IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 80 OF 2021

BETWEEN

ULTIMATE SECURITY (T) LTD & GARDA WORLD COMPANY ..... APPLICANT

VERSUS

ALLY SIMBA JUMA & 2 OTHERS ..... RESPONDENTS

JUDGMENT

S.M. MAGHIMBI, J:

The applicant herein, who was the employer of the respondent; is aggrieved by the award of the CMA in Dispute No. CMA/DSM/KIN/895/19/47/2020 ("the Dispute") dated 07/12/2020. In his Chamber Summons lodged under Section 91(1)(a),(b), 91(2)(a),(b), 91(4)(a),(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 R.E. 2019 and Rule 24(1), 24(2)(a),(b),(c),(d),(e) & (f) & 24(3)(a),(b), (c),(d) and 28(1)(a),(b),(c),(d),(e) of the Labour Court Rules GN. No. 106 of 2007. The applicant is moving the court to revise and set aside arbitration proceedings and CMA award. The application was supported by an affidavit of one of Joseph Goliama which in his submissions to support the application,

Mr. Hassan Mwenda, learned advocate representing the applicant, prayed that they form part of his submissions.

On the first ground of revision which is whether it was legally right for the arbitrator to hold into an assumption that the respondent were convinced and forced to reach into an agreement despite of the strong evidence adduced by the applicants, Mr. Mwenda submitted that the arbitrator misled himself badly for failure to consider the evidence adduced by the applicant during arbitration proceedings. That as far as the case is concerned, the respondents were not supposed to enter into an agreement as per page 8 last paragraph of the CMA award. That the arbitrator in reaching his decision, wore the shoes of the respondents and stated:

> *"Walalamikaji hawakuafiki makubaliano yaliyofikiwa licha ya kusaini, katika mazingira haya Tume inakubaliana na walalamikaji kwasababu ushahidi uliotlewa hauonyeshi kwamba walitoa ridhaa kwa hiari yao."*

He then argued that from the exhibit that was received as D1, on its page 2 last para the respondent's witness one Joseph Goliama testified that the applicants contracts were for a period of two years which were amicably terminated in writing on 31/10/2019, which the respondents herein signed.

That the evidence that was adduced by the employer shows that the respondents were not forced to sign the agreement but it was at their own consent. He supported his submission by citing the case of **Timothy Mgaya & 10 others Vs. Cisco Group Limited & Another, Misc. Appln No. 294/2019** quoted and approved by Hon. Muruke J, in the case of **Miriam Maro Vs. Bank of Tanzania, Civil Appeal No. 22/2017** (unreported) where it stated that:

> *"It is the law that parties are bound by the terms of the agreement, they freely enter into. We find Solace on the stance in the position we took in the case of Univeler T Limited Vs. Benedict Mkasa, Civil Appeal No. 41/2009 (unreported) in which we relied in a persuasive decision of the Supreme Court of Nigeria in the case of Osun State Government Vs. Dalami Nigeria Limited, Sc. 277/2002 to articulate*
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> *"Strictly speaking, under our laws, once parties have freely agreed on the contractual causes it would not be open for the courts to change those clauses which parties have agreed between themselves"*

To sum up on that ground, Mr. Mwenda submitted that the respondents freely entered into an agreement with the applicant and they

agreed to sign, which indicates they have knowledge of what was in the contents.

On the second ground of the unfairness of the termination of employment, Mr. Mwenda submitted that the arbitrator misled himself badly in reaching to the CMA award for failure to consider the evidence adduced by the applicant in page 9 para two of the CMA award. That from the evidence adduced by the employer on the 2nd page, last para, the witness explained that the reason for terminating the employment contracts was by way of an agreement. He argued that the issue of procedure is something which has no merits considering that it was an amicable agreement hence the applicant had a good ground for terminating the employment contracts.

On the third ground of revision on whether the arbitrator was correct to hold that an agreement reached by both applicant and respondent on 31st October, 2019 was void despite of the strong evidence adduced by the applicant during arbitration hearing; he submitted that the arbitrator failed to consider the evidence adduced by the applicant. That as per the 2nd page of the award, the last para, termination by an agreement is one of the lawful ways of ending employment contract in Tanzania which is provided under Rule 3 sub 2(a) of the ELR (Code of Good Practise) GN No. 42/2007 ("the

Code"). That the termination by an agreement is also recognized under Rule 4(1) of the same G.N No. 42/2007.

He submitted further that according to the exhibit that was received by the Commission as D1, it shows that the complainant at the Commission voluntarily entered into an agreement with the employer and signed the agreement which shows that they understood the contents of the contract. He supported the submissions by citing the case of **Simon Kichele Chacha Vs. Aveline M. Kelawi, Civil Appeal No. 160/2018**, where on page 8 the Court, it was stated that:

"it is settled law that parties are bound by an agreement they freely entered into and this is a cardinal principle of the law of contract."

That the evidence shows that the respondents freely entered into an agreement hence that could not stand as a void agreement, citing the case of **Yara Tanzania Limited V. Catherine Assenga (Lab. Rev. No 88/2020) [2021] TZHCLD 259; (16 July 2021)** where the court held that the parties freely entered into a separation agreement. He then argued that the respondents voluntarily entered into an agreement with the applicant in terminating their employment contracts of two years.

