IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 47 OF 2021

BETWEEN

MSIMBANO LAUREAN AND 4 OTHERS..... APPLICANTS

AND

MSPH TANZANIA LLC..... RESPONDENT

JUDGMENT

Date of last order: 02/12/2022
Date of Judgement: 16/02/2023

M. MNYUKWA, J.

This Judgment is in respect of the Application for Revision brought by the applicants against the decision and award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MZ/MYAM/267/2020/124/2020 delivered in favour of the respondent. The applicants filed the present application under the enabling provisions of section 91(1)(a)(b), 91(2)(b)(c), (91)(4)(a)(b), 94(1) (b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and Rule 24(1), 24 (2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d) and 28(1)(c)(d) of the

Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN No. 106 of 2007). The applicant prayed before this Court for the following Orders:

1. *That this Honourable Court be pleased to exercise its revision jurisdiction, call for and examine the records of proceedings and the award thereof before the Commission for Mediation and Arbitration for Mwanza in Labour Dispute No. CMA/MZ/NYAM/267/2020 for the purpose of satisfying itself as to the correctness, legality and/or propriety of the reliefs made by Arbitrator (Hon. Doris A Wandiba) dated 15/11/2021*
2. *Any other relief that this Hoourable Court may deem fit and just to grant*

The present application is supported by the affidavit sworn in by Mathias Mwila, applicants' personal representative. The respondent challenged the application through the counter affidavit of Godfrey Hoya, the respondent's Director of Administration and Finance.

Before I proceed to determine what is argued by the parties in the present revision, it is imperative to give brief account of facts of the dispute as gleaned from the available court record. It goes thus: the applicants were employed by the respondent in yearly contract basis whereby on 1st October 2019, they renewed a one-year contract with the respondent. The applicants were employed into different cadres

according to their professional. Their contract was ending on 30th September 2020. Their contract of employment shows that, the applicants were employed under the fixed term contract. It is on record that, the disciplinary committee heard the matter and found the applicants guilty of misconduct. It also on record that, the applicants were the employees of the respondent until on 12th August, 2020 when their contract of employment was terminated. It is further on record that, the alleged reason for termination of the employment contract was gross misconduct due to dishonest acts which tarnished the image of the respondent.

Aggrieved by the termination, the applicants filed the labour dispute at the CMA. According to the CMA Form No 1, the applicants prayed for payments on breach of contract, overtime, accommodation and any other claim. After hearing both parties to the dispute, the CMA ruled out that, the respondent was justified to breach the employment contract with the applicants because there was proof of misconduct and dishonesty acts which tarnished the image of the respondents. The CMA dismissed the applicants' application and denied the payments of one month salary in lieu of notice as Rule 8(2)(d)(ii) of GN No 42 of 2007 allows the respondent to terminate the employment contract of the applicants without giving notice and that as termination was followed by

the disciplinary hearing, there was no need to issue a notice. Also the claim of Joseph Kasanyika on payments of accommodation was dismissed for lack of proof and the overtime claim of all applicants were dismissed too as the applicants failed to prove the same.

Dissatisfied with the decision of the CMA, the applicants lodged the present revision application for this Court to revise and set aside the Award of the arbitrator. The applicants' personal representative raised the following issues to fault the arbitrator's decision;

1. *The arbitrator failed to apply the law correctly in dealing with the relief of statutory payment of repatriation package to the place of recruitment as per section 43(1)(a)(b)(c) of the Act*
2. *The arbitrator failed to apply the law correctly as far as the notice of breach of contract is concerned as per the requirement of section 41(1)(b)(ii)(3)(5) of the Act*
3. *The arbitrator failed to apply the law correctly because the respondent has the burden to prove if the payments and other dues were done to the applicants.*

On the date of hearing of the revision application, the applicants were represented by Mr. Mathias Marwa, personal representative and the respondent enjoyed the legal services of George Shayo, learned counsel. The application was argued orally.

