IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 13 OF 2023

(*From Labour Dispute No. CMA/MZA/NYAM/321/03/2022*)

TAHSEEN SALIM MAWJI ---------- **APPLICANT**

VERSUS

JEET PHARMACY----------**RESPONDENT**

JUDGEMENT

July 24th & August 18th, 2023

Morris, J

The applicant above invites this court to revise the decision of the Commission for Mediation and Arbitration for Mwanza (hereinafter, **CMA**). He has three grounds to envelop his invitation. That is: whether the CMA was correct to base on a salary scale in the employment contract in exclusion of other evidence to the contrary; whether the CMA was bound to draw adverse inference against the respondent for failure to call material witnesses; and whether the CMA was biased to disallow the applicant to call independent witnesses for it to award just reliefs to parties.

The application is supported by the affidavit of the applicant. It is, however, contested by the counter affidavit of Susan Nana Gisabu. Parties argued it by way of written submissions. The applicant filed his submissions through Advocates Salehe Nassoro and Innocent Bernard whereas the respondent enjoyed representation of Advocate Susan Nana Gisabu.

Per the record, parties' litigation relates to the breach of employment contract between them. The subject contract was from 1/10/2020 to 30/10/2022. Vide it, the applicant was employed by the respondent as supervisor. However, on 20/12/2021 the respondent terminated the employment allegedly due applicant's misconduct. The disputed was lodged to the CMA which found that the respondent had breached the contract of employment.

Consequent to the foregoing findings, the applicant was awarded a total of Tshs. 13,153,845.9 being an aggregate of salary for 10 months and 10 days pending in the breached contract (Tshs. 10,384,615.3); 20 days' salary for December 2021 (Tshs. 769,230.6); one month's salary in lieu of

the termination notice (Tshs. 1,000,000); and one paid annual leave (Tshs. 1,000,000).

The applicant is disgruntled with the scale used in the foregoing arithmetic. To him, wrong application of the scale by CMA lead to an unjust remedy. Thus, the present revision hinges only on the scale of salary used by the CMA to compute the awarded reliefs. Whereas the applicant claims his last salary before termination being Tshs. 2,750,000; his employer-respondent contends it to had been Tshs. 1,000,000.

I will consider respective parties' submissions while discussing each ground of revision. From the outset, I record that this being the second court to determine the matter at issue, proceedings herein shall take a form of rehearing. In law, this Court enjoys the mandate to re-appraise, re-assess and re-analyse the evidence on the record. Therefrom, it may arrive at its own conclusions on the basis of disclosed reasons. See cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga***

Hydro Limited v Commissioner General Tanzania Revenue Authority, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited v K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

The first ground interrogates the CMA's reliance on the salary scale provided in employment contract without considering other evidence proving otherwise. It was submitted that the net salary of the applicant at the time of termination was Tshs. 2,750,000/= not Tshs. 1,000,000/=. The applicant argued further that he was receiving his pay from his employer through different modes. That is, the respondent paid him through bank cheques, M-pesa transactions and by cash. His counsel referred to the testimonies of both the applicant and the respondent's accounts and human resource officer - DW1 (at pages 41 and 42 of CMA proceedings).

It was also submitted that the applicant was receiving the monthly salary through his DTB bank account No.7132172002 from mobile No. 0764989274 registered in the name of **Albert Kyaruzi**. The said Kyaruzi was one of the employees of the respondent at Bukoba Branch. Further, the applicant referred to pages 35 and 40 of the proceedings at which DW1

confirmed that the respondent's employees may work at one branch but get paid by/from another branch. To the applicant, the payment transactions remained constant for months as it appears in page 42 of the CMA proceedings.

Further, the applicant's counsel contended that paragraphs 5, 6 and 7 of the affidavit in support of the application were not controverted by the respondent. Thus, the latter conceded that the averments of the applicant were truthful. Reference was made to the case of ***East African Cable (T) Ltd v Spencon Services Ltd***, Misc. Application No. 61 of 2016 (unreported). Basing on the cited case, the applicant submitted that it is undisputed that his salary at the time of termination was Tshs. 2,750,000/=; and that the mode of payment was cash, cheque and e-money transfers. He concluded by arguing that in the opening statements there was no issue raised regarding salary.

