IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]
AT ARUSHA

LABOUR REVISION NO. 26 OF 2019
(C/F Labour Dispute No. CMA/ARS/ARB/473/18/162/2018)

LEMALA CAMP T/A GRUMET EXPEDITIONS TANZANIA LTD ..... APPLICANT

Versus

JOHN KINGAZI ..... RESPONDENT

JUDGMENT

1st December, 2020 & 16th March, 2021

Masara, J.

Mr. John Kingazi, the Respondent herein, brought a claim of breach of contract of employment (unfair termination) at the Commission for Mediation and Arbitration of Arusha (herein the CMA). According to the CMA records, He was employed by the Applicant on 13th June, 2018 as a Waiter for a fixed term of one (1) year. According to the contract of employment, he was to serve a probationary period of three (3) months. His service was terminated with effect from 31st July 2018. By that time, he had only served close to two months of the probationary period. Aggrieved with the decision to terminate him, the Respondent filed a claim at the CMA craving for payment of the unexpired period of contract (Tshs. 2,900,000/=), Overtime for the months of June & July, 2018; Holidays; Service fee and night Allowance (Tshs. 55,099/=). The total amount of his claim was Tshs. 4,112,636/=.

After hearing of the dispute, the Arbitrator held that the termination of the Respondent by the Applicant was unfair on the ground that he was

terminated unheard contrary to Rule 10 (7), (8) and (9) of the Employment and Labour Relations (Code of Good Practice) Regulations, GN No. 42 of 2007. He awarded him a total of Tshs. 4,460,000/-. The Applicant was aggrieved. He filed this Application contesting the CMA Award on 7 grounds which were reduced to three during the hearing. The grounds are

a) *That the Arbitrator erred in law and in fact by awarding daily night allowance without any proof as required by the contract to the Respondent;*
b) *The Arbitrator erred in law and in fact by failure to properly assess and evaluate the evidence tendered before it, leading to wrong findings; and*
c) *That the Arbitrator award has occasioned a miscarriage of justice to the Applicant.*

The Application was argued through filing of written submissions. The Applicant was represented by Mr. George Njooka, learned advocate, while the Respondent was represented by Mr. Frank Maganga, Personal Representative.

Submitting on behalf of the Applicant, Mr. Njooka was of the view that the award of the CMA was erroneous as the Arbitrator awarded a total of Tshs. 1,560, 000/= as daily night allowance while there was no proof that the Respondent worked or would have worked on those nights. He further contended that the decision to award the said amount was against the respondent's own CMA F1, which claimed Tshs. 55,099/=). As night allowance. The learned counsel submitted that the night allowance is only payable upon proof that a person was at the Applicant's Camp and actually

worked a night shift. He therefore craved that this amount should not be condoned as there was no justification for the same.

Regarding the second ground, Mr. Njooka contested the CMA award in that the Arbitrator did not properly evaluate the evidence. He further stated that the analysis of the evidence as per the CMA award contradicts the finding of the arbitrator. He urged the Court to decide that the Applicant proved their case to the required standard through the witnesses that testified contrary to the evidence of the Respondent whose evidence was ruled to be hearsay.

On the last ground, the learned counsel for the Applicant was of the opinion that as the Respondent was terminated while on probation, he was only entitled to damages for the remainder of the probationary period and not the remainder of the whole contract.

In reply, Mr. Maganga informed the Court that the Applicant had already paid the whole amount decreed by the CMA and that proceeding with the Application was futile. Regarding the first ground by the Applicant, it was Mr. Maganga's contention that the award regarding night allowances was justified as it is the Applicant who breached the contract with the Respondent. That had the contract not been breached, the payment would have been done every month. Further, that the Arbitrator has a right to grant a relief even if it is not pleaded. On the issue of evidence, Mr. Magamga contended that the evidence of absconding from duty by the Respondent was not proved by any of the Applicant's witnesses. On the contrary, he said,

the fact that the Respondent was sick was adequately proved by documentary evidence. Mr. Maganga challenged the averment that what the Respondent deserved was payment of the remaining period of his probationary period. He retorted that the counsel for the Applicant did not substantiate that assertion. He therefore asked the Court to dismiss the Application for lack of merits.

In a brief rejoinder, Mr. Njooka while admitting that the award had already been discharged by payments effected by the Applicant, he quickly added that such payments cannot be taken to be an admission of the award of the CMA and that they were forced to settle the claim which arose from an ex parte execution proceeding which led to the attachment of the car of the Applicant's Managing Director. The learned counsel reiterated his prayer that the award of the CMA be set aside.

I have considered the affidavits both in support and against the Application and the written submissions thereof. I have also taken note that payment to the Respondent with regard to the CMA award has already been effected. The issue I am called to decide is whether the award of the CMA was justified given the evidence before it.

