IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LABOUR REVISION NO. 1 OF 2022

(Originating from CMA/RK/SMB/28/2021 of the Commission for Mediation and Arbitration for Rukwa)

BODI YA WADHAMINI EFATHA MINISTRY ..... APPLICANT

VERSUS

NELSON NYAMWIHULA ..... RESPONDENT

JUDGMENT

24/1/2023 & 30/05/2023

MWENEMPAZI, J:

The applicant has applied in this court for orders revising the decisions/Award in Labour Dispute No. CMA/RK/SMB/28/2021 for purposes of satisfying itself as to its legality, correctness, rationality and propriety of the decision/ Award delivered by the Arbitrator on 14/03/2022 and set aside the said decision and or Award. She is also praying for Costs of this

application to be provided for and that this Honorable Court be pleased to grant any other relief(s) as it deems fit to grant.

The application is supported by the affidavit sworn by Elias M. Machibya, who is the counsel for the applicant. In it the applicant has stated that the respondent in the Commission for Mediation and Arbitration alleged that he was an employee of the Efatha Ministry Heritage Farm since 2017 which allegation has been denied by the applicant. The respondent further alleged that the dispute between the parties arose in May,2021 when the said Efatha Ministry Heritage Farm stopped paying him salary without assigning reasons. In order to alleviate the dissatisfaction, the respondent referred the dispute to the CMA for Rukwa at Sumbawanga, whereby upon hearing and determination by the Arbitrator, the Commission for Mediation and Arbitration ordered for the payment of a total of Tshs. 27, 265,385/= being compensation for unfair termination Tshs. 8,400,000/= as per Section 40(1)(c) of the ELRA, compensation for breach of contract Tshs.12,000,000/ as per section 73(1)(2)(3) and (4) and section 74(1)-(4) of ELRA, Notice Tshs. 700,000/= according to section 44(1) of ELRA, Leave not taken for three years, Tshs. 3,500,000/= as per section 44(1)(a) of ELRA and severance allowance Tshs. 565,384 as per section 44(1)(e) of ELRA and also

repatriation expenses. The Arbitrator denied payment of compensation for the destroyed farm because it is not within the scope of the labour dispute and also rent as there was no evidence that the employer was paying rent for the respondent.

The respondent is vehemently opposing the application and has duly filed a counter affidavit to support the Notice of Opposition. His contention is that he was an employee of the applicant and that it is not true that he averred that the dispute arose sometime in May 2021. The dispute arose on the 3rd September, 2021. Under the circumstances, the respondent has deposed that the dispute was referred in time at the CMA hence there was no need to file an application for condonation along with CMA FORM NO. 1. In the counter affidavit, the respondent has stated that the award by the CMA was procured properly and legally hence this application should be dismissed and the award be upheld.

At the hearing the applicant was being represented by Ms. Precious Ahmad Hassan, learned Advocate who was holding brief for Advocate Elias M. Machibya with instructions to proceed and the respondent was being represented by Mr. Justinian Herman Bashange, Personal Representative of the Respondent.

The learned advocate for the applicant submitted that this is an application for revision emanating from an award by CMA – Rukwa in Labour Dispute No. CMA/RK/SMB/28/2021 delivered on 14/3/2021. The parties are as named herein above.

The counsel narrated the history of the dispute that it simply started when the applicant refused to pay salaries to the respondent sometime in May 2021. The respondent thus filed an appeal in the CMA alleging that he is an employee of the EFATHA MINISTRY HERITAGE FARM which allegation was and is disputed by the applicant. The mediation failed and upon hearing of the dispute the award was delivered in favour of the complainant. After the award, the respondent (then) was aggrieved that is why this application was filed.

In this application, the applicant has filed legal issues which are ten (10) in number. The same are contained in paragraph 13 of the affidavit. On the basis of the issues raised the counsel submitted as hereunder recorded. The counsel for the applicant dropped issue number 3 and 7 and submitted on the rest.

On the first issue, the question is whether the form No. 1 was correctly filled by the respondent. Under Rule 10(1) of the **Labour Institutions (Mediation and Arbitration) Rules GN. 64 OF 2007** it provides on the time limit to refer the dispute before the Commissioner for Mediation and Arbitration. Rule 10(1) provides that: -

> *"Disputes about fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.*
>
> *(2) all other disputes must be referred to the Commission within sixty days from the date when the dispute arises."*

The counsel submitted that if we look at Form No. 1; it was filed after 30 days had lapsed. Even the respondent admit that their dispute commenced on May 2021 after the applicant stopped paying his salaries. The CMA Form No. 1 was filed on 13/09/2021. Under the circumstances the applicant in the CMA ought to have attached an application for condonation in accordance to Rule 11 of the ***Labour Institution (mediation and Arbitration) Rules, 2007***.

