IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION ARUSHA SUB-REGISTRY

AT ARUSHA

REVISION NO. 30 OF 2023

(C/F Labour Dispute No. CMA/ARS/ARS/179/22/02/23)

K.K.K.T DAYOSISI YA KASKAZINI KATI.....1ST APPLICANT

SHULE YA SEKONDARI KIMANDOLU.....2ND APPLICANT

Versus

NICKSON MARCO.....RESPONDENT

JUDGEMENT

07th Dec 2023 & 15/02/2024

TIGANGA, J.

This is an application for revision filed by the applicants, K.K.K.T Dayosisi ya Kaskazini Kati and Shule ya Sekondari Kimandolu hereinafter referred to as the 1st and 2nd applicants respectively. The application intends to challenge the award passed in favour of the respondent by the CMA in Labour Dispute No. CMA/ARS/ARS/179/22/02/23).

To understand what brought about this revision, it is important to trace the background of the matter albeit briefly. Deciphered from the record, the Respondent was employed by the Applicants with effect from 03rd July 2004 on a permanent base contract in the position of Chief Chef "Mpishi Mkuu".

It is alleged that; on 10th March 2022, the Respondent was suspended from work, and at the time when he was suspended, he was claiming salary arears of 23 months from December 2019, totaling, Tsh 6, 720, 830/=, computed from the amount he was being paid i.e Tsh. 292, 210/= per month. That is according to CMA Form No.1

The respondent referred the matter to the Commission for Mediation and Arbitration (herein CMA) claiming his salary arrears. Moreover, at the time when the mediation had failed and the matter went to arbitration, the claim had already accumulated to 35 months, equal to Tshs. 10, 227, 350/=. After a full hearing, the CMA found that the Respondent successfully proved to have a valid claim of unpaid salary arrears, it consequently ordered the applicants to pay the Respondent the salary arrears of 40 months equal to Tshs. 11, 688, 400/= at the time when the award was pronounced.

Dissatisfied by the CMA's award, the Applicants filed the present application seeking the Court to revise the award based on the following issues: -

i. Whether the testimony of the Respondent's witness was full of contradictions and highly doubtful deserving not to be accorded weight by the Arbitrator.

ii. Whether the evidence of the Principal Officer of the 1st Applicant proved that the Respondent's suit is bad in law and unmaintainable for suing a non-existing party unknown to the law as per pleadings and evidence.

iii. Whether the Arbitrator was correct in holding that the Respondent had claims of salary arrears against the Applicant and failed to consider Exhibit D-1 which negated that fact.

iv. Whether the Arbitrator was correct in holding that the Respondent was still entitled to receiving salaries from the employer during suspension and without working.

v. Whether the Arbitrator was justified in law in holding that the Respondent was given what is not prayed in the CMA Form No. 1 that is to say salaries of 23 months at the tune of Tshs. 6, 720, 830/=.

vi. Whether the Arbitrator underscored the Settlement Deed filed before this Honourable Court as admitted by the Commission as Exhibit D-1.

vii. Whether the trial Arbitrator failed to consider Exhibit D-1 in his award which was tendered and admitted by the Commission as Exhibit.

viii. Whether the CMA proceedings and Award issued on the 20th day of April 2023, before Hon. Lomayan Stephano, in Labour Dispute No. CMA/ARS/ARS/179/22/02/23 is improper, unjustified, biased, unfair, irrational, and has occasioned a

grave miscarriage of justice against the Applicants warranting this court to revise the Award and set it aside.

With leave of the Court, the hearing of this application proceeded by way of written submissions. During the hearing, the Applicant enjoyed the services of Mr. Jeff George Sospeter, learned Counsel. Whereas, Mr. Emmanuel Shio, learned Counsel represented the Respondent.

I appreciate the well-researched submissions filed by both counsel. However, to make this judgment not unnecessarily long, I will not reproduce the submission as filed but will consider them in due course of constructing this judgment. Now, after considering the party's pleadings, the rival submissions, the record of the CMA, as well as relevant laws, I find the following issues that call for determination, ***One,*** *whether the Respondent proved that he had valid claims for unpaid salary arrears from December 2019, against the Applicant? While deciding this issue I will be resolving issue No. (i) to (vii).* ***Two,*** *whether the Arbitrator properly awarded the Applicant or in other words whether the award was proper, justified, unbiased, fair, rational, and has not occasioned a grave miscarriage of justice against the Applicants*

warranting this court to revise the Award and set it aside, as framed in the (viii) issue.

