IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 14 OF 2021

(Originating from CMA/MOR/157/2019, Commission for Mediation and Arbitration at Morogoro)

YAPI MERKEZI INSAAT VE

SANAYI ANONYM SIRKET ..... APPLICANT

VERSUS

JEROME AIDAN MBULINYINGI & 4 OTHERS ..... RESPONDENT

RULING

16th Sept, & 25th Oct, 2022

CHABA, J.

The applicant, Yapi Merkezi Insaat Ve Sanayi Anonim Sirket filed this application seeking for revision of an arbitral award of the Commission for Mediation and Arbitration (the CMA) for Morogoro, in Labour Dispute No. CMA/MOR/157/2019 by Hon. H. Kayugwa, Arbitrator on 23rd August, 2021 which was given in favour of the respondent.

The application was preferred under sections 91 (1) (a), (2) (b) (c) and 94 (1) (b) (i) of The Employment and Labour Relations Act [Cap. 366 R.E 2019] (the ELRA) and Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) of The Labour Court Rules GN No. 106 of 2007 (the Rules). Based on the above provisions of the law, the applicant prayed this court be pleased to revise, quash and set aside the Award of the CMA. The grounds upon which the application is based are: -

1) *That, the arbitrator failed to properly scrutinize evidence adduced during the hearing of the matter.*

2) *That, the arbitrator erred in law and fact by awarding the respondent what was not pleaded in CMA Form No. 1.*
3) *That, the arbitrator erred in law and fact by awarding the respondent 12 months salary compensation while their termination was based on fair reason and fair procedures.*
4) *That, the arbitrator erred in law and facts by holding that the applicants failed to adhere to fair procedure in terminating the respondents.*
5) *That, the arbitrator erred by not assigning any reason whatsoever as to why during arbitration stage the case file shifted to different arbitrators.*
6) *That, the arbitrator erred in law and fact by using wrong amount of monthly salary of the respondents in his calculations, hence awarded wrong total amount of the respondent 12 months' salary.*
7) *That, the arbitrator erred in law and facts by holding that the respondents' refusal to work was not illegal strike.*
8) *That, the arbitrator erred in law and facts by holding that the termination of the respondent contract by the applicant was a bigger penalty without considering circumstance of the misconduct and nature of the applicant's work.*

As gleaned from the record, the applicant is a Turkish Company in the undertaking of Standard Gauge Railway construction herein Tanzania. The respondents were among the employees of the applicant working in the capacities of motor vehicle drivers stationed at different stations in Morogoro Region.

At the hearing of this application, the applicant enjoyed the legal service of Ms. Seikunda Lyimo, learned counsel whereas the respondents were represented by Mr. Daudi Melkiades, learned counsel. The matter was heard and disposed of orally whereby each learned counsel had an opportunity to submit and defend her / his arguments.

Submitting in support of the application, Ms. Lyimo prayed to argue grounds 1 and 3 jointly. She commenced arguing by referring the court at pages 11 – 13 of the Award where the CMA accepted the applicant's submissions that the respondents committed misconduct. That being the position, the CMA had to rule that the applicant had reasonable grounds to terminate the respondents according to the Internal Disciplinary Rules (admitted at the CMA as Exhibit DD9), which provides for dismissal from employment as a remedy for the misconduct.

She continued to argue that, the arbitrator erred when ruled that dismissal from employment was severe penalty in the circumstance. In her opinion, such a finding was contrary to the Rules of Good Practice.

In respect of the 2nd ground, the learned counsel contended that, usually parties are bound by their own pleadings. The arbitrator was as well bound to deal with and grant only the prayers or reliefs sought as it was pleaded in CMA/F1. She submitted that the respondent's prayers in the pleadings were not clear. No compensation for 24 months' salary was prayed for. Thus, the arbitrator erred in awarding 12 months' salary without any prayer.

Dealing with ground 4, Ms. Lyimo cited the case of **Tatu Mohamedi and Aisha Ramadhani vs. A3 Institute of Professional Studies,** Revision No. 308 of 2009 at p.9 where the court had the view that procedures for termination of employment contract set under GN. No. 42 of 2007 has not been set to apply in a checklist fashion. She maintained that the arbitrator erred to rule that the procedures were not followed while the applicant adhered to the rules of natural justice, investigation and fair hearing before the disciplinary committee, as

exhibited in exhibits DD4 (show cause notice) and DD5 (proceedings/termination letter), respectively.

