IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC LABOUR REVISION NO.59 OF 2020

(Arising from the CMA/MZ/ILEM/90/2018)

BEIJING CONSTRUCTION ENGINEER GROUP CO LTD ..... APPLICANT

VERSUS

JOSEPH CHRISANTY KILUCHA ..... RESPONDENT

JUDGMENT

Date of last Order: 09.11.2020

Date of Judgment: 17.11.2020

A.Z.MGEYEKWA, J.

This is an application for revision, the applicant seeks this court to revise the award of the Commission for Arbitration and Mediation in CMA/MZ/ILEM/90/2018 21st April, 2020. It is supported by affidavit deponed by one, Mathias Mwilwa. The respondent also filed a counter-affidavit deponed by Joseph Chrisanity Kilucha.

The brief material background facts to the present application from what I have been able to glean from the founding affidavits have this story: The applicant and the respondent had an employer and employee

relationship. The respondent claimed that he was unfairly terminated by the applicant. He testified to the effect that he entered into a contract on three months basis with the applicant starting from 15th December, 2012, and was terminated on 15th February, 2018. The respondent claimed for his NSSF donation, leave, extra working hours allowances, holiday allowance, and disturbance allowances. On his part, the applicant claimed that the respondent abstained from his work station on 26th January, 2018 as the result the applicant ended his employment.

The Commission for Mediation and Arbitration determined the matter and decided in favour of the respondent. The employer could not see justice hence he opted to file the present application. The applicant in his chamber summons pray for the orders of this court in the following terms:-

1. That this honorable court be pleased to call for record, revise and set aside the whole CMA Ruling in Labour Dispute No. *CMA/M2/ILEM/90/2018* issued to the applicant in the ground set forth on the attached affidavit in support of this application.
2. That this honorable court be pleased to determine the application in its entiretly in the manner it considers appropriate.
3. That this court be pleased to give any relief it deem fit and just to grant.
4. Any other relief the court may deem just to grant.

When the matter was called for hearing the applicant had the legal representation of Mr. Mathias, personal representative while the respondent appeared in person, unrepresented.

In support of the application, Mr. Mathias submitted that the respondent was working in Mbeya and was dismissed while in Mbeya. He cited section 15 (2),(c) of the Employment and Labour Relation Act established the office. He argued that the respondent was required to institute his claim where the dispute arose. To bolster his submission he referred this court to Rule 12 (1) of GN.64.

On the second point, Mr. Mathias argued that the respondent was employed as a surveyor and was paid on daily basis, Tshs. 4, 5000/= per day thus, his contract was ending at anytime. Mr. Mathias went on to argue that the respondent was employed on 25th November, 2017, a 3 months contract and ended on 15th February, 2018. He did not stop there on the second point. He argued that the respondent traveled to Mwanza and was paid NSSF and payment of four days notice. He lamented that according to section 41 (i) (b) of the Employment Labour Relation Act the respondent was paid.

In conclusion, Mr. Mathias urged this court to find that the CMA misdirected itself in awarding the respondent since there was no any outstanding payment.

Resisting the application, the respondent argued that the dispute did not occur in Mbeya. He stated that he was working at Makambako, Njombe. The respondent went on to argue that section 2 of the contract stipulates that an employee is assigned by the employer were to work anywhere thus he was assigned to work in a sub-office. The respondent argued that the contract was ending 26th March, 2018. He added that the three months contract was not recognized or approved by the Tanzania Revenue Authority for lack of stamp duty. He went on to argue that his contract did not come to end since he was issued with an ID starting from 31st August, 2018 to 31st August, 2019.

The respondent went on to state that he received half payment of NSSF benefits but the employer did not issue him with a certificate of service. He claimed that he was paid only Tshs. 17,000/= per day and Tshs. 521,000/= per month. He insisted that he was working in the same office of Beijing though the branch was in Njombe -Makambako the head office is in Mwanza. He lamented that the applicant has not paid him the transport allowance to his place of domicile.

For the foregoing reasons, the respondent urged this Court to dismiss the application.

In his rejoinder, Mr. Mathias argued that the respondent was required to institute his claims at the CMA offices in Mbeya where the dispute arose. He went on to argue that an employer can terminate an employee by a letter or orally and it is not necessary to issue a notice of termination by writing. He insisted that the respondent was paid in full and that he was required to request a certificate of service.

