

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 735 OF 2019

BETWEEN

AMSONS INDUSTRIES (T) LTD..... APPLICANT

VERSUS

MASHAKA MARUSU.....RESPONDENTS

JUDGMENT

Date of Last Order: 30/11/2020

Date of Judgment: 14/12/2020

Z.G.Muruke, J.

This application originates from a labour dispute No. CMA/DSM/TEM/259/2017/185/2017 before the Commission of Mediation and Arbitration (herein CMA). On 17th October, 2018 CMA issued an award which was on favour of the respondent. The applicant was dissatisfied with the award hence filed the present application calling upon this court to revise and set aside the CMA's award on the following grounds;

- i. That, Hon. Arbitrator erred in law and fact by holding that the respondent has a permanent contract with the applicant.
- ii. That Hon, Arbitrator erred in law and fact by declaring that the applicant unfairly terminated the respondent was on grounds of gross negligence.

- iii. That, Hon. Arbitrator erred in law and fact by awarding the respondent with 8 months compensation and payment of notice on ground of unfair termination.
- iv. That, Hon. Arbitrator appeared to have acted in exercise of her jurisdiction illegally or without material irregularity.

To support the application, the applicant filed an affidavit affirmed by Sharifa Isihaka Tuli, Principal Officer. In opposition the respondent filed his counter affidavit.

The brief facts are that, on 09th February, 2013 the respondent was employed by the applicant as Process superintendent. He worked with the applicant until 8th February, 2017, when the applicant decided to end contract after issuing a notice of none renewal of a contract. It is on record that in November, 2016 the respondent was involved in the event of theft of powder of cement at the factory. The respondent was suspended pending investigation. On 3rd January, 2017 the respondent was served by the applicant a notice of non-renewal of their employment contract which was denied by the respondent. Thereafter he filed a labour dispute claiming for compensation after being unfairly terminated. Unsatisfied with the award, the applicant filed the present application.

With court's leave the matter proceeded by way of written submission. Both parties were represented, where Advocate Hassan Juma Zungiza represented the applicant while Robert Oscar Mlowe, Advocate was for the respondent.

Arguing in support of the application, on the 1st ground it was submitted that, it is undisputed that the applicant was a professional employee and he was the head of department of cement production. He was employed in a one year contract as required under Section 14 (1) (b) of the Employment and Labour Relations Act, Cap 366 RE 2019. The contract was renewed by mutual agreement, hence the arbitrator erred into holding that the respondent had permanent contract.

On the 2nd ground the learned counsel submitted that, the arbitrator erred in law and fact by declaring that the respondent was terminated on gross negligence. The respondent's contract expired on 8th February, 2017. The applicant issued a notice to show intention of non-renewal of the contract of employment on 4th January, 2017 but the respondent on his own reasons decided not to receive the same.

In regard to the 3rd ground it was submitted for the applicant that, the arbitrator erred in law and fact by granting the respondent 8 months' salary compensation and notice for unfair termination. While the respondent employment ceased after expiry of the contract and the applicant followed the procedure as he issued a 30 days' notice to the respondent.

On the 4th ground the applicant's counsel submitted that, the award was improperly procured as the arbitrator issued the award after expiry of 30 days contrary to Section 88(9) of Cap.366 RE 2019. The award was issued after 68 days from conclusion of the proceedings. The arbitrator has

not stated any reason for the delay. He thus prayed for the grant of the application.

In reply the respondent's counsel on the 1st ground submitted that, the respondent was employed on permanent basis through oral contract and there is no any written contract evidencing the one year contract. The applicant through DW1 testified that there is no any written record of employment of the respondent contrary to Section 15 (6) of Cap.366 RE 2019. The arbitrator was correct to decide that the respondent was on permanent contract hence the allegations that the contract came to an end are baseless.