The applicant's counsel proceeded to challenge the decision of the CMA for having ruled that the disciplinary committee was not impartial for a chairperson having conflict of interest without any explanations. On the other hand, the Chairperson had all the qualifications stated in GN No. 42 of 2007. Also, the arbitrator erred when he noted that committee members were not disclosed while exhibit DD8 listed the names. Alternatively, if the procedure was unfair, the arbitrator was supposed to award lesser compensation as both parties contributed to the termination. To reinforce her argument the learned counsel referred this court to the case of **Felician Rutwaza vs. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT – Bukoba, at pages 15 - 16.

On ground 5, the learned counsel submitted that transfer of the case from Haji Kayugwa to Mkombozi Zubeda who was neither an arbitrator nor a mediator, and then back to Haji Kayugwa, that was against the law. To support her argument, she cited the case of **Kinondoni Municipal Council vs. Q Consult Ltd,** Civil Appeal No. 70 of 2016 and **Joseph Wasonga Otieno vs. Assumpter Nshunju Mshana,** Civil Appeal No. 97 of 2016. She added that the movement of a case file was unjustified and irregular.

Facing ground 6, the learned counsel challenged the calculation made by the respondents in respect of their remunerations. According to the salary slips (PD2), hourly pay was Tshs. 2564. Thus, the arbitrator had to calculate Tshs. 2564 times 195 regular working hours per month and this would have brought a figure of Tshs. 499,980/= per month and multiplied by 12 months which the total would have arrived at Tshs.

5,999,760. The arbitrator's calculations, i.e., Tsh. 6,276,917 was erroneous and contravened section 19 of the ELRA (Supra).

With regards to the 7th ground, Ms. Lyimo submitted that the arbitrator contradicted when found that the strike was illegal and at the same time ruled that the dispute was not a dispute of interest. On the 8th ground, Ms. Lyimo submitted that the strike was unlawful and offended Rule 41 (1) of GN 42 despite several warnings, referring to the exhibits DD1, DD2, and DD3 respectively. She contended that owing to the circumstance, the applicant had no other option other than terminating their employment services. However, the arbitrator on this facet erred to rule that termination was a severe penalty.

On his part, the learned advocate for respondents Mr. Daudi, countered the applicant's submissions by arguing in respect of the 1st and 3rd grounds that the award did not violate the law (See: pages 7 – 9 of the CMA). He accentuated that the evidence before him was properly considered. The applicant had no genuine grounds to expel the respondents. He stated that the applicant's witnesses did not state that they witnessed the strike, as provided by the law under rule 12 (2) of the Employment and Labour Relations Code of Good Practice GN 42 of 2007 (Code of Good practice) that the employer shall not interfere with the employment unless the misconduct is so serious that employment relation is intolerable. The applicant had to consider all the conditions set under the rule.

In respect of the second ground, Mr. Daudi submitted that the reliefs were prayed in CMA F.1 for 24 months' salary compensation which was confirmed at page 17 of the award. Placing reliance under

section 40 of the ELRA (Supra), the learned counsel highlighted that the arbitrator had all powers in law to award the reliefs sought.

As to the 4th ground, Mr. Daudi contended that the applicant did not follow the procedure under Rule 13 (1), GN 42 of 2007. The investigation report was neither tendered nor the investigator was ready to attend questions raised by the respondents. He referred the court to the case of **Novat Rapua vs. Tanzania Zambia Railway Authority,** Revision No. 786 of 2018 to buttress his argument. He contends that since the Chairperson of the Disciplinary Committee was the employer and the same interviewed the respondents, he was thus not impartial, and contravened rule 13 (4) of GN 42. He continued to argue that, members did not state their positions and affiliation, as revealed in exhibit DD8. He further submitted that, the respondents were not given an opportunity to be heard contrary to Rule 13 (3) of GN 42 of 2007 and therefore, were prevented to enter appearance. As unveiled by the record, instead thereof PW.1 was chosen to represent others as shown in exhibit DD8. He contended that the CMA proceedings were therefore tainted with irregularities and so vitiated as it was underscored in **Fredrick Mizambwa vs. Tanzania Ports Authority,** Revision No. 220 of 2013. He prayed this ground be dismissed for lack of merit.

In respect of ground 5, the learned counsel submitted that the arbitrator informed them to the effect that the other arbitrator Hon. Mkombozi came purposely for disposal of cases. Hon. Kayugwa, arbitrator so informed them properly. The said Mkombozi had only one week and recorded only one witness, the matter then proceeded before Hon. Kayugwa. As regard to the case cited by Ms. Lyimo, Mr. Daudi

submitted that the case of **Kinondoni Municipal Council vs. Q Consult** (Supra) is different and should be ignored.

