IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 104 OF 2021

(Originating from Employment Labour Dispute No. CMA/ARS/585/20/258/2020)

EMIMA GIDEON AKYOO..... APPLICANT

VERSUS

NOTRE DAME SECONDARY SCHOOL..... RESPONDENT

JUDGMENT

31/08/2022 & 19/10/2022

MWASEBA, J.

This is an application for the revision of the Commission for Mediation and Arbitration Award preferred by the applicant herein. It is accompanied by an affidavit deponed by Emima Gidion Akyoo, the applicant. The respondent challenged the application by filing a Notice of Opposition and Counter Affidavit sworn by Fredrick Musiba, Counsel for the respondent.

In brief, the applicant stated that she was employed by the respondent as a Matron for female students and storekeeper on 14/02/2015 for the

payment of Tshs. 252,000/= and when she was terminated on 11/11/2020, she was receiving a salary of Tshs. 300,000/=. The reasons for the termination were failure to sign a warning letter, failure to report the destruction that happened at her work area, allowing her fellow employer to break the door knob of the food store without permission from the employer and for not attending students' religious service. Aggrieved by the said termination, she filed a dispute at CMA claiming for reinstatement without loss of remuneration and all her entitlement following the breach of contract. At the end of the hearing, it was the CMA's decision that the termination was substantively unfair and ordered the respondent to pay the applicants seven (7) month salaries of Tshs. 1,890,000/= at the rate of Tshs 270,000/= per month. Being dissatisfied with the said decision she knocked the door of this court armed with seven legal grounds as follows: -

i. That, the Award was tainted and riddled with fundamental misdirection and non-direction in law and facts, thus, occasioning miscarriage of justice to the Applicant.

ii. The Hon. Arbitrator erred in law and facts for failing to properly analyze and evaluate the evidence adduced by both parties, particularly the Applicant's evidence analysis.

iii. The Hon. Arbitrator erred in law and facts for failing to consider issues that were never disputed by both parties.

iv. The Hon. Arbitrator erred in law and facts for reaching to a conclusion without a proper proof to that effect.

v. The Hon. Arbitrator erred in law and fact for failure to properly construe the laws and established authorities.

vi. The Hon. Arbitrator erred in law and facts for failure to properly consider the most disputable concern as per the Applicant's pleadings in CMF1 accordingly.

vii. That, the Commission erred in law and fact by taking into account extraneous matters and failed to demonstrate and advance reasons for departure and or not be bound by the High Court of Tanzania decisions.

viii. That, the Commission erred in law and fact by not considering the principles established by the High Courts.

The hearing was done orally whereas, the applicant was represented by Mr Justinian Bashani personal representative whilst Mr Fredrick Musiba, learned counsel represented the respondent.

Supporting the application, the applicant's representative prayed for their affidavit supporting the application to be adopted and form part of their submission. He argued all eight (8) legal issues jointly. **Firstly**, He

submitted that at page 4, 3rd paragraph of his award he said there is no dispute that there is an employer and employee relationship while it was not among the raised issues. **Secondly**, he told the court that, the procedures of termination were not followed as argued by the Arbitrator since no investigation was conducted while it is a mandatory procedure before a disciplinary hearing as required by **Section 37 (2) (c) of the Employment and labour Relation Act**, Cap 366 R.E 2019. It was his further submission that there was no representative on the part of the applicant and the mentioned name of Philipina was a witness and not a representative of the applicant, the same is evidenced by Exhibit D3 and more to that the applicant was not given enough time to prepare her defence as she was given a notice on 4/11/2020 and a disciplinary hearing was to be conducted the next day.

It was his further submission that a minute of the disciplinary hearing did not disclose the title of the members to distinguish who is an employer and who is not. The disciplinary hearing did not give out its verdict which is contrary to **Rule 13 (7) of GN No. 42** of 2007 and the Chairman of the Disciplinary hearing did not sign the proceedings. More to that, it was the complainant who issued a termination letter which is against the law since a member of the disciplinary hearing cannot be a judge. He cited a

number of cases including the case of **Leornald Samson Mirambo Vs Eden Nursery and Primary School**, Revision No. 10 of 2018 to prove his arguments. Further to that on 11/11/2020 the applicant was terminated before she was given the right to be heard on appeal something which is contrary to the law. Since oral evidence contradicts that of written one it was wrong for the Arbitrator to rely on such evidence.

