IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION NO. 37 OF 2022

(Arising from Labour Dispute No. CMA/ARS/230/21/184/21)

NEEMA KESSY BAHATI .....APPLICANT

AND

SOS CHILDREN'S VILLAGES TANZANIA .....RESPONDENT

JUDGMENT

19/12/2022 & 27/2/2023

GWAE, J

Aggrieved by the award procured by the Commission of Mediation and Arbitration of Arusha at Arusha (CMA) delivered 13th April 2022, the applicant, Neema Kessy Bahati has preferred this application for an order of the court in the following terms;

1. That, this court be pleased to invoke its revisionary power to call upon the record of the CMA in Labour Dispute registered as CMA/ARS/230/21/184/2021 between Neema Kessy Bahati and SOS Children's Villages Tanzania

2. That, this court be pleased to inspect the said records, set aside the award thereof and/or give such directions as it may consider necessary in the interest of justice.
3. Any other relief (s) the court may deem fit to grant

Legal issues upon which the applicant relies are as follows;

(a) That, the Hon. Arbitrator erred in law and fact by answering an issue of the breach of the contract without giving a chance to address the same
(b) That, the Hon. Arbitrator erred in law and fact by not considering the evidence presented by the applicant
(c) That, the Hon. Arbitrator committed misconduct by breaching rules of fair trial and hearing
(d) That, the Hon. Arbitrator erred in law and facts by bringing and adjudicating on issues not presented by any party during trial

The CMA's record plainly reveals that, the respondent, SOS Children Village Tanzania employed the applicant as Alternative Care Coordinator since 15th November 2020, recruited in Dar es Salaam Region and her place of work was at Arusha. That, the parties' contract of employment was for a specified period of two years. Hence, their relationship was to end up on the 14th day of November 2022. It is further evident from the CMA record that, the applicant was charged with disciplinary offences namely; 1st count, an act of insubordination and in 2nd count, negligence in the performance of duties. After the Disciplinary Hearing Committee

had found her guilty of the 1st count on the offence of insubordination. The particulars of the 1st count being that, the written warning letter was initially sent to her through e-mail and she received the same and made a reply thereto. However, the applicant is alleged to have refused a copy of the warning letter which was physically sent to her for proper maintenance of records, thus in accordance with the respondent's best practice and policy.

Upon termination of the applicant's employment, the respondent paid her the following terminal benefits; salary from 1st June 2021 to 18th June 2021, 16 days untaken leave, 19 days untaken off days and one month salary in lieu of notice and certificate of service.

On 28th day of November 2022 the parties' counsel namely; Mr. Gospel Sanava assisted by Mr. John Massangwa and Moses Ambindwile for the applicant and respondent respectively, reached consensus that, this application be disposed of by way of written submission.

In the course of arguing in support of this application, the learned counsel for the applicant opted to have abandoned legal issues in paragraph (a), (c) and (d) appearing hereinabove. He thus argued legal issue (b) alone. It was his stance that it is the duty of the decision maker to analyse evidence on order to arrive at a fair conclusion. He invited the

court to refer a case of **Charles Issa @ Chile v. The Republic**, Criminal Appeal No. 97 of 2019 (unreported).

According to Mr. John, the applicant did not refuse to accept a warning letter (DE1) given to her by one Peterson Joseph (DW2) save that she requested time for consultation as confirmed by Evaline Dillip (DW1) and DW2. He invited this court to refer to a case of **Jetendra Kapoorchand Solank vs. Machines and Tractors (T) Ltd**, Labour Revision No. 389 of 2021 (unreported) where right for an employee to consult was found to be vital as far as employer-employee's relationship is concern. He thus opined that what the applicant did, does not amount to an offence worthy of requiring a disciplinary action against her. The applicant went on arguing that there is no law requiring an employee to receive a warning letter or any other letter from his employer and if dissatisfied should appeal against it and that the respondent failed to produce the respondent's terms and conditions of services.

Submitting further on the competence of the dispute, the learned counsel stated that the cause of action, unfair termination of employment was properly pursued since the termination in question was not a breach of the parties' contract as the contract of employment would end up to 14th November 2022.

In his reply, the counsel for the respondent argued that it was amply established that the applicant refused to receive the warning letter which amounted to gross insubordination contrary to the respondent's policy and Regulation 12 (3) (f) of the Employment and Labour Relations (Code of Good Practice) Rules of 2007. He went on arguing that it was proper to terminate the applicant's employment.

