IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]
AT ARUSHA

REVISION APPLICATION NO. 19 OF 2020
(C/F Commission for Mediation and Arbitration for Arusha, Labour Dispute No. CMA/ARS/ARB/208/19/110/19)

HANGZHOU AGROCHEMICAL (T) LTD ..... APPLICANT

Versus

REHEMA KUNGAI ..... RESPONDENT

JUDGMENT

6th October & 17th November, 2020

Masara, J.

The Applicant herein was aggrieved by the award passed by the Commission for Mediation and Arbitration (CMA) in Labour dispute No. CMA/ARS/ARB/208/19/110/19). She has filed the instant revision praying that this Court revises and sets aside the impugned CMA award. The application is supported by affidavit sworn by Mr. Daud Haraka, learned advocate for the Applicant. The Respondent opposed the application through a counter affidavit sworn by Dr. Eliwako E. K. Mjemah, learned advocate for the Respondent.

According to the CMA records, the Respondent was employed by the Applicant in the position of sales supervisor for a period of one year, from 1/1/2019 to 30/1/2020. Her employment was terminated on 30/3/2019 for reasons of absenteeism at work place and claims for salary increment. At the CMA, the Respondent claimed to have been unfairly terminated therefore

she sought compensation to the tune of Tshs. 10,453.333.33. However, the CMA awarded her Tshs. 3,542,307.69 as 10 month's salary of the remaining period of her contract, severance pay and one-month salary in lieu of notice. The Applicant was displeased, thus this Application.

When the application came up for hearing, it was agreed that the same be heard through written submissions. The Applicant was represented by Mr. Daud Haraka, learned advocate while the Respondent engaged the services of Dr. E.E.K. Mjema, learned advocate.

In his submissions, Mr. Haraka sought to adopt and relied on the affidavit in support of the application. Submitting in support of the application, Mr. Haraka contended that the CMA misdirected itself for not considering strong evidence exhibited by the Applicant to the effect that the Respondent was not terminated from employment but that the dispute was on salary increment. According to Mr. Haraka, the Respondent absconded from work for five consecutive days without notice and upon being called for disciplinary hearing, she served the Applicant with the summons to appear before the CMA. According to the learned advocate, the Respondent should not benefit from her own wrong doings.

Submitting on the issue of the award given to the Respondent, Mr. Haraka submitted that the Respondent claimed Tshs. 10,453,333.33 but was awarded Tshs. 3,542,307.69 contrary to the claims. That there were no facts adduced for breach of contract rather the evidence adduced was on salary

claims that the Respondent was paid Tshs. 300,000/= and not Tshs. 700,000/=. The award, in the counsel's view, is contrary to the rule that parties are bound by their own pleadings, and it contravenes Order IV Rule 7 and Order VI Rule 7 of the Civil Procedure Code, Cap 33 [R. E. 2002].

It was Mr. Haraka's contention that the Applicant was not afforded the right to be heard, which is a fundamental right. Further, the learned advocate argued that the Commission did not evaluate the evidence of the parties properly so as to reach a fair Award. His contention is that the claim is on salary increment and not on termination as decided by the Commission. The Applicant wanted the Respondent to resume work but the Respondent refused and the Commission supported such misconduct.

Another matter raised by Mr. Haraka is that the trial Arbitrator neglected the framed issues as he did not deal with the first framed issue. Since the first issue was not dealt with, and since the second issue depended on the answer from the first issue, the second issue as well was not dealt with. To support his argument, Mr. Haraka referred this Court to the Court of Appeal decision in ***Scan-Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu***, Civil Appeal No. 78 of 2012 (unreported).

Contesting the application, Dr. Mjema submitted that the Commission was proper to deal with the issue of termination as the fundamental issue was the denial of the Respondent's rights pertaining Social Security benefit remittance. That the tendency of paying the Respondent less remittance was

violation of laws of Tanzania. That the refusal of the Applicant to remit the true remittance according to the Respondent's salary led to termination of the Respondent as she was told not to go to work forthwith in case she was not ready to be paid Tshs 300, 000/= as salary. In his view, this contravenes section 37(1) and (2) (a) and (b) of the Employment and Labour Relations Act, No. 6 of 2004. According to the learned advocate, the Respondent was never served with a reprimand for any disciplinary offence, which led to her termination. That was not among fair reasons for terminating the Respondent's employment, he added.

