IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
(AT DAR ES SALAAM)

REVISION NO. 173 OF 2020

BETWEEN

KASTAN MINING PLC ..... APPLICANT

VERSUS

DEVOTA SALUM ..... RESPONDENT

JUDGMENT

S. M. MAGHIMBI, J:

At the Commission for Mediation and Arbitration for Kinondoni ("CMA") the respondent herein was a successful complainant in Labour Dispute No. CMA/DSM/KIN/R.447/15/16/193 ("the Dispute") which was decided on 10/08/2018. The CMA awarded the respondent a compensation to the tune of Tshs. 9,871,756/-. Aggrieved by the award, the applicant has lodged this application raising the following legal issues:

1. Where the Arbitrator usurped the jurisdiction of the Labour Court by determining the case and issuing a monetary award based on the Arbitrator's finding that the Applicant had subjected the Respondent to an unauthorized lockout beginning o 2 July, 2015.

2. Whether the Arbitrator act with over bias against the Applicant and make an error to the merits of the matter by disregarding evidence and failure to consider testimony of the Applicant and failure to account for the reasons for such disregard in determining the Applicant engaged in an unauthorized lockout leading to a miscarriage of justice.

3. Whether the Arbitrator improperly and illegally exercised jurisdiction not vested in the CMA by ruling on and determining the contractual merits, commercial validity, and contractual right of the Applicant and the Respondent under a standalone Educational Support Agreement.

4. Whether the Arbitrator acted with material irregularity by finding the Employment Contract (which was tendered and accepted in evidence during the hearings) between the Applicant and Respondent was a void contract, hence causing an injustice to the Applicant. The Arbitrator thereafter acted illegally by granting Respondent damages for breach of the terms and conditions of the same void contract, thereby violating the principles of natural justice in finding the Applicant culpable in a nugatory contract.

5. Whether the Arbitrator acted with material irregularity by finding that an employee is required to provide a written notice of resignation, and using this finding to issue the Award cause an injustice to the Applicant.

6. Whether the Arbitrator acted with material irregularity and overt bias against the Applicant by selectively interpreting the law against the Applicant, and interpreting the same provisions of the law in favor of the Respondent hence creating a miscarriage of justice against the Applicant.

7. Whether Arbitrator acted with material irregularity and made errors material to the merits of the subject matter by raising issues suo moto in writing the Award which were not among of the issues framed or argued by the parties during the case, hence violating the principles of natural justice by denying the Applicant its right to be heard and present a defense against the suo moto allegation.

8. Whether the Arbitrator acted with material irregularity and overt bias against the Applicant by disregarding evidence and failure to consider testimony of the Applicant and failure to account for the reasons for such disregard in relation to the impeachment

arguments regarding the Respondent and the credibility of the oral testimony of PW1 raised by the Applicant during cross examination of Respondent's sole witness, PW1, hence creating an injustice by denying the Applicant the right to have a fair trial.

9. Whether the Arbitrator made errors material to the merits of the subject matter by issuing speculative, contradictory, and non sequitur findings and determinations inconsistent with the testimony and evidence which have created an injustice for the Applicant.

10. Whether the arbitration proceedings and granting of an Award under the "crash program "were conducted illegally, with gross material irregularity, overt bias, and negligence contrary to accept and codified arbitration standards, practices, and procedural fairness considerations.

11. Based on the above stated Legal Issues, the Award in the instant case is illegal, biased, and has been determined based on significant material irregularities and errors material to the merits of the subject matter.

The application was preferred under the provisions of Made under Section 91(a) and (b), 91(2)(a), (b) and (c), 91(4) (a) and (b), and

94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 read together with Rule 24(1),(2)(a), (b), (c),(d),(e),(f), and 28(1) (a)(c)(d) and (e) of the of the Labour Court Rules GN. No. 106 of 2007, by a notice of application and a Chamber Summons supported by an affidavit of Mr. John Allen Tate a Principal Officer of the applicant which is dated 11th May, 2020. In the Chamber Summons, the applicant moved the court for the following:

(1) That this Honourable Court be pleased to call for the records, revise, quash and set aside the Award of the Commission of Mediation and Arbitration delivered on 10 August 2018 by the Honourable MPULLA, Arbitrator, in Labour Dispute CMA/DSM/KIN/R.447/15/16/193, and

(2) That the matter heard and determined by the Labour Court in the manner it considers appropriate, and

(3) To make any other orders that this Honourable Court, in the interests of justice, may deem proper and fair to grant.