On the 3rd issue, Mr Bashange challenged the relief awarded by Hon. Arbitrator on the grounds that there was no proof that the applicant was receiving the salary of Tshs. 270,000 per month as it was not an issue with no source and they challenged the employment contract (Exhibit D1) since the applicant stated that she started working with the respondent since 2015 as per exhibit D4 (certificate of service), thus, a one-year contract as alleged by CMA cannot stand. He submitted further that the said contract had no amount to be paid as salary, no terms, no logo and no job description as required by **Section 13 and 14 of ELRA**. He prayed for Exh. D1 to be disregarded. The case of **Abdallah M. Abdalah Vs Lake Cement**, Revision No. 400 of 2020 was one of the cases cited to buttress his arguments. More to that, he told the court their relief falls

under **Section 40 (1) (a) and (c) of ELRA** and not breach of contract as alleged by CMA.

It was his further submission that the Arbitrator did not consider the evidence of the applicant and the decision did not reflect the proceedings as the termination was both procedurally and substantively unfair. Thus, they prayed for the CMA award to be quashed and set aside and the application be considered in an appropriate way.

In his reply, counsel for the respondent argued that on the first issue of evaluation of evidence the representative of the applicant challenged the employment contract tendered at CMA as Exhibit D1, however all the requirements mentioned by him were met and there is no requirement concerning the number of pages and a logo to appear on a contractual agreement. Further to that they were given a chance to challenge the said exhibit at CMA and they failed that is why it was admitted as Exhibit D1. And the applicant was given the right to be heard by attending the hearing during the disciplinary hearing as evidence by Exhibit D2, thus this allegation has no merit too. As for the issue of language since the applicant was employed by the respondent at the English medium school the issue of language has no merit too.

Regarding the second issue, it was his submission that after the issues were raised the case was heard by calling the witnesses and submitting evidences and the Arbitrator's decision was based on the evidence submitted by both parties, thus, this allegation has no merit too. On the issue of salary, D1 indicated the salary of the applicant to be Tshs. 270,000/= and the same was very clear. Therefore, the argument of the applicant's representative cannot stand. He prayed for the revision to be dismissed since the applicant received what she was deserving.

In his long rejoinder, the applicant's representative reiterated what was submitted in his submission in chief and maintained his position that the termination was both procedurally and substantively unfair and the applicant was supposed to be reinstated without loss of remuneration as prayed.

Having heard the rival submission made by both parties, now, it is for the court's determination on the following issues:

i. Whether or not the Arbitrator's findings with effect that, the employees' termination was not based on valid reason is justifiable in law.

ii. Whether or not the Arbitrator's findings that the employee' termination was procedurally fair is justifiable in law.

iii. Whether or not the award of 7 months' salary awarded by the Arbitrator is justifiable in law.

Starting with the first issue, it is a trite law that the employer under the labour laws regime can hire as and when he wishes but once he hires, he can only fire (terminate) for valid reason(s) and by observing the laid procedures. There must be procedural and substantive fairness before an employee is terminated. In our present application the evidence revealed that the applicant's employment was a fixed term contract with renewable option and in order for this kind of employment to come to an end the employer needs to prove that he had a valid reason to end the contract.

The law under **Rule 4 (2) of the Employment and Labour Relations (Code of Good Practice)** GN 42 of 2007 provides that:

> "*Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise*".

