IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 31 OF 2019

BETWEEN

MIC (T) LIMITED ..... APPLICANT

VERSUS

ONESMO EMILY KIYENGO ..... RESPONDENT

JUDGMENT

Date of Last Order: 26/02/2020

Date of Judgment: 04/03/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant **MIC (T) LIMITED** has filed this application under the provisions of Sections 91(1)(a)(b)(c), 2(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 as amended by Section 14 of the Miscellaneous Amendment Act No. 17 (Amendment No. 3) of 2010 and Rules 24(1), (2)(a)(b)(c)(d)(f), 3(a)(b)(c)(d) and 28(1)(a)(b)(c)(d)(e) of the Labour Court Rules GN No. 106 of 2007 praying for:-

a)That this Honourable Court be pleased to call for and examine the records of the proceedings and Award of the Commission for Mediation and Arbitration (Hon. Nungu, S.M) dated 16th April, 2019 in Labour Dispute No. CMA/MOR/192/2015/13/2017, for the purpose of satisfying itself as to the correctness, legality or propriety of the said proceedings and as to their regularity and revise them accordingly.

b)Any other Order that this Honourable Court may deem fit and just to grant.

The application is supported by the sworn affidavit of Kay Ngalomba, the Principal Officer of the applicant.

The respondent Mr. **ONESMO EMILY KIYENGO** filed a counter affidavit bitterly challenging the application.

At the hearing of this matter Mr. Rahim Mbwambo Advocate appeared for the applicant. He prayed to adopt the contents of the affidavit of Ms. Kay Ngalomba to form part of his submissions.

He further submitted that:-

(i). The arbitration proceeding were time barred for the following reasons:-

(a) Mediation was marked failed on 15/02/2018 as seen on Page 8 of CMA's award. On 20/02/2019 the applicant was served with summons to appear for arbitration on Page 12 of CMA's record.

This matter took a year without any extension of time known to the applicant. The respondent had to fill a form to refer the matter to arbitration but there is no time frame set for the same. However if such procedure is not provided for in the Labour Court Rules so we refer to the Law of Limitation Cap. 89. In Item 21 Part 2 of the schedule which provides for sixty (60) days. So the same cannot be done after one year. In the case of **Dr. Nurdin Jella Vs. Mzumbe University**, Rev. No. 15 of 2010 it was held that the time ought to be thirty (30) days. It was thus wrong to proceed with arbitration as the matter was time barred.

(ii). The issues in dispute were stated at Page 4 of CMA's award and Page 20 of CMA's proceedings. The award has not analyzed this issue nor concluded the same. The Arbitrator decided the same according to his own thinking which was contrary to Rule 27(3) of GN No. 57 of 2007. In the case of **VODACOM (T) Ltd Vs. Frola Gaba Tenga**, Rev. No. 21 of 2012 it was held that failure to decide main issues led to irregularity (Page 4). It thus referred the matter to CMA for retrial.

We thus pray that the same be referred to CMA for retrial as was also held in the case of **John Masweta Vs. General Manager MIC (T) Ltd**, Civil Appeal No. 113 of 2015.

(iii). GN 67/2007 provides for procedures to be adhered to during hearing (Rule 27 of GN 67/2007). However, there are no written open statements, no order to file a list of documents nor closing submissions. Since this is a mandatory procedure then failure to make such orders was a serious irregularity. We thus pray for the award to be set aside.

(iv & v) The awarded compensation was not proved. There is no evidence presented to prove that the respondent was an employee as there is no ID, contract of employment nor salary slip produced. It is unknown as to how the Arbitrator knew that the respondent was receiving a salary of Tshs. 300,000/=. It was an irregularity calling for CMA's award to be revised as he who alleges must prove the same.

(vi) The claims were time barred. Under Rule 10 of GN 67/2007 they ought to be made within sixty (60) days. So only two (2) months' salary were within time and the rest were out of time.

(vii) The Counsel requested for time to file documents and bring material witnesses but was denied the same and he was forced to leave though the record says he just walked out. Since the applicants were denied a right to be heard. We pray that the award was full of irregularities and ought to be remitted back to CMA for hearing.