Brief background of this application is as follows; the parties herein had an employer/employee relationship which commenced on the 09/05/2011 and ended on the 30th June, 2015. How the contract ended is what has led to the dispute at hand whereby the applicant alleged

that the respondent verbally resigned from the employment on the fateful date. Following the alleged verbal resignation, on 01st July, 2015 the applicant wrote a letter to the respondent accepting her resignation from employment, however, the respondent resisted service of the letter which was attempted to be served to her on the same date of acceptance, at around 4 pm.

On her part, the respondent strongly disputed that she resigned from the employment hence a confrontation occurred between the respondent and the management of the applicant. Upon failure of the parties to amicably resolve their misunderstanding, the respondent referred the matter to the CMA on ground of unfair termination, discrimination and breach of Educational Support Agreement ("the Agreement"). After considering the parties evidences, the CMA arrived at a finding that the respondent was unfairly terminated, ordering the applicant to compensate her a total of Tshs. 9,871,756/= being one month salary in lieu of notice, severance pay, 12 months compensation for unfair termination and refund of Tshs. 400,000/= resulting from the agreement. Aggrieved by the CMA's decision, the applicant filed the present application raising the aforementioned legal issues and seeking the aforementioned reliefs.

Before this court, the applicant was represented by her Principal Officer, Mr. John Allen Tate, whereas Mr. John J. Lingopola, Learned Counsel from a firm trading as Jelis Law Chambers represented the respondent. The application was disposed by way of written submissions.

The first legal issue is on the jurisdiction of the CMA whereby the applicant argues that the CMA usurped the jurisdiction of the Labor Court by issuing a monetary award based on the fact that the applicant was subjected to an unauthorised lockdown. On this issue, Mr. Tate submitted that the Arbitrator awarded the respondent on the basis of unlawful lockout arguing that it is only the Labour Court that has exclusive jurisdiction to make monetary awards for unlawful lockout as provided under section 84 of the ELRA. He submitted further that after making a determination that an unlawful lockout occurred, the Arbitrator should have referred the matter to this court pursuant to Section 58 (1) (a) of the Labour Institutions Act, Cap. 300 RE 2019 and Rule 52 (1) of Labour Court Rules, G.N. 106 OF 2007 (LCR).

Mr. Tate submitted further that the Arbitrator suo motto raised and determined the issue of constructive termination which was never pleaded by the respondent in her pleadings. He was of the view that the

relevant issue was determined without affording the parties the right to be heard which is against the principles of natural justice. He went on to argue that in cases of constructive termination, it is the duty of the employee to prove that he/she was unfairly terminated. To booster his argument, he cited numerous South African decisions and this court's decision including the case of **Ledger Nyagawa & Another vs Sputnik Engineering Co. Ltd (HC. Labour Revision No.81 of 2018) [2020] TZHCComD 63; (30 July 2020).**

Mr. Tate submitted further that the Arbitrator misconducted himself on a finding that verbal termination clause in the employment agreement was void, making the relevant agreement not in conformity with the law, as stated at page 14 of the impugned award. That being the position, he argued that the parties' employment agreement is void ab initio thus it has no legal binding which is the position stated in the Black's Law Dictionary 9th Edition. He argued further that the employment agreement between the parties is the standard agreement for all employees and the respondent freely signed it.

Mr. Tate proceeded to submit that as the termination clause was void, the Arbitrator ought to have found that the parties were under a mistake of fact essential to the employment agreement as provided

under section 20 (1) of the Law of Contract Act, [345 RE 2019]. He argued that since the employment agreement was void, it follows that the parties had no employer/employee relationship thus, the CMA lacked jurisdiction to entertain the matter.

