

**IN THE HIGH COURT OF TANZANIA
(LABOUR COURT DIVISION)
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

LABOUR APPLICATION NO. 20 OF 2022

**SAINT AUGUSTINE UNIVERSITY OF TANZANIA.....APPLICANT
VERSUS**

**ANDREW EUGINE KASAMBALA.....RESPONDENT
(From Award of the Commission for Mediation and Arbitration –Dodoma
(J.R. Katto-Arbitrator)**

Dated the 18th of October, 2022

In

Labour Dispute No. CMA/RUV/SON/50/2020

.....

JUDGMENT

3rd May&5th June, 2023

MDEMU, J:.

Saint Augustine University of Tanzania, the Applicant herein, moved this court in terms of the provisions of section 91 and 94 of the Employment and Labor Relations Act, 2004 and Rules 24 and 28 of the labour Court Rules, GN. No.106 of 2007 on application for revision. The application which is by way of notice of application, chamber summons and supported by the affidavit of Fr. John Massaka Chacha, principal officer of the Applicant, is on the following orders:

- 1. That, this honorable be pleased to exercise its revision jurisdiction, call for and examine the records of proceedings before the Commission for Mediation and Arbitration for Dodoma in labour Dispute No. CMA/RUV/SON/50/2020 for the purpose of satisfying itself as to the correctness, legality and or propriety of the Award made by Arbitrator [Hon. J.R.Katto] dated 18/10/2022*
- 2. If the court find the incorrectness, illegality and impropriety, set aside the awards and the orders made therein.*
- 3. Any other relief as this honorable court may deem fit and just to grant under the circumstances.*

On the 3rd of May, 2023, I heard parties to this application. The Applicant was represented by Mr. Innocent Bernard and the Respondent was represented by Mr. Majaliwa Wiga, both learned Advocates.

In support of the application, Mr. Bernard adopted affidavit of Fr. John Massaka Chacha in support the application to form part of his submissions and thereafter submitted that, the CMA erred in granting salaries claim for

the months of June 2016 to September 2017 as they were out of time and there was no condonation. He said that, the Respondent filed both referral, condonation (CMF1 and F2) at the same time. However, in CMA F2 he said that, the Respondent was to state the degree of lateness. He argued that, it was 17 months counting from 15th December, 2018 to June 2020 when the matter was referred to the CMA. He argued therefore that, the same was to be dismissed in terms of section 3(1) of the Law of Limitation Act, Cap. 89. He also cited the case of **Barclays Bank (TZ) Ltd vs. Phylisian Hussein Ncheni**, Civil Application No. 19/2016 (unreported) to bolster his argument

He further submitted that, even when the CMA found the claims in time, it was the duty of the Respondent to prove his claim on the balance of probability and not to shift the burden of proof to the Applicant Employer. He added also that, at the CMA the matter was not on fair termination. but on claims of salaries and gratuity. He cited the case of **Gidion Odongo and Two Others vs. Pamba Engineering Ltd. and Two Others**, Labour Dispute No. 1/2017 (unreported) in support thereof.

It was his submissions further that, the evidence on salary arrears besides oral evidence, there is no any other evidence that he was not paid such salaries. He said that, evidence of the Applicant shows that the

Respondent was paid through bank account. He said therefore, evidence was to be his bank statement. On this, he cited the case of **Roberty Mhando and Another vs. Registered Trustees of Saint Augustine University**, Civil Application No. 44 of 2020 (unreported) to support his argument.

It was his argument further that, exhibit D2, a letter by Respondent to Applicant on payment of salaries advances shows that, the Respondent owed no claim because had he owed his employer any salary arrears, then he would have claimed for such arrears and not loan advances. He contended further that, the Respondent acknowledged to have been paid his salaries from January 2018 towards the end of his contract on 14th December, 2018.

With regard to gratuity, he said to be a contractual one and not a legal requirement. He cited clause 5 of the Contract (P1) on the right to gratuity subject to satisfactory implementation of the contract. In the instant case, the Respondent was permitted to go on study leave from June 2016 to October 2019. He argued that, in exhibit P3, the Respondent was released of contractual responsibilities, therefore satisfactory completion of contractual terms was not fulfilled hence gratuity was not supposed to be paid. He added that, there was no evidence from the Respondent to the

effect that, he was allowed to teach while on study leave. He did not teach as the station was at Songea and the Respondent was at China.

