IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR ES SALAAM
REVISION NO. 09 OF 2023
BETWEEN

EXPRESS HOTEL LIMITED T/A ONOMO HOTEL ..... APPLICANT

VERSUS

BEATRICE BATAO ..... RESPONDENT

JUDGEMENT

Date of last Order: *03/04/2023*
Date of Judgement: *12/05/2023*

MLYAMBINA, J.

The Applicant was the Respondent in *Labour Dispute No. CMA/DSM/ILA/70/22/76/2022* referred at the Commission for Mediation and Arbitration (herein CMA). The relationship of the parties herein commenced on 16/07/2013 when the Respondent was employed by the Applicant as Executive Housekeeper in two years employment contract. The contract was renewed upon its expiry. The last contract entered by the parties which is the subject matter of this dispute commenced on 15/07/2021 and it was to end on 14/07/2023. The Respondent alleged to have been unfairly terminated on 14/01/2022. Aggrieved by the termination, she referred the matter to the CMA claiming for breach of

contract. After consideration of the parties' evidence, on 02/12/2022 Hon. Kokusima, L (Arbitrator) delivered the Award in favour of the Respondent. The Applicant was ordered to pay the Respondent the total of TZS 57,600,000 being eighteen months salaries as compensation for breach of contract and six months salaries as compensation for general damages.

Being dissatisfied by the CMA's award, the Applicant filed the present application on the following grounds:

i. That, the Honorable Arbitrator erred in law and facts by failure to record and analyze properly the evidence which were before him and jump into the wrongly conclusion contrary to the evidences adduced by parties to the labour dispute.

ii. That, the Arbitrator never accorded proper wait to the Applicant's testimonies. Further, she failed to properly analyze the evidence presented especially through the contract of employment.

iii. That, the remedies of general damages granted by the arbitrator were never testified for during the hearing.

The application proceeded by way of written submissions. Before the Court, the Applicant was represented by Mr. Frank Kashumba, Learned

Counsel. On the other hand, Mr. Gasper Mwakayenda, Learned Counsel appeared for the Respondent.

Arguing in support of the application, Mr. Kashumba consolidated the first and second grounds. According to Mr. Kashumba, the Applicant through DW1 (Ms. Gloria Mwendwa) testified before the CMA that; on 10/01/2022 she informed the Respondent verbally to attend the meeting which was held on 14/01/2022 to discuss on termination of employment by agreement. He said, the witness testified further that the Respondent attended the said meeting as informed and the minutes thereto were prepared and served to her for signing. The counsel contended that the Arbitrator did not consider such evidence.

It was further submitted by Mr. Kashumba that; DW1 tendered the Employment contract. It was admitted as Exhibit B3. DW1 referred to clause 10 of the contract which was signed by parties. He stated that the referred clause clarify that any part can terminate the employment contract by giving the other part one month notice. Mr. Kashumba was of the view that the Arbitrator did not consider such evidence in the Award. He insisted that the Respondent's termination was fair and was done in accordance

with the terms of the employment contract. He maintained that the Arbitrator failed to consider the evidence tendered before her.

As to the award of general damages, Mr. Kashumba submitted that; the Arbitrator awarded the Respondent general damages by relying on hearsay evidence. He contended that there is no birth certificate tendered to prove that the Respondent was 57 years of age at the time of termination. In the upshot, he urged the Court to quash and set aside the CMA's decision.

In response, Mr. Mwakanyemba faulted the first and second grounds for being misconceived and devoid of merits. He submitted that; during hearing, the Applicant had only one witness (DW-1) who testified on the trial. Her evidence was clearly recorded and latter on considered and analyzed as reflected at page 6 and 7 of the impugned Award.

As to the allegation that the Arbitrator did not consider clause 10 of the employment contract, Mr. Mwakanyemba submitted that; the referred clause is illegal for contravening *Section 38(1)(a), (b) and (d)(i), (ii), (iii)* of the *Employment and Labour Relations Act [Cap 366 Revised Edition 2019] (herein ELRA)*. He argued that the cited provision requires the employer not only to issue notice of intention to terminates part of the work force, but also to disclose his intentions and consult with any trade union with

members at work place, which is registered and recognized under the law. He insisted, the position was considered by the Arbitrator as reflected at page 8 and 9 of the contested Award.

Mr. Mwakanyemba went on to submit that; the trial Arbitrator considered all the evidence on record contrary to the allegation and lies produced by Applicant's counsel. He said, as it was clear from her testimonies, DW1 admitted herself that there were no minutes of the meeting, no any written agreement which shows what was discussed in the meetings. She even failed to tender what was the agenda and minutes of the meetings during trial as a proof of agreement to end the contract of employment.

It was further submitted that the Respondent was informed on the same day to attend the meeting which carries serious change of her contract without observing the procedures. Mr. Mwakanyemba submitted that in the board meeting there was nothing discussed. They only read and issued a letter with the heading.