Regarding the 6th ground, Mr. Daudi asserted that the respondents' salary was Tshs. 523,076/= per month for each of the respondents and were working their overtime as per section 19 (3) of the ELRA as agreed. The CMA was thus correct in its calculation and the award of Tshs. 6,276, 912 was a right figure in the circumstance.

On ground 7, the respondent's counsel contended that the CMA was correct to rule that there was no illegal strike. Section 75 (1) (a) of the ELRA read together with Rule 12 (3) of GN 42 of 2007 does not mention striking as a ground *per se* for termination of employment. The applicant was required to comply with rules 39 and 40 of GN 42 and sections 75 to 85 of the ERLA.

Regarding the 8th ground, Mr. Daudi applauses the CMA's holding that termination was not an appropriate remedy in the circumstance. The learned counsel made reference to rule 12 (2) (3) and (4) of GN 42, which the applicant was bound to follow.

In conclusion, Mr. Daudi rested his case by a prayer that the instant revision deserves dismissal and the applicant be ordered to pay the respondents 24 months salaries as prayed plus all the benefits entitled even if they were not mentioned in CMA F.1. He sought support from **Jawadu Juma Kamuzora vs. Standard Chartered Bank (T) Ltd,** Civil Appeal No. 15 of 2019, CAT – Dar es Salaam.

In rejoinder, Ms. Lyimo referred this court at page 12, the last paragraph of the award, and noted that the arbitrator observed that there were reasons for termination in the circumstance. She reiterated

that the respondents in CMA F.1, did not specify the reliefs. Also, that the law is silent on whether the respondents were to attend in person or not. As per rule 13, collective hearing is not unfair in case of collective misconduct. She however, maintained what she submitted in chief, but discredited prayers of other reliefs as new facts.

Having summarized the parties' rivalry oral submissions, it is my turn to determine the merit of this application in line with the CMA records and considering the nature of the grounds advanced by the applicant. In the course of determining this application for revision, I propose to observe the following sequence: ground 5 will be dealt separately, whereas grounds 1, 4, 6, 7 and 8 will be jointly determined. Lastly, grounds 2 and 3 will be determined jointly.

Grounds 2 and 3 are challenging the remedies awarded by the arbitrator. I will first deal with the question, whether the reliefs awarded by the arbitrator were proper. As a general rule, the court is, as well as parties, bound by the pleadings. The decision in the case of **Melchiades John Mwenda vs. Gizelle Mbaga** (administratrix of the Estate of John Japhet Mbaga - deceased) and **2 Others,** Civil Appeal No. 57 of 2018 (unreported) also referred in **Jonathan Kalaze vs. Tanzania Breweries Ltd,** Civil Appeal No. 360 of 2019 the Court observed that:

> *"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for".*

However, in labour cases, the rule may not apply to the strict test as there are consequential orders that will automatically crystalize to the reliefs even where no prayer was made by a party. See the cases of

Magnus K. Laurean vs. Tanzania Breweries Limited, Civil Appeal No. 25 of 2018 and **Pangea Minerals Ltd vs. Gwandu Majali,** Civil Appeal No. 504 of 2020 (unreported). When prayer for relief was not made, it does not mean that it will not be granted, usually, it, depends on the circumstance of the case. In the case of **Balton Tanzania Limited vs. Victoria Galinoma and Another,** Civil Appeal No. 224 of 2019, the Court of Appeal of Tanzania had this to pronounce:

> *"It does not need overemphasis to hold that when giving awards, the courts have discretion under Section 40 (1) (c) of the ELRA. On that one there is a long list of authorities including Pangea Minerals Limited (supra) cited by Mr. Mbedule. The question whether or not the relief granted by the Court was prayed in the CMA's Form No. 1 and proved by the employer as also complained of by Mr. Lupogo's, on different occasions we held that the courts are not precluded from granting such reliefs. We read the decision of the High Court, Labour Division in Said Mohamed Nzegere (supra) which held that an arbitrator or the High Court, as the case may be, has the discretion to award an unfairly terminated employee any relief including those ones not pleaded in the referral CMA Form No.1".*

In this case, I had ample time to examine the CMA F.1 and found that the respondents prayed to be paid compensations of 24 months' salary each, general damages to the sum of 20 months each and any other entitlements according to law.

The arbitrator was consistent when ruled whether the respondents should be paid 24 months' salary compensation, and having considered the circumstance surrounding this matter, he awarded 12 months' salary. In my view, these grounds have no merit.