He went on submitting that the Arbitrator misdirected himself in a finding that the respondent should have served a written notice before terminating her employment. Further that the Arbitrator's argument based on selective and superficial analysis of the statute without examining the intent of the law as emphasized in the case of **Chikilo Haruni David v. Kangi Alphaxard Lugora, Civil. Appl. No. 36 of 2012.**

Mr. Tate further contended that the Arbitrator raised the issue of misconduct suo motto basing on the respondent's closing arguments as reflected at page 15 of the impugned award. That misconduct was not one of the issues raised for determination, neither was it argued by any of the parties or any evidence adduced thereto. He argued that since the issue of misconduct was never raised, the arbitrator fell into error as the matter of fact cannot be proved by an advocate in the course of hearing. He supported his argument by citing the decision of the Court of Appeal in the case of **Attorney General Vs. Mkongo Building and**

Civil Works Contractors Limited and Namtumbo District Council, Civil Application No. 81/16 of 2019 where the Court emphasised that a matter of fact cannot be proved by an advocate in the course of making submissions to the court.

As to the award of severance pay, Mr. Tate submitted that the Arbitrator made an interpretive determination favourable to the respondent as reflected at page 19 of the impugned award. He stated that in the award of severance pay, the Arbitrator accepted the minimum standard agreed by the parties but the standard was disregarded on the parties' ways of terminating the employment agreement. That such conduct shows impartiality on the part of the Arbitrator adding that the Arbitrator made contradictory findings on unlawful lockout and constructive termination of the respondent.

Regarding the allegation of breach of educational support agreement, Mr. Tate submitted that the said agreement was executed two years after the employment agreement therefore it is exclusively a contractual matter. That it is not a labour matter thus the CMA had no jurisdiction over the same arguing that in the educational support agreement, the applicant agreed to pay the respondent any membership or registration fees required but not all fees as wrongly interpreted by

the Arbitrator. He stated that the word *'or'* should be construed disjunctively and not implying similarity as it is provided under section 13 of the Interpretation of Laws Act, [CAP 1 RE 2019] citing the interpretation of the Court of Appeal in the case of **National Microfinance Bank v. Victor Modest Banda, Civ. Appl. No. 29 of 2018** that where a word "or" is used then the two reliefs cannot be combined.

He went on submitting that the respondent did not present any documentary proof of the alleged registration fees, arguing that the actual cost in the year when the respondent was admitted was Tshs. 212,000/= as evidenced by the TLS Subscription Fee Notice attached to his submission. He added that the Arbitrator suo motto speculated on the main objective of the educational support agreement which was not disputed by the parties. He therefore made a finding which contradicts the evidence presented, he prayed that his findings be expunged.

Mr. Tate also raised a concern on how the case was conducted at the CMA. He stated that the applicant was served with summons on 26th July, 2018 that the case has been assigned to special 'Crash Program' and arbitration hearing was scheduled on 31st July, 2018. That the five days' notice is contrary to Rule 19 of the Labour Institutions (Mediation

and Arbitration) Rules, 2007 GN 67 of 2007 (GN 67/2007) which requires fourteen days' notice to be given before arbitration hearing. He alluded that the manner in which the crash program was conducted was hasty, rushed and highly biased because the applicant was denied more days to prepare for the case.

He submitted further that the Arbitrator failed to consider the fact that the applicant accepted the voluntary verbal resignation of the respondent, insisting that it was impossible for the applicant to lock out a person who was no longer his employee. In conclusion, Mr. Tate submitted that the impugned award is tainted with material irregularities thus, for the interest of justice it should be revised.

Responding to the submissions, Mr. Lingopola also started with the issue of CMA's jurisdiction on lockout matter. His submission was that the applicant misdirected himself and he is trying to mislead this court. That the issue of lockout was not discussed in the CMA's award as alleged and that the crucial issue at the CMA was whether the respondent resigned or she was terminated and it was found that the respondent was unfairly terminated.

