

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

REVISION APPLICATION NO. 359 OF 2022

Arising from an Award issued on 28/9/2021 by Hon. M. Batenga, Arbitrator in Labour dispute No. CMA/DSM/TEM/538/19/202/10 at Temeke)

CORPORATE SECURITY SERVICES APPLICANT

VERSUS

ERASTO ENOS BUJIBA..... RESPONDENT

JUDGMENT

Date of last Order: 27/03/2023
Date of Judgment: 02/5/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 5th December 2015, Erasto Enos Bujiba, the respondent entered unspecified period of contract of employment with Corporate Security Services, the applicant. It is said that on 14th November 2019, applicant terminated employment of the respondent, allegedly, that the latter committed misconducts, namely theft. On 27th November 2019, respondent filed Labour dispute No. CMA/DSM/TEM/536/19/202/19 before the Commission for Mediation and

Arbitration henceforth CMA at Temeke claiming to be paid 12 months salaries as compensation, unpaid annual leave, severance pay, golden handshake and be issued with clear certificate of service. After respondent has filed the dispute at CMA and failure of mediation, applicant failed to enter appearance, as a result, the dispute was heard ex-parte. On 28th September 2021, Hon. M. Batenga, Arbitrator, issued an ex-parte award in favour of the respondent that termination was unfair. The arbitrator, therefore, awarded respondent be paid TZS 2,400,000/= being 12 months salary compensation, TZS 200,000/= being leave pay and TZS 161,538/= being severance pay all amounting to TZS 2,761,538/=.

On 30th November 2021, applicant filed an application under Rule 29(1)(a), (2) and (3) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007 seeking the Arbitrator to set aside the said ex-parte award. In support of the application, applicant filed the affidavit sworn by Msengi William Makala, her principal officer. In the said affidavit, the deponent deponed *inter-alia* that, after the order of ex-parte hearing, applicant was not served nor notified the date of the award.

In resisting the application to set aside the said ex-parte award, respondent filed his counter affidavit wherein he stated *inter-alia* that

applicant was served and that the applicant was intended to delay justice on his part.

On 16th September 2022, Hon. Mikidadi A, Arbitrator, having considered evidence of the parties in both the affidavit and the counter affidavit and submissions thereof, dismissed the application by the applicant on ground that applicant did not advance good reasons.

Aggrieved with the ruling dismissing the application to set aside the said ex-parte award, applicant filed this application for revision. In support of the Notice of Application, applicant filed the affidavit of William Matinde Makala, her principal officer. In the said affidavit, the deponent raised four(4) grounds namely:-

- 1. That the Arbitrator erred in law and facts by accepting each and every spoken word of the respondent.*
- 2. The arbitrator erred in law and facts for failure to inquire source of documentary evidence instead of relying solely on the oral evidence given from one side by the respondent.*
- 3. That the arbitrator erred in law and fact for failure to set aside its ex-parte award despite of irregularities and material cheating made by the respondent.*
- 4. The award was improperly procured due to cheating of the respondent.*

Respondent resisted the application by filing both the Notice of Opposition and the Counter Affidavit.

By consent of the parties, the application was disposed by way of written submissions. In the written submissions, applicant enjoyed the service of William Matinde, her Human Resources Office, while respondent enjoyed the service of Salum L. Rugwiza, the Personal Representative.

Arguing on behalf of the applicant, Mr. Matinde submitted that, there is no proof that summons were served to the applicant. He cited the provisions of Rule 7(1)(c)(i) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that respondent was supposed to prove the name of the person who received the summons, place and time of service. Matinde submitted further that, initially applicant was represented by Elizabeth Kavishe, advocate but later on, was represented by Msengi Makala, who appeared and raised a preliminary objection but was informed that applicant has lost right to be heard due to non-appearance.

Mr. Matinde submitted further that, respondent did not prove his claims because he did not tender the contract of employment or pay slips. He went on that, in the ex-parte award, after finding that termination of employment of the respondent was unfair, the arbitrator was supposed to award respondent based on TZS 100,000/= as monthly salary instead of

TZS 200,000/=. He added that the arbitrator was supposed to call written records proving monthly salary and compare with oral evidence of the respondent.

In his written submissions on behalf of the respondent, Mr. Rugwiza, personal representative of the respondent, submitted that, applicant was served and filed opening statement and list of documents to be relied on but thereafter willfully failed to appear. Mr. Rugwiza submitted further that there was no cheating on part of the applicant.

