

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

REVISION APPLICATION NO. 416 OF 2022

*(Arising from the award of the Commission for Mediation & Arbitration of DSM at Temeke)
(H, A Nyanguye: Arbitrator) Dated 01st August 2022 in Labour Dispute
No. CMA/DSM/TEM/47/2021/37/2021)*

ERICK JOSEPH MNDEME.....APPLICANT

VERSUS

AFRISIAN GINNING LIMITED.....RESPONDENT

JUDGEMENT

K. T. R. Mteule, J.

04th April 2023 & 28th April 2023

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application for Revision praying for the Orders in the following terms:-

1. That this Honorable Court may be pleased to revise and set aside the award of the Commission for Mediation and Arbitration delivered on 1st day of August 2022 before Hon. Nyang'uye, H.A., Arbitrator, in Labour Dispute No. CMA/DSM/TEM/47/2021/37/2021.
2. Any other relief(s) that this Honorable Court may deem fit and just to grant in the circumstances of this application.

The background facts of this application are extracted from the CMA record, affidavit and counter affidavit filed herein. The applicant was an employee of the respondent working in fuel department. He was terminated due to an alleged theft. Aggrieved by the decision, the applicant filed a complaint in the CMA. The matter was decided by the CMA where the Applicant was awarded a payment of 5 days salary being a compensation for the remaining period of contract to the tune of **TZS 67,300/=**. The applicant was not satisfied by the amount of compensation of 5 days which triggered this application.

Along with the Chamber summons, the applicant filed an affidavit sworn by himself, in which after expounding the chronological events leading to this application, challenged the decision of the arbitrator on the ground that his termination was unfair in both aspects in terms of reason and procedure.

The applicant's affidavit at paragraph 11 contains five legal issues which are: -

- i) Whether the arbitrator was properly moved to hold that the applicant has a fixed term contract while neither witness nor exhibit tendered to establish and prove the same.

- ii) Whether the trial arbitrator was correct to hold that the applicant deserves only payment of five days' worth 67,000/=only, and abandoned all other statutory reliefs sought such as leave pay, notice pay, certificate of service undecided.
- iii) Whether it was proper for the trial arbitrator to allow DW2 to appear again as DW4 despite being informed prior to commencement of his testimony for the second time.
- iv) Whether it was proper for the trial arbitrator to deliver her award out of prescribed time and no reasons for delay ever stated.
- v) Whether it was proper for the trial arbitrator to raise and formulate her own evidence and consider it to form part of the award.
- vi) Whether the award was legally justifiable.

The application was challenged through a counter affidavit affirmed by Mr. Mahir Hussein. The deponent in the counter affidavit vehemently and strongly disputed the applicant's allegation regarding unfair termination and existence of error in the arbitrator's award.

The application was disposed of by a way of written Submissions. The Applicant was represented by Mr. Martin Frank, Advocate, from Mwenye

& Company Advocates whereas the Respondent was represented by Mr. Thomas Yohana Gahigi, Advocate, from a firm styled as Atez Attorney. I appreciate their rival submissions which will be considered in determining this application.

Before I embark to the main issues, I noted that the respondent raised a concern asserting applicant's disobedience to the Court order. According to the Respondent, the Applicant did not serve the Respondent with the written submissions within the date the court ordered the service to be done. It is appropriate to consider this legal issue before going to the merit of the Application. I went through the Court record, and discovered that the applicant's submission was filed on 22nd March 2023 as per Court Order. It is not disputed that the Respondent was not served on the same day of 22 March 2023 as ordered by the Court. However, despite of being not served timely, the respondent was able to file it timely on 29th March 2023. The Respondent wants the applicant's disobedience to be punished by disregarding the submission. In my view, this would be too harsh penalty to the Applicant. I say so because there was no serious injustice occasioned to the Respondent arising from the late service of the submissions. The order to serve the written submissions on a specific date serves as a safety incase of any negative

consequences which should have been interpreted to the detriment of the party who delayed the service. I do not agree that it should be penalized by disregarding it even when no injustice is occasioned. I commend the Respondent for the diligence shown by managing to file the reply to the submissions timely despite of being served late.

Coming to the merit of the Application, having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in Labour Dispute No. CMA/DSM/TEM/47/2021/37/2021 and secondly, **to what reliefs are parties are entitled?** In addressing these issues, all the issues raised in the affidavit will be considered all together.

The applicant challenged the arbitrator's findings which confirmed that the **applicant had a fixed term contract**. According to the Applicant, the holding was not supported by the evidence including the contract of employment contrary to **Section 39 of the Employment and Labour Relations Act, Cap 366 R.E 2019**.

In resolving this issue, I agree with the applicant's Counsel that in unfair termination, employer owe duty of proving the fairness of termination. It

is not disputed that employment contract was not tendered in the CMA as rightly claimed by the Applicant, but the record indicates that in the CMA proceeding of **25th April 2022** at page 3 paragraph 1 &2 it was testified by the applicant that he had a yearly fixed term contract, which commenced on **1st January 2021** and that he was terminated on **26th December 2020** as contested by the respondent.

Apart from that, the CMA Form No. 1 shows that the applicant claimed to be paid with the remaining period although he computed it to 4 months. The CMA could not award what was not pleaded. The Arbitrator was required to confine his decision to what was rightly claimed by the Applicant in the CMA Form No. 1. In the case of **Astepro Investment Co Limited v. Jawinga Company Limited, Civil Appeal No. 08 of 2015 (CAT) DSM (Unreported)** it was held that parties are bound by their own pleadings. The Court quoted the following words from the case of **James Funge Ngwagilo Vs the Attorney General [2004] TLR 161; -**

"... The functions of pleading, is to give notice of the case which is to be met. A party must therefore state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ

and the points on 'which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matters in dispute."