It was his further contention that, calculation to determine gratuity was not known as to how in two years it reached 5,552,000.67. He said that, gratuity and salaries were subject to taxation as employment income and which are subject to clearance. He added that, the Respondent never made clearance to date at the Applicant's premises. He thus prayed the CMA award be quashed and in case is upheld, then such benefits be subject to taxation and clearance.

In reply on gratuity, Mr. Majaliwa Wiga submitted that, no evidence was adduced by the Applicant to prove that, the Respondent has not completed his two years contract as to require non-payment of gratuity. It was his submissions that, since the Respondent completed his contractual terms, he was entitled to gratuity as per the terms of the contract. He added that, parties are bound by their terms as stated in the case of **Higher Education Students Loan Board vs. George Nyatega**, Labour Revision No. 846 of 2018 (unreported).

Regarding unpaid salaries, he argued that, from 2016 to September 2017, the Respondent was not paid his salaries. He said that, salary slips submitted by the Applicant is evident that the Respondent was paid salaries of October, November and December, 2017 only. In his view, this contravenes section 15(6) and 27(1) (a-c) of the Employment and Labour Relations Act. He added that, it was a duty of employer to faulty allegation that he didn't pay the Respondent. He cited the case of **Tarmo Mohamed and Another vs. Rahkan and Others** (1959) EA 567 to support his argument.

On the issue that the claim was out of time, he submitted that, the claim was filed within time prescribed by the law. In case it was not, he said that, the Applicant was to raise it as a preliminary objection. It was his view therefore that, the CMA award was correct and thus prayed the same be upheld.

In rejoinder, Mr. Innocent Bernard reiterated his submissions in chief on the issue of gratuity. Regarding salary arrears, he observed that, section 15 (6) of Employment and Labour Relations was misconceived by the Respondent as it does not relate to legal duty to the Applicant to prove payment of salary but rather mode of payment of the same. It was his

submissions that, salary slip tendered were in relation to claims as in the claim form. On the issue of time limitation, his observation was that, it is a matter of jurisdiction hence can be raised at any time. Parties ended their submissions this way.

In resolving the contentious positions of the parties, I will adopt approach of the parties by dealing with subjects. They are two, one is gratuity and the other is unpaid salaries. Starting with gratuity, I agree with both parties that the basis should be the contract entered between the Applicant and the Respondent. This is also the position of the Arbitrator in the Award ordered. For clarity, clause 5 of the Employment contract (P1) is reproduced as hereunder:

5. Gratuity.

Fifteen (15) percent of the total basic salary drawn during the period of the agreement will be paid after satisfactory completion of the contract, including leave pay when contract is not renewed.

In this, there is no dispute that, the Applicant (employer) and the Respondent (employee) entered into a two years employment contract on

15th of September, 2016. According to the foregoing quoted paragraph of the contract on gratuity, the same is payable subject to satisfactory completion of the contract. In this one, parties are at variance as to what amounts to satisfactory completion of the contract. The Applicant's view is that, there was no satisfactory completion of the contract to warrant the payment of gratuity because the Respondent was on study leave and there is no evidence that he was summoned to teach during the period. The Respondent thought this to be an afterthought.

Going by the terms of the contract, there are only two forms of termination from service; one is through three months' notice from either party (clause 9) and two is voluntary retirement (clause 13). As the Respondent was neither terminated nor summarily dismissed in terms of clause 10 on gross misconduct, then being on study leave may not be interpreted want of satisfactory completion of the contract. In fact, the Applicant is the one who permitted the Respondent to go for studies, and thought study paid leave is permissive under the circumstances. Again, in exhibit P3, study leave permission and contract, there is no clause mandating the Respondent to teach and more so, the Respondent was not supposed to engage in any type of employment. In each semester of study, his duty was

to furnish progressive report to the employer. The Applicant therefore may not advance views on satisfactory completion of the contract basing on teaching during vacation. After all, he was not called anyway. It is my considered view therefore that the Respondent is entitled to gratuity in terms of clause 5 of the employment contract (P1). The CMA therefore got it right.