As to the issue of constructive termination, Mr. Lingopola submitted that the same was not suo motto raised by the Arbitrator in

the impugned award and that the Arbitrator's decision was not based on the ground of constructive termination. He alluded that the Arbitrator determined the issue of resignation by looking at its definition and factors which prove its existence by referring to the case of **Katavi Resort v. Nunirah J. Rashid, [2013] LCCD 161.**

Regarding the issue of the validity of the employment agreement between the parties, Mr. Lingopola submitted that the Arbitrator never declared the whole employment contract void. That the Arbitrator only ruled that the provision of the contract which contravenes the requirement of section 41 (3) of ELRA is void. He argued that written resignation would have proved the respondent's resignation and not otherwise. Further that since the applicant alleges that the respondent resigned from employment, the onus of proof lied on him as provided under section 112 of the Evidence Act, [CAP 6 RE 2019].

On the allegation that the issue of misconduct was raised by the Arbitrator basing on the respondent's closing argument, Mr. Lingopola submitted that the issue of misconduct was discussed by the parties during trial as reflected at page 39 and 40 of the CMA typed proceedings.

Turning to the allegation that the respondent was not a credible witness, Mr. Lingopola submitted that the onus of proving the respondent's termination lies to the applicant pursuant to section 39 of ELRA therefore whether the respondent brought documents to prove her case is immaterial. Mr. Lingopola went on to submit that the contention that the Arbitrator made biased interpretative is fallacy, stating that severance pay was awarded to the respondent because she prayed for the same in CMA F1 and it was not disputed by the applicant.

Turning to the award of educational support, Mr. Lingopola submitted that the contention that the educational support agreement is not a labour matter ought to have been raised by the applicant at the CMA but not in this stage. He argued that the educational support agreement was part and parcel of the labour issues worth to be determined by the CMA. That the Arbitrator was right to order the applicant to refund the respondent Tshs. 400,000/= because the same is pursuant to the agreement. He then submitted that the applicant has attached the TLS fee note, the attached note shows that the fees to be paid exceeded Tshs. 400,000/= refunded to the respondent. Mr. Lingopola contended that there was no bias on the part of the Arbitrator

as the Advocates fees are easily accessible to everyone wishes to know them.

As to the allegation of short notice of the crash program which included this case at the CMA, his reply was that the ground is baseless as such contention ought to have been raised at the CMA. He argued that before crash program, the matter was pending for three years therefore the parties had ample time to prepare for the case. He added that the allegation that DW 1 was sick during trial is immaterial and was not stated at the CMA.

In the conclusion, Mr. Lingopola submitted that this application lacks merit as all the required procedures pertaining the proceedings of this dispute were followed and he therefore urged the court to dismiss the application.

In rejoinder, Mr. Tate submitted that the respondent failed to respond to the issues of law and fact that he raised. That the respondent again asserted that the applicant locked her out of the office which is the basis of the Arbitrator's award therefore, the CMA lacked jurisdiction on lockout matters. On other issues Mr. Tate reiterated his submission in chief.

After considering the submissions for and against this application, I find that the court is called upon to determine the following legal issues:-

i. Whether the Arbitrator usurped the jurisdiction of the Labour Court by determining and issuing an award based on a finding of lockout.

ii. Whether the Arbitrator legally made a finding that the parties' contract was void.

iii. Whether the Arbitrator suo motto raised and determined the issue of constructive termination.

iv. Whether the Arbitrator had jurisdiction to enforce educational support agreement.

v. Whether the respondent was a terminated or voluntarily resigned.

vi. What relief are the parties entitled.

On the first issue on record the applicant submitted at length that the Arbitrator made a finding on unlawful lockout. He argued that the CMA had no jurisdiction over the relevant issue because it is only the Labour Court vested with such jurisdiction pursuant to section 84 (1) of the ELRA. The applicant referred several pages where the word lockout was

used by the Arbitrator. For easy of reference, I hereunder quote two occasions where lockout was impliedly mentioned by the Arbitrator in the impugned award.

At page 13 first paragraph he stated the following: -

'... the employer by his conducts created situations which prevented the complainant from working.'

Moreover, at page 14 first paragraph the Arbitrator stated as follows:-

'... the complainant could not reasonably fulfil her obligations because she was prevented from entering the workplace.'

