IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 920 OF 2019

BETWEEN

TLL PRINTING AND PACKAGING LTD.....APPLICANT

VERSUS

MONICA THOMAS KADASO.....RESPONDENT

JUDGMENT

Date of Last Order: 24/06/2021

Date of Judgment: 06/7/2021

A.Msafiri, J.

The applicant filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 29th October 2019 in Labour Dispute No. CMA/DSM/TEM/ 288/2018/113/2018 by Hon. Kokusiima.L, Arbitrator. The application was made under the provisions of Sections 91(1)(a) & 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act Cap 366 and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), and 28(1)(b)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007.

The application was supported by the affidavit of Daudi Charles Msungwandeba, the applicant's personal manager, and the respondent filed a counter affidavit challenging the application.

Following is the brief background facts to the application. The respondent was employed by the applicant on one year fixed contract from1st May 2017 in the position of Executive Quality Control. On 31st March 2018, applicant informed the respondent through the letter dated 31st March 2018 that her contract expires on 30th March 2018 and will not be renewed as the company cannot afford to have three employees in the department due to economic reasons. On 17th April 2018 respondent was paid all her benefits in accordance with the law. However, on 10th May 2018, respondent filed a labour dispute before CMA claiming breach of contract.

After failure of mediation, the matter was referred to arbitration and after the hearing, the arbitration ended in favor of the respondent in the award issued on 29th October 2019 whereas the respondent was awarded compensation for eleven (11) years and eight (8) months remuneration for breach of employment contract.

Aggrieved by the said award, the applicant has by way of chamber summons filed the present application praying for the orders that; this court

revise and set aside the whole proceedings and award of the CMA dated 29th October 2019 and this court to grant any other reliefs as it deems appropriate. When this application was placed before me for hearing, Mr. Ashery K. Stanley, learned advocate appeared for the applicant. The respondent was represented by Mr. Denis Mamkwala, personal representative.

Submitting in support of the application, Mr. Ashery K. Stanley prayed to submit on grounds appearing in paragraph 5 (i) (a), (b), paragraph 5(ii) (a) (b) (c), paragraph 5(iii) (e) of the affidavit. The contents of the said paragraphs were that;

i. *The trial arbitrator erred in fact and law by denying the prayer by the respondent that exhibits D2 and T1 be taken for forensic examination without assigning any reason or record in the award;*

ii. *The trial arbitrator erred in law and fact for failure to frame and determine crucial issues regarding the validity of contracts;*

iii. *The trial arbitrator erred in law and fact for failure to properly construe the provision of clause 4.1 of exhibits D2 and T1;*

iv. *The trial arbitrator erred in law and fact for failure to assign reason as to why he failed to consider exhibit T1 and instead resort to consider exhibit D2;*

v. *The trial arbitrator erred in law and fact for ruling that exhibit T4 was void;*

vi. *The trial arbitrator erred in law and fact for misdirecting herself regarding apparent annotation made in exhibits D2 and T1.*

Arguing on first ground, Mr. Ashery submitted that, during hearing at the CMA, counsel for the applicant prayed for Exhibit D2 and T1 to be taken for forensic examination. The prayer was recorded by the trial arbitrator and the same was refused without assigning reasons for such refusal. The order for refusal was not challenged by the applicant because it was within power of arbitrator under section 23(9) of GN. 67 of 2007, and the Arbitrator directed that the reason for refusal for the applicant prayer will be given while composing the award. But when the award was delivered, the prayer and reasons for refusal was never recorded in the award.

The counsel stated that such failure to record and assign the reason contravene the mandatory requirement of Rule 23(5) of GN. 67 of 2007

which requires the Arbitrators to make sure all necessary recordings takes place during the hearing and be reflected in the award.

On the second ground, he stated that, it is from the opening statement where the Arbitrator is required to frame issues in dispute. This requirement is provided under Rule 24(4) of GN. 67 of 2007. At page 2 of the impugned award, the applicant contended that the contract with the respondent was of one year while the respondent contended that the employment contract was of 12 years. From the outset of opening statement, one of the issue in dispute was the duration of the employment contract. But such issue was never framed by the arbitrator to allow parties to lead evidence and prove the duration of contract.

