeal of Tanzania in the case of **Astepro Investment Co. Ltd. vs. Jawinga Company Limited**, Civil Appeal No. 8 of 2015 (unreported) the Court at page 17 observed that:

> *"As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the*

decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings."

Also, it is trite law that, the function of pleading is to give notice to the adverse part on the case which is about to face. A party must therefore, so state his case that his opponent is not be taken by surprise. See the case of **James Funge Gwagilo vs. The Attorney General (2004) T.L.R 161.**

From the authorities cited, this Court cannot take into consideration on it. Therefore, this Court found that these new grounds do not found in the applicant's affidavit hence, it is an afterthought.

Turning to the merits of this application, I wish to start on the issue whether the respondent was unfair terminated or not. It is apparent on the record that, the respondent was employed by the applicant as Human Resource Officer, the same was testified by the first witness of the applicant at page 8 of the typed proceedings of the CMA.

Also it is on record that, the applicant failed to tender the written statement of the particulars of the respondent. Again Section 15 (1) of the Employment and Labour Relations Act, 2004 provides:

"(1) Subject to the provision of subsection (2) of Section 19, an employer shall supply an employee, when the employee

commences employment, with the following particulars in writing namely-

(a) Name, age, permanent address and sex of the employee;

(b) Place of recruitment;

(c) Job description;

(d) Date of commencement of the contract;

(e) Form and duration of the contract;

(f) Place if work;

(g) Hours of work;

(h) Remuneration, the method of its calculation and details of any benefit or payments in kind, and

(i) Any other prescribed matter.

Further subsection (6) of the same provision provides as follows:

> *"(6) if in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (10 shall be on the employer."*

From the above position of the law, the employer has duty to supply his employee the above mentioned written contract in writing. Therefore it was the duty of the applicant to prove that the respondent had specified contract and not shift the burden of proof to the respondent.

Also I have perused the record and did not find any written agreement made entered between the applicant and respondent.

Furthermore the record does not show if the procedure of retrenchment was followed I hold so because there is no collectively agreement and also there is no enough evidence to show that there was consultation between the applicant and respondent before the termination as per Section 38 of the Employment and Labour Relation Act No.06 of 2004 and Rule 23 of the Employment and Labour Relation (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007.

It is canon principle in the labour law the employer has a duty to prove that the termination is fair as clearly stipulated under Section 39 of the Employment and Labour Relation Act, No. 06 of 2004. In the present application, the applicant failed to prove the same because did not tender the copy of the collectively agreement to show that the respondent was well participated as the retrenched one, but the record revealed that the respondent appeared in the retrenchment meeting as the Human Resource Officer in the retrenchment process.

Coming to the second issue on whether the award given by the CMA does not comply with the requirement of the law. Looking at the award it is clear that the award complied with the requirement. At page 6 of the award the arbitrator mentioned why there was no valid reason for termination and also in the same page the arbitrator stated that the

procedure for termination was not fair because there was no evidence adduced by the applicant to show that a notice to intention for retrench the respondent.

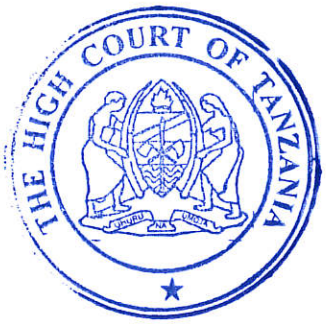
On that regard, I am not inline with argument advanced by the counsel for the applicant that it was not an award in eyes of the law. Therefore, this argument must fail.

In relation to the last issue on the reliefs entitled by each party, my determination is that the applicant failed to prove the types of contract which were entered by the respondent therefore the arbitrator was right to rule out that the respondent was employed under unspecified contract due the nature of the work was done by the respondent.

Again the probable consequence of act of the employer to breach of the unspecified contract is the loss of salaries hence I concur with the decision of arbitrator that the respondent is entitled 24 months as compensation for unfair termination. There is no any law or precedent which demands the arbitrator when awarding compensation for the employee work under unspecified contract to give justification.

But the law required the arbitrator not award a less than 12 months as compensation. In my opinion the arbitrator was right to grant the said relief in her decision.

From the observation above, I see no any reason to interfere the findings and award which was given by the CMA. Further I hereby dismiss this application. No order as to costs.



D. B. NDUNGURU
JUDGE
28/08/2020

Date: 28/08/2020

Coram: D. B. Ndunguru, J

Applicant: Absent

For the Applicant: Absent

Respondent:

For the Respondent: Mr. Ngwale – Advocate

B/C: M. Mihayo

Mr. Ngwale – Advocate:

The matter is for judgment.

Court: Judgment delivered in the presence of the Mr. Ngwale advocate for respondent and in the absence of the applicant.

D. B. NDUNGURU
JUDGE
28/08/2020

Right of Appeal explained.