THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 20 OF 2022

(Arising from the Labour Dispute No. CMA/MBY/Mby/121/2020/AR.43)

UTENGULE COUNTRY HOTEL LIMITED.....APPLICANT

VERSUS

HAPPYNESS ISDORY MTONGA.....RESPONDENT

JUDGMENT

Date of last order: 22.02.2023
Date of Judgment: 27.04.2023

NDUNGURU, J.

The applicant, Utengule Country Hotel Limited through the service of Mr. Essau Abraham Sengo, learned advocate filed the present application seeking for revision of the award of the Commission for Mediation and Arbitration (herein to be referred as the CMA) in Labour Dispute No. CMA/MBY/Mby/121/2020/AR.43 delivered on 22nd day of August 2022, by Honourable Severine Ndonde, Arbitrator.

The application is pegged under Section 91 (1) (a) and (b), 91 (2) (b) and (c) and Section 94 (1) (b) (i) of the Employment and Labour Relation Act, 2004, Act No. 6 of 2004 as amended, Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and Rule 28 (1) (a) (b) (c) (d) and (e) of the Labour Court Rules, 2007 G.N. No. 106 of 2007.

The application is supported by the affidavit of Deborah Bacon, the applicant's principal officer.

In order to appreciate the sequence of events, I think, it is instructive to set out briefly the background giving rise to the present application. The respondent (the complainant at the CMA) was employed by the applicant under a fixed term contract for one year commencing on 1st day of March 2020 and was ending on 28th day of February 2021. Also, the record reveals that, the applicant employed the respondent as Beauty Therapist and Receptionist. The respondent's salary was Tshs. 400,000/= per month plus Tshs. 50,000/= being food and transportation allowance per month making a sum of Tshs. 450,000/= per month. It is further on the record that on 26th day of March 2020 the applicant forced to close the Hotel due to cancellation of reservations due to COVID-19.

On 20th day of March 2020 before closing the hotel, the applicant and respondent signed an addendum to the contract to the effect that all staff had to go for unpaid leave but with hardship allowance of Tshs. 100,000/= per month and to work on rotation per week to assist the bungalows since the bungalows were not closed. Again, it is apparent that, the respondent worked for first two weeks of April and then she was paid the sum of Tshs. 200,000/= being her allowances. The Respondent however, stayed in Mbeya on the ground that the applicant's lodge manager told them that she would calling them to work on rotations whenever the need arises. It was further alleged by the respondent that she was terminated from employment on 24th day of September 2020 via a WhatsApp text message from her manager (the applicant's lodge manager).

Therefore, the respondent went to the labour officer of Mbeya to complain about the termination. According to her, at the Labour office the applicant's lodge manager admitted to have sent the said text to her and promised that she would cancel it. Thereafter, the applicant wrote a letter to the Labour office withdrawing the termination notice and insisted that the respondent has remained a staff member of the applicant. Finally, the

record reveals that, the respondent found no need to go back to work. As result she instituted a claim of unfair termination at the CMA.

Having heard the parties' evidence, the CMA arbitrator found that there was unfair termination both; substantively and procedurally. She thus, issued an award dated 22nd day of August 2022 under which the applicant was ordered to pay the respondent one month's salary in lieu of notice of Tshs. 450,000/=, annual leave of Tshs. 450,000/=, compensation for unfair termination of Tshs. 5,400,000/=, bus fare to Morogoro of Tshs. 36,000/=, costs for transporting the respondent's personal effects of Tshs. 945,000/= and subsistence allowance of Tshs. 10,350,000/=.

Being aggrieved, the applicant filed the present application for this Court to revise the award of CMA on eight grounds as follows:

1. That, the Honourable Arbitration erred in law by adjudicating a matter without jurisdiction on account that the respondent had specific time employment contract whereas she filed CMA Form 1 claiming for unfair termination.
2. That, the Honourable Arbitrator erred in law by awarding the relief entitled to be granted to an employee with unspecified time

employment contract to the respondent who had specific time employment contract.

3. That, the Honourable Arbitrator erred in law by admitting and relying on the documentary evidence without applying the principles of evidence governing admissibility of evidence before judicial proceedings.
4. That, the Honourable Arbitrator erred in law by relying the documentary evidence which was not read after its admission and which is not even readable.
5. That, the Honourable Arbitrator erred in law and facts by disregarding the binding terms of the addendum contract dated 20th day of March 2020 and proceeding to award the respondent subsistence and twelve months' compensation for unfair termination and the while the respondent agreed to unpaid leave hence not expecting for the same.
6. That, the Honourable Arbitrator erred in law and fact by not considering the fact that the respondent failed to testify and prove that she was terminated from employment despite claiming the same in the CMA Form 1 while the applicant disputed that fact.