As to why the arbitrator awarded 12 months' salary and about the calculations, I have visited the salary slips (PD2) along with PW1's testimony. I am satisfied that the respondents were being paid a regular working gross salary of Tshs. 523,076.40/= monthly. Though it is correct that the hourly pay was Tshs. 2,564.10/=, the CMA was as well correct to have applied the monthly salary in calculating the compensation.

Regarding to the movement of the file (5th ground), upon a close scrutiny I observed that the file moved from Mkombozi and Kayugwa. It is on record that when Mkombozi was indisposed, the parties prayed that the case be expedited. In considering parties' prayer, Kayugwa proceeded with the matter from the second witness to its finality. That being the case, I interpret that transfer of the case between arbitrators did not comply with the rule of procedure, no re-assignment was made and reasons for transfer from Kayugwa to Mkombozi on 04/03/2020 were not given. But after recording the evidence of DW1 on 09/03/2020. At least when the file was transferred again back to Kayugwa, though no reason was stated clearly, it is seen from the record that Mkombozi was not present and the parties prayed for expediting of their case.

From the foregoing, I partly agree with the applicant that transfer of the file was made without adhering to the rules of procedure and reasons being recorded therein. The general rule is that a case once assigned to an individual judge, magistrate or arbitrator, should proceed before him / her to its finality unless there are good reasons for doing otherwise. This is what it was held in the case of **Fahari Bottlers and Another vs. The Registrar of Companies and The National Bank of Commerce** [2000] TLR 102. The rationale is not far to seek. In **MS**

Georges Centre Ltd vs. The AG and MS Tanzania National Road Agency, Civil Appeal No. 29 of 2016, the Court of Appeal held:

> *"There are a number or reasons why it is important that a trial started by one judicial officer must be completed by the same judicial officer....as the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*

The bullet point for securing movement of case files is to protect integrity of proceedings by maintaining transparency lest justice be compromised. Where the issue of case-file movement arises, the test should be on the above substance. There are cases where proceedings may be nullified, but some cases they may stand. In this case, movement of the file from and/or between arbitrators, though irregular at some point, in my view, did not occasion miscarriage of justice.

Considering the whole evidence adduced before the CMA, it seems that a misunderstanding which led to this dispute developed from inaction of the employer. The misconduct which was perceived and attributed to gender and racial discrimination at the workplace was mishandled. Part of the evidence given at the disciplinary hearing (See exhibit DD8) at page 4, Paskal Mboso, a Foreman, among others stated:

> *"Tarehe nane lilitokea tatizo la dada mmoja anaitwa Aisha ambaye alimwagiwa mchanga na kushikwa matiti na Mturuki mmoja bila ridhaa, hivyo siku ya tarehe 08/20/2019 wakasitisha kazi mpaka uongozi wa Kilosa utakapokuja".*

The said Aisha gave the statement that the Turkish man actually pushed her, touched her breast while fondling them. During hearing at the CMA, PW.1 (Joseph Mbuta) and PW.2 (Jerome Mbulinyingi) supported this fact. It was further revealed that the reason why the employees stopped working, was because no action was taken against the perpetrator despite the fact that some reports and complaints were unveiled to the respective authority. This court has held in several cases including **SF Ulinzi Limited vs. Paulo Rumasi Siriya,** Revision Application No. 32 of 2022 that: -

> *"Participation in an unprotected strike does not automatically render dismissal substantively fair. The substantive fairness of the dismissal must be measured against inter-alia (i) seriousness of the contravention of the law, (ii) the attempt made to comply with the law and (iii) whether the strike was in response to unjustified conduct by the employer".*

In view of the above observations, I am of the unfeigned view that there was no illegal strike that would justify the dismissal of the respondents and thus the employer had no fair reason for termination of the respondent's employment. Even if the disciplinary rules would not permit any kind of strike, termination was a harsh penalty against the respondents owing to the surrounding circumstances of the case. The CMA was correct to rule that there was no reason for terminating the employees. There having been no reason for terminating the employees, there is no need to discuss about the procedures adopted by the employer. By syllogism, if there was no just reason for termination, the procedure followed in termination can in no way be sanctified. It takes this court to dismiss grounds 1, 4, 6, 7, and 8 altogether.

Having so found and ruled on the points in brief as shown above, I thus dismiss this application for having no merit. The arbitral award so being challenged remains intact as this court have no genuine grounds upon which to revise the same. **It is so ordered.**

DATED at **MOROGORO** this 25th day of October, 2022.

M. J. Chaba

Judge

25/10/2022