IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO 49 OF 2019

YARA TANZANIA LTD ....APPLICANT

VERSUS

ATHUMAN MTANGI & OTHERS..... RESPONDENT

JUDGMENT

Date of last Order: 18/02/2020
Date of Judgment: 22/04/2020
Z.G.Muruke, J.

YARA (T) LIMITED the applicant, being aggrieved by the Award of Commission for Mediation and Arbitration [herein referred to as CMA] delivered on 07 /12/2018 filed this application seeking to revise and set it aside the proceedings and the award. The application was supported by the sworn affidavit of Mr. Narindwa Shaidi, Human Resources Manager of the applicant.

The respondents opposed the application through the counter affidavit affirmed by Athuman Mntangi, a co – respondent. Hearing was by way of written submissions. The applicant enjoyed the service of Advocates from Nexlaw Advocates while the respondents were served by Advocate Thomas Joseph Masawe.

Submitting on the grounds challenging the award as stated under paragraph 8(i-ix) of the affidavit, the applicant counsel stated that on ground 8(i) and (ix), CMA granted excessive reliefs contrary to the laws governing granting of the relief.

He added that CMA failed to consider that the respondents had already been paid a sum Of Tshs. 25,043,687/= as a consideration for entering a separation agreement and the same was never turned back to the applicant , citing the case of **Yara Tanzania Limited v Alphonce Damian** , Rev.No. 39 of 2018. Also the arbitrator erred to reinstate the respondents without loss of remuneration from the date they agreed to be terminated.

On ground 8(ii) of the applicant counsel argued that, the arbitrator ruled that termination was both substantively and procedurally unfair. He failed to take note that, termination by agreement is provided under the law as one of the termination methods. Referring Rules 3(1) (a), (2) (a) and 8(2) of the Employment and Labour Relations Act (Code of Good Practice) Rules GN 42/2007. Though Exhibit Y 3 the respondent signed the agreement and they went contrary to clause 6 of the contract as they sued the applicant for the claims which they agreed upon.

Regarding Ground 8(iii), it was contended that in its award, CMA failed to adhere to the principal of sanctity of contract which is binding in our jurisdiction which is illegal and cause injustice to the applicant . The principle of sanctity states that the agreement need to be respected by the parties and the parties are bound by their respective promises. Added that

the said principle was adopted in Tanzania by Court of appeal in the case of **Abually Alibhai Aziz v Bhatia Brothers Ltd**[200] TLR 288. That CMA had no jurisdiction to reform the terms and conditions of a contract merely because they consider them unduly onerous to one party. Parties entered an agreement as per Exhibit Y3 CMA ought to have respected the same.

On the 8(iv) and (v) grounds the Applicant counsel submitted that , the arbitrator in the award stated that the respondents were threatened by pistol when they were entering the separation agreement, This issue was introduced by PW1 who upon cross examination at page 29 paragraph 2 of the typed CMA proceedings, PW1 stated that ..."*mimi sikutishiwa bastola bali nilitishika kuona mtu anabastora kiunoni...".* From those words it is clear that he was not threatened by the applicant hence the arbitrator misguided himself in the impugned award as he bases on wrong assumptions.

Further it was submitted that, the agreement was consented by the applicant themselves, no any force was used the respondent ha d a duty to prove on the same. The said agreement was duly signed by the respondents they received payments and never returned the money back to the applicant. they also never reported that threat to the police station and however they waited for the payment to be made first then filed the complaint before CMA. The arbitrator relied on merely speculations of PW1 as there is no any proof tendered to prove coercion towards them, citing section 15 (1) of the Law of Contract Act Cap 345 RE 2002 (herein to be

referred as Cap 345) and the case of **Anthony Ngoo & Another v Kitinda Kimaro & another** in Civil Appeal NO. 25 of 2014.

On 8 (vi) and (vii) grounds, Counsel submitted that each respondent signed the agreement separately. However the arbitrator relied on PW1 evidence which based on hearsay evidence, and he was not there while others were signing the contract as he admitted. Citing Section 62 of the evidence Act. Cap 6 RE 2002.

On 8(vii) ground the applicant submitted that the arbitrator failed to analyze all the evidence hence arrived to the impugned award. There were key evidences which were not considered and sufficiently appraised.

In reply to the grounds for revision, the respondent counsel contended that, on the 8(1) and ix grounds, it was the finding of CMA that termination was substantively and procedurally unfair as per page 8 paragraph 3 of the award. There was no excessive award given awarded to the respondents since what they got was their entitlements as per Section 40 (1) (a) of Employment and Labour Relations Act, Cap 366 RE 2019. There was no any penalty to the respondent as he was required to pay salaries for the period as alleged by the applicant, but was the compensation for unfair termination.

