IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

LABOUR REVISION NO. 73 OF 2021

(Originating from Employment Dispute No. CMA/ ARS/ARS/67/2020 at the Commission for Mediation and Arbitration at Arusha)

EMMANUEL HUBERT KESSY.....APPLICANT

Vs

EASY TRAVEL TOURS LTD.....RESPONDENT

JUDGMENT

Date of last Order:17-5-2022

Date of Judgement: 14-6-2022

B.K.PHILLIP, J

Before me is an application for revision seeking to revise and set aside the award made by the Commission for Mediation and Arbitration ("CMA") at Arusha in Employment Dispute No.CMA /ARS/ARS/67/2020, which was delivered on 16th July, 2021. The application is made under the provisions of sections 91 (1) (a) and 2 (a), (b) and (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act read together with Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (b) (c) (d) and (2) of the Labour Court Rules, G.N. No. 106 of 2007, supported by an affidavit sworn by the learned advocate Anna Mnzava, who appeared for the applicant in this matter. The learned Advocate John S. Massangwa appeared for the respondent. He filed a notice of opposition to the application together with counter

affidavit sworn by Anna Josephat Samaritan the respondent's human resource manager.

I ordered the application to be disposed of by way of written submissions and the same were filed as ordered.

Before dealing with the merit of this application, it is worth stating the background to this matter, albeit briefly. The applicant herein was employed by respondent as a mechanic supervisor from 11/1/2017 to 29/01/2020 when his employment was terminated. Before his employment came to an end , on 12/11/2018 the applicant was injured on his right leg while performing his duties. He was admitted in the hospital from 13/11/2018 to 15/4/2019. Thereafter he resumed to his work upon being called by his employer though he had not recovered fully. On 25/11/2019 he started feeling unwell again. He communicated with the respondent's human resource manager and work shop manager. He was allowed remain home for a while. On 9/1/2020 his employer asked him to come to work again. He heeded to the request and went to the office where he had a long discuss with his employer concerning his health condition . He explained to him that he was not capable of resuming to his work since his health condition was not good. Finally ,they reached a consensus that his employment should be terminated and be paid his terminal entitlements. The process for the termination of his employment began. At the end a contract for termination of employment was signed by the applicant and his employer (the respondent herein).

However, after the termination of his employment the applicant lodged complaints at the CMA claiming for unfair termination of

employment and payment of Tshs. 33,195,591.8/=, whose breakdown is as follow:

a) January salary- Tshs 1,224,232/=

b) 1 unpaid leave- Tshs 1,224,232/=

c) 8 Off days - Tshs 376,686/=

d) Severance pay- Tshs 988,801.8/=

e) Compensation for unfair termination for 24 months-Tshs 29,381,568/=

In determination of the applicant's complaint the Arbitrator framed the following issues ;

i) Whether there was a valid reason to terminate applicant's employment.

(ii) Whether procedure was followed before termination.

(iii) What reliefs parties are entitled to.

Upon analysis of the evidence adduce by the applicant the Arbitrator ruled that there was valid/fair reason for termination of the applicant's employment and the procedure for termination was properly adhered to. Consequently he dismissed the applicant's claims in their entirety . Aggrieved by the decision of the CMA, the applicant lodged the instant application on the following grounds;

i) That, the Honourable Arbitrator erred in law and facts by failure to record and analyse properly the evidence which were before

him and jumped into wrong conclusion contrary to the evidence adduced by parties to the labour dispute.

ii) *That, the honourable Arbitrator erred in law and fact by not considering that the applicant was not paid his terminal dues and rashed into a wrongful decision that the termination was fair while the respondent failed to prove the same.*

iii) *That, the Honourable Arbitrator failed to consider that the agreement for termination of the contract was not made under consent of the both parties.*

iv) *That the award does not reflect the proceedings of the case.*

Submitting on the first and second grounds, the counsel for the applicant argued that it is not in dispute that termination of applicant's employment was due to injury he sustained when he was in the course of his employment. The evidence adduced before the CMA shows that the applicant decided to enter into agreement with respondent for termination of the employment contact due to his incapacity to work caused by the injuries he sustained while in the course of his employment. She contended that Arbitrator failed to analyse and evaluate evidence properly which shows that the respondent failed to prove on the balance of probability that after termination of his employment the applicant was paid his terminal benefits. Further, she argued that the Arbitrator failed to evaluate the evidence which was to the effect that the termination of employment contract was not done by the will of applicant but it was caused by incapacity to work due to the injuries he sustained in the accident which happened when he was

in the course of his employment. The respondent failed to prove that the termination of employment was fair.

With regard to the third ground the learned Counsel submitted that the Arbitrator failed to consider that the termination of employment was not made under the consent of both parties because applicant agreed to terminate the employment contract due to his incapacity to work caused by the accident that happened while he was in the course of his employment. Furthermore ,she argued that the termination of employment contract was due to intolerable working conditions created /caused by respondent when he resumed to his work shortly, and that amounts to constructive termination. She cited rule 7 (1) of Employment and Labour Relations (Code of Good Practice) Rules. GN No. 42 of 2007 (Henceforth " G.N No. 42 of 2007), to cement her arguments.