It is clear that Exhibit "D1" Employment Contract, indicates the terms of applicant's employment contract, to be of one year (renewable) starting from 01/07/2020 and ending on 30/06/2021. However, on 11/11/2020

the respondent terminated the applicant based on the reasons that she failed to sign a warning letter, failure to report the destruction that happened at her work area, allowing her fellow employee to break the door knob of the food store without permission from the employer and for not attending student's religious' service. This court do concur with the CMA that the same was not valid reasons to warrant termination of the contract since the applicant could have been warned and proceeded with her work. The same is provided under **Rule 12 (3) of GN 42** of 2007 that:

"*The acts which may justify termination are: -*

a) Gross dishonesty
b) Wilful damage to property
c) Gross negligence
d) Assault on a co-employee, supplier, customer or member of the family of, and any person as sociated with, the employer and
e) Gross insubordination "

Guided by the cited authority, it goes without saying that the termination of the applicant's contract was substantively unfair.

Turning to the second issue whether or not the arbitrator's findings that the employees' termination was procedurally unfair is justifiable in law.

The established principle under **Section 37 (2) (c) of the ELRA** is that no termination is permissible in law if it does not follow fair procedures. And **Rule 13 of GN. No. 42/2007** provides clearly the procedure for termination of employment.

The records herein reveal that, the applicant's notice to attend the hearing was dated 03/11/2020 (D2) and the applicant signed on 04/11/2020 and the disciplinary meeting was conducted on 05/11/2020 (D3), that was enough time for the applicant to prepare her defence and he was even able to choose a person who would represent her in the disciplinary hearing as per Exhibit D2. Thus, there is no merit on the argument that she was not able to prepare her defence.

As for the issue of the representative Exhibit D2 was very clear that the applicant chose Philipina. Sunday to be her witness during the disciplinary hearing, but she did not choose any person as a representative, the words "Hakuwepo Mwakilishi" do not mean he was denied the right to call any representative during the hearing. It was her option to have a representative and she chose to have a witness instead of a representative. And for the issue of title of members of the disciplinary hearing Exhibit D3 is very clear regarding the names of the members and their titles, thus I find no merit of the said allegations of titles.

And for the issue of right to appeal there was no proof submitted by the applicant to prove that he was denied the right to appeal.

Regarding the issue of the decision of the disciplinary hearing not to be given on the same day, the law allows the decision to be given within five days from the day the disciplinary hearing was conducted, therefore it was right for the decision to be given on 11/11/2020 instead of the day the hearing was conducted.

So, the arbitrator's findings on this issue were grounded from the evidence submitted at CMA and the court do concur with its decision that the termination was procedurally fair.

As for the issue of relief, since the evidence is very clear that the applicant was employed under a one-year fixed term contract which was renewable being employed since 2015 does not mean he was employed under a permanent term. The same is proved by Exhibit D1 "The renewal of the contract". Now what are the reliefs in case the employer breaches the contract without having a valid cause.

In **James Renatus Vs Cata Mining Company Limited**, (Labour Revision 1 of 2021) [2021] TZHC 5732 (18 August 2021); (Tanzlii) it is suggested that:

> "*.... pursuant to section 40 of the ELRA, the reliefs for unlawful termination are re-engagement, reinstatement or compensation not less than twelve (12) months' salary. This is not the case on the dispute premised* ***on breach of contract where the reliefs thereto include, special damages (such as salary arrears, leave not paid, overtime not paid, salaries for the remaining period of contract etc),*** *general damages and/ or specific performance as provided for under section 73 of the Law of Contract."* (Emphasis is mine).

Guided by the cited authority since the applicant was already paid a one-month notice, leave, payment of November 2020 and certificate of service then the trial Commission was correct to award her salaries for the remaining period of the contract which was seven (7) months since her prayer of reinstatement is not one of the reliefs in a breach of contract scenario. As for the claim of the amount that was being paid as salary to the applicant, it is the duty of the employer to keep all the documents and information of the employer as per **Section 96 (1) of ELRA**, therefore the amount of Tshs. 270,000/= stated by the employer was the correct one.

For the foregoing reasons, I find no reasons upon which the award of the Arbitrator can be faulted by this Court. In the result, I dismiss the application with no order as to costs.

Ordered accordingly.

DATED at **ARUSHA** this 19th day of October, 2022.

N.R. MWASEBA

JUDGE

19/10/2022