Arguing on the propriety of the applicant's dispute under unfair termination instead of breach of contract, Mr. Moses stated that, the applicant's reliefs are not grantable on the ground that he ought to have filed his claim under breach of contract. Supporting his argument, he cited the case of **Malaika B. Kamugisha vs. Lake Cement Ltd**, Revision No. 591 of 2019 (unreported-HC) with approval of its decision in **Mtambua Shamte and 64 others vs. Care Sanitation and Supplies**, Revision No. 154 of 2010, unreported) in which it was stated that;

> "*Principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of specific task*"

In his rejoinder, the counsel for the applicant reiterated that, the applicant through her email received the letter and that her reluctance to physically receive it was for the reason that she wanted to consult first. He added that the warning letter was also invalid since the offence was

not proved during disciplinary hearing. According to him, the warning letter was maliciously issued and therefore there was no lawful order (s) to be obeyed thereof. On the issue of cause of action, the applicant's counsel rejoined by stating that, a dispute on either breach of contract or unfair termination affects only remedies to an employee.

Having briefly outlined the parties' written submission for and against the application, this court is therefore, duty bound to determine the following issues;

1. Whether the applicant's dispute on unfair termination was properly before the Commission
2. Whether the applicant's refusal to physically receive the warning letter constituted gross misconduct justifying the termination of employment
3. Reliefs

In the **1st issue**, at the outset, I am not persuaded by the finding of the arbitrator as well as the respondent's argument. I am of that view simply because it is not in dispute that, the respondent terminated the applicant's employment before expiry of the contract (Fixed contract of employment). However, the parties' contract was on a specified period but it was yet to come to an end. It is my view that the cause of action

would be breach of contract if the applicant based his complaints on failure by the respondent to pay some of her entitlements as stipulated in the contract or failure to renew the contract where there was reasonable expectation of renewal as stipulated under section 36 (a) (iii) of the Employment and Labour Relation Act, Cap 366, R. E. 2019) or an earlier termination of the fixed contract not based on the misconduct. It follows therefore, in a fixed contract of employment a cause of action may be either unfair termination or breach of contract depending on the nature of complaints.

With due respect with endeavours by the respondent's counsel to persuade the court that, the cause of action was on breach of contract and not unfair termination. It is my considered view that the cases cited are not relevant to the dispute at hand since the parties' fixed contract was yet to come to an end as the applicant was terminated on 18th June 2021 whereas the contract was to come to an end on 14th day of November 2022. More so, the respondent unilaterally terminated the applicant on the ground of misconduct.

Regarding the **2nd issue**, I have carefully examined the evidence on record, Disciplinary proceedings and parties' submissions, it goes without saying that the applicant initially received the warning letter through her

email. It is also clear as argued by the applicant's counsel that the offence in which the applicant was issued with the warning letter was not proven since the Disciplinary Hearing Committee did not find her guilty of the offence of negligence in the performance of duties. I have also considered the fact that, failure by the applicant to receive the hard copy of the letter with a view of consulting a lawyer in itself does not constitute a serious or gross misconduct. The applicant through her defence during disciplinary hearing stated that, the warning letter was issued not in conformity with the respondent's guidelines. In these circumstances, the applicant's move for consultation was proper since proper legal guidance at that juncture was necessary as was correctly held in **Jetendra Kapoorchand Solank vs. Machines and Tractors (T) Ltd** (supra) where my learned sister (Mteule, J) stated that;

> *"Consultation with a lawyer was not a bad measure taken by the applicant because by that time she needed a proper legal guidance to handle the situation.....there was nothing wrong to consult lawyer for what transpired which signaled an impending labour dispute".*

In our instant dispute, the applicant's act of refusing to receive the hard copy of the warning letter, in my firm view, did not amount to gross insubordination. Moreover, the warning letter lacked legs to stand since

even the disciplinary offence to wit, negligence in the performance of duties was not proved.

Coming to the determination of the 3rd issue on remedies. Since the termination of the applicant's employment is found to be substantively unfair and since the parties' contract of employment was for a specified period, she is therefore entitled to her salaries for the remaining period, unexpired period) that is from 18th June 2021 to 14th November 2022 (See **Tanzania Saruji Corporation vs. Africa Mable Company Limited** (2004) TLR 155.

Consequently, this application is not without merit. The award of the Commission is hereby revised and set aside.The applicant is thus entitled to her monthly salaries for the remaining period of the contract (18th June 2021 to 14th November 2022). This being a labour matter, I shall make no order as to costs of this application.

It is so ordered.

DATED at **ARUSHA** this 27th day of February 2022

M. R. GWAE
JUDGE