Submitting on the first legal issue, Mr. Marwa argued that, the arbitrator failed to properly apply the law by denying applicants the repatriation costs. He stated that, the three applicants were recruited at different places as Msimbano Laurean was employed at Mbeya, Faustine Preside at Geita and Joseph Kasanyika at Dar es Salaam. He stated that, as the applicants' employment end up at Mwanza, therefore, the respondent was required to pay the applicants repatriation costs. He supported his argument by referring to section 43 of the Act.

On the second legal issue he argued that, the arbitrator failed to apply the law correctly as he failed to issue notice as per the requirement of section 41(1)(b)(ii)(3)(5) of the Act. He prayed the respondent to pay the applicants' one month's salary in lieu of the notice.

On the third legal issue, he submitted that, the arbitrator erred in law and fact to hold the view that the respondent proved the payment of terminal benefit to the applicant contrary to the requirement of section 37(2) (c) of the Act as it was the duty of the respondent to prove that the applicants were paid. He added that, the respondent failed to prove by evidence that the applicants were paid as he failed to bring the document from the bank to show that the applicants were paid. He therefore prays the Court to allow the Revision Application.

Contesting, the learned counsel for respondent submitted that, the arbitrator correctly reached its decision by considering the evidence presented before him especially the employment contract like Msimbano who was employed at Mbeya was paid repatriation costs. That the other applicants were employed at Mwanza and that they were paid their dues in accordance to the law. He added that, the applicant like Joseph Kasanyika his evidence is very clear as he testified that he was employed at Mwanza.

Addressing the second legal issue, Mr. Shayo submitted that, the employment contract of the applicants were fixed term contract and that it is governed by the provision of Rule 8(2)(a)-(d) of the Employment and Labour Relations (Code of Good Practice) Rule 2007. He went on that, as the applicants admit the commission of the offence, it was right for the respondent to terminate their employment contract after the disciplinary processes as the applicant breached the contract. He added that, the applicants were given the notice of termination and that it was justified for the respondent to breach the contract as it is provided for under clause 11.3.7 of the Local Hire Manual.

On the third legal issue, he submitted that, the proof of payment by the respondent before the CMA was done by presenting the accounts document and that the applicants failed to prove that the

payments was not done as they failed to bring their respective bank statements. He therefore prayed the revision application to be dismissed.

Rejoining, the personal representative stated that, the employment contract shows that the applicants were employed at different places as exhibited by Exhibit SU1 collectively. He further stated that, Claue 11.2 of the contract of employment requires the issuance of notice which was not done and that the money were not deposited into the applicants' account as there was no proof to prove the payment was done. He therefore maintain the revision application to be allowed.

After considering the submissions of both parties, it is my considered view that the issues that need consideration and determination in this Revision Application are as follows;

1. *Whether the applicants were entitled to be paid repatriation costs after their employment contract be terminated*
2. *Whether the applicants were entitled to be paid one month's salary in lieu of notice of termination.*
3. *Whether the respondents sufficiently proved that the applicants were not paid their claims and other dues owed to him.*

To begin with, I will start by addressing the first issue as to whether the applicants were entitled to be paid the repatriation costs or not. In his submission in chief, the applicants' personal representative submitted that, three applicants who are Msimbano Laurean, Faustine Preside and Joseph Kusanyika, were recruited out of Mwanza and that they were not paid repatriation costs as their employment contract ended at Mwanza. Contesting, the respondent counsel averred that, it is only Msimbano Laurean who was employed out of Mwanza and he was duly paid the repatriation costs and that other applicants were employed at Mwanza and therefore they are not entitled to be paid repatriation costs.

It is the requirement of the Act under section 43(1) that when the employment contract is terminated at the place other than the place where the employee was recruited, the employer is duty bound to cover transport costs to the place of recruitment. This is considered as one among the statutory right of the employee. For easy of reference, I find it wanting to reproduce section 43(1) of the Act which reads;

> *"43(1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-*

(a) transport the employee and his personal effects to the place of recruitment or

(b) pay for the transportation of the employee to the place of recruitment or

(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period if any, between the date of the termination of contract and the date of transporting the employee and his family to the place of recruitment."