On the 8(ii) and (v) grounds Mr. Masawe argued that, it was quiet clear that separation agreements were not negotiated. It was issued in the matter of directive on whether you sign or not, the consequence will be similar. It is undisputed that termination may be done on agreement but that agreement should be free from coercion and with consent, unlike in

the present dispute as per PW1's evidence, in the conference room there was a new security guard who was armed pressing the respondent to sign the agreement. He referred Section 10 and 14(1) and (2) of Cap 345. He further added the applicant didn't take into consideration Rule 10(1) and (2) of GN 64/2007

The respondent's counsel regarding ground 8(iii) averred that, any contract regardless of its nature should be entered freely from coercion for it to enforceable under the law. The consent agreement should be declared voidable as there was no consent of the respondent, referring section 19(1) of Cap 345.

On the 8(iv) ground, respondent's counsel submitted that, the arbitrator's finding was correct as the applicant didn't challenge PW1 evidence during cross examination, regarding the presence of the armed guard who forced him to sign the agreement.

Moreover on the 8(vi) and (vii) grounds Advocate Masawe stated that Athumani Mntangi was authorized by others to represent them as per Rule 5(1), (2), and (3) of the GN. 64/2007. And it was agreed that he will testify on their behalf.

On ground 8(viii) the respondent insisted that CMA decided basing on the evidence. The applicants witness were supposed to address and answer the issues which were framed and agreed to the extent of convincing CMA to deliver in their favour.

In rejoinder the applicant reiterated what has been submitted in submission in chief, he added that they don't dispute the authority of PW1 on representing others, but the credibility of his evidence.

Having gone through the rival submissions and CMA record, this court is to determine the following issues:

(i). Whether the parties had an agreement to terminate the employment contract?

(ii). Reliefs entitled to each party.

It is a principal of contract law that, just as parties are free to enter into contracts; they are equally free to bring their contracts to an end by consensus. This principle is also applicable to contracts of employment. The termination of a contract under the common law requires genuine mutual agreement of both parties and neither party may unilaterally change his or her mind as stated at page 94 of the book **of Employment and Labour Relations in Tanzania by Bonaventure Rutinwa, Evance Kalula and Tulia Ackson.**

The applicant alleged that the respondents were terminated on agreement as per exhibit YR 3. I have gone through the said agreement and find that all the respondents have signed the agreement and under clause 5 of the same , the respondents are prohibited to raise any claim against the employer from the contract or tort or related to his employment with employer which is being terminated by the agreement.

However the records are silent on whether there was consultations, prior signing the agreement. Again I find nowhere in records the applicant had stated the reasons for such termination. Employment and Labour Relations (Code of Good Practice) G.N. No. 42(herein to be referred as Code)

3.-(I) for the purposes of these Rules, the termination of employment shall include-

(a) a lawful termination under the common law;

2) A lawful termination of employment under the common law shall be as follows-

(a**) Termination of employment by agreement;**

(b) Automatic termination

(c) Termination of employment by the employee; or

(d) determination of employment by the employee;(emphasis is mine)

From the above provision it is quite clear that termination by agreement is recognized under the law. However, it is a principle of law that, for termination to be valid, it must state the reason for such termination as provided under Section 37 (2)of Cap 366 RE 2019. Again the law requires the employer and employee to agree before termination as per Rule 4 of the Code.

4-(1) An employer and employee shall agree to terminate the contract in accordance to agreement.

The applicant stated that they had several discussions regarding the termination. From records, I didn't find any document to show that there were negotiations prior signing the agreement. This raises inference that the agreement was not mutually agreed by them. The applicant terminated the respondents on his own whims. This denied the respondents' right to work. Equally, the applicant had not stated any reason led to that termination, and the procedure for that termination were not adhered by the applicant. I thus find that termination agreement to be invalid hence the termination is substantively and procedurally unfair.

Regarding reliefs of the parties, since it is also the finding of this court that termination is substantively and procedurally unfair. There is no dispute that, respondent received the amount started, which has not been returned to date after signing agreement. Respondent cannot be paid twice. Thus applicants to pay 12 month's compensation to the respondents. Order for re-instatement without loss of remuneration is quashed. Application for revision on the other grounds is dismissed.

Z.G.Muruke
JUDGE
22/04/2020

Judgment delivered in the absence of the applicant and in the presence of Thomas Masawe for the respondent.

Z.G.Muruke
JUDGE
22/04/2020