To start with the first issue, as to whether the Respondent proved that he had valid claims of unpaid salary arrears from December 2019, the records of the CMA, on pages 6 and 7 of the proceedings indicate that the Applicant admitted that the Respondent had a valid claims of unpaid salary arrears because of the decreased number of students admitted to school. Further, the record on page 5, indicates that on 13th May 2022 when he filed his claim before the CMA, he claimed the salary arrears of 35 months equal to Tsh. 10, 227, 350/=, the fact which was not denied by the Applicant.

It was Mr. Jeff George's submission that, the parties are bound by the pleadings. In CMA Form No. 1, the Respondent claimed Tshs. 6, 720, 830/=, equal to the salary of 24 months. He did not amend the CMA Form No.1, but in his testimony, he told the CMA that he was claiming 35 months' salary arrears. He argued further that, on page 4 of the Award, indicates that he was awarded 40 months which is contrary to the law and against what he pleaded.

In response, Mr. Emmanuel Shio submitted that page 5 of the proceedings of the CMA is clear. At the time the claim was lodged/filed

the salary arrears were 24 months, and when he testified, he was claiming 35 months, while up to the time of the award, it was already 40 months. He argued further that, the employer was duty-bound to pay the Respondent in full until his discharge from duties. The principle of being bound by pleadings cannot apply in the case at hand.

In the bid to be elaborate, I find it important to define the term pleadings which in law means, a written presentation by a litigant in a lawsuit setting forth the facts upon which he/she claims legal reliefs or challenges the claims of his opponent. It includes claims and counterclaims but not the evidence by which the litigant intends to prove his case. **See: Pleading in law - Encyclopedia Britannica http://www.britannica.co. topic**.

That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their pleadings and that any evidence produced by any of the parties that is not supportive or is at variance with what is stated in the pleadings must be ignored. See; **James Funke Gwagilo vs. Attorney General,** [2004] U R 161; **Scan Tan Tour vs The Catholic Diocese of Mbulu,** Civil Appeal No. 78 Of 2012, **Lawrance Surumbu Tara vs. The Hon. Attorney General and 2 Others,** Civil Appeal No. 56 of 2012; **Charles Richard**

Kombe T/A Building vs. Evarani Mtungi And 3 Others, Civil Appeal No. 38 of 2012, and **Barclays Bank (T) vs Jacob Muro,** Civil Appeal No. 357 of 2018 **(all unreported)**.

In the latter case, the Court cited with approval an excerpt in an article by **Sir Jack I.H. Jacob** bearing the title, "**The Present Importance of Pleadings**", first published in **Current Legal Problems (1960) at p. 174** whereby the author among other things said:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way* ***subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he is to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it, other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings..."*** [Emphasis supplied]

In the bolded part of the excerpt quoted above, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such pleadings except where the court has granted leave to amend the requisite pleadings.

Guided by the principle stated herein above, it is crucial at this juncture to initially revisit the Respondent's pleading as appearing in the CMA Form No. 1, on page 3 of the record which pleads as follows:

> *"Paragraph 3: That sometime in December 2019 the Respondent was not paid up his salary cumulatively, and on 10/03/2022 was suspended from work without being paid his salary arrears for a total of 28 months."*

Furthermore, the reliefs claimed by the Respondent included payment of salary arrears since December 2019. According to what appears in the CMA Form No. 1, and the evidence adduced during the mediation and Arbitration before the CMA, it is categorical that, the Respondent claims for salary arrears started in December 2019 until when he would be discharged from duties. Thus, on account of what is evident in the pleadings and records of the CMA, I concur with Mr. Shio that, the CMA was correct to hold that the salary arrears were to be paid in full until the Respondent is discharged from his duties, i.e. terminated from employment. This is because suspension from work does not

terminate or end the employment of the employee. Therefore, since when the disputes were being adjudicated the employee was still under suspension, he is entitled to salary arrears for all 40 months, equal to Tshs. 11, 688, 400/= at the time the award was pronounced. With respect, I find Mr. Jeff to have misdirected himself when submitting that, there is a variance between what is pleaded and what was awarded to the Respondent. In my considered view, that argument was based on misdirection because the respondent was still in his employment when his case was being heard.