I have examined the CMA record and considered submissions of the parties in this application and find that on 27th November 2019, respondent filed the dispute at CMA complaining that he was unfairly terminated by the applicant. The record shows further that, applicant was served with summons to appear before CMA on 11th December 2019 and on 13th December 2019 Erasto Bujiba, the respondent and Gilbert Sawe, the Human Resources Officer of the applicant, signed certificate of non-settlement before Hon. Ngalika, mediator. After failure of Mediation, the dispute was referred to arbitration.

The CMA record shows further that, on 30th December 2019, Sekondo Mshana, a receptionist, on behalf of the applicant, was served

with the summons requiring applicant to attend hearing on 4th February 2020. The record shows that, though served, applicant did not enter appearance. On 4th February 2020, Hon. Kokusiima, L, arbitrator issued a summons to the applicant to appear on 18th February 2020. On 13th February 2020, a summons was returned by the executive officer of Kibasila street that applicant refused service. In fact, on 18th February 2020, applicant did not enter appearance. The Arbitrator issued an order that the dispute will be heard ex-parte.

The CMA record shows that, on 12th October 2020, Elizabeth Kavishe, advocate for the applicant and Salum Rugwiza, personal representative of the respondent, appeared before Hon. Dorice Wandiba Arbitrator. On this date, Ms. Kavishe, advocate for the applicant prayed the matter be heard inter-parte instead of ex-parte and Mr. Rugwiza, personal representative of the respondent had no objection. The arbitrator vacated the order of hearing the dispute ex-parte and issued an order based on interest of justice, that the dispute will be heard inter-party. The arbitrator ordered the applicant to file opening statement by 13th October 2020 and hearing on 18th October 2020. The record shows that, applicant complied with the order of filing opening statement on 13th October 2020. The record shows

further that, after filing the opening statement, applicant did not enter appearance, as a result, the matter was heard ex-parte. It is my view from the foregoing that, applicant was well aware of the dispute but willfully decided not to enter appearance. Rule 7(1)(c)(i) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 cannot help the applicant in this application. Historical background of the application namely that it was filed at CMA on 27th November 2019, tells all.

It was submitted on behalf of the applicant that, the arbitrator believed oral evidence of the respondent that his monthly salary was TZS 200,000/= instead of TZS 100,000/= and that the arbitrator was supposed to call written contract to prove monthly salary of the respondent. With due respect, apart from TZS 200,000/= as monthly salary of the respondent, there was no evidence on the CMA record showing that monthly salary of the respondent was TZS 100,000/=. The complaint that the arbitrator was supposed to call written contract to prove monthly salary of the respondent is unfounded. I am of that view because, it is not a requirement of the law that for a witness to be believed, his oral evidence must be supported by documentary evidence. Since there is no evidence contradicting what was testified by the respondent, I find that the

complaint by the applicant is without merit. I am aware that opening statement is not evidence but a mere guide to what are the claims of the parties. I have read the opening statement filed by the respondent and find that he indicated that his monthly salary was TZS 200,000/=. On the other hand, applicant did not dispute that amount or indicate that monthly salary of the respondent was TZS 100,000/= as he claims in this application. Whatever the case, this being a revision application, it will only be decided based on what was placed before the arbitrator otherwise the arbitrator will be criticized for matters that was not put before him for consideration.

It was complained by the applicant that respondent cheated meaning that. the award was improperly procured. Apart from those bare accusations, applicant has failed to point out the alleged cheating that resulted into improper procurement of the award. In my view, applicant was duty bound to place before the court evidence proving improper procurement of the award by the respondent and not just to raise unsubstantiated accusations. In my view, when the court held in the case of *Nyakuboga Boniface vs Republic* (Criminal Appeal 434 of 2016) [2019] TZCA 461 citing its earlier decision in the case of *Goodluck Kyando v. Republic*, Criminal Appeal No. 218 of 2003(Unreported) that every

witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations, was aware that sometimes parties who lost the case tender to discredit solid evidence based on unsubstantiated allegations and wanted to limit those allegations. In the application at hand, there is nothing material that can convince this court to go in the same journey with the applicant.

That said and done, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam on this 2nd May 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on 2nd May 2023 in chambers in the absence of the parties.



B. E. K. Mganga
JUDGE

