IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION NO. 75 OF 2022

(From the award of the Commission for Mediation and Arbitration of Arusha, Dispute No. CM/ARS/ARB/345/21/147/21)

BETWEEN

FAME LTD..... APPLICANT

VERSUS

ELIAS HHAWU SULE.....RESPONDENT

JUDGMENT

03/05/2023 & 06/06/2023

MWASEBA, J.

Before the Commission for Mediation and Arbitration (CMA) of Arusha, the respondent who was employed by the applicant as Groundsman, filed a complaint against the applicant claiming for unfair breach of contract. The respondent sought to be compensated for the remaining time of the contract to the tune of Tshs. 16, 875,000/=. The CMA decided that the respondent's contract was unfairly breached and ordered the applicant herein to pay him Tshs. 16,200,000/= being salary arrears for the remaining time of the contract.

Aggrieved, the applicant is now seeking revision of the award on the grounds stated in paragraphs 6 and 7 of an affidavit sworn by the learned counsel for the applicant.

When this application came up for hearing, the applicant enjoyed legal representation from Mr. Bernard Buberwa Buhome, learned counsel whereas the respondent was under the legal representation of Mr. Paul Baraka Lusewa and Dr. Miriam Matinda, both learned advocates. At the request of the parties, this application was disposed of by way of written submissions.

Submitting in support of the application, Mr. Buhoma, learned counsel for the applicant firstly, prayed for the notice of application, chamber summons and the affidavit supporting the application to form part of this application. He submitted further that they would submit on grounds 6 (a) –(c) and the rest would be abandoned.

Starting with Ground 6 (a), Mr. Buhoma submitted that, it was wrong for the trial commissioner to refuse to admit the document for receipt of fuel while the same was attached to the opening statement filed by the employer as per **Rule 24 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules,** 2007, GN 67 of 2007. He argued that the said document met all the requirements of being tendered and

admitted as it was primary evidence as per **Sections 63 and 64 of the Evidence Act,** Cap 6, R.E 2022. It was his further argument that the reasons advanced by the trial Arbitrator that there is no proof that the handwriting was of the respondent or that the register was still in use to record fuel received even after the termination of the respondent's employment could have been discussed later on after the admission of the exhibit. Thus, he argued that the said act denied the respondent a right to prove the case and he prayed for a re-trial so that justice can be done.

Responding to this ground, Mr. Lusewa submitted that the trial tribunal was correct to refuse to admit the register of fuel as it has no connection with the respondent who was employed as a gardener as per exhibit P1 (Employment contract). Further to that, as they objected to the admission that's why the same was rejected as per the rules governing the admission of documents.

Submitting on ground 6 (b), Mr. Buhome, the learned counsel for the applicant argued that as submitted on ground 6(a) the trial Arbitrator refused to admit the register of fuel as exhibit but later on, he used the same to justify his decision. He submitted further that the said document did not form part of the records, hence, it was wrong to rely

on it. He further challenged the CMA for relying on the contract which was not tendered in court to decide that the respondent's salary had increased to Tshs. 675,000/= as opposed to Tshs. 624,000/= contained in the contract the respondent tendered in court.

In his response to this ground, Mr. Lusewa learned counsel for the respondent contended that the trial Arbitrator did not base his decision on the rejected documents. On page 9 line 3 to 13 of the award the Arbitrator was only explaining why the same was rejected. He submitted further that the determination of Salary was based on the last salary of the respondent which is Tshs 675,000/= as he submitted since the applicant had no proof of salary. He prayed for this ground to be dismissed as the CMA's decision was based on the law.

On ground 6 (c) Mr. Buhome learned counsel for the applicant submitted that it was wrong for the trial tribunal to rely on the notice which calls the respondent to appear at the disciplinary hearing as amounted to a verdict of the respondent's misconduct. It was his further submission that a notice must contain a statement of offence as well as particulars of the offence as per **Rule 13 (2)** of GN 42 of 2007. Thus, the argument by the trial Arbitrator that the inclusion of the offence on the notice amounting to convicting him was not correct.

Responding to this ground, Mr. Lusewa, learned counsel for the respondent submitted that a notice which was sent to the respondent contained a verdict contrary to **Rule 13 (2)** of GN 42 of 2007. It was his further submission that, as a verdict was already passed, calling him to a disciplinary was just to rubberstamp the procedures. He prayed for the application to be dismissed and the decision of the CMA be upheld since the respondent was terminated without following the proper procedures as required by the law.

In a brief rejoinder, Mr. Buhome reiterated what he had already been submitted in his submission in chief and prayed for the CMA decision to be nullified and set aside.

After considering submissions by both parties, records of this matter, and relevant applicable laws, this Court considers the main issue for determination to be whether this application has merit or not.

Starting with ground 6 (a), the learned counsel for the applicant complained that their documents including the register for receiving fuel were rejected to be admitted as exhibits while they met all the requirements needed by the law.

Having perused the records of the trial commission, this court noted that, on 01/06/2021 the learned counsel for the applicant wanted to

tender "Kitabu cha kuagiza na Kununua mafuta" as an exhibit but the respondent strongly objected for the reason that there was no proof that the same was prepared by the respondent herein. The counsel for the applicant insisted for the document to be admitted in court on allegation that it was the respondent herein who prepared the same and it had his handwriting. Further to that he was the custodian of the said register.

