IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 117 OF 2018

(C/F Dispute No. CMA/ARS/ARB/01/2018)

THOMSON SAFARIS LTD .....APPLICANT

VERSUS

FRANCIS AKONAAY ..... RESPONDENT

JUDGMENT

17/3/2021 & 19/5/2021

ROBERT, J:-

This is an application for revision filed by Thomson Safaris Ltd against her former employee, Francis Akonaay. The Applicant seek to revise the award of the Commission for Mediation and Arbitration (CMA) which made a finding to the effect that the Respondent was unfairly terminated by the Applicant and proceeded to deliver its judgment in favour of the Respondent herein.

The application is made under section 91(1)(a), (2)(a)(b)and (c) of the Employment and Labour Relations Act, No.6 of 2004 and Rules 24(1),(2)(a) - (f) and (3)(a)-(d) and 28(1)(a)(c)(d)and (e) of the Labour

Court Rules, GN. No. 106 of 2007 and supported by the sworn affidavit of Mr. Qamara Aloyce Peter, Counsel for the Applicant.

Briefly, details relevant to this application recounts that, the Respondent, Francis Akonaay, was employed by the Applicant in April, 2010 and allegedly terminated on 9th August, 2017. Aggrieved, he successfully challenged his termination to the CMA. Dissatisfied with the CMA award, the Applicant lodged this application seeking to revise the CMA award.

When the matter came up for hearing at this court the Applicant was represented by Mr. Geofrey Mollel, learned counsel whereas Ms. Farida Juma appeared as Personal Representative for the Respondent. The application was argued by way of written submissions as desired by parties and ordered by the Court.

Submitting in support of the application, Mr. Mollel itemized four grounds in support of this application for revision. The grounds are stated in paragraph 5 of the affidavit in support of this application as follows:-

5.1. That, the Arbitrator's award was improper for failure to consider matters which were at issue during the proceedings, thus arriving to unfair and unjust decision;

5.2. That, the Arbitrators award was improper for failure to consider the evidence and exhibits which were tendered during the proceedings, thus arriving to unjust and unfair decision;

5.3. That, the Arbitrator's award was improper for failure on the part of arbitrator to the testimonies of the parties thus arriving to a wrong and unjust decision.

5.4. That, the arbitrator award was illogical and irrational for decision on his own opinion without considering evidence tendered and testimonies of the witnesses.

Demonstrating on how he would approach his submissions, he indicated that he would argue grounds no. 5.2 and 5.3 separately then grounds no. 5.1 and 5.4 together. However, it appears that he did the opposite by submitting on grounds no. 5.2 and 5.3 together and grounds no. 5.1 and 5.4 separately.

Highlighting on the grounds no. 5.2 and 5.3, Mr. Mollel submitted that the Arbitrator failed to analyze the evidence, exhibits and testimonies of the Applicant in addressing the issues raised. He argued that, the issues drawn for determination by the Arbitrator were two, namely; first, whether the employee was terminated or left the employment by himself and secondly, what reliefs are the parties entitled to. He maintained that,

to prove the first issue the employer through her witness Rose Ngilisho proved that the employee left employment after tendering resignation letter (exhibit D1). After receiving the Applicant's resignation letter she wrote a letter to the Applicant on 5/5/2017 asking him to appear for discussion on or by 20th May, 2017 (exhibit D2). Having failed in her consultation with the Respondent, the Applicant herein accepted the Respondent's resignation through a letter dated 15th June, 2017 (exhibit D3). He submitted that. the documents tendered proved that the Respondent herein was not terminated but resigned on his own.

Submitting further, he stated that, after resignation the Respondent entered into a contract with the Applicant to work on special agreement from 12/06/2017 to 5/7/2017 and again another contract from 6/7/2017 to 18/8/2017. Copies of the daily rated work agreement were admitted as exhibit D4 and D6 whereas the copies of the two pay slips were admitted as exhibit D5 and D7. He stated that the two specific agreements (exhibit D4 and D6) bears the signature of the Respondent.

He argued that the Arbitrator missed the fact that the Respondent herein did not report to work after tendering his resignation letter on 28/4/2017. He noted that this fact was not recorded in proceedings and therefore not analyzed by the Arbitrator. He submitted that, the Applicant

paid the Respondent's salaries for April and May, 2017 out of good will because she was trying to retain him.

Based on the reasons stated he urged this court to find merit in grounds No. 5.2 and 5.3 of this application.

