IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION NO. 105 OF 2021

(Originating from the Labour Dispute No. CMA/ARS/252/20/130/20)

TEMBO ADVENTURES SAFARI.....APPLICANT

VERSUS

EMMY JOHN.....RESPONDENT

JUDGMENT

09/11/2022 & 14/12/2022

MWASEBA, J.

The applicant is seeking for Revision of Arbitrator's award dated 20th day of September, 2021 for the legal issues as depicted from paragraph (4) (a) to (c) of an affidavit supporting the application sworn by Mr Frank Wilbert Makishe. Their application was objected by a counter affidavit sworn by Ms Miriam J. Nitume, counsel for the respondent.

Briefly, the records revealed that the respondent was employed by the applicant in a position of reservation officer since September, 2017 until 30th day of March 2020 when the applicant alleged that the respondent left her work for her own accord. While the respondent alleged that he was unfairly terminated although he was employed orally and they had an employer and employee relationship for three years. At the end of the

trial, the CMA found the termination to be both substantively and procedurally unfair and ordered the applicant to give the respondent 12 months compensation amount to Tshs. 4,800,000/=, Severance Pay Tshs. 200,000, Notice Tshs 400,000 and Leave Payment at the tune of Tshs 400,000/=.

Aggrieved by the decision, the applicant filed the instant application for revision praying the Court to revise and set aside the arbitrator's award based on the following legal issues:

a) The award is based on dead law.

b) Swayed away by flimsy evidence by the respondent.

c) Deliver decision based on assumption.

At the hearing of the application, the applicant was represented by Mr Frank Wilberd Makishe, learned Counsel whilst Ms Esther Malima, also learned counsel represented the respondent herein. The application was argued by way of written submission.

Supporting the application on the first legal issue, Mr Makishe argued that the Hon. Arbitrator's award was based on dead Law by citing "**The Employment and Labour Relation Act**, 2004" instead of citing as "**The Employment and Labour Relations Act**, Cap 366 R.E 2019". More to that, he cited general provisions without being specific.

In her reply, Ms Malima argued that it was not their fault that the Act was cited as 2004 instead of Cap. 366 R.E 2019 and more to that the said citation did not cause any miscarriage of justice to either party herein. She added that, the Revised Edition of 2019 did not change anything on the cited provisions.

Coming to the second legal issue, Mr Makishe submitted that, the trial Commission adopted the words of the respondent without any proof as required under **Section 110 (1) and 112 of the Evidence Act**, Cap 6 R.E 2019.

Responding to this issue, Ms Malima argued that since the respondent testified under oath, she submitted genuine evidence and during cross examination she disputed all the facts raised by the respondent.

Coming to the third legal issue, counsel for the applicant submitted that, the respondent did not have an endless oral contract starting from September, 2017. The trial Commission stated there was an endless contract without availing parties a chance to argue the same. He supported his argument with the case of **Regina Gaudence vs Sadock James**, Civil Appeal No. 11 of 2019 (Unreported) where the court held that:

> *"Assumption and Speculations have no room in Civil Justice."*

Responding to this ground, Ms Malima argued that the Award of the Commission did not base on assumption that there was an endless oral contract between the employer and the employee since the evidence adduced reveal the same. She added that, although the parties did not have a written contract, they had a legal oral contract which is also admissible in law. Therefore, it was her submission that the Commission was right to hold that there was an endless oral contract between them.

She further argued that, since all the requirement of **Section 110 (1) and 112 of Cap 6**, R.E 2019 were met and both parties were accorded right to be heard, there is no merit on this issue.

In his brief rejoinder, Mr Makishe reiterated what he had already submitted in his submission in chief and maintained his prayer for the CMA's award to be quashed and set aside.

After reading the application, parties' submissions together with the record from the CMA the main issues to be determined by this court are as follows:

i.) Whether the award was based on dead law.

ii.) Whether the trial Commission was swayed by the flimsy evidence of the respondent.

iii.) Whether the CMA's award was based on assumption.

Starting with the 1st issue of whether the award was based on dead law, the applicant submitted that the act of citing "**The Employment and Labour Relations Act**, 2004" instead of "**The Employment and Labour Relation Act**, Cap 366 R.E 2019" renders the whole award a nullity as it based on dead law while the respondent was of the view that it was not their fault and no miscarriage of justice resulted from the said citation of the dead law.

Having gone through the CMA award this court noted that the said citation of the dead law was done at page 5, 1st paragraph. However, citing wrong edition is not fatal as it was held in the case of **Azulu Mwalongo and 12 Others vs Ambonisye Mbilike Mwandembo**, Misc. Land Application No. 33 Of 2019 (HC- reported at Tanzlii) that:

> "*In sum therefore, I find that, the non-citation in the amended chamber summons and the citation of the dead law in the original chamber summons discussed above were not, under the circumstances of the case, lethal to the application. I will thus, proceed to consider the PO which is based on the single-limb.*"

Being persuaded by the cited authority, I concur with the counsel for the respondent that not only the applicant nor the respondent who were prejudiced by the act of the trial Commission to cite the ELRA as of 2004

instead of Cap 366 R.E 2019 since the provisions were not amended, they were still the same. Thus, there is no merit on this issue.

Coming to the 2nd and 3rd legal issues, the applicant alleged that the respondent did not have enough evidence to prove his allegation as required under **Section 110 (1) and 112** of Cap 6 R.E 2019 while on his side the respondent alleged that the evidence proved there was an employee relationship between the employer and employee and that the respondent proved she was unfairly terminated. As for the last issue, the applicant complained that the trial Commission's award was based on an assumptions and speculations evidence from the respondent.

Based on the above two legal issues, the applicant is challenging the evaluation of evidence done by the trial commission for the reason that the respondent failed to prove her claim on the balance of probabilities.

It is undisputed fact that the respondent was employed by the applicant, the dispute is whether she was terminated or not. At page 4, 1st paragraph of the Commission's award Hon. Arbitrator ruled that:

> "*The respondent in this case denies that he didn't terminate complainant employment rather the complainant absconded from employment. I have passed through respondent evidence there is nowhere respondent had made some effort to attempt to contact an employee. The employer has a duty to contact an employee when he/she abscond in*

order to notify him/her concerning hearing of abscondment in which respondent in this case has to do so. For that matter this commission observe that respondent has failed to comply with the rules of natural justice by not affording complainant the right to be heard."

However, having gone through the whole evidence submitted at the trial Commission there is no proof that the respondent was terminated by the applicant other than a mere words from the respondent himself that the applicant told her not to go to the work place again. The applicant alleged that they suspended workers for some time due to Corona Pandemic but she was not dismissed and she asked her to return to her work.

I am aware with the procedure that when the applicant is absent from work place the employer is supposed to conduct a disciplinary hearing to prove that he was not at work place and the efforts to find him/her were fruitless the reason that can lead to termination.

However, the situation is different from our case since the respondent has no proof that she was terminated by the applicant and the applicant submitted that the workers were just suspended for some time due to Covid 19 pandemic.

Thus, based on the said evidence this court is of the firm view that the application was pre maturely filed at CMA since the respondent was not yet terminated from his post rather than being suspended for some time

due to Covid 19 Pandemic which affected the tourism business in the year 2020.

As for the issue of relief, since the application was pre maturely filed the respondent is not entitled to be given any relief from the applicant.

In the final analysis, it is the holding of this court that this application has merit. Consequently, the award of the CMA is hereby quashed and set aside. Each party to bear his/her costs of this application.

It is so ordered

DATED at **ARUSHA** this 14th day of December, 2022.

N.R. MWASEBA

JUDGE

14/12/2022