In reply, it was submitted by the respondent that CMA correctly evaluated evidence before awarding the reliefs. To her, remedies at pages 9 and 11 of CMA award were justifiable. She insisted on the principle is that

parties are bound by their contracts. The Court was also referred to the cases of ***Yukos Enterprises E.A Ltd v Regional Administrative Secretary of Mwanza Region and another***, Revision No. 6 of 2019; and ***Unlever Tanzania Ltd v Benedict Mkasa t/a Bema Enterprises***, Civil Appeal No. 41 of 2009 (both unreported). Therefore, to the respondent, CMA was defensible to base on Tshs. 1,000,000/= for it is the salary provided by the contract. It was further maintained that DW1 refuted the applicant's allegations that he was paid from various sources. Reference was made to pages 26, 41, 42 and 60 of the CMA proceedings.

Further, the respondent argued that, affidavits should not contain objections, legal arguments or conclusion. Therefore, she was correct to generally dispute paragraphs 5, 6 and 7 of the applicant's affidavit without further explanations in order to avoid raising arguments in the counter affidavit. In this regard, I was referred to the case of ***Uganda v Commissioner of Prisons, Ex parte Matovu*** [1966] EA 514. In the fine, the respondent reiterated that the arguments regarding the salary scale at CMA were fused in determination of parties' reliefs.

Rejoining, the applicant argued that in labour law jurisprudence, employment contracts bear unique features calling for flexibility during interpretation. However, he did not cite any authority to such effect. He further cited section 27(2) of ***the Employment and Labour Relations Act***, Cap 366 R.E. 2019 to cement his argument that the salary slip sufficed to prove otherwise because it also contains statutory deductions.

Dispassionately, I will consider the submissions above. The only question for determination, to me, is the exact salary that the applicant earned at the time of his termination. I have no issue with the respondent's argument that parties are bound by terms of contract. I am also alive to the philosophy that when a person of capacity (especially who can read and write) executes a document; he cannot later on be allowed to disown it. See, for instance, the case of ***Sluis Brothers (E.A) Ltd v Mathias & Tawari*** [1980] TLR 294. It is also a cardinal principle of law that, generally; no oral agreement or statement shall be admitted to disprove contents of written contract as per sections 100 and 101 of ***the Evidence Act***, Cap 6 R.E 2022.

See, also, ***AMICO Ltd v Salu Limited***, Civil Appeal No. 91 of 2015 (unreported).

Nevertheless, the foregoing general rule is subject to some exceptions. The proviso to section 101 of ***Cap. 6*** (*supra*) has it a principle that;

> *"Provided that–*
> *(a) any fact may be proved* ***which would invalidate any document, or which would entitle any person to any decree or order*** *relating thereto such as fraud,* ***intimidation****, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;*
> *(b) the existence of any* ***separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms*** *may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;"* (emphasis added).

In line with the above excerpt, for oral facts and agreements to be entertained by the court to controvert or later a clearly executed written agreement there are fundamentals to be settled first. These include, fraud,

intimidation, illegality or mistakes and silence in the document. Nevertheless, such oral facts should not be inconsistent with terms or formality of the document. In the matter at hand, one of the stated elements, particularly intimidation, was mentioned by the applicant herein. At page 4 and 10 of the proceedings the applicant said that he was forced by the director to sign the contract of Tshs. 1,000,000/=.

However, no conclusive proof that the applicant was indeed placed under intimidation. The record has no details of such coercion. It is not clear as when it was exerted on him; its form (torture, mistreatment, malpractices, etc.); for how long it did exist; and mitigations or reaction which he mounted in retaliation. In labour law, if he was indeed under constrained employment relationship, he could have initiated constructive termination proceedings and achieve the intended objective.

To the contrary, the applicant is recorded as having testified that the payment of more than the figure in the contract was out of agreement. Logically, intimidation and agreement cannot co-exist in one boardroom. Thus, I find myself loath to entertain an argument that there was conclusive

oral agreement between the parties or circumstances under the parlance of the proviso to section 101 of ***Cap. 6*** (*supra*).