Having carefully perused the pleadings and evidence on records, it is clear that the Advocate for the Applicant misdirected himself on the difference between the correctness in the computation of salary arrears and variance in what was pleaded, which this Court will elaborate in detail as it goes by. The formula of how the computation was supposed to be done will soon be made clear and the reasons as to why the computation should be that way will also be given in due course.

In respect of the second issue, *whether the Arbitrator properly awarded the Applicant, or in other words whether the award was proper, justified, unbiased, fair, rational, and has not occasioned a grave*

miscarriage of justice against the Applicants warranting this court to revise the Award and set it aside, as framed in the (viii)

I have carefully considered Mr. Jeff's arguments as adopted from the Affidavit of the Principal Officer of the 1st Applicant Michael Beda Moshi (above-mentioned). According to him the failure of the Arbitrator to analyze and accord weight and value to the evidence on record renders the award to suffer impropriety, unjustified, biased, unfair, and irrational, and has occasioned a grave miscarriage of justice against the Applicant warranting this court to revise the Award and set it aside.

Mr. Jeff submitted further that the proceedings were illegal because the respondent sued the non-existing party. The parties in the case were K.K.K.T Dayosisi ya Kaskazini Kati and Shule ya Sekondari Kimandolu. However, the respondent was supposed to sue K.K.K.T only. In support of his submission, Mr. Jeff referred to the case of **Jung Hwan Kim and Another vs Tanzania Presbyterian Church,** Civil Case No. 98 of 2019, High Court of Tanzania, (Unreported).

He argued further that, the Respondent wanted to be paid while he had already been paid by the Applicant. He invited this court to look at paragraph 10 of the Affidavit, exhibit D1, a deed of settlement, and averred that the Arbitrator failed to coordinate the payment. He further

submitted that; the Respondent had already received party payment of his claim and went on to quote paragraph 8 and stated that the Respondent has not been attending to work while he was paid.

Lastly, Mr. Jeff prayed for this court to give an award in favour of the Applicants with costs and order the respondent to go back to work. Mr. Jeff added that what is done by the Respondent is an abuse of the court process.

In response, Mr. Shio submitted that, in regards to the fact that the Applicant was being paid as proved by Exhibit D1, he said the advocate did not mention the case number. Therefore, Exhibit D1 is not recognized in law. He argued further that there is no proof that the Respondent has been receiving the said money, it is mere words without proof.

Regarding suing the wrong party, Mr. Shio submitted that, on page 6 of the proceedings, DW1 was asked by the counsel for the respondent, and in reply, he said the Respondent was claiming salary arrears against the KKKT – Northen Central Diocese. On top of that, the Advocate has never told the CMA that the Respondent had sued the wrong or non-existent party. Hence, the advocate is the one who abuses the court process. He cannot be heard at this stage to come up with a new issue.

In rejoinder, Mr. Jeff added that Exhibit D1 was in the case file but the CMA did not consider the said exhibit. He further contended that the Respondent admitted that he had already been paid for three months. On the other hand, suing the wrong party is dangerous because the award will not be executable.

In determining the merits of the application at hand I would like to commence by the complaint that exhibit D1 was not considered. After passing through the record, particularly the judgment, I concur with Mr. Jeff that the Arbitrator did not consider the evidence in exhibit D1, at the composition of the award. However, such omission did not occasion any injustice on the part of the Applicant.

Exhibit D1 is a document purporting to be the deed of settlement allegedly entered in a case where the Labour Officer was suing the K.K.K.T, the employer to pay the salaries of its employees. I am saying so because of the following reasons; **one,** there is no proof on records proving that the Applicant did honour the said deed of settlement;

two, at Clause 3 of the said Deed, it is clear that, if the Applicant (employer) fails to honour the Deed by not paying the claimed salaries as agreed, the settlement will automatically terminate; **three,** I have gone through the Exhibit D1 on the last page titled "Kiambatanisho". I

have not seen the name of the Respondent written as it appears in this case. Also, the records do not show that the Respondent agreed to settle. However, there is a name of a person on item No. 17 which resembles that of the Respondent herein. That name is Nickson M. Lukumay, but the records do not show that that man is the Respondent herein. Hence, it is unsafe for this court without further evidence to assume that the name on item No. 17 is the same person as the Respondent.

