

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 936 OF 2019

BETWEEN

TAMICO APPLICANT

VERSUS

HUSSEIN KOMBO MWACHIKOBE RESPONDENT

JUDGEMENT

Date of Last Order: 13/04/2021

Date of Judgement: 07/05/2021

Aboud, J.

The applicant **TAMICO**, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 27/11/2019 by Hon. Mbeyale, R Arbitrator in labour dispute No. CMA/DSM/ILAR.303/17/126. The application is made under Rule 24(1) 24 (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules) read together with section 91 (1) (a), section 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act).

The application emanates from the following background; the employment relationship between the applicant and the respondent started since 01/02/2008. From 2014 to 2017 the respondent made several applications pursuing the applicant to allow him to retire from the employment. The last application by the respondent to retire was on 22/09/2017, however, the applicant rejected the same. On his part the respondent proceeded with his decision of retiring from the employment, surprisingly on 09/10/2017 he was served with a letter of abscondment. Despite being served with the letter of abscondment the respondent did not despair his decision to retire. He unsuccessfully waited for his terminal benefits hence filed his application to the CMA.

The CMA decided the matter in favour of the respondent and awarded him according to the collective agreement. Aggrieved by the CMA's decision the applicant filed the present application. The applicant called upon the court to determine the following issues: -

- i. Whether the Commission for mediation and Arbitration had jurisdiction to determine the dispute.
- ii. Whether the respondent had attained voluntary retirement age at the time he submitted application for early retirement.

- iii. Whether the respondent was entitled to early voluntary retirement without agreement with the applicant.
- iv. Whether the particulars submitted by the applicant himself could not be relied by the applicant.
- v. Whether the respondent was entitled to what he was granted.

The matter was argued orally. Both parties were represented by Learned Counsels. Mr. Evold Mushi appeared for the applicant whereas Mr. Daniel Bushele was for the respondent.

Arguing in support of the application Mr. Evold Mushi prayed to adopt the applicant's affidavit to form part of his submission. On the first issue on record, it was submitted that, the CMA had no jurisdiction because the claims by the respondent originated from the collective bargaining Agreement (CBA) between the applicant and his employees. It was further submitted that section 74 of the Act is very clear on the disputes relating to the CBA's. The Learned Counsel added that the CMA had no jurisdiction to arbitrate the dispute because after the mediation has failed the applicant was supposed to file an application in this court and not to proceed with the Arbitration.

On the second issue it was submitted that, the respondent did not attend the age of 55 years which allows voluntarily retirement. He stated that on 25/01/2008 the respondent submitted his particulars to the respondent indicating that he was 44 years old according to the Application for Employment (exhibit T1) on record. That at the time the respondent submitted his voluntary retirement request he was 53 years, he said. It was also submitted that, the applicant responded via his Notice to retire (exhibit T2) that the respondent did not qualify for voluntary retirement.

It was submitted that, since the respondent himself submitted his particulars to the applicant, the later was entitled to rely on that information. Therefore, in the situation the respondent did not qualify for an early retirement.

Regarding the allegation that there was a retirement agreement, it was submitted that, there was no agreement between the employer and employee on such effect. Hence the respondent was not supposed to retire until he attains 60 years of age.

On the last issue it was submitted that, the respondent had a duty to prove his claims because it was the case of unfair termination. The Learned Counsel stated that, evidence of the

respondent on record was not sufficient for him to be granted Tshs. 42 million as the Arbitrator did. He submitted that, the respondent did not tender the purported Voluntary Agreement which entitled him the said terminal benefits. It was added that, the respondent was awarded severance pay while he resigned and not terminated from employment the position which is well expressed under section 42 of the Act. On the basis of the above submission, he prayed for the CMA's award to be revised and set aside.

Responding to the application Mr. Daniel Bushele also adopted the respondent counter affidavit to form part of his submission. On the first issue it was submitted that, the CMA had all powers to entertain this matter at mediation and arbitration due to the prayers sought by the respondent at the CMA. The Learned Counsel submitted that, the CMA while deciding the case engaged itself on only the prayers of the respondent.

On the second issue it was submitted that, the respondent attained the age of early retirement as evidenced by his passport and driving license which were marked as exhibit P3. He added that, the respondent was at 56 years age which was above the age of voluntary retirement.

