IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

LABOUR REVISION NO. 2 OF 2022

(Arising from Labour Dispute No. CMA/MTW/08/2021)

BETWEEN

OLIVIA KANWA ---------- APPLICANT

AND

STELLA MARRIS MTWARA UNIVERSITY COLLEGE

(STEMMUCO) ---------- RESPONDENT

RULING

Date of last order: 21.09.2023

Date of Ruling: 15.12.2023

Ebrahim, J.

The applicant OLIVIA KANWA being aggrieved with the award of the Commission for Mediation and Arbitration at Mtwara in Labour Dispute No. CMA/MTW/08/2021 dated 18/03/2022, filed the instant application seeking to revise and set aside of the award. The application was preferred under **Sections 91 (1) (a) and (b), (2) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP.**

366 R.E. 2019], read together with **Rule 24 (1), (2) (a-f) and 24 (3) (a-d) of the Labour Courts Rules, 2007 (GN No. 106 of 2007)**. The application was supported by an affidavit sworn by the applicant herself. The same was protested through a counter affidavit sworn by Alex Peter Msalenge, the respondent's Counsel.

The brief facts leading to the present application is that, the applicant was employed by the respondent as Assistant Lecturer on a three years contract which started on 07.10.2011. On 06.10.2014 the contract was renewed for another three years. On 06.10.2017 the contract was renewed for another three years which expired on 07.10.2020. After the expiration of the third contract, the respondent refused to pay the applicant some of her entitlements which includes gratuity.

Dissatisfied, the applicant instituted a labour case for breach of contract claiming a total of Tanzania Shillings 10,503,000/= as gratuity benefits.

The respondent protested the claim on the ground that the employment contract had a clause which awards the employee gratuity after satisfactory completion of the contract.

Having heard the matter on merits, the CMA pronounced the award in favour of the respondent. It decided that the claim of the applicant to be paid gratuity has no legal bases due to the reason that the employment contract was not satisfactorily completed on the reason that the applicant did not give out the students results on time.

The applicant's grievances are pegged into different areas of the CMA award as can be gathered from paragraph 6 (a- f) of the affidavit. The grounds for the application can be condensed into one issue for determination which is;

1. Whether the arbitrator erred and fact in refusing to award gratuity to the employee on the ground that the employee committed the misconduct while the employee was not charged with the said misconduct.

The application was heard by way of written submissions. The applicant was represented by advocate Happyness Sabatho, whereas the respondent was represented by Phoenix Advocates.

Submitting in support of the application, the Counsel for the applicant adopted the contents of the affidavit to form part of her submission. Argued the grounds of application jointly. She contended that

according to the contract (exhibit KM3) the applicant is entitled to be paid gratuity as the contract ended on 06.10.2020 in satisfactory completion of the contract as per party 4 (b) of the contract. She further contended that the respondent allegation that the contract was not satisfactorily completed due to the applicant misconduct hence the applicant was not entitled to be paid gratuity was not proved she argued further that if there was misconduct the respondent could have taken disciplinary measures against the applicant as the contract had yet not ended. She cited **Regulation 6.15 (c) of the Academic and Administrative Staff Regulations of 1998 R.E 2010** (exhibit KW2) which states that;

> *"A faculty employee who fails to turn his/her terminal or final grades on the designated date shall be guilty of misconduct."*

Ms. Happyness also argued that **Regulation 12.4 of the Academic and Administrative Staff Regulations of 1998 R.E 2010** (exhibit KW2) provides for a mandatory requirement of a service of a written warning to the employee who is guilty of a misconduct. She stated that no proof that the said written notice was issued to the applicant. Further to that she contended that the Staff Disciplinary Committee is the one vested

with powers to deal with misconduct and not the Governing Board as provided under **Rule 36 (4) and (5) of the Charter of Incorporation (Stella Maris Mtwara University College (STEMMUCO) Rules, 2014.**

Ms. Happyness further contended that there was no any charge or any disciplinary measures taken against the applicant as per the requirement of the law. Since there was no proof of termination of the contract in dispute therefore there was a satisfactory completion of a contract and the denial of the respondent to pay gratuity to the applicant as per the contract was a breach of contract.

In reply, Counsel for the respondent contended that the dispute between the parties is on payment of gratuity to the applicant. The applicant was not paid the gratuity of her last contract ended on 06.10.2020 due to the reason that the contract was not satisfactorily completed. The applicant failed to upload the results of students on time as required by the University Regulations. Further submitted that the applicant does not dispute she refused to submit the results on time which act constitutes misconduct and that they sent notice to inform the applicant that the respondent would not sign a new contract.