The law requires one who delays to apply for extension of time (condonation) so that the application is heard. The applicant in the CMA (respondent herein) did not do that. Even if the applicant (respondent) herein would allege he was terminated from employment without a letter, given time limit is known, filing an application for condonation was inevitable for the application to be legally proper. The respondent stated that he was not paid salaries for the three months, before complaining to the CMA he ought to have filed an application for condonation.

Moreover, if the applicant would say he was right in time, still Rule 10(2) of the GN No. 67 of 2007 requires all disputes to be filed within 60 days, that is far out of time, when the applicant filed Form No. 1. He ought to have filed CMA Form No. 1 and an application for condonation. Absence of CMA Form No. 1, the counsel opined, that the application in the Commission for Mediation and Arbitration was out of time. The application was therefore incompetent for the CMA to hear and determine.

On the issue No. 2 whether the honorable was right to amend the CMA Form. No. 1. The applicant herein (respondent in the Commission for Mediation and Arbitration) while the matter is in the CMA, was able to raise a preliminary objection, that **Efatha Ministry Heritage Farm** is not a legal

entity. It is very unfortunate the arbitrator amended the CMA Form NO. 1 (page 14 of proceedings). The law is obvious that when a party sues a wrong party the remedy is to strike out the application. The counsel for the applicant referred to the case of **Respicius Emilian Mwijage Vs. The Municipal Director Ilala Municipal Council and two Other, Land Case No. 27 of 2021, High Court of Tanzania-Land Division at Dar es Salaam**. It is our view, that the award was contravening the principle laid in the cited case. The arbitrator was wrong to amend the name of the respondent in the application at the Commission for Mediation and Arbitration.

Whether it was right for the Hon. Arbitrator to admit copies of the exhibits and not original. During the hearing the Arbitrator admitted secondary evidence (copies) instead of original. Section 67 of the Evidence Act, Cap 6 R.E 2019 has provided for circumstances where secondary evidence may be admitted refer page 35. The law requires the witness to tender exhibit which is original or give notice to rely on copies. That was a breach of the law of evidence. The applicant ought to have given notice under section 68 of Evidence Act, Cap 6 R.E 2019.

On whether it was correct for Hon. Arbitrator to award breach of contract in the dispute of unfair termination. The complainant was complaining for unfair termination. However, during decision the arbitrator focused on the breach of contract. Courts have powers to award reliefs of the prayers made by the applicant or plaintiff or whoever has requested the said relief and not otherwise. Issuing reliefs not prayed for is to deprive rights on the other side. The award issued by the arbitrator was on breach of contract which was not prayed for in Form No. 1.

On the 8th issue is whether it was correct for the CMA to take evidence without allowing the witness to sign on the said evidence. The counsel submitted that it has been noted in the record that the arbitrator did not sign on the evidence after recording the same. The law requires the arbitrator to sign after finishing recording the testimony of the witness. That position was pronounced in the case of **Monica Dude Vs. World Vision Tanzania, Labour Revision No. 20/2020, High Court of Tanzania, Labour Division -Tanga.**

On the 9th issue Whether the order for compensation was legally correct. The arbitrator did not clarify the compensation. The order for compensation was issued without any option even considering the possibility of filing for

review. The order issued is vague. Whether the applicant was an employee for a fixed term contract or permanent term contract. The order is vague in the eyes of the law.

The counsel submitted that the amendment of CMA Form No. 1 and receiving Form No. 1 without Form No. 2 was not proper. As well as receiving of documentary evidence through copies. The counsel for the applicant opined that it was wrong to issue an award both for breach of contract and unfair termination.

The counsel prayed that the award be set aside based in the legal faults which has been shown and also waived the prayer for the costs. But the counsel left open to the court to issue any order and or relief the court may deem fit to grant.

In response to the submission in chief by the counsel for the applicant, Mr. Justinian Bashange – Personal Representative of the respondent submitted commencing with the first issue that the Counsel has alleged that the dispute arose on May, 2021. There is no dispute the form was filed on September, 2021. There is no evidence that the dispute arose on May 2021. According to the award page 1 and 5 it states the dispute commenced on termination

of the applicants employment there was no need for filing condonation form as the dispute commenced on 03/09/2021. The applicant claimed for unfair termination and salary for three (3) Months. The dispute was competent before the CMA. The CMA had jurisdiction.

The personal representative for the respondent supported the decision of the arbitrator on the way he determined the issue of amendment of parties in the dispute. The arbitrator had power. According to section 84(4) (a) of Employment and Labour Relation Act. The arbitrator had power to do what he did. He invited this Court to refer to, article 107A (2) (b) (e) of Constitution of the United Republic of Tanzania and Rule 23(6) (7) (8) (9) and (10) of GN. No. 67 of 2007.