On the 2nd ground the respondent's counsel submitted that, the applicant's testimony was contradicting itself grounds of termination. In their evidence they testified that the respondent's contract expired and another ground was gross negligence which led to loss of applicant's products where the respondent was a supervisor and was criminally charged. As regards to the 3rd issue the respondent's counsel submitted that, since the applicant contradicts himself by stipulating that the respondent was terminated on gross misconduct, then the procedure for termination were not adhered. Issue that the contract came to an end the applicant continued to pay monthly salaries the respondent and it was confessed by DW1 who stated that payment of salary was a mistake hence the contract was automatically renewed. Therefore the payment of 8 months' salary compensation and notice was justified by the arbitrator.

Concerning the 4th ground, the respondent counsel submitted that the arbitrator stated the reasons orally being the failure of the printing machines. Assuming that decision were pronounced on time, they would have not changed the findings and the applicant have not stated how he was prejudiced by the delay. He therefore prayed for dismissal of the application.

Having carefully considered the parties submissions, court and CMA records, following issues are for determination;

- i. Whether the respondent was employed under the permanent term contract.
- ii. Whether the applicant had valid reason for terminating the respondent
- iii. What are the relief of the parties.

Before addressing the raised issues, as stated by the applicant's counsel, the award was delivered out of 30 days as required by the law. And it is true that the arbitrator have not stated the reasons for doing so and that was contrary to Section 88(9) Of Cap 366 RE, 2019. The arbitrator ought to have adduced reason for such a delay. However, the applicant have not stated how he was prejudiced by the same. This court having considered that if the said irregularity will be considered, then, it will cause more delay of justice. Therefore the ground is disregarded as the applicant have not stated how he was prejudiced with such a delay.

Concerning the 1st issue for determination, the applicant alleged that on 9th February, 2013 the respondent was employed under one year fixed term contract which was renewable upon their agreement and it

ended on 8th February, 2017. It was the arbitrator's finding that the applicant had failed to prove the said contract, hence it is presumed that the respondent was employed under permanent contract. As found by the Arbitrator the applicant as the employer has a duty to keep records of employment, and in case of any legal proceedings employer has a burden of proving or disproving an alleged term of employment as provided under Section 15(6) of Cap 366 RE 2019 which provides;

"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer.

In the case of **Ramadhan H. Ramadhan v Andro Roofing Product Ltd**, Rev. No.347/2009 it was held that; "It is the duty of employer to keep employment record." In this case the applicant have not tendered a contract of employment or any evidence to prove the duration of their contract. The only evidence which was issued by the applicant to prove the existence of one year contract was a notice of non-renewal of a contract. However, the same does not provide for duration of a contract agreed by the parties as it is not a contract by itself. Failure to prove the same then benefit of doubt is on the respondent that he was on permanent contract as he alleged. Concerning the 2nd issue, it is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and


procedural fairness of termination of employment as provided for in Section 37(2) of Cap 366 RE 2019

It is on record that the applicant has stated that he did not terminate the applicant rather the contract came to an end. It was the respondent's contention that the applicant contradicts themselves as regard to the reason of termination. It was uncertain as to whether the contract came to an end or it was gross negligence. This court is of the view that even if the reason for termination was gross negligence, still the applicant failed to establish how the respondent conducted the misconduct. Again since the applicant has filed criminal case against the respondent, the applicant ought to have waited for the determination of the criminal case which was filed against the respondent as required under Section 37(5) of Cap 366 RE 2019. On that basis the applicant had no valid reason for terminating the respondent.

As regard to the procedure for termination, I will not labour much as it is crystal clear that, the applicant have not complied with any procedure prior terminating the respondent as required under Rule 13 of Employment and Labour Relations (Code of Good Practice) Rules, GN.42/2007. I find no need to fault the arbitrators finding on that aspect.

Concerning the relief of the parties, this court having found that the respondent was on permanent contract, and was unfairly terminated both substantively and procedurally, do hereby find no need to interfere the arbitrator's order in regard to the compensation. I hereby uphold the same.

On basis of the above finding, I find the application lacks merit. Same is dismissed.



Z.G. Muruke.

JUDGE

14/12/2020

Judgment delivered today in the presence of Twahib Burhani for applicant and Emily Laus holding brief of Rober Mlowe for respondent.



Z.G. Muruke.

JUDGE

14/12/2020