Failure of the Arbitrator to frame that crucial issue occasioned injustice on the part of the applicant. The trial Arbitrator forced parties to confine themselves on the issues she framed. He referred this court to the decision of HC Labour Division in the case of **TMJ Hospital LTD vs Pili Mbena** Revision No. 208 of 2019 (unreported) at page 13, where it was held that

> "*Failure to frame crucial issue by the Arbitrator may lead to wrong award.*"

He prayed for this Court to ascribe to the holding on the cited case, that the award was wrong because the crucial issue was not framed. On the third ground, Mr. Ashery submitted that, during hearing at CMA, two employment contracts were tendered and marked as Exhibit D2 and T1 respectively. Clause 4.1 of the said contracts required changes on the duration of contract to be made by agreement signed by both parties. In exhibit D2, duration was crossed by pen and signed by one person but there was no agreement signifying parties to have agreed to change the duration of contract. The absence of agreement made all changes made in exhibit D2 illegal. He referred the case of **Edwin Simon Mamuya vs. Adam Jonas Mbala** (1982) TCR 410 where it was held that where contract is in writing, its terms can only be valid by writing.

On fourth ground, Mr. Ashery submitted that, it was the finding of the trial Arbitrator at the trial of impugned award, that exhibit D2 tendered by the employee was a valid contract without making any comment on validity of exhibit T1 tendered by the applicant.

He said that section 15(6) of the Employment And Labour Relation Act, Cap 366 give obligation to the employer to prove terms of contract and if fails, terms stipulated by the employee will be considered. But trial Arbitrator

did not bother to evaluate the reason as to why he believed the terms stipulated by the respondent rather than the ones stipulated by the applicant. Such failure contravene mandatory requirement of Rule 27(3) (e) of GN 67 of 2007 which requires the Arbitrator to give reasons for decisions. The same spirit was once discussed in the case of **Tanzania Air Service Ltd vs. Minister of Labour, AG and Commissioner For Labour** (1996) TLR 217, where it was held that, failure to give reasons for the impugned decision is a serious irregularity which made that decision a nullity in law.

On fifth ground, Mr Ashery submitted that, after hearing of the evidence, the CMA was tasked to contextualize evidence in order to reach proper decision. But trial Arbitrator throughout the award failed to discover that there was apparent annotation of clause 4.1 of Exhibit D2 which shows that such annotation was made intentionally to mislead the Commission.

Also at page 11 of the award, the trial arbitrator admitted that the respondent in this case was issued with a non-renewal letter which was tendered as Exhibit T4 .The trial Arbitrator as a prudent person, failed to apply normal reasoning to answer the question that, if the contract was of 12 years, why did the applicant issued non-renewal letter to the respondent.

If the Arbitrator would have reasoned on that, he would have come into settled mind that, the contract was of one year and not of 12 years.

He referred the case of **Lutter Symphorian Nelson VS. AG and Ibrahim Said Msabaha** TLR (2000) 421 at page 444. Mr Ashery concluded that, through exhibit D2 and T1, applicant witness DW at page 7 of the award, raised a reasonable doubt that the signature appeared in clause 4.1 of exhibit D2 did not belong to his General Manager, and it was a result of forgery. This was serious allegations which required the trial Arbitrator to be cautious to satisfy herself on the authenticity before considering such exhibit in composing the award. And that the arbitrator would have invoked the provision of section 75(1) of the Evidence Act by making comparisons of signatures but she failed to do so and the reason was not recorded.

The question which raise doubt is how did the Arbitrator managed to authenticate the document which had already been doubted. It would be expected such explanation to be recorded in the award.

He reiterated his prayers that for this Court to revise and set aside the whole proceedings and subsequent award as prayed in the Notice of Applications and chamber summons. In response, Mr. Denis Mamkwala, respondent's personal representative prayed to adopt the contents of counter affidavit and

Notice of Opposition and submit that, the applicant is challenging that the Arbitrator denied his prayer that exhibits D2 and T1 to be taken for forensic examination. However, the CMA is just guided by the law and according to the law, any prayer or order sought by any party at any stage before CMA, must be made by Notice of Application.

This is per Rule 27 (1) of G.N. 64 of 2007. According to the said Rule, the applicant must have complied with requirement of Rule 29 (1) (2) of G.N. 64 of 2007. But in the CMA record, there was no any evidence which indicates that there is an application made by the applicant which made him to challenge the arbitrator's decision. In that sense, since there was no application made by the applicant before CMA, the arbitrator was correct in her decision.

Regarding the ground on failure of the Arbitrator to frame the issues, Mr. Mamkwala argued that, by practice, parties before CMA are supposed to submit opening statements before framing the issues. Thereafter they are ordered to file the list of document which they think are necessary for that case. The opening statement of both parties in the present matter at CMA, was concerning the termination of a fixed term contract. In such sense, the arbitrator was properly moved by the parties. That the nature of the matter

concerned termination of a fixed term contract hence the Arbitrator was right in framing issues which was properly before him.