The question to be addressed by the Court is whether the Arbitrator's above comments and findings falls within the meaning of lockout provided under section 84 of the ELRA. The word *'lockout'* is defined under section 4 of the ELRA to mean: -

'a total or partial refusal by one or more employers to allow their employees to work, if that refusal is to compel them to accept, modify or abandon any demand that may form the subject matter of a dispute of interest'

In line with the above definition and the circumstances of this case, it is my view that the Arbitrator's finding on lockout does not fall under

the above meaning. What the Arbitrator did was to justify his decision that the respondent could not perform her work because she was not allowed entrance or access to the office of her employer. The fact that she was locked out of office as used by the arbitrator cannot be construed to mean the lock out under Sectio 84 of the ELRA as Mr. Tate would want the court to believe. In this case, the applicant did not prevent the respondent to enter the office premises while she was still his employee, the lockout was done in a belief that the contract had come to an end and the employment relationship between the parties ceased to exist. On the other hand, the lockout defined by the act is done by the employer to compel an employee to accept, modify or abandon any demand. Such is not the position in this case and by my reading of the award, is not what the arbitrator meant as in this matter, the lockout was done after acceptance of the resignation.

At this point, I find the allegation that the Arbitrator made a finding of a lockout provided under section 84 of ELRA is baseless and lacks merit. As rightly submitted by Mr. Lingopola, no lockout issue was determined by the CMA hence this ground lacks merit and is dismissed accordingly.

Going to the second and fifth issue, to whether the Arbitrator legally made a finding that the parties' contract was void and whether the respondent resigned or was terminated. The applicant alleges that the Arbitrator made a finding that the parties' contract was void. The applicant's allegation is based on the following findings of the Arbitrator as stated at page 14 third paragraph of the contested award: -

> *'I should stress here that the provision of their agreement which makes verbal termination and/or cancellation one of the agreed way to end employment relations is void as it contravenes the mandatory requirements of written notice as provided under section 41 (3) of the ELRA.'*

In my view the above order is very clear, the Arbitrator did not rule that the employment agreement between the parties is void as alluded by the applicant. He specifically mentioned that only the provision which is in conflict with the requirement of section 41 (3) of ELRA is void therefore such allegation lacks merit.

I fully agree with the Arbitrator that pursuant to the provision of section 41 (3) of ELRA the notice of termination has to be in writing and if the applicant alleged that the respondent resigned from employment, then she was duty bound to prove such resignation which is lawfully

done by way of notice in writing. I have considered the fact that the parties agreed to terminate their contract either verbally or in writing as reflected in the employment agreement (exhibit K2). However, whichever is the way used, the one who alleges must prove, therefore if the applicant contends that the respondent voluntarily resigned from employment, then she was bound to prove those allegations.

I have noted that the applicant strongly alleges that the respondent verbally resigned, but according to the internal memo (exhibit K5), it was reported that on 30th June, 2015 the respondent went to the office demanding payment of Tshs. 400,000/=, however the applicant only offered Tshs. 212,000/=. It was further testified that the respondent demanded to be paid the whole amount requested, otherwise she would resign from the employment. That, after being denied the requested amount, she decided to resign and that the respondent started to write resignation letter but promised to submit the same on the next day 01st July, 2015. The applicant further alleged that the respondent did not come to the office as promised on 01st July, 2015 therefore, he wrote a letter of acceptance of resignation (exhibit K6). That on the same date at 4:42pm the respondent went back to the office and refused to be

served with the said letter of acceptance of resignation disputing that she did not resign.

Under such circumstances, since the applicant could not prove the respondent's intention to resign, but instead admitted to have written her a letter to accept resignation which she (respondent) did not tender, it means that it was the applicant who terminated the respondent prematurely before she submitted her alleged intended resignation. If the respondent promised to bring her resignation letter on the next date, the applicant should have waited until she submits the same but not proceeding to write the acceptance of termination before the final resignation. As correctly found by the Arbitrator, there was no resignation in this case. Therefore, it is crystal clear that the applicant unfairly terminated the respondent.

As to the allegation of verbal resignation the same lacks merit. The fact that the respondent promised to tender the resignation letter on the next date signifies that she opted for written resignation and not otherwise. As stated above, the applicant should have waited for written resignation of the respondent.