In response Mr. Sosten Mbedule Advocate who appeared for the respondent submitted that we pray that the submissions of the Counsel be disregarded and the dismissal of the application for the following reasons:-

(i). The application was not time barred because there was a letter written and filed by the respondent on 22/02/2018 praying for adjournment of the matter as he was facing family problems. So the sixty (60) days rule can in the circumstances, not be applied. The cited case of Mzumbe University is also irrelevant in the circumstances.

(ii). It is an afterthought that at Page 2 of the award the applicant was given ample time to address their case by way of opening statement and thereafter opted to move out of CMA's chambers. The applicant can now not come to ask for what they were given time to address and they decided to move out of the Arbitrators chambers. Issues were discussed and a conclusion as seen at Page 4 and Page 15. The award is self explanatory Rule 27(3) of GN 67/2007 is thus not applicable as well as Rev. No. 21/2012 and the Case of the Court of Appeal herein cited is distinguishable in the circumstances, as the issues were well analyzed.

(iii). The third ground should also fail as it is on record that before the hearing date parties agreed that on the hearing date if the preliminary objection raised is overruled. The ruling was delivered

and the preliminary objection was overruled thus hearing had to proceed. We thus pray the Court to draw an inference that the applicant was wrong as they came with the witness but walked out. The case was proceed in their absence and they cannot seek to have the same proved before this Court. They are submitting on hearsay. They could have shown that document before this Court which they have also failed to annex. They are saying the Arbitrator used his head to decide the matter but did not say what ought to be used in determining the matter. They ought to have even attached an affidavit as to why they walked out but there is none.

(iv). It has been stated that the respondent ought to have claimed his salary arrears within sixty (60) days but when did the cause of action arise? The cause of action arose in December, 2014 when the applicant refused to pay the respondent's salary. The applicant is trying to use technicalities to deny the respondent his rights. I pray that overriding principles be used for the respondent to be granted his rights.

In rejoinder Mr. Mbwambo argued that as for the 2nd issue I retaliate my submission in chief as the issues were not analyzed nor concluded. The proceedings sought to speak for itself. How could he say the respondent was an employee without looking at the ID and contract of employment.

It was submitted that hearing of the matter proceeds if the preliminary objection is overridden. But all procedures could not be concluded in one day. But could not file documents and bring witnesses. That was why they refused to proceed with the hearing.

The Arbitrator used his head as he did not analyze issues which were not framed and so he did not use the facts and evidence therein adduced.

The letter herein stated was not served to the applicant. But again the family issue was not stated even if it was indeed filed. I thus retaliate my submissions that CMA's proceedings had a lot of serious irregularities and there was no proof that the respondent was an employee.

They thus prayed that the award be set aside and the matter be ordered to be retried at CMA.

I have the following response in respect of the grounds raised herein:-

(i). I will combine the 1st and 6th ground raised. There is an allegation that the matter was determined out of time. This had been raised at CMA before the commencement of the hearing of the application but the Arbitrator dismissed the same on the ground that Rule 10 is in respect of filing complaints at CMA and not moving the matter from Mediation to Arbitration. That as found by this Court in the case of **Magreth Njau Vs. Tanzania Cigarette Company**, Labour Rev. No. 115 of 2016 where the Court held that:-

> *"With regard to the time limit in referring the dispute to arbitration after the failure of mediation the court had this to say:-*
>
> *I concur with the Counsel for the respondent's submission, that the law does not compel parties to refer dispute to arbitrate or adjudicate immediately after mediation fails. The Employment and Labour Relations Act No. 6/2004 is silent."*

Rule 10 GN No. 64/2007 provides that and I quote:-

> *"Rule 10(1) Dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty (30) days from the date of termination within or the date that the employer made a final decision or uphold the decision to terminate.*
>
> *(2) All other disputes must be referred to the Commission within sixty (60) days from the date when the dispute arised."*

Rule 10 is thus in respect of filing a complaint at CMA and not move the matter from mediation to arbitration.

But again the arguments raised herein by the applicant of resorting to the provisions of the Law of Limitation Act, Cap. 89 RE. 2002 were not stated at CMA. This brings a new ground which ought not to be entertained on appeal.

Since it is true that there is no time frame in moving the matter for arbitration as was held in the case of **Magreth Njau** (Supra), I thus find no merit in this ground.