7. That, the Honourable Arbitrator erred in law and fact by not addressing credibility of the respondent witness despite lies testified.
8. That, the award sought to be impugned is illegal for being unreasonably issued out of time only at the detriment of the applicant.

When the matter placed before this Court for hearing, Mr. Essau Abraham Sengo, learned advocate, appeared for the applicant whereas Mr. Isaya Zebedayo Mwanri, learned advocate, appeared for the respondent. Hearing of this application was conducted by way of written submissions and counsel for the parties complied with the filing schedule.

In their respective submissions, counsel for the parties have made considerably lengthy submissions in respect of all grounds of application. Nevertheless, for convenient purpose I will not recapitulate them all here, rather I will be referring to them in the course of determining the relevant issue. Moreso, considering the nature of the issues which were framed and resolved before the CMA, I find it pertinent and compelling to firstly resolve the 6th ground of application on the issue raised by the applicant as:

Whether the Hon. Arbitrator erred in law and fact by not considering the fact that the respondent failed to testify and prove that she was terminated from employment despite claiming the same in the CMA Form No. 1 while the applicant disputed that fact.

Submitting in support of that pertinent issue Mr. Sengo argued that, it was expected for the respondent to prove the denied fact to the highest degree so as to convince the Arbitrator that there was termination and it was expected for the respondent to testify what she claimed in the CMA F.1 that the reason stated in the WhatsApp text that she worked privately is not true. He cited the case of **Ahmed Teja t/a Almas Autoparts Limited v. Commissioner General TRA,** Civil Appeal No. 283 of 2021, CAT at Dar es Salaam(unreported), section 110 (1) of the Evidence Act (Cap 6 R.E. 2019) and he referred this Court at pages 20-28 of the CMA's proceedings.

Advocate Sengo continued to submit that, the letter addressed to the Labour Officer which the respondent claimed to be wrote by the applicant was not readable. In addition, Mr. Sengo contended that, the respondent failed to call a material witness to prove material and relevant facts in her

case. To buttress his argument, he cited the cases of **Msafiri Benjamin v. Republic,** Criminal Appeal No. 549 of 2020, CAT, and **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008, CAT (both unreported). He also referred this Court at pages 22-23 of the CMA's proceedings.

In rebuttal, Mr. Mwanri co-jointly argued ground 6, 7 and 8 of application, in effect as to the 6th ground he submitted that, the respondent has proved that she was terminated by the applicant via oral evidence, documentary evidence and the circumstantial evidence. Also, he stated that, the applicant is circumventing her legal burden of proof of termination. He added that, the applicant has never proved that there was no any termination. Further, Mr. Mwanri argued that, the applicant has never adduced any evidence that they assigned any job to the respondent after resumed the business of the Hotel. He went on to submit that, everything is silence on the part of the applicant which means that they are still acting under their termination notice.

Again, he argued that, the case of **Zakaria Jackson Magayo v. Republic** (supra) which was cited by the counsel for the applicant is

irrelevant on the ground that evidence in civil case is measured on balance of probability while in the criminal case is beyond reasonable doubt.

In his rejoinder submissions regarding the 6th ground, Mr. Sengo insisted that the respondent did not prove her allegation that she was terminated by the applicant. According to him the respondent's counsel did not dare to submit on the effect of expunging the alleged WhatsApp text from the respondent's evidence that the respondent was bound by her pleadings taking into consideration of the law that parties are bound by their pleadings.

I have considered the submissions by the counsels for the parties in respect of the issue under consideration, the record and the law. Looking at counsels' submissions, there is a slight antagonist on who has a duty to prove termination if it is contested. Counsel for the applicant is of the view that the respondent (employee) had to prove that she was terminated since the applicant (employer) had denied to have terminated her, whereas, counsel for the respondent maintained that it was upon the applicant to prove that she did not terminate the respondent.

Conversely, the labour laws i.e section 39 of the Employment and Labour Relations Act, Cap. 366 R.E 2019 and Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, the employer has a duty of proving fairness of termination on the balance of probabilities and not otherwise. Section 39 of Cap. 366 for example, provides that:

> *"39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

Apart from the foregone provisions of the law, I had an opportunity to go through the labour laws, unfortunately, I did not come across any provision of the law which impose the duty of proving termination to the employer. Therefore, it is my considered view that, the employee is duty bound to establish the existence of termination and not the employer. The similar position was underscored by this court in the case **CRJ Construction Co (T) Ltd v. Maneno Ndalije & another,** Labour Revision No. 205 of 2015, High Court of Tanzania at Dar es Salaam (unreported) where it was observed in part that:

"Looking at the evidence in record I find the respondents contention to be mere allegations not supported by any evidence. There is no any evidence which proves that the respondents allege to have been terminated from employment and the applicant denies to have terminated them. ***I find the respondents had the duty to establish the termination by evidence"*** (bold emphasis supplied).

