IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(TANGA DISTRICT REGISTRY)

AT TANGA

REVISION NO. 4 OF 2019

(Original Labour Dispute No. CMA/TAN/22/2018 of the Commission for Mediation and Arbitration at Tanga)

ANJARI SODA FACTORY LIMITED.....APPLICANT

-VERSUS-

MICHAEL JOSEPH JOHA.....RESPONDENT

RULING

Date of last order: 30/09/2021
Date of Ruling: 06/10/2021

AGATHO, J.:

The Applicant was dissatisfied with the Ruling of the Hon. Arbitrator that ordered him to re-engage the Respondent and pay him compensation of two months' salary. The Applicant applied for revision to this Court inviting it to revise the Award and the proceedings of the Commission for Mediation and Arbitration (CMA) to satisfy itself whether they were proper in the eyes of the law.

Among the issues to be determined in this revision application is whether in deciding on the award granted to the Respondent the CMA did not exercise

jurisdiction with material irregularity and error to the merits of the case involving injustice. The Applicant prayed that if the irregularity involving injustice is established the Court be pleased to revise the proceedings and set aside the Award or otherwise make appropriate orders as it may deem fit.

Other issues are whether the reliefs awarded contradicts the entire findings of the Arbitrator; whether the trial Arbitrator erred in awarding the Respondent reliefs of unfair termination; and whether the Arbitrator erred in awarding to the Respondent both re engagement and compensation without assigning any reasons for awarding two alternative reliefs concurrently or simultaneously.

Yet other questions that are relevant in this revision are: whether there was an oral employment contract; when was the Respondent employed? What was his salary? When was he terminated from employment? To answer the above questions, briefly, indeed there was an oral employment contract. The Respondent's salary was TSH. 280,000/=. The records also show that his employment contract was terminated on 30/01/2018.

Although the Applicant (employer) contended that they (employee and employer) had quarrels, and employee did not follow employer's instruction on 30/01/2018. We ask at this point, did employee commit any misconduct? Moreover, if he did commit misconduct, was he informed or given notice of termination?

Following the above stated quarrel, the employer ordered the employee to stay home for a month and he will be paid his one-month salary to avoid further quarrels. On 02/02/2018 when the employee went to collect his salary the employer informed him that he has changed his prior directive and he should resume his duties. The employee refused and hence the matter was referred to CMA by the employee.

To appreciate gist of the whole incident leading to this revision, it is fair to restate the issues raised by CMA (Arbitration) by they are relevant, namely:

a) Whether the Applicant (employee) was terminated from employment by the Respondent (employer).
b) If the first issue is answered in the affirmative, whether there were justifiable reasons for termination of the Applicant from the employment.

c) Whether the Respondent followed procedures are set out in the law in terminating the Applicant from the employment.

d) As to what reliefs are the parties entitled to?

From the issues drawn hereinabove we proceed to examine the evidence on evidence and how the same was evaluated. To begin with DW1, Jafari Issa Juma, the plant's manager. He testified that the Applicant was never terminated from employment [see page 5 of CMA decision). Rather he decided himself to terminate his employment after having quarreled with the Respondent despite being asked to resume the services he refused.

DW2, Amon Mchalo he was a fellow employee of the Respondent. After the latter had left, DW2 followed him but he told the DW2 that he will not come back because the employer (the Applicant) terminated his employment. He nevertheless refused to write resignation letter.

DW3, Fakhridin Anjari, the Executive Director of the Anjari Soda Factory testified that the Respondent (Applicant at CMA) is the employee and his salary is T.sh 363,000/=, He testified that on 05/12/2016, the Applicant wrote a letter terminating his employment resigning. But the Applicant continued to perform his duties. And he received his last salary on 02/02/2018 [see page 4 – 5 of the CMA Ruling]. The (DW3) further

stated that on 30/01/2018 there was a quarrel that arose, and he ordered (the Applicant) to go home and return after a week on 02/02/2018 he (PW1) come to collect his salary and they had thought he would come back after a week but he did not come back.

PW1 (the Applicant now the Respondent) testified that in 2016 he wrote resignation letter because he had family problems. When these problems were resolved he continued with his employment. The PW1 testified further that on 30/01/2018 the DW1 (Safari) switched on the machine (printed) which normally the Mr. Hatibu (PW1's boss) complains when it is switched on. Hatibu passed by and found the machine is on and started attacking the Applicant with abusive language. Thereafter, he informed or ordered the Applicant to leave and never to come back to work. This is visible on page 4 of the CMA Ruling. The PW1 thought this to be his termination of employment. When the quarrel emerged on 30/01/2018 DW3 was not at the factory. The DW1 testified that he was not followed home. And he had never asked DW2 to talk to the Respondent (DW3).

It is undisputed that there was a quarrel on 30/01/2018. But was the Applicant terminated from employment? The Applicant (PW1) believed he

was terminated when he was told to go home and never come back to work.

The Respondent (DW3) argued that the Applicant after the quarrel on 30/01/2018 he was given one week to stay home and thereafter to return to work.

