IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION MOSHI REGISTRY

AT MOSHI

APPLICATION FOR REVISION NO. 02 OF 2018

(C/F Labour Dispute Ref. No. MOS/CMA/ALB/41/2017)

IQRA ACADEMY (PRE – PRIMARY SCHOOL)..... APPLICANT

VERSUS

HAMZA SELEMANI KILONGO..... RESPONDENT

23rd September & 16th October, 2020.

RULING

MKAPA, J:

The applicant aggrieved by the Award of the Commission for Mediation and Arbitration of Moshi (The Commission) **in Labour Dispute No. MOS/CMA/ARB/41/2017** delivered on 15th December, 2017 by G.P Migire – Arbitrator filed this Application seeking this Court to quash and set aside the Award.

This application by way of Chamber Summons is supported by a sworn affidavit of Faraji Mwanga and is brought under Rule 24 (1) (2) (b) (c) (d) and (f) and 24 (3) (a) (b) (c) (d); and Rule 28 (1) (c) (d) (e) and 28 (2) of the Labour Court Rules, 2007 G.N No. 106 of 2007 and section 91(1) (a) (b) and 2 (b) and 3. Section 94 (1)

(b) (ii) (c) of the Employment ad Labour Relations Act No. 6 of 2004.

The factual summary of this Application is that, the Complainant (the Respondent herein) was employed by the Respondent (Applicant herein) as a teacher at IQRA ACADEMY (PRE-PRIMARY SCHOOL) in September 2015. It was alleged that on 17/08/2017 the Respondent issued a three month notice of resignation. On 24/08/2017 the Applicant convened a school board meeting whereupon the applicant's director one Faraji Mwanga ordered the respondent to leave the school premises within 24 hours after handing over. It was further alleged that following that order the respondent had to leave without being paid his terminal benefits. Dissatisfied, the Respondent lodged a labour dispute against the Applicant at the Commission whereby the Commission decided in his favour by awarding him a total of shillings 1,080,000/= being three month salary (900,000/=,) and shillings 180,000/= being unremitted NSSF contributions for three months. Aggrieved, the applicant preferred this Revision.

At the date when this application was set for hearing parties consented the application to be argued by way of filing written submissions The applicant was represented by Mr. G.M Shayo learned advocate while the respondent appeared in person,

unrepresented. The filing schedule was set for the applicant to file the written submission in chief on or before 07/05/2020; reply on the submission made on or before 21/05/2020; rejoinder if any on or before 28/05/2020 and the matter was set for mention on 9th June, 2020.

However, on the date which was set for mention the applicant alone had complied with the filing order. Upon the prayer by the applicant, the hearing proceeded ex-parte.

Submitting in support of the application Mr. Shayo submitted that no material evidence was presented by the respondent to prove that he had employment contract with the applicant as a teacher. Mr. Shayo went on submitting that the respondent was working on part time basis since 2015 and further that in the year 2016 he was to sign employment contract but the respondent declined to sign the same and opted to continue with part time employment. It was Mr. Shayo's contention that since there existed no contract of service respondent's three month notice of resignation was misplaced.

Mr. Shayo challenged the Commission's Award of Shilings 1,080,000/= being respondent's three month salary and three months unremitted NSSF contribution to the effect that, he was not entitled to the same as the respondent decided to resign on his

own wishes and that, in case an employee resigns on his own wishes he is not entitled to compensation from his employer. He cited the decision by this court **(Mkapa J)** in the case of **NATIONAL MICROFINANCE BANK PLC VERSUS BOSCO THADEI KOMBA, LABOUR REVISION No. 14 of 2017** (unreported) where the court held that;

"the resignation notice by the respondent was legally acceptable that, all subsequent action by the respondent after his resignation was nullity. Likewise the case of ***COCACOLA KWANZA VERSUS KAJERI MISYANGI (2010-2012) and PAUL LIHAMWIKA VERSUS COCACOLA LTD 2011-2012 LCCD 76*** *underscored the facts that, when the employee issues 24 hours notice in principle he abandons all his terminal benefits"*

Furthering his argument Mr. Shayo submitted that since the respondent had no contract of service with the applicant the alleged termination letter dated 17th January is frivolous and unfounded in the eyes of the law and further that he had no right for to compensation as an employee. He finally prayed for this court to set aside the Award by the Commission with costs.