On the first ground, I agree with Mr. Njooka that the Arbitrator awarded night allowance over and above the claimed amount claimed in the Respondent's claim. The evidence tendered also does not back the award.

Night allowances were payable to the Respondent pursuant to Clause 4.1 of the Employment Agreement. That clause partly stated that:

> *"For Lemala Tented Camp employees, who work at one of the camps, a night allowance off TZS 6,000.00 per day will be paid in arrears to your bank account. Night allowances will only be paid for days that were actually spent at the camp..."*

I note that both the Applicant and the Respondent did not testify on the previous experiences of payment. I expected to see whether full or partial night allowance was paid to the Respondent in the two months that he worked and was paid. This could be the reason that made the Arbitrator to award the whole amount as the evidence showed that the Respondent was full time at the camp and such payments were inevitable. I thus subscribe to the assertion made by the Respondent's representative that the arbitrator was not tied with the claims presented. He was entitled to depart from the claims in CMA F1. The provisions of Rule 32 (5) (a) – (f) of the Mediation and Arbitration Guidelines Rules, 2007 appear to provide discretionary powers to the arbitrator to award compensation based on circumstances of each case. It provides:

> *"(5) Subject to sub-rule (2), an Arbitrator may make an award of appropriate compensation based on circumstances of each case considering the following factors-*
> *(a) any prescribed minima or maxima compensation;*
> *(b) the extent to which the termination was unfair;*
> *(c) the consequences of the unfair termination for the parties, including the extent to which the employee was able to secure alternative work or employment;*
> *(d) the amount of employee's remuneration;*
> *(e) the amount of compensation granted in previous similar cases;*

(f) the parties' conduct during the proceedings; and Any other relevant factors."

The above regulation offers discretion to the arbitrator. Furthermore, it has also been held that the use of "may" in Section 40 (1), suggests that a discretion exist. In the case of ***Deus Wambura Vs. Mtibwa Sugar Estates Limited,*** Revision No. 3 of 2014 (unreported) Madam Judge Rweyemamu (as she then was) held:

"Under the law (the ELRA), an arbitrator has discretion to award or not to award any of the remedies provided under Section 40 (1) (a) or (b) or (c) following a finding of unfair termination. It is my view that, with such discretion, an arbitrator can award compensation which is more or less than 12 months, provided that he has justifiable grounds for doing so, grounds such as those enumerated under rule 32 (5) (a) to (f) of the GN 67/2007"

The above position was also followed in the case of ***Michael Kirobe Mwita vs. AAA Drilling Manager***, Revision No. 194 of 2013 (Unreported) where His Lordship Mipawa, J (as he then was) at held:

"In my opinion the learned arbitrator trekked in the correct avenue when he ordered the compensation of six months, he had discretion to order compensation of less than twelve months remuneration where appropriate".

In light of the above, I see no reasons to interfere with the discretion exercised by the learned Arbitrator. The Award is clear that he justified the payment made, proving that he was quite aware that what had been claimed was different from what he awarded.

On the other two grounds of revision, I have failed to comprehend the line of argument made by the learned counsel for the Applicant. The basis for which the Arbitrator decided the case was the fact that the Respondent's contract of employment was terminated without according him the right to be heard, including non-compliance of Rule 10 (7), (8) and (9) of the Employment and Labour Relations (Code of Good Practice) Regulations, GN No. 42 of 2007. Rule 10(8) of the Regulations provide conditions antecedent to termination of a probation employee. The conditions are:

> *"(a) the employee has been informed of the employer's concerns;*
> *(b) the employee has been given* ***an opportunity to respond to those concerns****; and*
> *(c) the employee has been given a* ***reasonable time to improve performance or correct behaviours and has failed to do so.***"
> (Emphasis added)

There is no proof that the Applicant complied with the above cited Rule. In the affidavit in support of this application and in the written submissions thereof, it is not contended that there was any fair hearing or an opportunity to improve accorded to the Respondent. In the circumstances, the Arbitrator's finding that the termination was unfair remains unchallenged. Furthermore, there is no rule that requires the Arbitrator to award damages of the remaining probationary period. As already stated, the Arbitrator was justified in the circumstances of the case before him to award the damages he awarded. I however wish to state that the phrase "unfair termination" is not appropriate in cases of employees serving probationary period. The right phrase would be "unfair labour practice" the consequences of which are akin

to those relating to unfair termination. That notwithstanding, I find no merits in the two grounds of revision.

Guided by what I have endeavoured to explain; 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 as was ordered by the Arbitrator. This being a labour dispute, each party to bear their own costs.

Order accordingly.

Y.B. Masara
JUDGE

March 16, 2021