The CMA rightly noted that the law Section 37 of Employment and Labour Relations Act of 2004 has stipulated different scenario of termination of employment. All scenario/circumstances enumerated therein are unrelated with the present case. The employer (Applicant) testified that he has not terminated the employee (the Respondent), while the employee on his side has refuted a claim that he resigned himself. It will also be unbecoming to suggest that there was a constructive termination as per Rule 7 (1) of GN 42 of 2007, the Employment and Labour Relation Act (Code of Good Practice) because the situation in the case at hand was not befitting the conditions of constructive termination. I am saying this because the employer as per DW2 and DW3 made attempts to persuade the Applicant to return to work, but he refused. It is apparent on page 3 and 5 of the CMA Ruling that the employer had no intention of terminating the employee (the Respondent) from his employment. Rather the Applicant

tried to calm the situation by ordering the Respondent to stay home for a week and thereafter come back to work. This is a right position because had the employer intended to terminate the employee (the Respondent) then he would not have paid him the salary on 02/02/2018. Moreover, the Applicant could have terminated the Respondent from employment if he so wished for abscondment from duty station after receiving the salary on 02/02/2018. That is also seen on page 5 – 6 of the CMA Ruling.

Furthermore, while it seems there was miscommunication between the Applicant and the Respondent, neither party wanted to part ways. None of them wanted to write a letter to end their relationship either through resignation or termination of employment. That is seen on page 5 of the CMA Ruling. Therefore, the CMA was right to hold that the Applicant was not terminated from employment. Consequently, the second and the third issues die off because the Applicant was never terminated from employment.

Having said so, we ask what then went amiss in the CMA's Ruling? And along that, as to what reliefs are the parties entitled to? The issue of reliefs has been complained about by the employer (the Applicant). The CMA Arbitrator held that from the circumstance of the present case Section

40 (1) (b) of Employment and Labour Relations Act of 2004 shall be used to conclude the dispute between the employee and employer. It stated as follows:-

> ***"If an arbitrator or labour Court finds termination to be unfair, the arbitrator or Court may order the employer (b) to re - engage the employee on any terms that the arbitrator or Court may decide"***

The CMA Arbitrator was of the view that since in the circumstance of the present case the Respondent was not terminated from the employment and both parties contributed to the emergence of the dispute the employee (the Respondent) shall be re-engaged and shall be paid two (2) months' salary as compensation (T.sh 726,000/=).

The above holding triggered the filing of the application for revision preferred by the Applicant (the employer) to this Court. Looking at the submission of both parties, and without further ado I hold as follows:

That the ruling of the CMA Arbitrator is irregular and contradictory in the eyes of law. If the Arbitrator held that there was no termination, why then proceeding to invoke provision of Section 40 (1) (a) (b) and (c) of Employment and Labour Relations Act of 2004 because that provision can

be called into play if "the Arbitrator or the labour Court finds the termination to be unfair it may order the employer to re-engage the employee." The CMA Arbitrator did not end up there he added another shock, that is, he simultaneously ordered the employer (the Applicant) to compensate the Respondent a two months' salary to the tune of TSH. 726,000/=. I concur with the submission of Mr. Mlang'a that the CMA Arbitrator's holding is with respect illegal.

It is my settled view that after the CMA Arbitrator having found that there was no termination of employment, then it ought to have dismissed the application/dispute brought before it for being premature. This is important because there was not termination of employment whatsoever. Since there was not termination of employment worth ordering re-engagement then the CMA Arbitrator's giving of re-engagement order is irregular in law.

Turning to the second misery piled on the employer, that is the order of compensation. I am of view that this again was illegal, there was no justification for ordering compensation after having vividly and justifiably underscored that the Respondent was not terminated from employment.

In the end and to make justice smile the CMA Arbitrator's Award is set aside. And the re-engagement and compensation orders are overruled because from the record of this case inclusive the CMA Ruling it is apparent that there was no termination of employment to warrant re-engagement and leave alone compensation of two months' salary (TSHS. 726,000/=). I find the employee to have never been terminated. If he wishes he can resume work and if not interested proceed to exercise his right of resignation in accordance with the law.

This being a labour dispute no order for costs is given.

U. J. AGATHO

JUDGE

06/10/2021

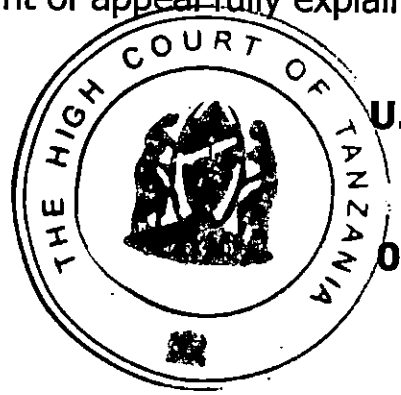
Court: Ruling delivered today 06/10/2021 in the presence of the Respondent and Mr. Kapoma Personal Representative of the Respondent but in the absence of the Applicant.

U. J. AGATHO

JUDGE

06/10/2021

Court: Right of appeal fully explained.



U. J. AGATHO

JUDGE

06/10/2021