Further, in this matter, the appellant had two consecutive written contracts of employment (exhibit P1 and P2). Under the first contract, he was employed as a Sales Officer from 1/10/2018 to 01/10/2020, whereas in the second contract he was the Supervisor from 1/10/2020 to 30/10/2022. In both contracts the salary was Tshs. 1,000,000/=. At page 4 of the proceedings the applicant testified the salary to be Tshs. 2,500,000/= in the first term of contract payable through bank (Tshs. 900,000/=); cash (Tshs. 600,000/=); and M-pesa (Tshs. 1,000,000/=). In the second tenure of employment, he testified at page 5 of the proceedings to be paid salary of Tshs. 2,750,000/= payable through bank (Tshs. 900,000/=); cash (Tshs. 600,000/=); and M-pesa (Tshs. 1,250,000/=). Exhibit P3 (bank statement) indicates, at diverse dates, entries of Tshs. 900,000/= (from the respondent) and M-pesa Transactions of Tshs. 1,000,000 and 1,250,000/= (from 0764989274).

In his testimony DW1 (Accountant and Human Resource Officer) of the respondent testified to the effect that the applicant was paid salary of Tshs. 1,000,000/-. He further (page 26 of CMA proceedings) prayed to tender NSSF contribution remittance list and payroll as exhibits. Only the NSSF list was admitted as Exhibit D1. The record is silent regarding the payroll. All the same, during cross examination, DW1 testified that there was deduction 10% from the applicant's salary for NSSF contributions (exhibit D1). Further, he testified that there was no acknowledgement of salary payment by the applicant though exhibit P3 contained Tshs. 1,250,000/= as mobile phone transactions. He also stated that the applicant was paid in cash or cheque (pages 41 and 60 of proceedings).

A very critical question to be answered in this connection is if the foregoing inconsistencies in entries in the applicant's bank account amounted to amendment or rectification of salary in the employment contract. Straightaway, I am inclined to disaffirm. More than a few reasons account for my stance. **One**, apart from Tshs. 900,000/= all other entries in the subject exhibit (P3) do not correspond directly with the employer. The former amount

consistently seems to be made by Jeet Pharmacy. The rest of the payments bear different references.

Two, if the mobile money transfer is the mode to go by, the link between the phone number and the employer is disjointed. It is undisputed that one Kyaruzi, in whose name the number was registered, was the respondent employee. Nevertheless, there is no evidence to prove that the said Kyaruzi was mandated by the respondent company to pay salary to the applicant. **Three**, CMA record bears inadequate proof of the existence of oral agreement acknowledging such amendment. For instance, details of parties to and the time for the alleged agreement are not disclosed.

Four, the employment contract (exhibit P2) was categorical in respect of amendment procedures. Clause 10 (d) thereof provided that:

> *"**d). Mabadiliko katika Mkataba***
> *Mwajiri atakuwa na haki ya kufanya mabadiliko katika kipengere (sic) chochote katika Mkataba huu, Mwajiriwa atapewa taarifa kuhusu mabadiliko hayo kwa maadishi. Ikiwa mabadiliko ni ya msingi Mwajiri atampatia mwajiriwa taarifa kwa maadishi ndani siku zisizo pungua siku 28, vinginevyo mwajiriwa apinge kwa maandishi, badiliko hilo litakuwa limekubaliwa."*

After that evaluation of evidence and the analysis given, one thing is clear: the applicant was duty bound to prove his salary to be Tshs. 2,750,000/=. In view of the fact the respondent maintained stance that the salary was Tshs. 1,000,000/=; the burden remained that of the applicant to prove otherwise. This is in line with section 110 (1) of ***Cap 6*** (*supra*); ***Obed Mtei v Rakia Omari*** [1989] TLR 111; and ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported).

The foregoing onus was, in this case, intensified by the fact that the applicant alleged that he received part of his salary in cash. However, it was not evident from whom he received such money; on what dates; at what location; and the amount so given. On his part, the respondent - yes DW1, acknowledged various modes of payment being used by the respondent. But such acceptance was less helpful. For instance, it also did not unpuzzle the current interrogation of from whom, when, how and why such encashments were made to the applicant. In the interest of exactness, the subject witness was not committal as to whether or not such payment was being made to tally with Tshs. 2,750,000/= or Tshs. 1,000,000/=. That is, was cash paid as

part of the former or latter figure; or even of a different aggregate altogether? Such imprecision was supposed to be unclogged by the applicant.

I need not underpin the principle that, in civil cases, the standard of proof is on balance of probabilities. See, for example, ***Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)***, CoA Civil Appeal No. 118/2014 (unreported). In the present matter, the applicant has left the Court with insufficient evidence to arrive at a firm deduction that his clearly established salary was Tshs. 2,750,000/= when his employment was terminated.