The Personal Representative argued that the decision was proper provided both parties were heard. No miscarriage of justice was carried by the Arbitrator not striking out the application and instead substituted a party relying on Rule 24(8) of the **Labour Institutions (Mediation and Arbitration) Rules, G. N. No. 64 of 2007**. The substitution did not affect proceedings. He prayed to refer to the case of **Gilbert Kalonda VS. Tanzania Assemblies of God Kesegese, Labour Revision No. 12 of 2019, High Court of Tanzania at Morogoro(unreported)** at page 8

where the presiding Judge observed that it was a duty of the employer to reduce a contract into writing wherein it will show the juristic person to sue and be sued.

Thus, it was argued by the Personal Representative that any anomaly must be construed against the employer. Exhibit P1 – P5 which were tendered by the applicant (respondent herein) where the employer fails to supply necessary documents, the employee recognizes the employer by the contents of the documents he has.

In the case of **Evans construction Co. Ltd Versus Chivington & Co. Ltd and Another [1983] 1 ALL ER 310** the Court has the option of using the doctrine of finger litigation or misnomer in dealing with correctness of names of the parties. Section 15(6) of Employment and Labour Relation Act, Cap 366 it's provided that the burden of proving the terms of employment shall be on the employer. He submitted that the court has power to rectify the names. The issue of names touches both sides, even the respondent.

The issue of use of copies that was not an issue at the CMA, basically the respondent (applicant thereat) issued a notice dated 15/1/2022 and the CMA issued an order on 28/01/2022; the requirements were fulfilled as per

section 67 and 68 of Evidence Act, Cap 6 R.E 2022 (67 (a) (a) (116)). The argument is baseless in law. Even the respondent referred exhibit P5 and P16 to support her argument.

On the fourth issue, the witness did not sign their testimonies. The counsel has not referred the proceedings and name of the witness. The referred case that of **Monica Dude Vs. World Vision Tanzania** has no relevance.

In the **North Mara Goldmine Ltd Vs. Khalid Abdallah Salum page 9.** The prayer to impeach the proceedings is baseless as there is no dispute on the testimony of witnesses.

On the breach of contract, the respondent's representative left to the Court to decide. Other remedies as in the award were proper in law including mandatory entitlement. The counsel submitted that other option in remedies were not issued. According to section 40(1) and (2) of Employment and Labour Relation Act read together with Rule 32(1) and (2) of GN No. 67 of 2007, are very clear on remedies. The relationship of the parties was intolerable.

The counsel for the applicant has submitted that the arbitrator did not clarify the award. That was explained, the basis of compensation is permanent

contract between the parties. So, the allegations by the applicant are not founded.

The award not giving option for revision. The representative for the respondent referred to Rule 27(3) (f) of GN No. 67 of 2007 which provides for contents of an award. That the arbitrator complied to the requirement of an order. The kind of details which are required to be included into it. In this case, the arbitrator has power to issue an order and that does not deprive the applicant to apply for revision.

According to Rule 32(5) (b) and (c) of GN No. 67 of 2007. It has outlined factors for consideration on compensation.

It is a legal fundamental that where an employee is terminated unfairly without reason, the punishment must be stiff. The CMA must consider the consequence of termination including hardship to obtain new employment as per section 41 of Employment and Labour Relation Act.

The respondent's representative submitted that the consideration by arbitrator were proper. He prayed that the application be dismissed with cost because they lack legal foundation. The Respondent prayed this Court

that the CMA at page 17 item No. 9 to see there is a need to show the amount in repatriation cost.

In rejoinder the counsel for the applicant Ms. Precious Ahmad Hassan – Advocate submitted in rejoinder on the first issue that there was need of filing condonation form. She prayed to refer at page 28 of the proceedings of the applicant; the respondent was required to comply with the requirement of Rule 10(1) of GN No. 64 of 2007 which prescribe thirty (30) days and if it is issue of salaries, he was required to file the complaint within sixty (60) days. The counsel for the Applicant argued that there was need to file form No. 1 and 2 she prayed the award to be quashed and set aside.

The respondent has submitted that the arbitrator had a power to amend the CMA Form No.1, that is a wrong position as suing a wrong party has as the only remedy to strike out the application and not amend. Even article 107A of Constitution of the United Republic of Tanzania cannot cure the problem. The law has given power to strike out. The respondent has submitted that even the name of the respondent reads Nelson Josia. Thus, even the respondent himself does not exist. It will be difficult to enforce the award.