Mr. Mamkwala asserted that, the case of **TMJ Hospital vs. Pili Mbena** (supra) is distinguishable from this current matter because the TMJ case was concerning different opening statement by the parties. This is well elaborated at page 12 of the TMJ'S case.

On the ground where the applicant is challenging the authenticity of exhibit D2 which was tendered before the CMA by the respondent, Mr. Mamkwala stated that the respondent agree that there was correcting and cancellation of dates made by the applicant and his signature appears there. This correction of dates, do not differ with exhibit T1 which was tendered by the applicant before the CMA. The dates which appears at page 1 of Exhibit D2 is the same which appeared in Exhibit T1 at page 2. All these changes has been written by the applicant.

The changes of duration also appears in clause 6.3.1 of exhibits D2 and T1 respectively, the same was made and signed by the applicant. These changes were witnessed by the General Manager of the applicant on one side and the other side by the respondent herself. However, during the proceedings, the applicant decided not to call the General Manager who

signed that document but decided to call Human Resource Manager who did not witness or sign the document.

So, when trial Arbitrator was delivering an award he just elaborated the reason concerning who was supposed to appear before CMA to witness the contents of exhibit D2 and T1. This is because of duty to call the witness was on the part of the parties and not CMA. This is according to Rule 25 (1) (a) (i) of G.N. 67 of 2007 which requires the applicant to bring the witness before the CMA to prove the respective case. So the Arbitrator was right to deliver his decision.

Regarding the apparent annotation made in exhibit D2 and T1, Mr. Mamkwala stated that, the trial Arbitrator noted that all annotations appearing in exhibits D2 and T1 and consider that they are the same because any annotation appearing in D2 is the same which appear in T1. This is because, all these documents were made by the applicant, and that the one who made and witness, and signed on the side of the applicant decided not to appear to prove the fact, and the burden of proof was upon the applicant.

He pointed out that, in the Doctrine of contracts, when two contracts appear before CMA or any trial Court and seems to differ, the trial Court Arbitrator shall always favor the one who did not made that document. Since

Exhibits D2 and T1 was made by the applicant and decided not to defend that document, the trial Arbitrator was right to consider exhibit D2 because it favors the respondent. He prayed for this Court to dismiss the application because it has no merit at all.

In rejoinder, Mr. Ashery reiterated his submissions and prayers before this court.

In view of the submission of the parties and having gone through the records, the issue I am supposed to determine generally is; ***whether the arbitrator erred in law and fact in control of the proceedings and determination of the evidence at the CMA and hence reaching a wrong finding and wrong award.*** In determining this issue, I will confine myself on the grounds raised by the applicant in the affidavit and the counter submissions by the respondent.

The first ground was that the trial arbitrator erred in fact and law by denying the prayer by the applicant (then respondent) that exhibits D2 and T1 be taken for forensic examination without assigning any reason of her findings or record in awards. Going through the record, clearly there are two disputed employment contracts both claimed to be the contracts of

employment of Monica Thomas Kadaso, (respondent), employee of the applicant.

The two documents were both tendered during the CMA proceedings as exhibit D2 belonging to the employee and exhibit T1 belonging to the employer. Going through the said documents, I noted that there is difference between the two, and this difference is the source of the dispute at CMA and the present application.

On the said documents, exhibit D2 at clause 4.1 the typed words shows that the duration of contract will be 12 months/ I year with effect from 1st May of the 2017. However, these words were annotated/crossed and changed to read "12 year" with effect from 1st November of the year 2016 and there is a signature on the crossed words.

At the same time exhibit T1, the words are unchanged and they read that; the duration of this contract will be 12 months/1 year with effect from 1st May of the year 2017. From these disputed documents, the applicant is claiming that, the respondent has one year fixed term contract from 1st May 2017 which expired on 30th April 2018. In the same breath, the respondent vehemently objected stating that she had 12 years fixed contract and that

the applicant breached the contract when they terminated her and give her the terminal benefits as per the letter dated 17th April 2018.

While submitting before this Court, Mr. Ashery stated that during the hearing at the CMA, the applicant prayed for exhibits D2 and T1 to be taken for forensic examination, he claimed that the prayer was recorded by the trial arbitrator and was refused without the arbitrator giving reasons of her findings.