(ii). It has been submitted in the 3rd ground that the procedures were not adhered to. However going through the record I have noted that the opening statements were delivered orally at the request of the applicant (Page 18 – 22 of CMA's proceedings). The respondent's Counsel (CMA) did not challenge the same. He also gave oral submissions. It is not in record that the Applicants Counsel prayed for leave to file any document and was denied that right. In fact he sought for an adjournment to 1:00 pm so that he could summon his witness and I beg to quote what is on record at Pages 22 last paragraph to 23.

"***Wakili Herry; Naomba Tume iahirishe shauri hadi saa 7 mchana leo hii ili nikamlete shahidi upande wa mlalamikiwa, kisha Tume iendelee kusikiliza ushahidi. Upande wa mlalamikiwa utatumia kielelezo Mkataba wa Kazi. Shauri lenyewe siyo gumu wala halihitaji mambo mengine.***

Onesmo; *Mimi nilikwisha eleza maelezo yangu nitatoa ushahidi mwenyewe.* ***Kwa kuwa wote tulitia saini shauri lisikilizwe mfululizo na ushahidi utolewe leo, ofisi ya mlalamikiwa haipo mbali ndiyo maana ameomba saa 7 mchana ataleta shahidi wake mimi ninakubali.***

Tume:

Amri; *Shauri* ***limeahirishwa hadi saa 7 mchana leo*** *tarehe 21/09/2019* ***kama Wakili Herry alivyoomba ili akamlete shahidi wake kutoa ushahidi.***"

[Emphasis is mine].

The Counsel told CMA that he would produce a document being the Employment Contract at the hearing at 1:00 pm. So this ground can also not stand.

Section 61 (a), (b), (c), (d), (e), (f) and (g) of the Labour Institution Act No. 7 of 2004 provides for the factors to be considered when presuming the existence of the employment relation. It provides that:-

"Section 61 For the purpose of law, a person who works for or renders a service t other person, is presumed until the contrary is proved to be an employee regardless of the form of contract if any , one or more of the following factors is present.

a) *The* ***manner in which the person works subject to the control or directions of another person****.*

b) *The person hours of work are subject to the control or direction of another person.*

c) *In the case of person who works for the organization,* ***the persons forms part of the organization.***

d) *The* ***person has worked for that other person for an average of at least 45 hours per month*** *over the last three months.*

e) *The person* ***is economically dependent on the other person*** *for which that person renders service.*

f) *The person* ***is provided with tools of trade or works equipment by the other person****.*

g) *The person* ***only works or renders service to one person."***

[Emphasis is mine].

This was well explained by Hon. Rweyemamu, J (as she then was) in the case of **Mwita Wambura Vs Zuri Haji**, Revision Application No. 42/2012 at Mwanza. LCD 2014 Part II page 182 that:-

> *"**there are no hard and fast rules regarding how to determine existence of employment relationship** but, there are a number of common factors running through which can aid a decision maker in determining existence of an employment relationship. These principles are among others,*
>
> *(a) **defining employment relationship by looking at parties roles** ,considering matters among others; **dependency, subordination, direction, supervision and control of services rendered**; (page 19 to 23 of the report).*
>
> *(b) **principle of primacy of facts looking at what was** actually agreed and performed by each of the parties.*
>
> *(c) use of burden of proof".*
>
> *[Emphasis is mine].*

There is no doubt therefore that there was an employer/ employee relationship between the parties because the respondents gave him an Identification Card, paid for the office premises, trained him on Customer Care as per Exhibit MJ2, and gave him a company's motor vehicle so that he could discharge his duties and paid him allowances for tasks performed to mention just a few.

(iii). The applicant concedes that the respondent was entitled to two (2) months' salary but does not explain as to why the rest were out of time. He even does not say how much the respondent was entitled to per month.

It is on record (at Page 27 of the proceedings) that the respondent was receiving a salary of Tshs. 300,000/= per month. He alleged that he was issued with the applicants Identification Card (ID) and working tools by the applicant, for example office premises were paid for by the applicant as well as an office motor vehicle driven by the respondent. He was also trained by the respondent on Customer Care as per Exhibit MJ2. So the arbitrator did not get this information from his head.