Mr. Mwakanyemba insisted that the Arbitrator properly analyzed the evidence on record by relying to *Section 37(1) of ELRA and Rule 3 (2) of*

GN. No. 42 of 2007. To support his submission, he cited the case of **Tanzania Revenue Authority v. Andrew Mapunda**, High Court Labour Division at Dar es Salaam, Revision No 104 of 2014 (unreported) where it was held that:

> I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims.

Mr. Mwakanyemba went on to submit that; the parties had neither any negotiation nor arrangement but for the reasons best known to the employer, she decided to surprise the employee by giving the termination letter illegally. He emphasized that there is no any agreement tendered explaining their consensus, or any agreement rather the mere letters with Heading *'End of Employment Contract'*, which explained the intention and decision of the employer to end up the Contract summarily.

With regard to the Award of general damages Mr. Mwakanyemba submitted that; the same are awarded at the discretion of the Court. They need not be proved by the Respondent. He argued that the power to grant general damages is derived from *Section 40(2) of ELRA.* To support his submission, he referred the Court to the case of **The Cooper Motor**

Corporation Ltd v. Moshi/Arusha Occupational Health Services [1990] TLR 96 where it was stated that:

> The fundamental Principle by which the Court are guided in awarding damages is "restitution in integrum" this meant that the law will endeavor, so far as money can do it to place the injured person in the same situation as if the contract had been performed' and the assessment of general damages be by Judge or Jury.

Mr. Mwakanyemba added that; the above position was advanced and discussed in the case of **Robert Mhando and Terezia David Manumbu v. The Registered Trustees of St. Augustine University of Tanzania**, Civil Appeal No. 44 of 2020 Court of Appeal Mwanza (unreported). He further submitted that; the Arbitrator satisfied herself that the circumstance of this matter justified the award of general damages. He added that; such circumstances include, loss of job and expectation to work, the said employment being the only means of surviving. She testified that; her age for the time of termination was 57 years which is difficult to be employed. He added that; the Respondent suffered mental psychology, she has family which depends on her, she is paying schools fees, hence the learned trial Arbitrator rightly and judiciously exercised her discretion to

award general damages after considering the peculiar circumstances surrounding the case so as to place the injured and affected person in the same situation as if the contract had been performed.

Mr. Mwakanyemba continued to submit that; the allegation that the Respondent was awarded general damages based on her age which was not proved by the birth certificate is rather absurd and should be disregarded. He contended that the Respondent's age was not contested during trial and such allegation is an afterthought and irregular to raise it at the stage of revision. He added that the Arbitrator considered several factors before awarding general damages. Her decision was not solely depending on the age of the Respondent, as submitted above. In the upshot, Mr. Mwakanyemba insisted that the impugned Award is genuine, valid and it is in compliance with the laws and procedures. He therefore urged the Court to uphold the CMA's Award and dismiss the application.

After considering the rival submissions of the parties, I find the Court is called upon to determine the following issues: *One*, whether there was termination by agreement in this case. *Two*, whether the Arbitrator properly awarded the Respondent general damages.

To start with the first issue as to; whether there was termination by agreement in this case, it has to be noted that termination by agreement is one of the lawful methods of ending employment contracts recognized in Tanzania labour laws as per *Rule 3(2) (a) of GN 42 of 2007 (supra)* which provides that:

> A lawful termination of employment under the common law shall be as follows:
>
> *(a) Termination of employment by agreement*
>
> (b) Automatic termination
>
> (c) Termination of the employment by the employee, or
>
> (d) Determination of employment by the employer.
>
> [Emphasis supplies]

Termination by agreement is also provided under *Rule 4(1) of GN 42 of 2007*. The relevant provision empowers parties to the employment contract, employer and employee to agree to terminate the contract in accordance with their agreement. Unfortunately, the law is silent as to procedures to be followed to reach into the said agreement. The Applicant insisted that in this case termination was by mutual agreement of the parties. The record shows that an initiative to agree to terminate the contract was initiated by the employer. Under such incident, the Court

subscribes to the Court's position in the case of **McAlwane v. Boughton Estates Limited** [1973] 2 All ER 299 cited in the book titled **Employment Law Guide for Employers by George Ogembo** where it was held that:

> An agreement to terminate an employment contract, if the initiatives arise from the employer, must be interrogated to confirm whether the employee freely consented to the termination. Hence, the Court would not approve an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him.

As pointed out earlier, in the present application, the initiative to terminate the contract by way of agreement was initiated by the employer. For the reasons best known to the Applicant (employer), he persuaded the Respondent to agree to terminate the employment contract. This is proved by DW1's testimony at the CMA where he testified as follows:

> Mnamo tarehe 14/01/2022 tuliitisha kikao pamoja na mlalamikaji akaelezwa mlolongo mzima wa yeye kufikia mwisho wa mkataba na mwajiri. Na kukabidhiwa barua ambayo alitakiwa aisome na akiishaielewa aisaini.

