

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 384 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Temeke dated 6th day of September 2021 in Labour Dispute No. CMA/DSM/TEM/218/19/104/19 by (Batenga: Arbitrator)

ANTONY JOHN KAZEMBE..... APPLICANT

VERSUS

INTERTEK TESTING SERVICES (EA)(PTY) LTD.....RESPONDENT

JUDGEMENT

K. T. R. Mteule, J.

19th March 2023 & 30th March 2023

This Revision for Application arises from the Labour Dispute No. CMA/DSM/TEM/218/19 originating from the Commission for Mediation and Arbitration of Dar es Salaam, Temeke (CMA). Vide CMA Form No.1, the Applicant claimed from the Respondent a compensation of 24 months remuneration for alleged discrimination and unfair termination. The Applicant further claimed for severance allowance, leave and payment in lie of notice.

According to the record of CMA, the affidavit and counter affidavit filed herein, it appears that the Respondent employed the Applicant as a Chemist working under unspecified term contract. On 18th April

2019 their relationship ended due what the applicant claimed to be financial constraints which encountered the business due to changes of laws regulating her trade. Aggrieved by the fairness of the termination both substantively and procedurally and the payment of her terminal benefits the applicant referred her complaint to the CMA.

The arbitration in the CMA was conducted and an award was issued in the Respondent's favour. The arbitrator confirmed that the applicant was employed by the respondent on unspecified term contract. He assessed and got satisfied with the fairness of the reasons and procedure used to end the applicant's employment and dismissed the complaint.

The Applicant being resentful with the dismissal of his complaint in the CMA, preferred the present application. In the affidavit in support of this application the applicant advanced 6 legal issues which are: -

- i. That the Honourable arbitrator grossly erred in law and fact by misdirecting in respect of cause of action whereby award was based on retrenchment instead of unfair termination of applicant's employment without affording him his rights.
- ii. That the Honourable arbitrator grossly erred in law and fact by failure to raise issues which could resolve the dispute by

blessing termination of employment which occurred while the applicant was on leave.

- iii. That the Honourable arbitrator grossly erred in law and fact by failure to make a finding on each issue as framed by the parties as well as assigning reasons for the finding.
- iv. That the Honourable arbitrator grossly erred in law by basing his decision on *suo motto* raised issue in respect of procedure for termination without affording applicant with an opportunity of being heard, hence an award on extraneous matters out of proceedings.
- v. That the Honourable arbitrator grossly erred in law and fact by failure to evaluate evidence on record and making decision or issuing an award without reasoning thereof.
- vi. That the Honourable arbitrator erred in law and fact by failure to order the respondent herein to pay the applicant reasonable compensation in accordance with the law.

In disputing the application, the counter affidavit affirmed by Amina Said Makunganya, the respondent's Principal Officer was filed, in which the deponent denied all the material facts contained in the affidavit. According to the counter affidavit the procedure of

termination was complied with, and the arbitrator was correct in his findings.

The application was argued by a way of written submissions, where the applicant was represented by Mr. Baraka Lweeka, Advocate while the respondent was represented, by Mr. Lwijiso Ndelwa and Francisco Kaijage Bantu, Advocates from a firm named Triana Attorneys. Their submissions approached 1st and 2nd ground together, 3rd ground separately, 4th and 5th grounds jointly and last ground separately.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, the issue before me is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in **Labour Dispute No. CMA/DSM/KIN/380/2020/178/20** and to **what reliefs parties are entitled?**

In grounds No. 1 and 2 the Applicant is accusing the arbitrator of having disregarded the cause of action raised in the CMA F. No 1. According to the Applicant, CMA Form No. 1 claimed that the Applicant was unfairly terminated but the arbitrator issued an award based on retrenchment instead of unfair termination. The Applicant the blamed arbitrator asserting failure to raise issues which could resolve the dispute. In Applicant's view, disregarding a cause of

action as filed in CMA Form No.1 is contrary to the principle that parties are bound by their pleadings as per the position in the case of **Baclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania, at Mbeya, (unreported).

The applicant asserted that his termination was based on the reason of failure to participate in a retrenchment exercise in good faith and disruptions. The Applicant is of the view that basing on that purported misconduct, the arbitrator's findings ought to be on unfair termination and not retrenchment.