The applicant had to prove the contrary as stated in Section 39 of ELRA which provides that:-

> *"Section 39* ***In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."***
>
> *[Emphasis is mine].*

In the case of **Abdalah Kidunda V. CM Co. Limited,** Rev. No. 277/2013. It was stated that:-

> *"I firmly find that the arbitrators conclusion that the applicant failed to prove that they were unfairly terminated as required by Section 60 (2) (a).The law applicable to the parties dispute is section 39 of the ELRA 6/2007 which provides clearly that ... in any proceeding concerning unfair termination of the employment by an employer shall prove that termination is fair."*

It was therefore the duty of the applicant to prove that the respondent was not their employee and not shift the burden of proof to the respondent.

As for the 7th ground it is worth stating that the applicant cannot claim that they were denied the right to be heard while the matter was previously heard exparte. While at the execution stage the exparte award was set aside at the applicants request and in the absence of the respondent.

On 21/09/2019 when the matter was adjourned for hearing to 1:00 pm as requested by the applicants Counsel, the said Counsel decided not to proceed with the hearing of the matter and walked out. The applicant has now come to this Court seeking to have the matter retried at CMA as they were not heard.

I have perused the record and did not find any prayer made by the applicant for filing documents, leave alone that he was denied the same.

There is no dispute that parties have a right to be heard but not when and how they wish to have the same heard. It has been held in the case of **Tanzania Fish Processors Ltd Vs. Christopher Luhangula,**

Civil Appeal No 161/1994 that one cannot come to Court when one wishes too. Nor can one come to Court and demand to have the matter heard as he wishes. By walking out of the arbitrator's chamber, the applicants Counsel waived the right to be heard and cannot be heard to claim the same at this Court. More so because no reason has even been reduced for the same.

It is under the same spirit that I believe that the applicant cannot even be heard to challenge the proceedings which they had decided to walk out of.

On the allegation that the issues were not analyzed and concluded as alleged in ground No. 2, I would say that is ones style in writing the award. It is on record that the respondent was employed by the applicant as per Exhibits CK collectively. Issues were framed as seen at Page 4 of the award. Since the applicants Counsel did not challenge the matter and instead walked out, then the Arbitrator awarded the respondent who alleged to have been unfairly terminated the following reliefs:-

- Notice in lieu of one (1) month's salary - Tshs. 300,000/=.
- Unpaid salaries for five (5) years as claimed - Tshs. 18,000,000/=.

- Severance allowance - Tshs. 403,847/=.

  Thus a total of Tshs. 18,703,847/=.

This is because there was an inference drawn that the applicant had nothing to challenge in respect of the complaint filed at CMA.

In the circumstances, I believe I have no reason to fault the award of CMA for as stated because the claims were not challenged and according to Section 39 it was the applicant who had to prove the contrary, an opportunity which they dishonored.

But again it was the 2nd time that the applicant decided not to prosecute its case. The 1st time is when it led to issuing on an the exparte judgment which was set aside. One would expect due diligence on the part of the applicants when the matter was ordered to proceed inter parties.

Having failed to prosecute their case the applicant cannot claim to have been denied the right to be heard and thus vitiating the proceedings as was held in the case of **The Principal Secretary Ministry of Defence and National Service V. Duram P. Valambia**, 1992 TLR 387. This is distinguishable as the applicant decided not to proceed with the

matter after 1:00 pm when the matter was called for hearing after being adjourned and at his own instance.

In the circumstances, I herein uphold CMA's award and dismiss the application for want of merit.

S.A.N. Wambura
JUDGE
04/03/2020

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 31 OF 2019

BETWEEN

MIC (T) LIMITED ..... APPLICANT

VERSUS

ONESMO EMILY KIYENGO ..... RESPONDENT

Date: 04/03/2020

Coram: Hon. F.A. Mtarania, Deputy Registrar

Applicant:

For Applicant: Mr. Hilali Hamza Advocate

Respondent: Present in person

For Respondent: Mr. Sosten Mbedule Advocate

CC: R. Mchocha

COURT: Judgment delivered today in presence of Mr. Hilali Hamza Advocate for the Applicant and Mr. Sosten Mbedule Advocate for the Respondent who appeared in person.

F.A. Mtarania

DEPUTY REGISTRAR

04/03/2020