From the available evidence on record; and being guided by the above authorities and analysis, I have arrived at the conclusion that the applicant did not manage to sufficiently invalidate the amount in exhibit P2. Therefore, CMA did not err in law to base on the salary scale provided in the employment contract. The first ground is accordingly found to be feeble.

Regarding the 2nd and 3rd grounds, it was the submission of the applicant that the CMA was required to draw adverse inference against the respondent for failure to call important witnesses. According to the applicant,

two employees were very indispensable witnesses. These are Satish Kumar who transferred Tshs. 1,250,000/= from account No. 7132172001 to the applicant's account; and Albert Kyaruzi who habitually aired money to the applicant's account through M-pesa transactions.

In reply, it was submitted that the applicant unsuccessfully prayed to call the witness at CMA. That is, the arbitrator rightly refused such request for it had the effect of prolonging the matter. Further, the applicant had already closed his case. The respondent also submitted that it was the duty of the applicant to call those witness before closing his case.

I have considered the submissions of both parties in this regard. The applicant faulted the CMA for not drawing adverse inference against the respondent who supposedly failed to call material witness; and/or denying the applicant the right to call them. I have carefully read the ruling of CMA in this connection. Reasons advanced by CMA to deny the applicant to call that witnesses are twofold. On the one hand, the appellant's request was after closure of his case. Moreover, CMA is not under obligation to build the case of either party, on the other.

It is cardinal principle that, when a part fails to call a material witness to the case, the court may draw adverse inference that if he was called, he would have testified in favour of the adverse party. See the cases of ***CRDB Bank PLC v Africhick Hatchers Ltd and 2 Others***, Commercial Case No. 97 of 2014; and ***Ahiya Eliau Lukumayi v the Registrar of Titles and 2 others***, Land Case No. 97 of 2011 (both unreported),

In the present case, the Court is inclined to uphold the CMA's decision of denying the applicant to call the said witnesses. At that time, the applicant had already closed his case. Further, as the said witnesses were the respondent's employees, it would have the effect of pre-empting or undermining the respondent's case. Moreover, as DW1 played a double role of the respondent's accountant and human resource personnel (pages 24-25 of proceedings); was, to me, the most suitable witness to handle both portfolios in so far as the applicant's plight was under concern.

As I descend towards conclusion, two aspects deserve brief comments. In the course of submitting for his application, the applicant raised two interesting arguments. The first one is that, certain paragraphs in the affidavit

relating to salary of the applicant were not controverted. Hence, the respondent conceded to the applicant's salary being Tshs. 2,750,000/=. On her part, the respondent submitted that the depositions in the counter affidavit first were couched in a style that would not transgress the law governing affidavits.

In such a rivalry encounter, I find that both counsel have, with adequate respect, misdirected their approach to these proceedings. The application before me involves revising the CMA proceedings and award. The affidavits of parties hereof provide the justification for or against this Court to revise and fault the CMA pursuant to the raised grounds. In no justifiable way, such depositions can be taken to introduce evidence in the record of the trial CMA through the back door. That is, the affidavit in support or counter of the application, is not part of the record intended to be revised. I will rest this aspect at that knot.

The other argument was raised in terms of severance allowance. The applicant argued this aspect in his submissions. However, none of the presented grounds of revision relates to the subject allowance. Therefore,

claims thereof are mere afterthought and cannot be entertained. Law abhors such strategy. Courts are enjoined to deal with matters before it.

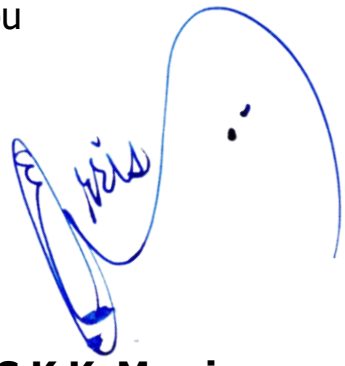
In the upshot, I find the present application to lack merit. The award of the CMA regarding the relief for the applicant is, therefore, not revised in his favour as prayed. Consequently, this application stands dismissed for want of merit. I make no order as to costs. It is so ordered and the right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

August 18th, 2023

Ruling is delivered this 18th day of August 2023 in the presence of Tahseen Salim Mawji and his advocates, Mr. Salehe Nassoro; and the respondent's counsel, Ms. Susan Nana Gisabu



C.K.K. Morris

Judge

August 18th, 2023