It was also argued that disciplinary action does not have time limit and considering the situation, it was impossible to institute a disciplinary action to a person who could not be found and subsequent her contract ended on 06.10.2020, of which, until then she had not submitted the results. He added that, disputed claim is found under **clause 6 (b) of exhibit KM3** and the right claimed under the mentioned clause is not absolute it is subject to satisfactory completion of the contract; and that satisfactory completion means a party has complied with all terms, conditions and performance requirement of the contract. They referred to the case of **Stella Maris Mtwara University College vs. Maro Msamba,** Labour Revision No. 1 of 2021 where it was observed that parties are bound by their agreement which they freely entered. Therefore, the contract was not satisfactorily completed as the applicant failed to fulfill the terms of exhibit KM3.

Having gone through the submissions by the Counsels for the parties and the record from the CMA, the controverse for determination is based on the issue as to whether the refusal to award gratuity to the

applicant on the ground that the she committed a misconduct while she was not charged with the said misconduct was proper.

Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules G.N No. 42 of 2007 which amongst others requires:

(i.) The investigation to be carried out;

(ii.) Employee to be given a reasonable time to prepare for the hearing;

(iii.) Right of representation by either Trade Union or by fellow employee of own choice;

(iv.) Hearing to be conducted and finalized within a reasonable time and;

(v.) Hearing to be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(vi.) In case the disciplinary hearing committee finds employee guilty of misconduct employee shall give his mitigation factor, and employer may make its decision and reasons for its decisions thereto, including explaining right of appeal to an employee.

In the matter at hand, it is clear that there was no charge against the applicant. The employer (respondent) did not serve the employee (applicant) with a formal charge showing the alleged misconduct. It was observed in the case of **Jimsony Security Serivce vs Joseph Mdegela** (Civil Appeal 152 of 2019) [2021] TZCA 176 (6 May 2021) that:

> *"The failure to serve any formal charge on the respondent was an egregious violation of Rule 13 (2) of the Rules. Actually, it was clearly the watershed of the alarming shortcomings that followed. It drew the rebuke of the learned Judge as he endorsed the arbitrator's finding, at the same page 37, that:*
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> > *"... as was correctly pointed out by the arbitrator, there was no formal complaint/accusation served [on] the respondent before he appeared before the disciplinary committee, even the letter summoning him to attend does not disclose the accusation he was required to answer.* ***This, therefore, is unprocedural because the respondent was not informed of the accusation against him [beforehand]. He was therefore taken***

by surprise which is against natural justice. This was against the law."

[Emphasis added]

Therefore, the respondent (employer) failure to serve the applicant (employee) with the formal charge showing the misconduct committed, violated the principle of natural justice, namely, right to be heard.

The agreement (exhibit KM3), essentially, stipulated for payment of gratuity after satisfactory completion of the contract or on termination. Referring to the Agreement. The applicant was an employee of the respondent from 2011 until 2020 when the contract ended. Upon the end of the contract, the applicant was paid gratuity of TZS. 14,578,650/=. Later, she claimed that, in accord with the Agreement, she ought to have been paid gratuity of the last contract at the tune of TZS. 10,503,000/=. The respondent contended that they could not pay the applicant the said gratuity on the reason that she committed a misconduct, so the contract was not satisfactorily completed. But the respondent failed to comply with **Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules G.N No. 42 of 2007.**

The Agreement thus ceased to exist on October, 2020; and the applicant's gratuity was therefore supposed to be calculated in terms of the Agreement. In view of the above, I am of the firm stance that the respondent is supposed to act well within the Agreement.

It is the law that parties are bound by the terms of the agreement they freely entered. In the case of **Univeler Tanzania Ltd. vs Benedict Mkasa Trading As Bema Enterprises** (41 of 2009) [2009] TZCA 24 (3 March 2009) in which it relied on a persuasive decision of the Supreme Court of Nigeria in **Osun State Government v. Dalami Nigeria Limited,** Sc. 277/2002 to articulate:

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

Taking a cue from the decision above, in the case at hand, the parties are bound by the contents of **clause 4 (b) of the Agreement (exhibit KM3)** which gave the applicant the rights to claim on the gratuity.

Owing to the above findings, indeed the applicant's employment contract has ended. Nonetheless, the applicant will be entitled to the gratuity available as per the Agreement **(exhibit KM3).**

From above therefore, the application is granted. The CMA award dated 18.03.2022 is hereby revised and set aside. Being a labour matter, I make no order as to costs.

Ordered accordingly.

R.A Ebrahim

JUDGE

Mtwara
15.12.2023