The argument that the problem of suing a wrong party was caused by the applicant. Ignorance of the law is not an excuse. The counsel submitted that they spotted the problem and brought an objection. Section 15(6) of Employment and Labour Relation Act as cited by the Justiman Bashange is not applicable because it is about the burden of proof on employment not burden on who is going to be sued.

There was a question of inapplicability of the case of **Monica Dude Vs. World Vision Tanzania.** In the proceedings the arbitrator did not sign after completion of the evidence. That was insisted by the counsel that the case is applicable. The counsel also insisted that issues of breach of contract and unfair termination, brought confusion.

On the issue of Board Resolution, the respondent has not cited the law. As a Court Officer an advocate appearance is exempted from the need of board resolution. Because there is a notice of representation, there is no need of board of resolution. Lastly, the repatriation, the award was clear the court looks at the cost of transport the time of execution the counsel believe that will effect justice.

I have read the record of the CMA as well as this Court and also I had a chance to hear the submission by the parties.

The first question raised in the submission which I consider it necessary to resolve is whether the respondent was an employee of the applicant. That question has been contested by the parties in the CMA as well as in this application.

Section 61 of the Labour Institutions Act, No. 7 of 2004 is very clear and it provides that:

"For the purpose of a Labour Law, a person who works for or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

(a) The manner in which the person works in subject to the control or direction of another person;

(b) The person's hours of work are subject to the control or direction of another person;

(c) In the case of a person who works for an organisation, the person is a part of that organisation;

(d) The person has worked for that other person for an average of at least 45 hours per month over the last three months;

(e) The person is economically dependent on the other person for whom that person works or renders services;

(f) The person is provided with tools of trade or work equipment by the other person; or

(g) The person only works for or renders services to one person".

The respondent in the CMA testified that he was working under the Manager of the farm who is under the Board of Trustees of EFATHA MINISTRY. He was working from 7:00 hours to 18:00 hours (saa 1:00 hadi 12:00) as per PW2. It is the employer who provided tools of trade or work equipment. Given the time he was working, it is very obvious that he was working for more the 45 hours per month as the law provides.

The position of the respondent was well clarified by the Arbitrator in the award particularly at page 8 – 14. In my opinion therefore the respondent was an employee of the applicant.

The respondent also raised the issue that the reference of the dispute to the CMA was filed out of time arguing that, the dispute arose sometime on May,

2021. That however, was contested by the applicant that the dispute, arose on the 3/9/2021 when the respondent was terminated from work. What transpired was that on 20/05/2021 while at his work place the respondent was summoned by the Board Chairman, one Charles Chabruma who asked him to stop from attending at work place for three months. The applicant did that and when he came back on 03/09/2021 that is when he was told there is no employment. The respondent that stated at page 21 of proceedings.

"Mwisho wa kufanya kazi na EFATHA Ilikuwa 03/09/2021".

Thus, the allegations that the dispute arose on May 2021 is untenable because the application according to the reference made in CMA form No. 1 the nature of dispute is termination of employment.

Under the circumstances I find the issue as to the allegation that the reference was time barred is not true. The reference was made within time as required by law.

At this point I would thus jump to look at the issue as to whether it was correct for the CMA to take evidence without allowing the witness to sign on the said evidence or the arbitrator signing after finishing recording the

testimony of the witness. For the position the counsel cited **Monica Dude Vs. World Vision,** Labour Revision No. 20/2020, High Court of Tanzania Labour Division at Tanga.

The counsel submitted that it was wrong in law not to sign at the end of each witness's testimony. The personal representative of the Respondent has opposed the point and demanded details and argued that the counsel for applicant has not mentioned witnesses who did not sign at their testimonies. He also dismissed that the case of **Monica Dude Vs. World Vision** (supra) is relevant.

I think the point as has been presented is somehow misleading. The point is that the judge or magistrate recording evidence during testimony is required to append his signature at the end of the testimony. Failure to append signature to the evidence of a witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings. Refer **Joseph Elisha Vs. Tanzania Postal Bank,** Civil Appeal No. 157 of 2019, Court of Appeal of Tanzania at Iringa.

I have also examined the proceedings in the CMA. The arbitrator has not been appending signature at the end of the testimony of a witness as

required by law. As was held in the cited case **Joseph Elisha Vs. Tanzania postal Bank,** (supra) that vitiated the proceedings before the CMA. Therefore, the proceedings in the CMA are quashed and the award is set aside. The record is remitted to the CMA for the dispute to be heard *de novo* before another arbitrator. No order is made as to costs.

It is ordered accordingly.

Dated and delivered at Sumbawanga this 30th day of May, 2023.

T.M. MWENEMPAZI

JUDGE