On the other hand, the respondent's Counsel maintained that the arbitrator was correctly directed to the issue of retrenchment because the applicant's claims were based on retrenchment. He added that the applicant's assertion that the arbitrator focused on retrenchment instead of unfair termination is intending to mislead the Court, because retrenchment is a form of termination in which principles of unfair termination apply. According to him the record including opening statement reveals nothing about the issue of misconduct. For that reason, he is of the view that raising it at the revision stage and not at a trial Court is contrary to the principle of law. Bolstering his argument, he cited the case of **Hope Kivule Secondary School v. Matiku Alfred & 2 Others**, Revision No. 124 of 2021, High Court of

Tanzania, at Dar es salaam, (unreported), where the Court declined to consider at the revision an issue which was not raised in the CMA

The above contention in grounds No 1 and 2 are centred on what is the nature of dispute presented by the applicant in the CMA. Although it appears to base on termination of employment, parties are inn serious disagreement on the nature of termination. **Section 37 (1) of the Employment and Labour Relations Act Cap 366 of 2019 R.E** provides:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

a. that the reason for the termination is valid;

b. that the reason is a fair reason-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer, and

From the above provision, termination of employment can be based on conduct, capacity, compatibility of operational requirements of the employer. Each of these types of termination is guided by a distinct procedure. A termination based on conduct cannot be dealt with by the procedure applicable to termination based on operational

requirements for instance termination on operational requirements is guided by **Section 38 of Cap 366 of 2019 R.E.** It appears to have some confusion in the CMA as to which type of termination was the concern in this matter. In his opening statement the Complainant in the CMA who is the instant applicant raised an issue as to whether the applicant refused to cooperate with the retrenchment exercise, whether it was appropriate for the Respondent to terminate the Applicant's employment while the retrenchment exercised was going on. These issues emanated from the letter of termination which indicated that the Applicant was terminated from the employment because of his failure to cooperate in the retrenchment exercise. All these in my view needed to prompt a question as to which type of termination were the parties contesting. It is apparent that the Applicant in his CMA Form No 1 envisaged a termination due to misconduct. This is what was pleaded, taking into consideration the Applicant's opening statement, the issues raised therein and the contents of the letter of termination.

The Respondent appeared to have considered the termination as an outcome of the retrenchment exercise. This dragged the attention of the arbitrator to treat the entire scenario as evolving around retrenchment. In contrary, what transpired raised a contention on the

type of the termination in question. In my view, a separate issue ought to have been framed to resolve which type of termination was involved in the matter, to be in a better position to ascertain the appropriate procedure to be assessed.

Rule 24(4) of the Labour Institutions {Mediation and Arbitration} Guidelines Rules, G.N. No. 67 of 2007 provides that at the conclusion of the opening statement the Arbitrator shall frame issues to narrow down the factual disputes which need to be proved. From that Rule, issues are supposed to be framed from factual disputes to be proved and not only from CMA Form No. 1.

In our case the arbitrator ought to have afforded opportunities to the parties as asserted by the respondent too in his submissions to address whether the applicant was terminated based on misconduct according to **Exhibit T13** (termination letter) or retrenchment as asserted by the Respondent. Having such confusion, it is my view that the arbitrator failed to assist parties in framing appropriate issues basing on factual disputes to be proved by witnesses.

In the case of **Safi Medics v Rose Peter, Mganga Mussa and Richard Karata**, Revision No 82 of 2010, High Court of Tanzania Labour Division, at Tanga, (Unreported), the Court held that; -

"A successful arbitration requires that both the arbitrator and the parties in the dispute have a common understanding of the issues in controversy".

In such circumstance I have to say that the cause of action and issues were framed out of factual disputes to be proved and that, CMA Form No. 1 was not properly filled to support opening statement as contested by the respondent. Hence the award is based on analysis which is not in accordance with **Rule 24(4) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007**. The award is grounded on a wrong analysis of issues and therefore it is improperly procured.

From the above legal reasoning, having found that the award was improperly procured, the first and second grounds of revision have merit. This is together with the Respondent's contention regarding improper filling of the CMA form No.1. The finding in this ground is sufficient to dispose of the matter, and therefore I see no need to labour on the other grounds of revision.

In the upshot, it is my view that the first issue in this matter is answered affirmatively that there are sufficient grounds for this Court to revise and interfere with the proceedings and the award of the CMA.

As to relief, the above findings are based on legal propriety. This means, the dispute is still unresolved in the CMA. As such, the appropriate remedy in my view is to nullify both the proceedings of the CMA and the award therein with leave to have it refiled for the sake of substantive justice.

Consequently, I hereby revise and nullify the CMA proceedings and award. Should any party be interested to pursue the matter on merit, he/she can reinstitute it in the CMA within 14 days from today. The application is therefore allowed to the extent discussed herein. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 30th day of March 2023.



KATARINA REVOCATI MTEULE

JUDGE

30/03/2023