Coming to ground no.5.1 he submitted that, the Arbitrator did not consider/address the matters at issue. He argued that the main facts at issue were resignation letter (exhibit D1), reply to the resignation letter (exhibit D2), and letter accepting resignation letter (exhibit D3). He argued that, the fact that the Respondent did not object or testify in respect of his letter of resignation is a proof that he tendered a letter of resignation. He argued further that, the Arbitrator failed to analyze and see the similarities of signatures in Exhibit D1, D4, and D6 compared to signatures in exhibit C1 (request for vacation), and exhibit A1 (Employment contract) which is an indication that the Arbitrator failed to consider the evidence and issues framed.

Coming to ground no. 5.4, he submitted that most of the findings in the award are the inventions of the Arbitrator and personal interpretations contrary to the evidence adduced. He argued that, at page 3 to 4 of the award, the arbitrator interpreted exhibit D1 and C1 that the Respondent went on leave while the testimony of the witness is that the

Respondent tendered resignation letter on the same date that he applied and went on leave. As a consequence he proceeded to decide on the matter he wasn't sure of. He argued further that, although from the evidence and testimony the resignation letter was received the same day as the leave letter, the leave letter was received by a different person and authority.

Similarly, he argued that at page 4 to 5 of the impugned award, particularly, paragraph 2 and 3 of page 4 and paragraph 1 and 2 of page 5 the interpretations are not from the evidence in record but what the Arbitrator invented himself. He submitted that the reasons for CMA decision are based on the opinion of the Arbitrator.

Based on the reasons stated in his submissions, he prayed for the court to allow this application and quash the CMA decision and set it aside.

Opposing this application, Counsel for the Respondent opted to respond to all grounds together. He stated that, all grounds for revision raised by the Applicant are baseless and intangible. He stated that the Respondent did not write the letter of resignation alleged to have been written on 28/4/2017 since on the alleged date he was already gone for leave, he was not at the workplace.

He submitted that, the Applicant failed to prove the date when the Respondent allegedly wrote the said resignation letter or submit any register book to prove that the Respondent was present at work on 28/4/2017.

He further stated that, the Respondent did not resign from work and on 7/5/2017 he reported at work place and continued with work and at the end of the month he received his monthly salary (exhibit B1, D5 and D7). He maintained that it's very difficult for the Employer to continue to pay salaries to an employee who had already resigned from work.

He further contended that, the Respondent had a permanent contract of employment with the Applicant which was signed on 1st April, 2010 as shown in exhibit A1 and he never signed any other contract apart from that one.

He submitted that exhibit D1 and D4 tendered by the Applicant herein as part of the evidence during arbitration proceedings are confusing because the payment for the daily rated work agreement alleged to have been paid to the Respondent are difficult to compare with the monthly salaries paid to the Respondent. He submitted further that, the Applicant failed to prove that the Respondent was paid for daily rated contracts. He maintained that, the evidence adduced at CMA particularly

exhibit A1, B1 and exhibits D5 and D7 all proved that the Respondent had permanent contract of employment and was paid on monthly basis.

On the similarity of signatures on exhibits D1, D4 and D6, he submitted that the signatures are not of the Respondent/employee and argued that a special institution which deals with proof of signatures could be used instead of relying on the CMA to prove similarity of signatures.

Furthermore, he argued that, the employer failed to prove that Respondent's termination was fair as required under the Employment and Labour Relations Act, Act No.6 of 2004. He argued that, no investigation was conducted prior to termination as required under rule 13 (1), (2), (3), (4), (5), (6), (7) and (8) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007, and no reason for termination was given. He cited the case of **Branch Director CRDB Bank Ltd vs Titoh Kwahren**, Rev. No. 14 of 2011 (unreported) and **Gymkhana Club vs Diana Johnes and 2 Others**, Rev. No. 55 of 2017 (unreported) to cement his arguments.

He maintained that the Respondent was unfairly terminated contrary to section 37 (2) (a), (b) (i), (ii) and (c) of ELRA. Based on that, he prayed for this Honourable Court to dismiss this application as it has no legs to stand on.

In rejoinder submissions, counsel for the Applicant underscored the points made in his main submissions. He reiterated that the Arbitrator did not determine the fate of the resignation letter (exhibit D1) and the signature therein nor did the Respondent herein explain anything about the said letter and other letters incidental to the said resignation (exhibit D2 and D3) and on similarity of signatures in the said documents and exhibit C1 tendered by the Respondent.

He submitted that although the Arbitrator made a finding at page 5 of the impugned award that the Respondent was called by the Managing Director in his office on 9/8/2017 and terminated without any reason, during cross-examination of the Respondent at page 11 of the proceedings the Respondent stated that he did not meet with the Company manager after tendering resignation letter.

He questioned that if the Respondent did not meet the General Manager after tendering the resignation letter how could he be terminated by the General Manager.