In determining the issue of repatriation costs, I revisited the renewal of employment contract that was tendered by both parties as exhibits to find as to where the applicants were recruited. The records reveals that, Msimbano Laurean was recruited at Mbeya and his place of work was at Mwanza, Fustine Preside was recruited at Geita and his place of work was at Mwanza and Joseph Kusanyika was recruited at Dar es Salaam and his place of work was at Mwanza. I also revisited the CMA proceedings both typed and handwritten.

It is on record that, the evidence tendered before the CMA depicts that, Msimbano Laurean who was recruited at Mbeya, was paid repatriation costs as he admitted that the respondent transported him by flight to the place of recruitment and that he was not married and he

has no children and that he was also paid Tsh 500,000. So his claim of repatriation costs fails. On the side of Faustine Preside and Joseph Kusanyika, there is no contrary evidence as alleged by the respondent counsel to show that they were paid repatriation costs as their evidence is silent to that effect, So, their contract of employment proves that they are entitled to be paid repatriation costs as they were recruited at Geita and Dar es Salaam respectively and their contract ended at Mwanza. As it was stated by the Court of Appeal in the case of **Pangea Minerals Limited v Gwandu Majali,** Civil Appeal No 504 of 2020 that;

> *"... That being the case, the transport costs for the employees, his dependents and his personal effects are statutory entitlements as claimed by the respondent."*

In light of the above cited provision and the decision of the Court of Appeal, it is the findings of this Court that Faustine Preside and Joseph Kasanyika are entitled to be paid repatriation costs. Thus the first ground of revision is allowed to the extent shown above.

On the second legal issue, the claim is all about issuance of notice prior to termination. It was the applicants' personal representative that, the contract of employment entered between the applicants and the respondents requires the issuance of one month notice in writing by either of the party. He remarked that, as the respondent failed to issue

notice before termination, the applicants are entitled to be paid one month's salary in lieu of notice. This argument was strongly opposed by the counsel for respondent who join hands with the arbitrator findings that as the employment contract was a fixed term contract, the is guided by the provisions of Rule 8(2)(a)-(d) of GN No 42 of 2007 in which the employer can terminate the employment contract without giving notice as the applicants materially breached the contract.

From the competing arguments of the parties, I find it pertinent to reproduce Rule 8(2)(d)(ii) of GN No 42 of 2007 which read as hereunder;

"8(2) - Compliance of the provision of the contract relating to termination shall depends on whether the contract is for a fixed term or indefinite in duration. This means that

(d) The employer may terminate the contract

(i) By giving notice of termination

(ii) Without notice if the employee has materially breached the contract.

On the other side of the coin, the parties' contract of employment as gleaned from the CMA record reads as here under;

Clause 11.2

"With Notice

(i) *This Agreement may be terminated at any time if either party shall have previously give the other one month's notice in writing of their intention in that behalf and such notice shall not have been withdrawn in the meantime with consent of either party in which event the agreement shall be terminated at the expiration of such notice, or sooner if both parties so agree. Either party may pay the other party one month's salary in lieu of notice if given less than a month notice."*

Additionally, clause 11.3 (a) reads that;

"MSPH may terminate the agreement and discharge the employees if the employee has committed an act of misconduct including but not limited to wilfully damaged or injured the property, business or good will of the MSPH failed after the warning to observe any rule, policy or directive of the MSPH or violated after due warning any of the covenants terms or provisions of the agreement.

Now, the intricate question is whether the arbitrator was correctly to decide the issue based on GN No 42 of 2007.

Noting that, in employment contract parties enters into a written contract to provides parties clearer understanding of the rights, duties, responsibilities and obligations to each other. At any rate, the

employment contract entered by the parties cannot go below the minimum standard set out by the Act, as the same will be unenforceable.