In the hand written proceedings of the CMA, the applicant's prayer does not appear clearly. However, on the examination in chief by the employer (applicant) when the (employee) respondent was adducing her evidence before the CMA, it shows that the employer (applicant) objected to exhibit D2 stating that the signatures which appeared on clause 4.1 of exhibit D2 were not authentic. This was as follows;

S/J *Unakumbuka nini ilipofika mnamo tarehe 01/05/2017?*

S/J *Tulisaini mkataba kati yangu na mwajiri wangu. Mkataba wa ajira umepokelewa kama kielelezo D2 lakini mlalamikiwa anadai sahihi zilizoko kwenye kipengele 4-1 na hasa zilizofanya marekebisho sio halali lakini ya mwisho wa ukurasa ni halali. Tume imepokea kielelezo hicho kwa sababu haijaona tofauti ya sahihi hizo.*

The referred paragraph appeared also in page 9 of the typed proceedings. In the award, at page 8, before analyzing on the raised issues, the trial arbitrator pondered on the authenticity of the two disputed documents that is exhibits D2 and T1 Arbitrator stated that, the difference on the disputed exhibits was seen on the duration of the employment whereby exhibit D2 showed that the contract was for 12 years period of time supposed to commence on 1st November 2016 while exhibit T1 showed that the employment period commenced on 1st May 2017.

The arbitrator observed that, exhibit D2 which was tendered by the employee was amended to reflect hand written changes on commencement and end of the employee's contract. The arbitrator analysed further that, clause 4.1 of both exhibit D2 and T1 allows amendments to the contract, and she quoted the said clause;

> *".....but the period/duration in this contract may change by amending the dates, subject to the agreement of both sides with clear signature of the side concerned....."*

The arbitrator, reasoned that, by this clause, it was expected that the amendments can be done on the contract, and that, by denying the changes, the employer is trying to hide the truth that the employee's

contract was indeed of 12 years duration. The arbitrator reflected that strangely, the amendments were also done in clause 6.3.1 of both exhibits but the employer is not disputing them. Also annotations are seen in clause 4.3 and 4.4 of the exhibit T.1 which are not seen in exhibit D2 but the employer is also not disputing the same.

The Arbitrator stated her findings that, because both parties had agreed to make amendments of dates in the contract, and the employer is not disputing some of the amendments but only the one concerning the duration of the contract of employment, she finds that the exhibit D2 which is the contract showing duration of 12 years is the authentic one, and she proceeded to award the employee basing on the said contract.

By this analysis, I don't agree with the submissions of the applicant that the applicant's prayer and the arbitrator's reasons for refusal were not recorded in the award. I find that, the arbitrator analysed the objection raised by the employer (applicant), refused the prayer and gave the reason for refusal.

However, that get me to the main issue on whether the arbitrator was right in her findings on the authenticity of the disputed exhibits. I am of the view that basing on the circumstances of the matter where the two

documents were disputed, and the dispute concern the authenticity of the signatures appearing in the contract of the employment, the arbitrator should have reasonably seek an expert opinion.

I am aware that, as correctly observed by the counsel for the applicant, that section 15(6) of the Employment and Labour Relation Act, Cap 366 provides that, if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer.

Furthermore, I have considered the submissions of the respondents counsel Mr. Mamkwala who observed that the General Manager of the applicant whose signature is allegedly the one appearing in the disputed exhibits, failed to appear and testify during CMA proceedings. As per Mr. Mamkwala, it was the duty of the applicant to bring the said witness to testify on his side and prove before the CMA on the authenticity of the signatures, but still, this could not have been an expert opinion.

Despite that, I am inclined to agree with the applicant's claims that, being employer, he was the custodian of the contract which was exhibit T1 and that was the one which was authentic, and he produced the said

document to prove that the one from the employee was not the original one. This raise the necessity of handwriting expert opinion.

I agree that the arbitrator could have invoked the provision of section 75 of the evidence Act, and invite a handwriting expert in order to ascertain the authenticity of the documents before her findings and award in this matter.

That being said, after analyzing the evidence, documentary on the Court record and the submissions by the parties, and considering the fact that the authenticity of the two disputed documents was not ascertained, and for the purpose of justice and fairness, considering this is a Court of equity, invoking the provisions of section 91(1)(4)(b), of the Employment and Labour Relations Act, I hereby set aside the findings of the arbitrator concerning the examination of the authenticity of the disputed exhibit D2 and T1, set aside the award of the dispute No. CMA/DSM/TEM/288/2018/113/2018 which was tried by Hon. Kokusiima, Arbitrator and order the matter to be remitted back to CMA before another arbitrator. I hereby order that a handwriting expert opinion on the disputed documents should guide the arbitration proceedings on the authenticity of the same. Right of appeal explained to both parties.

It is so ordered.

A. Msafiri

JUDGE

06/07/2021