Regarding the third issue it was submitted that, there was no agreement of retirement, that the respondent made several attempts to apply for voluntary retirement but for the reason best known to himself the applicant refused to meet with him to discuss that matter. He submitted that, on 21/12/2014 the respondent wrote a letter notifying the applicant his intention to have voluntary retirement but all letters were not responded by the applicant as evidenced by exhibit P4.

The Learned Counsel went on to submit that the applicant replied the respondent's letters on 31/12/2015 notifying him that his request for voluntary retirement was not accepted. It was also submitted that, under the mentioned circumstances the respondent had no other avenue to table his matter than the CMA.

In respect of the last issue, it was submitted that, the respondent is entitled to the remedies awarded because the Arbitrator rightly considered the available evidence on this matter. In the upshot it was submitted that the application has no merit and should be dismissed.

In rejoinder Mr. Evold Mushi on the first issue prayed for the court to consider the contents of pages 4 and 10 of the award, he

added that Tshs. 42.4 million was based on collective agreement and was not statutory entitled.

On the second issue he submitted that, exhibit T1 was the only evidence to the applicant which shows the age of the respondent and was never disputed by him. He added that, the issue of driving license came during arbitration but was never referred during mediation. He submitted that the CMA relied only on the evidence tendered by the respondent. The Learned Counsel strongly submitted that, the applicant relied on the information or particulars of the respondent in determining his age that was 44 years at the time of employment. It was argued that legally the respondent was supposed to claim his right for early retirement at the CMA after he was denied to do so by the applicant and not to quit the job as he did. He therefore prayed for the application to be allowed.

After considering the submissions from both Counsels, I find that the Court is called upon to determine the following issues; whether the CMA had jurisdiction to determine the dispute, whether the respondent attained voluntary retirement age at the time he submitted his application for early retirement, whether there was

agreement between the parties that the respondent was entitled to early voluntary retirement and what reliefs are the parties entitled.

On the first issue as to whether the CMA had jurisdiction to determine the dispute; the applicant's Counsel alleged that the dispute originated from the collective bargaining, hence the CMA had no jurisdiction to determine the same as per section 74 of the Act.

The relevant provision is to the effect that:-

'Section 74 - Unless the parties to a collective agreement agree otherwise-

(a) A dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for mediation; and

(b) If the mediation fails, any party may refer the dispute to the Labour Court for a decision.'

The provision quoted above is very clear that any dispute concerning application, interpretation and implementation of the collective agreement should be referred to the CMA for mediation and if the mediation fails any party may refer the dispute to Labour Court for a decision.

In the matter at hand the respondent referred the dispute at the CMA claiming for payment of his terminal benefits in accordance with the Collective Agreement. The respondent's nature of dispute was on the implementation of the Collective Agreement. In the event, it is my view that the CMA had no jurisdiction to arbitrate the matter at hand as rightly contested by the applicant's Counsel. As provided in the provision quoted above the powers of the CMA on disputes concerning Collective Agreements are limited to the mediation process only. Therefore, after mediation had failed any party was supposed to bring the matter to this Court for a decision but not for the CMA to assume the powers of the Labour Court and proceeded to determine the dispute without having jurisdiction.

On the basis of the above analysis since the CMA arbitrated the dispute without jurisdiction, the proceedings and award procured thereto are null and void, consequently the same are hereby quashed and set aside.

Had it been the CMA had jurisdiction to determine the dispute the following is the position of this Court; the applicant alleged that the respondent did not attain voluntary retirement age at the time he submitted his application for early retirement. He also contended that

the respondent did not obtain any approval for early retirement. In Tanzanian public sector, retirement system is governed by the Tanzanian Public Service Retirement Benefit Act of 1999 where it is provided that the voluntary retirement age shall be 55 and compulsory retirement age shall be 60 years of age. This is in accordance with section 17 of the Public Service Retirement Benefit Act of 1999 which provides as follows:-

'Section 17. - (1) The age of age voluntary retirement from Service shall be fifty five years. (2) Subject to subsections (3) and (4). of this section and section 16 (e) an officer who attains the age of fifty five years may at any time thereafter opt to retire but an officer who does not so opt shall continue in office in the Service on pensionable terms until he attains the age of sixty years which is the age of compulsory retirement.'