It is worth to note that, the employment contract entered between the applicants and the respondent have the general clause on notice and it does not specify as to what happened if the termination is a result of materially breached the contract. It is evident from Rule 8(2)(d)(ii) that the employer may terminate the employment contract without notice if the employee has materially breached the contract. As per the records of the CMA, I join hands with the arbitrator findings that, the respondent breached the employment contract with the applicants after satisfying that the applicants materially breached the contract since the dishonesty and misconduct done by the applicants tarnish the image of the respondent. The alleged misconduct was proved before the CMA as the evidence tendered before the CMA shows that the applicants admitted to be indebted by Maleli Executive.

Thus, it is my findings that, it was right for the arbitrator to apply Rule (2)(d)(ii) of the GN No 42 of 2007 to reach the conclusion. The arbitrator also held that, the respondent used Regulation 11.3 to terminate the applicants' employment in which again, as to the nature of

the misconduct, the issuance of notice is immaterial as the respondent follow all the procedure before termination of the applicants' contract of employment. The procedures including calling the applicants to the disciplinary committee and afforded them the opportunity to be heard.

Furthermore, it is on record that the applicants were given the right to be heard before the disciplinary hearing as they were given a chance to respond to the claim after being served with a notice to show cause. Therefore, the allegation that they were not given the notice of hearing is baseless based on the respondent's evidence that the same were sent to their email, and they were also received a call to attend a disciplinary hearing. For that reason, I find the second ground of revision to have lack merit and it is hereby dismissed.

The last issue is whether the arbitrator has failed to apply the law by holding that the applicants has the burden to prove about payments and other dues claimed owed to respondent.

From the outset, I wish to put clear that, the issues raised in the affidavit is different with the issue raised in the oral submissions. In his oral submissions, he argued that, the employer failed to prove the payments of terminal benefit as per the requirement of section 37(2)(c) of the Act. While in the affidavit he claimed that, the respondent failed

to prove that the applicants were duly paid as there was no evidence apart from the documents from the accounts department of the respondent. Contesting, the respondent averred that, the applicants were paid all their dues and claim and that, the applicants proved payments by tendering the accounts department which shows that the applicants were paid, and in contrary, the applicants failed to tender the bank statement to show that they were not paid.

First of all, I wish to point that, section 37(2)(c) of the Act, does not deal with the claim of the applicants as depicted on the legal issue and the CMA Form No 1 in which the applicants were claimed the payments of overtime and accommodation, and the same was determined by the CMA after hearing both parties. In his reasoned Award as shown on page 16 and 17 of the Award. In his findings, the arbitrator ruled out that, the applicants failed to prove before the CMA if they have genuine claim of overtime against the respondent as they failed to support the same by using the Local Hire Manual and Travel Policy for the claim of accommodation. The CMA records reveals that, the applicants knew very well the procedure for the overtime which needs to be approved before one claims payments.

The arbitrator went further by looking the evidence of SM1, Paul Josephat Galashi to show that the applicants knew very well the procedure to follow if one claim payments of accommodation. None of the applicants prove the claim of accommodation before the CMA. It is a cardinal principle that, the one who alleged must prove his allegation, as the applicants alleged that they have claim of overtime and accommodation against the respondent, they are duty bound to prove the same. The allegation that the documents are in possession of the respondent is an afterthought as the respondent proved that the applicants does not have any claim towards him by tendering the accounts document and exit form which do not show any claim of the applicants against the respondent.

For that reason, I join hands with the arbitrator reasoning that the claim of Joseph Kasanyika on accommodation were not proved as he failed to show that, there was agreement to be paid accommodation for the whole period of his employment contract for he was employed at Dar es Salaam. Thus, it is my finding that, the arbitrator was right in his findings, and therefore the third ground of revision is also dismissed.

In the final analysis, I partly allow the revision application to the extent explained therein. Since this is a labour matter, I make no order as to costs. It is so ordered.

Right of appeal explained.

M. MNYUKWA

JUDGE

16/02/2023

Court:

Judgement delivered in the presence of the applicants' personal representative and in the absence of the respondent.

M. MNYUKWA

JUDGE

16/02/2023