On the last ground of the reliefs granted by the CMA, whether they were justifiable, Mr. Mwenda submitted that the arbitrator misled himself badly for failure to consider the evidence adduced by the applicant in page 9 para 3 of the CMA award. That since the respondents had an agreement with the applicant, a voluntary agreement and terminal benefits were paid to them as per exhibit D2 which are the payments made to the applicants, and the same payments were also admitted by the CMA, then it was not proper for the CMA to have granted those relief(s). He concluded that from what has submitted, since the termination of the respondent was by mutual consent whereby, they were free to enter, their prayer is that the whole arbitration proceedings and award be revised and set aside.

In reply, Mr. Mgombozi also started by praying that the counter affidavit of the respondents in opposing this application be adopted to form part of these submission. He then submitted that the issue of time raised on para 9 of their counter affidavit is valid as the scheduled date of delivery of the decision to be 04/12/2020. The same was adjourned to 07/12/2020 whereby the ruling was read over to them and the respondents received the CMA award on 23/12/2020. He hence argued that the employer's act of collecting the award on 20/01/2021 was an act on negligence because the

award was ready for collection before that. Counting from the 23/12/2020 to the 20/01/2021 when the application was filed, he argued that it is more than 30 days while the respondent was aware that the award was ready for collection. Therefore, the application is outside the time limit and the applicants were aware that the award was issued since 07/12/2021.

He submitted further that the applicant had a duty to make follow ups on the CMA award since it was already decided as on which date it will be issued. That the applicant has legal officers who are internal and were also represented by advocates who had a duty to collect the award on time. That the reasons adduced for the delay are not sufficient and the argument that the application is timely filed is not correct.

On the substance of the application for Revision, his submission is that the decision was correct and had no default and the arbitrator decided the case according to the evidence tendered. That the arbitrator acted according to the Labor Laws, Section 15(4) of the ELRA, Cap. 366 R.E 2019 is very clear that when the employer intends to make any changes to the contract, he must negotiate with the employees. Further that Rule 8(1)(c)&(d) of the Code emphasize on fairness while you intend to alter the terms of an employment contract.

He went on submitting that according the EXD1, item 3 on page 2 provides the payment upon termination of employment which included the months' salary of the month of agreement, salary in lieu of notice which is equivalent to one month's salary and leave. That there is also gratuity payment and "mkono wa kwaheri" which is equivalent to two months salary and certificate of service. He argued that the agreement was not proper because those benefits are also provided for under the law therefore the learned Counsel's submissions are without merits.

Having heard the parties, I have noted that there is no dispute that the respondents were terminated from employment and that the termination was by way of an agreement signed by all parties. The only issue in question is whether the contract was voluntarily entered into by looking at the provisions of the law with regard to the termination. The applicant's claim is that the agreement was voluntarily entered into by the parties while the respondent alleged that they did not voluntarily sign those agreements.

The reason adduced by the applicant to terminate the respondents were that they had exceeded the retirement age. However, according to the EXP2, the employment contract, age was not mentioned as a factor to the termination of the respondents. It was just a two years renewable contract

and since the respondents were terminated during tenure of the contract. The applicant/employer is duty bound to prove the reasons for terminating the contract before it came to an end. The only reason revealed to the respondents was that they had reached retirement age. As I have stated, age was not a factor to the contracts in question as it did not express it anywhere in the contract.

Further to the above, the law is clear that the compulsory retirement age is 60 years. The evidence (EXD1) shows that the respondents were above 60 years of age by far and yet the applicant was renewing their contract. Hence if the applicant's reason for terminating the respondents is age, then it is substantively unfair reason because age was not a factor in those contracts. The law that governs the issues of termination under a fixed term contract is the Rule 8 (2) (a) of the Code which provides:

> *"(2) Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that:*
>
> *(a) where an employer has employed an employee on a fixed term contract,* ***the employer may only terminate*** *the*

contract before the expiry of the contract period ***if the employee materially breaches the contract.***"

In this case, the employer was bound under Section 37 to prove that there was material breach of contract and not merely convincing the applicants to sign of their right of employment on deceits that age was a factor.

Coming to the issue of voluntariness of the execution of the contracts, on the part of the respondents at the CMA who is the applicant, in their opening statements pleaded reason of termination as operational requirements and old age. Since the procedures for operational requirements were not established, neither was the age a factor in terminating the respondents, it cannot be said that there was voluntariness as the trade union was not involved in the negotiations. The issue of voluntariness cannot be said to have existed as defence for the applicant, the respondents did not enter into the contract voluntarily. Since the termination is found to be unfair, the respondents were rightly entitled to the benefits/compensation awarded by the CMA including their salaries for the remaining period of the contract.

Having made those findings, the conclusion is that the decision of the CMA is well founded and the applicant has failed to adduce sufficient reasons for it to be reversed. The revision beforehand lacks merits and it is hereby dismissed in its entirety.

Dated at Dar es Salaam this 10th day of December, 2021.

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S.M. MAGHIMBI
JUDGE