On that regard, I find out that it is prudent to invoke section 110 of the Law of Evidence Act, Cap 6 R.E. 2019 to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. See also the case of **Barelia Karangirangi v. Asteria Nyalwamba,** Civil Appeal No. 237 of 2017, CAT (unreported).

Turning back to issue under deliberation, the respondent through the CMA Form No. 1 alleged that she was terminated by the applicant through WhatsApp text. The fact that was forcefully rebutted by the applicant. In her evidence, the respondent did not adduce the said WhatsApp text in the original form instead she tendered a paper which she claimed to have the same contents as the WhatsApp text which is exhibit C1. The CMA

however, found the said paper not authentical as it violated the law regarding admission of electronic evidence. As the CMA found, truly, the said paper did not meet qualities of being admitted nor considered as electronic document. This is due to the live fact that since the respondent claimed to have received the said termination text through her cell phone, the original document was the cell phone itself. See section 18 of the Electronic Transaction Act, No.13 of 2015. Equally, the paper (Exhibit C1) did neither show the author, his signature nor the date it was made.

Following the fact that the main evidence of the alleged WhatsApp text being not tendered, my considered view the respondent did not remain with any material evidence to sustain her claim. The respondent's counsel was of the view that there was a letter from the applicant to the labour officer which collaborated oral evidence of the respondent that she was terminated. The counsel's position was in line with the CMA's decision where it found that the letter which was said to be not well readable has certain readable words/clause. The Clause was quoted by the CMA reading that: "*We will withdraw the termination notice and she will remain a member of Utengule staff team*"

The CMA construed that context/clause as a proof of the claimed termination. According to the CMA the context was enough and conclusive evidence that the respondent proved her claim of being terminated. It was held that since the letter indicated that there was a notice of termination, the respondent proved that she was terminated.

With due respect, the evidence on the above clause is very remote to be considered as a proof of termination. Even where I concur with the counsel for the respondent that the standard of proof in the matter like this one is on the preponderance of probability, I am not convinced that the pertinent readable clause was sufficient to prove termination of the respondent. This is because there was no other evidence in a balance of probability justifying that there was bad employment relationship between the applicant and the respondent.

Moreover, the contention by the respondent's counsel that the applicant did not show if she recalled or assigned a duty to the respondent after opening the business of the Hotel is also misconceived. In my conviction is based on the uncontradicted evidence that the applicant's

business resumed on 15th December 2020 after the respondent had already instituted the labour dispute the subject of the instant application.

Additionally, for the sake of argument, assuming that the applicant wrote a letter to the Labour Officer expressing that has intending to withdraw the notice of termination does the same amount to proof that she had terminated the respondent? In my determination, the letter addressed to the Labour Office by itself does not amount to the termination of the respondent's employment. I hold so because the contents of the said letter and the evidence by the respondent was that the applicant had withdrawn the termination notice. If the applicant has withdrawn his intention of terminating the respondent through the letter addressed to the Labour Officer that means, there was no termination of the employment contract.

In my further view, after the applicant has declared to withdraw her notice of termination was unreasonable for the respondent to rush to the CMA claiming that she had been unfairly terminated. Otherwise, the respondent could have pressed her claims that she resigned from the employment due to the existence of intolerable working condition after the applicant had agreed to withdraw the said termination notice. I hold so

because the evidence on the record is to the effect that, the respondent found no need to go back to work instead she instituted a claim of unfair termination at the CMA. Much as the respondent did not claim constructive termination as she did not say that there was intolerable working condition. It was herself decided to vacate the employment. Thus, the available evidence could not sustain her claim of unfair termination

Owing to the above findings, I concur with the counsel for the applicant that, the respondent did not adduce evidence to prove the alleged termination of her employment contract.

In the upshot, I find needless to belaboring to the rest of the issues in the present application since their determination solely depended on the positive answers to the foregone issue. Consequently, I find the applicant's application meritorious, I consequently, revise and quash the award of the CMA and set aside the order made therefrom. Being a labour matter, I make no order as to costs.

It is so ordered.

D.B. NDUNGURU
JUDGE
27/04/2023