Regarding unpaid salaries, the application and supporting affidavit to CMA shades a light. In paragraphs 3, 4 and 5 of the Respondent's affidavit sworn on 26th of October, 2020, the Respondent's claims was on gratuity, unpaid study fees and failure by the Applicant employer to remit NSSF contributions. For clarity, the said paragraphs are reproduced as hereunder:

3. That, upon the end of my contract, I was entitled for the payment of gratuity to the tune of Tshs.9,558,000/=

4. That, at the time of termination I was claiming unpaid fees for my Mmed studies worth Tshs. 11,500,000 per annum for two years, that is, Tshs.23,000,000/= as per contract agreement. A copy of sponsorship agreement and e-mail from respondent committing to pay school fees is annexed herein marked DRT-2

5. That, I also discovered late that the Respondent never committed NSSF contributions for the whole time of my contract except some four months in the whole period of thirty six months of my contract. A copy of my NSSF account statement is herein marked DRT-3

As there were no claims for salary arrears/ unpaid salaries, there was no justification on the side of the CMA to award unpaid salaries, an award which has no basis in the application. Well, in CMA F.1, the Respondent claimed unpaid salaries to the tune of Tshs. 37,170,000/=. The affidavit however is silent and has not at all pointed out months not paid. Since there is no specific months claimed as unpaid salary, the Applicant may not be condemned for producing salary slips of October, November and December, 2017 only. On that note, it was wrong for the Arbitrator to hold that the Applicant owe the Respondent salary to the tune of unsupplied salary slips as noted at pages 11-12 as hereunder:

Kwa kuangalia KIELELEZO D-1 mlalamikiwa hakuwasilisha salary slips za miezi inayolalamikiwa kwa mlalamikaji (Jun1, 2016-Disemba, 2017) isipokuwa miezi ya Oktoba, Novemba na Desemba 2017. Kwa kuangalia KIELELEZO D-1, Mlalamikiwa

alifanikiwa kuwasilisha salary slips za miezi ya Oktoba, Novemba na Disemba tu. Kitendo cha mlalamikiwa kushindwa kuwasilisha ushahidi wa maandishi kuthibitisha kumlipa mlalamikaji mishahara ya kuanzia Juni, 2016 hadi Septemba, 2017, kinaifanya Tume iamini madai ya mlalamikaji kuwa hakulipwa mishahara hiyo. KIELELEZO D-2 pekee haitoshi kuifanya Tume hii iamini kuwa mlalamikaji alilipwa mishahara hiyo kama kawaida.

It is my considered view that, the Respondent has not established to have not been paid salaries for the entire contract period. As alluded, **one**, the affidavit is devoid of such claims. **Two**, CMAF1 is not specific of which salaries were not paid and **three**, the supplied salary slips is not evidence on unpaid salaries to months whose slips were not supplied. I am aware and also as per the record that, the Respondent's salary was paid through the Respondent's bank account. It was the duty therefore of the Respondent also to produce evidence to that effect to prove unpaid salaries. Bank statement for that matter would have met the purpose on his side.

Regarding unpaid allowances and fees by the Applicant to the Respondent while on study, the landing criteria is exhibit P.3, the so called study leave permission and contract. In clause 4, it is stipulated that:

4. Bursary: Your study has a joint scholarship; partly self-sponsored and partly sponsored by AJUCO/SAUT.

As noted in the foregoing clause, there is no agreed structural apportionment or percentage on who should contribute what amount in the shared responsibility. In absence of such undertaking, the Respondent may not claim what was not agreed and is not in the knowledge not only of the Applicant herein but also of the Respondent Claimant. In this one, the Arbitrator got it right to dismiss such claims as observed in pages 10-11 of the award as hereunder:

Baada ya kupitia ushahidi wa pande zote kuhusu dai hili, ni mtazamo wangu kuwa msingi wa dai hili ambao ni kipengele cha 4 cha KIELELEZO D-2 hakisemi malalmikiwa atamchangia mlalamikaji kiasi gani cha fedha kwa ajili ya ufadhili wa masomo yake, hivyo kuwia vigumu Tume hii kutoa amri ya malipo juu ya dai hilo. Hata hivyo, wakati akiulizwa maswali ya dodoso (cross examination) malalmikaji alikiri kuwa aliwahi kulipwa na malalmikiwa

shilingi milioni 4.5 kama sehemu ya ufadhili huo. Kwa minajili hii, Tume inaona Mlalamikaji hana madai zaidi ya research and scholarship.

By the way, this application for revision was initiated by the Applicant and not the Respondent. The latter therefore may not raise such claims as to unpaid fees unless there is cross appeal/ revision in this application for revision if at all is permissive.

For the foregoing, this application is allowed to the extent that the award of the CMA in respect of unpaid salary and claims on unpaid fees is hereby quashed and set side. Complaint of the Applicant regarding gratuity is hereby dismissed. As said, the Respondent is entitled to gratuity in terms of clause 5 of the employment contract (P1). It is so ordered.



Gerson J. Mdemu
JUDGE
05/06/2023

DATED at DODOMA this 5th day of June, 2023.



Gerson J. Mdemu
JUDGE
05/06 /2023