Having considered the arguments for and against the application, I now turn to the issues of contention as submitted by the parties. The first issue the applicant's Advocate seeks to challenge the move of the respondent for filing a claim at the Commission for Mediation and Arbitration for Mwanza while the dispute arose at Njombe. The applicant's personal representative strongly argued that the respondent was required to institute his claim at the Commission for Mediation and Arbitration for Mbeya where the dispute arose.

I have perused the Commission for Mediation and Arbitration records to find out if the same issue was raised at the Commission for Mediation and Arbitration. I found that the record does not show that the applicant has raised the same concern at the Commission for Mediation and Arbitration. Therefore, this issue is raised as a new issue that was not

before the Commission for Mediation and Arbitration hence it was not dealt with. It is trite law that the appellate court is not required to determine a new issue, a new ground cannot be raised by submission at the appellate level. In the case of **Hassan Bundala Swaga v Republic**, Criminal Appeal No. 385 of 2015 (unreported) it was held that: -

> *"It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

From the above excerpt, the Court of Appeal of Tanzania restates the position that a second appellate court cannot adjudicate on a matter which was neither raised as a ground of appeal nor deliberated and determined in the lower court. In my view, this court is not in a position to determine the said issue at this juncture. Therefore, this ground is disregarded.

In tackling the second ground, I think I will not be detained by it. The appellant's counsel is shifting the burden of proof onto the respondent while he has failed to prove whether the employee was employed on daily basis and that the contract ended at the time when the specific activity came to an end. The duty to prove the kind of employment contract whether oral or written between the parties were solely lies on

the employer. It was therefore incumbent upon the applicant's witness to prove that the respondent was fully paid. In the absence of such records, it is reasonable to believe the respondent was orally terminated without valid reasons and without following proper procedure.

In my opinion, I find that this ground turns on the issue of burden of proof, whereas in employment termination cases, the applicable law is section 39 of the Employment and Labour Relations Act, Cp.366 [R.E 2019] of puts the burden of proof to the employer. It read that:-

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

Section 39 of the Employment and Labour Relations Act, Cp.366 [R.E 2019] reads together with section 60 of the Labour Institution Act, No. 7 of 2007 which provides that:-

> *" 60.-(1) In any proceedings concerning a contravention of any labour law, it shall be for the employer-*
>
> *(a)* ***to prove that a record maintained by or for that employer is valid and accurate****. [Emphasise added].*

Applying the above principles, it is clear that in the matter related to fair or unfair termination the burden is always on the employer. The

burden is on the person who has failed to keep the records as required by the labour law.

In the instant application, the applicant has tendered any documentary evidence to prove that the respondent was paid in full. DW1 tendered a contract (Exh.D1) and (Exh.D2) whereas the respondent signed a three years contract. The said exhibits do not state that an employee will be paid on daily basis and that the contract will end on each day of working day as stated by the learned counsel for the applicant. Therefore, the applicant's Advocate claims that the respondent was working and paid on daily basis cannot stand. However, DW1, the only applicant's witness did not tender any proof to ascertain that the respondent was fully been paid.

I find hasten to hold that what the applicant narrated at the Commission for Mediation and Arbitration are mere words with no supporting documents to substantiate that the respondent was fully paid considering that he did not dispute that the respondent was entitled to NSSF benefit payment.

In view of the above provisions and following the facts in our instant case, I firmly find that the Arbitrator's conclusion was correct to hold as he did because the applicant failed to prove that the respondent was fairly terminated. The same was observed in the case of **A – One**

Products and Bottles Ltd v Flora Paulo and 32 other, Labour Division at Dar es Salaam, Revision No. 356 of 2013.

The above said, I wish to recap that I accede to the respondent's submission that the applicant is duty-bound to pay him all the outstanding payments as ordered by the Commission for Mediation and Arbitration.

In the aforesaid circumstances, I, therefore, find that this application has no merit. In the end result, I proceed to dismiss it.

Order accordingly.

Dated at Mwanza this date 17th November, 2020.

A.Z.MGEYEKWA

JUDGE

17.11.2020

Judgment delivered on 17th November, 2020 in the presence of Mr. Mathias, personal representative of the applicant and the respondent.

A.Z.MGEYEKWA

JUDGE

17.11.2020