Having considered the submission by the applicant and records of Commission I think the question for determination is whether this application for revision has merit.

It is on record of the Commission's proceedings the fact that the Award by the Commission was occasioned by the complaint lodged by the respond against the applicant herein to the effect that his termination of employment was not fair. It is opportune for me to point out from the outset the fact that, the law is settled when it comes to the issue of termination of employee's employment by the employer to the effect that, termination of employee has to be for a valid reason. Section 37 of the Employment and Labour Relation Act 2004 provides as follows;-

S. 37 (2) (a) termination of employment by an employer is unfair if the employer fails to prove;-

(a) That the reason for termination is valid.

(b) That the reason is a fair reason-

(i) Related to the employee's conduct, capacity, or compatibility or

(ii) Based on the operational requirements of the employer.

As to the procedure for fair termination, Rule 13 (1) up to 13 (10) of the Employment and Labour Relations (Code of Good Practice)

G.N. No. 42 of 2007 is illustrative on the importance of fairness in termination procedure as a mandatory requirement. The case of **Stamili M. Emmanuel V. Omega Nitro (T) Ltd** Labour Div. Dar-Es-Salaam Revision No. 213 of 2014 LCC 2015 page 17, *underscored the fact as hereunder;-*

".....that the intention of the Legislature is to require employers to terminate employee only basing on valid reasons and not their own whims...."

More so in any labour dispute the burden of proving that termination is fair is on the employer as stipulated under sestion 39 of the Act as hereunder:-

" S. 39- In any proceedings concerning unfair termination of an employee by an employer the employer shall prove that the termination is fair"

The applicant has submitted the fact that termination of the respondent employment was occasioned by his own decision to resign after he had issued a three month notice of resignation. It was the applicant's further argument that the notice of resignation was irrelevant as the respondent was employed by the applicant on part time basis and further that the notice of resignation would have been relevant to the respondent if he wound have been

employed under a contract of service. Mr. Shayo for the applicant went on submitting that the respondent's termination was fair since being a part time employee immediately after issuing notice of resignation he was ordered to vacate the office after handing over the office and further that he was not entitled to terminal benefits. To support his argument he cited the cases of **National Microfinance** (*supra*) by this court and **Cocacola Kwanza** (*supra*) which underscored the fact that when an employee resigns or issues a 24 hour notice in principle, he abandons all his terminal benefits. Finally, he prayed for this court to quash and set aside the Commission's Award.

What I have gathered from the above submission in the fact that the main contentious issue is the allegations that the respondent was not an employee of the applicant as he had no formal contract of service and was employed on part time basis.

My perusal of the Commission's typed proceedings has revealed at page 5 the fact that, the respondent did tender salary slips evidencing his employment with the respondent which was admitted as Exhibit A 1, thus it is plain clear that the respondent was employed by the applicant not as part time employee as he managed to substantiate his employment status with salary slips. Since it has been established that the respondent was

employed by the applicant then termination procedure ought to have been adhered to by the applicant as stipulated under section 39 of the Act *(supra)* which the applicant did not adhered to. The appellant had cited the cases of **National microfinance p/c bank** (by this court) and **Cocacola Kwanza** to substantiate his argument. However, these cases are distinguishable with the instant case to the effect that, the former decisions relate to circumstances where employee has tendered resignation either by 24 hours' notice resignation or has resigned after lapse of three months' notice, then he is not entitled to terminal benefits. However in the instant case, it was a premature resignation before the lapse of a three months' notice. What the Commission ordered was kind of a compensation of a three months' salary which the respondent would have been paid prior to the lapse of three months' notice and three months unremitted NSSF Contribution. It is further on record at page 3 of the Commission's typed proceedings the applicant did not allow the respondent to continue to work during the notice period prior to the expiry of 3 months' notice of resignation on 17/3/2017 because the respondent was head of school which in my view amounts to forced pre- mature resignation.

For the reasons discussed above, I am therefore of the view that, the procedure for terminating the respondent was not fair and I found no ground to fault the Commission Award. In the circumstances, the Application for revision has no merit and is hereby dismissed, and consequently the Commission's Award is upheld. This being a Labour dispute, I give no orders as costs.

It is so ordered.

Dated and delivered at Moshi this, 16th day of October, 2020

S.B. MKAPA

JUDGE

17/09/2020