Submitting in support of the fourth ground , the learned Counsel argued that the award does not reflect what is in the proceedings. She contended that the Arbitrator failed to analyse and evaluate evidence in relation to the issue on whether or not the termination of the applicant's employment was procedurally fair. She cited Rule 8 (1) of GN NO.42 of 2007, to bolster her argument.

In rebuttal, with regard to the first ground the Counsel for the respondent submitted that the Arbitrator analysed all the evidence adduced by the parties properly as required by the law and reached a fair decision. Further , he submitted that the applicant was required to report to work on 9/12/2019 but did not do so. The respondent's Human Resources Officer made deliberate efforts to

look for the applicant and finally, the applicant appeared in January 2020.It was the applicant himself who informed the respondent about his inability to resume to his work. The applicant's employment came to an end due to the agreement which was signed on 27/01/2020 by both the applicant and the respondent. (Exhibit D3).

In response to the second ground the Counsel for the respondent submitted that termination of employment was fair since it was the applicant himself who requested the termination of his employment. Furthermore, he submitted that the applicant was paid his terminal benefits in accordance with the law as stipulated in clause (a) of Exhibit D3.

With regard to the third ground the learned Counsel submitted that the applicant consented to the termination of his employment contract that is why he signed the agreement for termination of employment (Exhibit D3). To cement his argument, he cited rule 4 (1) of GN No. 42 of 2007. Furthermore, he contended that the applicant was called at a meeting and was accorded the right to be heard. At the end of the meeting it was agreed that an agreement for termination of employment should be prepared. The same was prepared and signed by both parties as agreed. The applicant was involved in the whole process. There was no where the applicant was subjected to conditions which made his work intolerable.

On the fourth ground he submitted that applicant's advocate failed to show the alleged discrepancies between what is reflected in the award and the contents of the proceedings.

Having analysed the rival submissions made by learned Counsel as well as perused the CMA' records, in my opinion the issues to be determined by this Court are as follows:

i) Whether the termination of applicant's employment was fair.

ii) Whether applicant was paid his entitlements after termination of his employment.

It is not in dispute that the termination of applicant's employment was due to the injuries he sustained while performing his duties. He obtained treatment for long time, unfortunately he had a partial recovery. Consequently, he was not able to resume to his works.It is on record that following the health problems aforesaid the applicant had a discuss with his employer on the appropriate way forward whereby they both agreed that the best way was to terminate the contract of employment due to his incapacity to work as he used to do. There is ample evidence on the record , including his own testimony which show that applicant agreed his employment to be terminated (See pages 7 and 8 of the CMA proceedings).

In addition to the above, in his testimony the applicant's admitted that he appeared before the before disciplinary committee and accorded the right to be heard. The applicant signed disciplinary hearing form (Exhibit D2).

From the foregoing , I am of a settled opinion that the procedure adopted by the respondent in the termination of the applicant's employment is fair and there was a fair reason for the termination of the applicant's employment, that is he was not able to continue working

with the respondent and he is the one who suggested the termination of his employment.

Before moving to the last issue I wish to point out that , the argument made by the Counsel for the applicant that the applicant was forced to agree to terminate his employment contract due to intolerable working conditions is not supported by the evidence adduced by the parties. Thus , the same is unfounded . As alluded earlier in this Judgment the evidence shows that it is the applicant who suggested the termination of his employment contract because his health condition was not good.

With regard to the last issue, that is, Whether the applicant was paid his entitlements after termination of his employment, I have perused the contract for termination of employment ,(Exhibit D3) and noted that the same is written in Kiswahili language, which is our national language and I have no flicker of doubt that the applicant understood very well the contents of Exhibit D3. In item (a) of exhibit D3 states that the applicant was paid all his entitlements. In item (c) it states that the respondent does not owe the applicant any money. In his testimony the applicant admitted that he signed that agreement (Exhibit D3). There is no any allegation that the same was forged or tempered with. Therefore , I can safely say that its contents are correct. In my opinion the respondent discharged his burden of prove that the applicant was paid all what he deserved as per law by producing in Court exhibit D3. It is noteworthy that in case of conflicting position between oral and documentary evidence , documentary evidence takes precedence over oral evidence. In addition, in this matter the

applicant's advocate has not given any plausible reasons for discrediting the contents of exhibit D3. With due respect to the Counsel for the applicant, a mere fact that the amount paid to the applicant is not indicated in Exhibit D3 does not mean that the applicant was not paid his terminal benefits. What can be deduced from the contents of exhibit D3 is that the applicant and respondent agreed not to disclose the amount of money paid to the applicant.

In the upshot, this application has no merit and I hereby dismiss it. This being a labour matter each party will bear his own costs.

Dated this 14th day of June 2022.

B.K.PHILLIP

JUDGE