Turning to the third issue as to whether the Arbitrator raised and determined the issue of constructive termination suo motto. The

applicant submitted at length that the Arbitrator suo motto raised the issue of constructive termination. I have gone through the impugned award, as rightly submitted by Mr. Lingopola, there is no issue of constructive termination raised and determined by the Arbitrator. At page 15 of the award the Arbitrator, after analysing the evidence adduced, only stated that the applicant's conducts towards the respondent amounted to constructive termination. Therefore, no right to be heard was infringed as alleged.

The applicant also alleged the issue of misconduct raised by the arbitrator but not raised by parties, his argument was that the arbitrator fell into error by determining an issue not raised. As stated above, the crucial issue at the CMA was whether the respondent resigned or not therefore no issue of misconduct was raised and determined by the Arbitrator.

Regarding the jurisdiction of the arbitrator in determining the enforceability of the educational support agreement, the applicant contended that the CMA lacked jurisdiction to determine the same because it was a separate agreement agreed by the parties. I am not in disregard of the applicant's long argument and the authorities cited, in my view the educational support agreement (exhibit K4) as it appears,

stands as an addendum to the employment agreement. The agreement arose out of employment relationship between the parties, and was entered to endeavour the parties' future employment relationship after the applicant has fulfilled his promise to support the respondent in her education at the Law School of Tanzania. I therefore find the allegation that the Arbitrator had no jurisdiction to enforce the same is baseless and unjustifiable because the educational support agreement was one of the conditions of the employment contract between the parties.

Further to the above, the provision of section 88 (1) (b) (ii) of ELRA empowers the CMA to determine matters relating to labour law or breach of contract or any employment or labour matter falling under common law, tortious liability and vicarious liability. The educational support agreement being a contract relating to employment matter, the CMA had jurisdiction to determine the same.

The applicant further alleges that the Arbitrator awarded the refund of Tshs. 400,000/= without any proof. On this point, I fully agree with the applicant that although the applicant agreed to support the respondent in her education, any claim of fees should have been accompanied with receipts. If the respondent paid the claimed amount from her pocket, she should have attached the receipt to prove the

same. Failure to do so means she could not prove her allegations and on that basis, the order of the CMA for a refund of Tshs. 400,000/= to the respondent is hereby set aside for lack of proof.

The applicant also contended that the Arbitrator did not consider his evidence; I find the contention to be absurd because in the impugned award, the Arbitrator considered evidence of both parties. On a further complaint of short notice of attending arbitration hearing, as rightly submitted by Mr. Lingopola, the said contention should have been raised at the CMA and not before this court because the CMA control their own proceedings and determine how best they dispose their case on priority basis. I cannot determine whether the notice was short or not because the issue should have first been discussed during arbitration so that I could be seized with the explanations from both sides I cannot come at this point and condemn the CMA for holding a clearance session to dispose their backlog cases. Furthermore, as it has been indicated and as per the records, the case had been in CMA's corridor for almost 3 years therefore the applicant had enough time to gather and prepare for his defence.

The last issue is on the parties reliefs; starting with the award of severance pay, though it was not disputed by the applicant, the

Arbitrator ought to have considered the law governing the same. Severance pay is paid to an employee fulfilling the requirements of section 42 of the ELRA. In the application at hand the parties had a fixed term contract of one year subject to renewal. Under such circumstance the respondent did not complete 12 months continuous service with the applicant hence she is not entitled to the award of severance pay. The part of the CMA award ordering the applicant to pay severance pay is hereby set aside.

Regarding the award of compensation, as stated above, the applicant unfairly terminated the respondent. The Arbitrator awarded 12 months remuneration for the unfair termination, however, since the parties were in a fixed term renewable contract that started on 09/05/2011, and ended on 30/06/2015, then she had already started her new circle of the fixed term contract, had worked for the month of May and June, therefore she entitled compensation for the remaining period of 10 months remuneration. I find no need to disturb the award of one month salary in lieu of notice.

In the result I find the present application to have partly succeeded. The refund of Tsh. 400,000/= arising from educational support agreement and the award of severance pay are hereby set aside. The

award of 12 months compensation is reduced to 10 months. The applicant is also ordered to pay the respondent one month salary in lieu of notice. It is so ordered.

Dated at Dar es Salaam this 19th November, 2021.

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S.M. MAGHIMBI

JUDGE