Regarding the issue of illegality of the award as submitted by Mr. Jeff, who invited this court to ascertain whether the Respondent sued the wrong or non-existing party, he averred that; it was not proper to sue the 2nd Applicant (wrong party) therefore, this renders the award not to be executable. He supported his contention with the decision in the case of **Jung Hwan Kim (supra).** This argument was rebutted by Mr. Shio, Advocate for the Respondent, when he submitted that, it was nothing but an abuse of the court process as the matter was not raised at the CMA.

I have carefully read the submissions by the parties and the above-cited decisions of this court. In the last cited case of **Jung Hwan Kim (supra),** before arriving at the decision fondly advanced by the

applicant. The analysis done by the court is very sound and is appreciated. However, the cases considered in **Jung Hwan Kim's** case did not allow entertaining new issues at the appellate level. I find this to be a very significant point of departure and a base on which the case can be distinguishable. In my view, going against that imputes a danger of applying a "one size fits all" approach in as far as it is a settled position that new facts and issues not raised on the lower courts and tribunals cannot be raised on appeal.

In **Hassan Bundala @ Swaga vs. The Republic,** Criminal Appeal No. 386 of 2015 -CAT (Unreported). In the latter case, it was held *inter alia* that:

> *"It is now settled that as a matter of general principle, this Court will only look into matters which came up in the lower courts and were decided; and not on new matters which were not raised or decided by neither trial court".*

The CMA proceedings are very clear on how the case for both parties was argued during the trial. Nowhere in the records, has the applicant raised such issues of shortfalls in the pleadings for determination by the CMA. It is a settled legal position that raising new matters during appeal is not proper as correctly decided by this Court in **Seifu Mohamed Seifu vs. Zena Mohamed Jaribu** and the decision

by the Court of Appeal in **Hassan Bundala @Swaga vs. The Republic (supra).** Based on this reason, the argument by the Respondent's Advocate in favour of restriction in raising new matters which were not raised and decided before the lower court which were unfounded. The court therefore finds no merit on this ground of revision. Therefore, I join hands with the Respondent's submission that the Arbitrator properly considered the evidence available on record. Since it is found that the Respondent proved the claim of unpaid salary arrears against the Applicant, I find the Applicant's application unfounded for lack of merit.

Before going to the root, I feel obliged to comment on the appropriate computation of the amount of salary arrears owed to the Respondent. the records are very clear that the respondent was suspended from work vide a letter dated 10th March 2022, with reference number KSS/GL/2022/01. He was suspended pending investigation on three disciplinary offenses two of which were for theft, and one was for segregation in service delivery to the students and staff. He was ordered to vacate from the school premises until when he would be instructed otherwise by the school Board. At the time he was suspended, the Respondent was claiming salary arrears from December

2019. There is no record showing that the respondent was ever been called at the disciplinary hearing, and was found guilty of the offence he was accused of and convicted as such.

There is also no record proving that he was terminated either as the result of the disciplinary charges or for any other reasons. Without being terminated, the applicant continued to be a lawful employee of the applicants with all rights of the employee and without loss of salary. That means he was entitled to be paid salaries, and if not paid then he was entitled to claim the same. It is also important to note that the salaries continued to accrue in favour of the respondent up to when he would either be terminated or directed to resume work. Therefore, the general rule is that the claim will keep on appreciating as long as the claimant has not been paid. Therefore, the claim that was pleaded at the commencement of the dispute cannot be the same at the time of the award especially where there is the time from when the matter was filed up to when it was finally determined and that difference in the evidence cannot be termed as the variance between the pleading and evidence.

Based on the above findings, therefore the computation must be based on the following principle that is (Salary payable per month * the number of months unpaid = the total amount claimed). Computing from

when the respondent was not paid his salary that is December 2019 up to now the unpaid month's salaries up to the 15th day of February 2024 are 50 months. Now, applying that formula in the case at hand, that is Salary payable per month i.e. Tsh. 292, 210/= * the number of months unpaid i.e. 50 months = that brings a total of the claimed amount to be Tshs. 14, 610, 500/=.

In the end, I find the present application for revision is devoid of merit. Consequently, the CMA's Award is hereby upheld to the extent of the finding above by enhancing it from Tsh. 11,688, 400/= to Ths. 14,610,500/= which the applicant is hereby ordered to pay the Respondent salary arrears of fifty months from December 2019 to 15th February 2024. Since this is a labour matter, no order as costs are made.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 15th February 2024

HIGH COURT OF TANZANIA

J. C. TIGANGA

JUDGE