The above quotation can be loosely translated as follows:

> On 14/01/2022 we convened a meeting with the complainant where he was informed the whole process of ending her employment contract. She was served with a letter and required to read and sign it, if she understood the same.

During cross examination, DW1 testified further that; there was no any discussion or notice issued to the Respondent before the date the meeting was held. He clarified that on 14/01/2022 was the date the meeting was held and the same date the Respondent was issued with the end of contract letter which is hereunder reproduced for easy of reference:

> **RE: END OF EMPLOYMENT CONTRACT**
>
> This letter is to bring to your attention that the Company has taken the decision to terminate your Fixed Term Contract as of today, prior to the natural conclusion date of 14 July, 2023. The reason for this is due to the requirement to align with Onomo structural standards and current industry trends. In line with this procedure, you will be paid one month's salary as compensation for the early conclusion of your contract as per clause's 2.3 and 10 of your contract of employment, all outstanding leave entitlement and your salary for January, 2022 up to and

including Monday 17 January, 2022. I wish to stress this decision in no way reflects on your performance or conduct throughout the duration of your service for Express Hotel Limited.

You are hereby advised to ensure a detailed and documented handover is carried out for your Department to the designated employee who will be communicated to you. You are further advised to ensure a complete handover of all Company physical and intellectual property that is in your custody on or before the end of business on Saturday 15th January, 2022.

The content of the above letter speaks loudly that the Applicant decided to terminate the Respondent's contract even before the alleged meeting. The meeting was scheduled to inform the Respondent the employer's decision to terminate the employment contract. The Respondent was informed the reason for the termination of the employment contract. It was due to the structural needs of the business. As rightly found by the Arbitrator, that was a good ground to undergo retrenchment procedure as provided under *Section 38 of the ELRA*. To the contrary, the Applicant opted to terminate the contract through a purported agreement which does not reflect the true intention of both parties.

On the basis of the foregoing analysis, it is my view that the employer unilaterally made the decision to terminate the employment contract by way of a purported agreement. It is my findings that the employer used such method as a pretext to avoid following various mandatory procedures for termination on the ground of retrenchment. In the premises, there was no termination by agreement in this case.

Turning to the second issue, the Applicant challenges the Arbitrator's award of general damages. The Arbitrator awarded the Respondent general damages of equal to TZS 2,4000,000/= being six months salaries. The Arbitrator relied on the reason that the Respondent is of 57 years of age, hence it is difficult for her to find another employment. The Applicant wants this Court to fault the Arbitrator's reasoning because there is no proof on record that at the time of termination the Respondent was 57 years of age.

After examining the records, during tendering her evidence/testimony, the Respondent clearly stated that she was 57 years of age as it is reflected in her descriptions at the CMA seen at the CMA's proceedings. Before the CMA, the Applicant never disputed the fact that

the Respondent was indeed 57 years of age at the time of termination. Thus, such an objection is an afterthought levelled before this Court.

The point of general damages was also considered in the case of **Tanzania Bureau of Standards v. Anita Kaveva Maro**, High Court Labour Division, Dar es salaam, Revision No. 35 of 2016 [2016] LCCD 1. Again, in the case of **Syngenta Tanzania Limited v. Daniel Makondo**, Labour Division, Dar es salaam, Revision No. 208 of 2017 [2018] LCCD 1 the Court held that:

> Having carefully gone through the record of CMA, I fully agree with the Arbitrator's finding on this fact. I say so because general damages is a discretion of the Court thus the Court has discretionary powers to presume the amount to be awarded to the party regardless as to whether he claimed the same or otherwise. More so in the circumstances where the Applicant had no justifiable cause of terminating one's employment.

Considering the circumstances of this case where the Respondent was forced to agree to terminate the employment contract without her free will; also, taking into account of her age factor as considered by the

Arbitrator, I find no justifiable reason to fault the award of general damages as awarded by the Arbitrator.

In the end result, I find the present application has no merit and is dismissed accordingly. CMA's decision is hereby upheld.

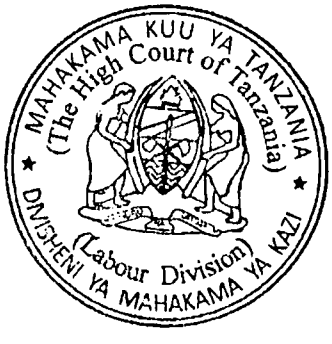
It is so ordered.

Y.J. MLYAMBINA

JUDGE

12/05/2023

Judgement pronounced and dated 12th day of May, 2023 in the presence of learned Counsel Gilbert Mushi holding brief of Frank Kashumba for the Applicant and Gaspar Mwakanyemba for the Respondent. Right of Appeal fully explained.



Y.J. MLYAMBINA

JUDGE

12/05/2023