Dr. Mjema substantiated that the CMA was fair in awarding the Respondent Tshs. 2,942,307.69 stating that the decision based on the evidence adduced by both parties in both oral and written submissions. On correcting the Award, it was Dr. Mjema's argument that the learned had erroneously skipped two months, that is why he rectified the compensation making it Tshs 3,542,307.69 from the original compensation of Tshs 2,942,307.69. He concluded that the termination of the Respondent was substantially and procedurally unfair as was decided by the CMA.

Dr. Mjema added that the procedure for terminating the Respondent's employment was unfair as it contravened the provision of Rule 9(1) of the Employment and Labour Relations (Code of Conduct) Rules, 2007, G.N No. 42 of 2007 which insist on fair procedure in terminating one's employment. He concluded by praying this court to dismiss this application by upholding the CMA award.

I have given considerable weight to the affidavit and counter affidavit both in support and against the application, as well as the rival submissions of the advocates for the parties. The pertinent issues for determination are whether the Respondent was unfairly terminated from employment and whether the CMA Award is justifiable.

It is not contested that the Respondent was employed by the Applicant in the position of sales representative for one year commencing from 1/1/2019 to 30/1/2020. It is on record that the dispute between the two arose on 30/3/2019, when the Respondent was terminated. The reasons for her termination, as obtained from evidence adduced at the CMA, is that she demanded increment on the amount payable to the Social Security Fund. According to the Respondent, she was employed on 26/1/2016, the fact which was not supported by any document. The Applicant's contention on the other hand is that the Respondent absconded from work for five days. In proving this assertion, the Applicant supported his evidence by a Charge charging the Respondent with misconduct of absenteeism in a place of work. However, the disciplinary hearing was not conducted because at the time the charge was served to the Respondent, the case was already filed in the CMA. Therefore, right as found by the learned arbitrator, the Respondent was terminated unheard, which makes the termination procedurally unfair.

For a termination to be termed as fair it has to conform to the conditions stipulated by section 37 of the Employment and Labour Relations Act, Cap. 366 and Rule 13 of the Employment and Labour Relations (Code of Good

Practice) Rules, 2007, G.N No. 42 of 2007. Once the procedure is breached, the termination will be regarded as unfair termination. One of the important procedures is to afford the employee the right to defend his/her case in a disciplinary hearing as provided under Rule 13(3)(4)(5). That was not adhered to by the Applicant, the charge was drafted after the claim has been filed in the CMA. Therefore, it is regarded as an afterthought as it was served to the respondent after she served the Applicant with the CMA summons.

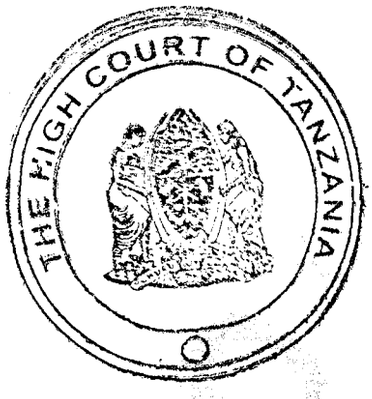
The complaint by the Applicant's advocate on the rate of salary used to calculate compensation to the Respondent has no basis, since it was as per the employment contract which the Arbitrator considered to be the right one. Similarly, complaints regarding the rectified Award lacks merits. I therefore see no reasons to fault the CMA Award in that regard. The Respondent was terminated unfairly contrary to the dictates of law. The first issue is therefore resolved in the affirmative.

Regarding the second issue, I note that the counsel for the Applicant contended that the Arbitrator did not evaluate the evidence properly. I do not agree with him. The evidence of both parties was thoroughly evaluated by the arbitrator as the Award depicts. The decision is clear that the Respondent was terminated after demanding the right deductions to be incorporated in the employment contract. The refusal by the Applicant to alter the deductions and the act of asking the Respondent to stay home if she was not ready to receive a low salary amounted to constructive

termination. I, like the Arbitrator, hold that the Respondent was unfairly terminated.

Guided by the above observations, this Court finds nothing to revise or alter in the CMA Award. The Award by CMA is hereby confirmed. The Application for revision fails in its entirety. The Respondent should be paid compensation for unfair termination as was ordered by the Arbitrator. This being a labour dispute, each party to bear their own costs.

It is so ordered.



Y. B. Masara
JUDGE
17th November, 2020