From the above authority, since the Applicant admitted in his own testimony that he had a fixed term contract, the Applicant cannot rebut what he pleaded on oath. Therefore, the arbitrator did not need further evidence to prove the nature of the employment contract. See **Good Samaritan Vs. Joseph Robert Savari Munthu**, Rev. No. 165/2011 HC Labour Division DSM (unreported). In this case, it was held: -

"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action...."

Under such circumstances, I am of the view that the arbitrator was right in awarding the remaining period of 5 days after finding that there was unfair termination effected under yearly fixed term contract. It is an established principle that the most foreseeable remedy for unfair termination of a fixed term contract is the remaining period of contract.

From the above legal reasoning, applicant's allegation that there was no fixed term contract. The computation which led to the claim of 4 months as pleaded in CMA Form was not sufficiently explained in the CMA since the applicants evidence confirmed that he was employed on 1/1/2020 n a yearly fixed contract and he was terminated on 26/12/2021. Therefore, I agree with the respondent's counsel on the relevance of the case of **Benda Kasanda Ndassi v. Makafuli Motors Ltd**, Revision No. 25 of 2011 on the appropriateness of the award of the remaining period of contract. Concerning the payment of the other statutory benefits such as leave allowance, severance pay, Notice & Certificate, I agree with the Respondent's counsel that the same were not pleaded in CMA Form No. 1, and neither in the Applicant's evidence. The arbitrator therefore was not moved to consider them. I can't fault the arbitrator on this. It is my holding therefore that the arbitrator was right in awarding 5 days being the remaining period of contract.

On the **third ground** Mr. Frank submitted that DW2 testified twice on different dates. He added that practise should be refrained as it tends to waste valuable time of the CMA. Although the Respondent did not respond to this assertion, I find it wise to remark shortly on it. Truly, it is the Court practices in our jurisdiction that witness testify once unless there is a leave of the Court to recall such witness when a need arises in

exceptional circumstances. The practice of having one witness testifying twice has been a subject of discussion in United States federal courts, as written by **David Markowitz and Joseph Franco** under their Article namely "***One Bite apple***" citing the case of **Burson v. Cupp**, 70 Or App 246, 248, 688 P2d 1382 (1984) where it was stressed that the trial court's refusal to allow a second deposition of a witness was not an abuse of discretion. This means one witness could not testified twice on the same matter he/she has already testified. In our case, the arbitrator did to state why she allowed one Mrisho Nasibu to testify as DW2 and DW4 at the same time. In absence of the reason of doing so I condemn this is an unacceptable practice although it does not vitiate the other proceedings of the CMA because the other pieces of evidence remained intact and undisturbed.

Regarding the allegation that the **award was derived out of time**, The applicant contended that the **Employment and Labour Relations Act** directs that the award should be delivered within 30 days from the day parties made their final submission, but in this matter, the award was issued after expiration of 82 days contrary to the law. As well, this issue was not challenged by the respondent in her submission but I find it worth to add my comment on it. The relevant provision is **Section 88 (11) of the ELRA** which provides as follows: -

"Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator".

The apparent objective of **Section 88 (11) of the ELRA** is to set a limitation period of thirty days for the award to be issued, technically to promote economic development through economic efficiency, productivity, and social justice in resolving dispute timely by the arbitrators as one of the objectives of ELRA. On other side of the coin, it does not mean that failure to comply with such timing invalidates the award issued. In the case of **Tanzania Breweries Limited v. Leo Kobelo**, [2015] LCCD 49 it was held: -

"In the case of 2000 Industries Ltd. Vs. Haiima Z. Giteta 7 Others, Rev. No. 9 of 2009, High Court at Dar es Salaam (unreported), the Court held that the award delivered outside of the required 30 days but the same did not cause any miscarriage of justice to the applicants as they failed to adduce any facts to show that they were unduly prejudiced as a result of non-delivery of the award within 30 days".

The above authority placed a duty to the one who alleged delay in issuing award out of 30 days to show how such delay prejudiced his or her right. In this matter nothing was stated by the applicant on how such delay affected him. Having said so, this ground could not warrant variation in CMA award. As such, the delay cannot form a reason to interfere with the decision of the CMA.

On 5th ground as to **whether the arbitrator raised and formulate her own evidence in procuring the award**, I have already pointed out hereinabove that the applicant testified himself that he was employed under yearly fixed term contract, as he was employed on 1st January 2021, and he was terminated on 26th December 2020. Therefore, the arbitrator was right in her findings that applicant had a yearly fixed term contract. I don't see any extraneous matter formed by the Arbitrator to negate the apparent evidence of the Applicant.

On reliefs I have found that the arbitrator was correct to award what was the remaining period of the employment contract since the Applicant could not prove the 4 months claimed in the CMA Form No. 1.

From the above, analysis, the issue as to whether the Applicant has established sufficient grounds for this court to revised and vary the decision of the CMA is answered negatively.

In the upshot, since I find no need to differ with the CMA award on the reason that the arbitrator's finding on remained period was correct, this Court finds that the application filed by the applicant has no merit and deserves dismissal. Therefore, I dismiss the application for want of merits. The CMA award is hereby upheld. No orders as to costs. It is so ordered.

Dated at Dar es Salaam this 28th day of April 2023.



KATARINA REVOCATI MTEULE

JUDGE

28/04/2023