On the issue that the resignation letter and request for vacation were both processed on the same day, he submitted that, according to DW1, she received the resignation letter on 28/4/2017 and signed as Camping Manager whereas vacation/time off request was signed by the

supervisor. He submitted that these are two different persons with different capacities. He argued that, the Arbitrator ought to have made a finding on this fact.

On the payment of salaries for April and May, 2017, he submitted that DW1 informed the CMA that the Company paid the Respondent salaries for the said months for the reason that the company was not ready to part with him and engaged him in consultation until acceptance of his resignation. He referred the Court to exhibit D2 and D3.

Further to that, he submitted that, it is apparent from the proceedings and evidence tendered that the Commission did not determine and examine the exhibits tendered particularly on the similarity of signatures on documents. He argued that, it is upon the Respondent to testify on signatures and upon the Arbitrator to make a finding on the similarities or dissimilarity of signatures and handwriting and it is not a matter to be argued in submissions. And if need be it has to be taken for forensic determination by order of the Arbitrator.

He submitted that the findings by the Arbitrator that the Respondent was terminated has no proof and further that, since the Respondent argued that he left the employment first by tendering his resignation letter, the question of procedure and substance cannot be an issue, the

employer could not have been able to take any action against the employee who has left employment by tendering resignation letter. The Respondent did not even complete the time frame for daily rated contract (exhibit D4 and D6) which specified the starting and finishing dates. He stated that the cases of ***Branch director of CRDB Bank Ltd (supra) and Gymkhana Club (supra)*** cited by the Respondent are distinguishable and of no relevance to this matter because the cited cases the employees were terminated by the employer while in the present case the employee tendered a resignation letter and left employment.

Having considered submissions from both parties and records of this matter, it appears that the central question for determination is whether or not there was sufficient evidence for the CMA to decide that the Respondent was unfairly terminated.

The Applicant faulted the CMA award for failure to consider the evidence, exhibits and testimonies of the parties thus arriving into a wrong and unjust decision. At the CMA the main issue for consideration was whether the employee was terminated or left the employment by himself.

At page 3 to 5 of the impugned award the CMA considered the evidence tendered by the Applicant herein to establish that the Respondent resigned from employment by himself. When considering the alleged

letter of resignation (exhibit D1) at page 3 of the impugned Award, the Arbitrator observed that although the Applicant herein claimed that the Respondent resigned on 28/4/2017, the vacation request (exhibit C1) tendered by the Respondent herein shows that the Respondent's date of leaving office for vacation was 28/4/2017 and the date of reporting back to work is 7/5/2017. The Arbitrator found the allegations of the Applicant herein that the Respondent resigned on the day when he started his vacation to be confusing considering that the Applicant had declined to accept the Respondent's resignation through her letter (exhibit D2) dated 5/5/2017 in which she asked the Respondent to appear for discussion by 20th May, 2017 and her subsequent letter dated 15th June, 2017 (exhibit D3) in which she purportedly accepted the Respondent's resignation.

With regards to the contracts allegedly signed by the Respondent, after the alleged resignation, to work on special agreement from 12/06/2017 to 5/7/2017 and from 6/7/2017 to 18/8/2017 (exhibit D4 and D6 respectively), the CMA found it questionable that the Applicant had prepared a special agreement for daily payment which started on 12/06/2017 before he could accept the Respondent's resignation from his permanent contract which he allegedly did on 15/6/2017.

Although the Applicant herein stated that after resignation the Respondent started to work on daily rated contract at the payment of TZS 27,000/- per day (in remote areas/ field trip) and TZS 6,420 per day (in urban areas), the CMA made a finding to the effect that the amount of TZS 758,667.00/- paid to the Respondent for the month of July as shown in the pay slip (exhibit D7 and B1), do not reflect the rate of payment for daily rated work agreement if multiplied by the number of days in that month.

Based on the evidence presented by the Applicant herein, the CMA found it difficult to believe that the Respondent resigned by himself, the Arbitrator observed that even if the Respondent had written resignation letter there is no evidence that the acceptance letter (exhibit D3) was received by the Respondent. The CMA observed further that, exhibit D7 and B1 shows that the Respondent was paid TZS 758,667,000/= as salary from 1/7/2017 until 30/7/2017 before his termination on 9/8/2017 without any valid reasons or due regard to fair procedure.