The provision above governs the employees who are in public sectors. In most of the private sectors like the employer herein the retirement age depends on the Rules of the particular organization and agreement between the employer and employee. In this application the retirement age in the employer's organization is governed by the employer's Rules of Service (Kanuni za Utumishi)

admitted at the CMA as exhibit T3 particularly at item 22 which provides as follows:-

'22. 1 Mfanyakazi anaweza kustaafu kazi kwa sababu zifuatazo:-

22.1.2 Mfanyakazi akifikisha umri wa kustaafu kwa lazima akiwa na umri wa miaka 60.

22.1.3 Kustaafu kwa hiari baada ya kufikia miaka 55 au Zaidi.'

The provision quoted above is in line with the provision of the Public Service Retirement Benefit Act of 1999. Now the question to be addressed is whether the respondent attained the age of 55 at the time he submitted his application for early retirement. It is on record the first application for retirement by the respondent was made on 06/06/2014 as evidenced by Notice to retire of 06/06/2014 (exhibit P4). It is also on record that, on his application for employment (Exhibit T1) the respondent expressed that he was 44 years of age on 2008. However, the respondent's passport (Exhibit P3) shows that the respondent was born on 13/11/1958. In his decision the Arbitrator relied on the respondent's passport and ruled that at the time of his application for early retirement he had attained 55 years of age as stated at page 9 of the impugned award.

In the circumstance, it is my view that it was wrong for the Arbitrator to rely on the respondent's passport and driving license to determine his age because the said documents were not in the employer's records. It is my view that, since the respondent had initially expressed in his application for employment letter that he was 44 years of age at the time of employment then the same is assumed to be his correct age. It is also believable that the applicant relied on that letter to keep the respondent's employment record as in accordance with section 15 (1) of the Act.

Therefore, if there were any changes of the particulars of the respondent, he had a duty to notify his employer of such changes short of that the employer will rely on the available information. Thus, if the respondent did not submit his correct age, it falls that he falsely obtained his employment under misrepresentation as rightly contested by the applicant's counsel.

Nonetheless, on a simple calculation if in 2008 the respondent was 44 years of age then on 2014 when he made his first application for early retirement, he was 50 years of age. As stated above the applicant's voluntary retirement age was 55 therefore, the

respondent made his application before reaching the voluntary retirement age and he was not entitled for the same.

On the other hand, regardless of whether the respondent had attained the age of retirement or not, a request for early retirement is an application which may be granted or not. This is also provided under item 10.2 of the Collective Agreement (exhibit T4) which provides as follows:-

*'10.2 Mfanyakazi anaweza kustaafu akiwa na umri wa miaka hamsini na tano (55) **kwa makubaliano na mwajiri** bila ya kupoteza haki zake.*

[Emphasis is mine].'

In the term quoted above it is specifically stated that, there should be an agreement with the employer for an early retirement. In this matter it is on record the applicant rejected the respondent's application for early retirement as evidenced by the letter dated 26/10/2017 (exhibit T2). In the relevant letter the applicant elaborated his reasons for the refusal of the respondent's early retirement one being failure to complete the organization's financial report. Under such circumstances it is my view the respondent had no right to assume his application for early retirement has been

granted on the allegation that he had applied for it in several time. In the event, I find the Arbitrator was wrong to bless the respondent's absenteeism as early retirement.

On the last issue as to the parties relief, at the CMA the Arbitrator awarded the respondent long term service gift of 10 tons of cement and 35 corrugated iron sheets of 30 gauge of ten feet, severance pay of 20% of the respondent's last gross salary and transport allowances. It is undisputed fact that the remedies awarded by the Arbitrator are granted upon retirement either voluntarily or on compulsory retirement as reflected in the Collective Agreement. With due respect to the applicant's Counsel submission the collective agreement was tendered at the CMA as exhibit T4. As it is found above the respondent did not retire from his employment but he absconded himself from work therefore, he is not entitled to the remedies awarded by the Arbitrator.

In the result since the CMA had not jurisdiction to determine the dispute, then the proceedings and subsequent award procured thereto is null and void. The same is hereby quashed and set aside. Additionally, as stated above even if the CMA had jurisdiction to

determine the dispute the respondent is not entitled to the remedies awarded by the Arbitrator.

It is so ordered.



I.D. Aboud

JUDGE

07/05/2021

Labour Court TZ