Following the said objection, the Commission did not admit the document as an exhibit. The question is on whether the hon Arbitrator was justified to reject the admission of the said register. It should be noted that in law, there are principles governing admission of exhibits. Apart from the Evidence Act, the case of **DPP vs Sharifu s/o Mohamed @Athumani and 6 others,** Criminal Appeal No. 74 of 2016, CAT at Arusha (Unreported) the Court laid down the following principles;

a) ***Relevancy;*** *Exhibit is relevant if it tends to make a fact that is offered to prove or disapprove either more or less probable. In admitting exhibits authenticity is an aspect of relevance and therefore, admissibility. Unless a document is authentic that is to say, it is written by its supposed author and is genuinely what it purports or is asserted to be - it is in most cases relevant and admissible.*

(b) Materiality; *exhibit is material if it is offered to prove a fact that is at issue in the case*

(c) Competence; *exhibit is competent if it meets certain requirements of reliability. Reliability may be established by first adducing foundation exhibit. So, when exhibit is objected for want of foundation it means its competence is called upon into question.*

Being guided by the above principles, I keenly went through the reasons for rejecting the admission of the said register which was annexed to the applicant's pleadings. Indeed, its relevancy is questionable. As it was well decided by the hon Arbitrator the same does not have either the name of the respondent or his signature. Nothing shows how it relates to the respondent. No foundation was laid before tendering it to make it reliable for admission. Therefore, it is my considered view that the hon. arbitrator was justified to reject the said register as it did not meet the legal requirement for its admission as exhibit. Hence the prayer for ordering trial *de novo* has no merit.

Coming to ground 6 (b), the applicant complained that it was wrong for the CMA to rely on the document which was not admitted as an exhibit. He said the Commission relied on the contract which was not tendered in court to calculate the salary of the respondent instead of using the old contract which was admitted as exhibit. Definitely, I agree with the

counsel for the applicant that the document which was not admitted as exhibit does not form the basis of the verdict. This was well stated in the case of **Abdallah Abass Najim vs Amin Ahmed Ali** [2006] TLR 55. I have gone through the records of the trial Commission particularly at page 9 of the award where the Arbitrator stated that:

> *"Upo waraka mwingine ambao unaonesha wazi kuwa mlalamikiwa alikuwa anayo nia ya kuleta Ushahidi wa kutengeneza kwa lengo la kuihadaa tume hii. Nao ni kinachodaiwa kuwa ni mkataba mpya wa ajira ya miaka miwili ambao mlalamikiwa anadai alikusudia kumpatia mlalamikaji tarehe 01/07/2021.* ***Mlalamikiwa hakutaka kutoa nakala ya mkataba huu mbele ya Tume lakini, kwakuwa ameleta nakala hiyo kwenye kumbukumbu za tume na ili kutokuacha shaka baina ya pande mbili za shauri hili, nitauzungumzia.****" (Emphasis is added).*

This was wrong, the hon arbitrator was to be guided by the laid down principles by not discussing the document that was not admitted as exhibit. Further to that, the fact that the document was annexed to the pleadings but was not tendered as exhibit by itself does not mean a party had intention to bring framed-up evidence with the aim of misleading the Commission as stated at the above quoted paragraph. However, regarding the amount of salary that the respondent was

earning was revealed in the evidence tendered in court. Looking at the proceedings dated 13/09/2022 the respondent (PW1) testified that his salary before the breach of contract was Tshs. 675,000/=. He insisted the same during cross examination. This could be easily proved through a written contract which the employer did not tender in court. **Section 15 (6) of the Employment and Labor Relations Act,** Cap 366 R.E 2019

> *"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."*

Due to the above cited provision, the employer was duty bound to produce the contract. Failure to that he had to disprove the employee allegation that his salary was Tshsy. 675,000/=. The applicant submitted that the Commission was supposed to use the contract which the respondent tendered in court. I have gone through the said contract which was admitted as exhibit P1, it was ending on 1/07/2021. However, as pleaded by the applicant in Respondent's opening statement, there was a new contract which commenced on 1st July, 2021 to 30th June, 2023 which was terminated. So, the employer was duty bound to prove

or disapprove the respondent's allegation regarding his salary. Thus, this ground has no merit and is dismissed.

Coming to the last ground 6(c), the applicant complained that a notice issued to the respondent did not contain a verdict as decided by the Commission but rather a statement of the offense and its explanation. However, having gone through the records of the trial Commission particularly exhibit D1 which reads:

> *"Hii ni kukutarifu kwamba siku ya tarehe 15/07/2021,* ***ulikutwa na hatia ya upotevu wa lita zaidi ya 2500 za mafuta*** *aina ya dizeli ambayo ni mali ya kampuni kupitia ripoti ya fedha na matumizi kwa kipindi cha miezi sita (6) ya mwaka 2021..." (Emphasis is added).*

The quoted paragraph goes contrary to **Rule 13 (2)** of GN 42 of 2007 which provides that:

> *"Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand."*

Thus, guided by the cited provision of the law, a notice sent to the respondent already determined a verdict hence it does not qualify to be a notice as per **Rule 13 (2)** of GN 42 of 2007. Therefore, this ground too is dismissed for want of merit.

As alluded above, it is the holding of this court that there is no need to disturb the finding of the CMA. Consequently, the award of the CMA is upheld, and the application is dismissed for want of merit. Each party is to bear his/her costs of this application and those in CMA.

It is so ordered.

DATED at **ARUSHA** this 6th day of June, 2023.

N.R. MWASEBA

JUDGE