Considering the analysis of evidence done by the CMA, this court finds no reason to fault the CMA award for failure to consider the evidence on record. As a matter of fact, the circumstances of the Respondent's resignation as alleged by the Applicant and the body of evidence brought

by the Applicant to prove the said resignation leaves a lot to be desired. If the Respondent's letter of resignation was written on 28/4/2017 and he resigned on 30/4/2017 as alleged by the Applicant's witness, there is no reasonable explanation from the evidence adduced as to why the Applicant continued to pay his salaries for the months of May and June, 2017 or approve his vacation from 28/4/2017 as shown in exhibit C1, or accepting his resignation on 15/6/2017 as shown in exhibit D3. If the Applicant accepted the Respondent's letter of resignation on 15/6/2017 as shown in exhibit D3, it is not clear as to why she entered into a daily rated work agreement with the Respondent on 12/6/2017 (exhibit D4) while she had not accepted Respondent's resignation from the previous permanent contract. Further to this, if the Respondent entered into the daily rated work agreement from 12/6/2017 to 5/7/2017 (exhibit D4) and then from 6/7/2017 to 18/8/2017 (exhibit D6), why is it that the pay slip for June, 2017 indicates that the payment was from 1/6/2017 to 30/6/2017 and the Payment for July, 2017 was from 1/7/2017 to 31/7/2017. If the Respondent's agreement (exhibit D6) was supposed to end on 18/8/2021 there is no explanation as to why he didn't continue working until 18/8/2017 which is the last date of the agreement. The Respondent stated that he was terminated on 9/8/2017 without any valid

reasons and the Applicant did not offer any reasonable explanation on how and why the Respondent's employment ended on 9/8/2017.

The alleged letter of resignation by the Respondent dated 28/4/2017 stated that he would like to resign from 30th April, 2017 and he decided to surrender his salary for April, 2017 in lieu of notice. However, the Applicant's approval of the Respondent's vacation request from 28/4/2017 to 7/5/2017 and the Applicant's letter of reply to the Respondent's resignation letter dated 5/5/2017 (exhibit D2) which indicated that the Applicant did not want to accept the Respondent's resignation as well as the payment of the Respondent's salary for the month of April, 2017 which he had given in lieu of notice as required by the employment contract (exhibit A1), had the effect of not accepting the Respondent's resignation letter. Consequently, this court considers that the Respondent's letter of resignation did not take effect due to the subsequent actions by the Applicant. Since there is no evidence to the effect that the Respondent was not attending work after the alleged resignation letter, this court finds that the Respondent was still an employee of the Applicant under the original contract which commenced on 1st April, 2010 (exhibit A1). Further to this, the court finds that there is no evidence that the letter accepting Respondent's resignation (exhibit D3) was delivered to the Respondent.

Similarly, this Court finds that, the Applicant failed to prove that the Respondent had agreed to enter into the daily rated work agreements as shown in exhibit D4 and D6. The argument by the learned counsel for the Applicant on the similarities of signatures in exhibit A1 and C1 which were signed by the Respondent and those in exhibit D4 and D6 which are denied by the Respondent is not supported by evidence. The Applicant had the burden of proving this fact instead of hoping that the CMA would order for the documents to be taken for forensic determination as argued by the learned counsel for the Applicant.

Since evidence indicates that the Respondent was terminated on 9/8/2017 without any reasonable explanation, this court agrees with the CMA that the Respondent was unfairly terminated and the termination procedures were not followed contrary to section 37 (2) of Employment and Labour Relations Act, No. 6 of 2004.

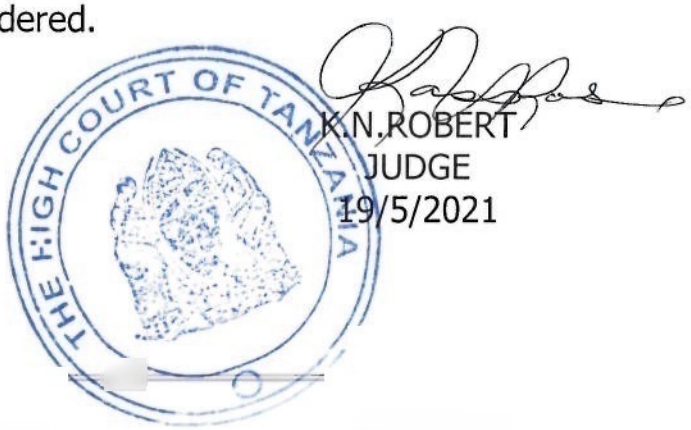
In the case of **Tanzania railways Limited vs Mwinjuna said Semkiwa,** Rev. No. 239 of 2014, reported at Labour Court Digest No. 1 of 2015, this court decided that:

> *"i. It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be*

substantive fairness and procedural fairness of termination of employment. See section 37 (2) of ELRA No. 6 of 2004"

In the foregoing, I find no reason to fault the Arbitrator's decision. Consequently, I dismiss this application for lack of merit.

It is so ordered.



K.N.ROBERT
JUDGE
19/5/2021