IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 753 OF 2019

BETWEEN

EFFCO SOLUTION (T) LTD..... APPLICANT

VERSUS

JUMA OMARI KITENGE..... RESPONDENT

JUDGEMENT

Date of Last Order: 18/05/2021
Date of Judgement: 16/07/2021

I.D. Aboud, J

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 15/08/2019 by Hon. Kachenje, J. J. Arbitrator in labour dispute No. CMA/DSM/KIN/R.1387/17/94. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act); 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).

The application emanates from the following background, on 06/03/2017 the respondent was employed as a Plant Manager of the applicant for a three years term contract, which was to end on 05/03/2020. On 21/08/2017 the respondent was terminated from the employment on the ground of misconducts namely, dishonesty, breach of trust and gross incompetence as it is reflected in the termination letter, exhibit T13. Aggrieved by the termination the respondent referred the dispute to the CMA claiming for breach of contract. On its findings, the CMA was of the view that, the applicant terminated the respondent both substantively and procedurally. Thus, the Arbitrator awarded the respondent 29 months' salary as compensation for the remaining period of the contract equal to Tshs. 369,039,500/=.

Dissatisfied by the Arbitrator's award the applicant filed the present application on the grounds set forth at paragraph 4 (xix) of the applicant's affidavit.

The matter was argued orally. Both parties enjoyed the services of Learned Counsels. Mr. Evold Mushi was for the applicant while Mr. Ashiru Lugwisa appeared for the respondent.

Arguing in support of the application Mr. Evold Mushi submitted that their first ground is on the basis that the matter was time barred at the CMA therefore it had no jurisdiction to entertain it. He argued that, the cause of action was breach of contract and according to Rule 10 (1) (2) of the GN. 64 of 2007 the matter had to be filed at the CMA within 60 days, but the respondent filed it after 102 days without asking for condonation as required by the law.

It was submitted that, after the matter was struck out by the Arbitrator for lack of jurisdiction, the CMA had no power to extend time to the respondent to file a new case basing on new cause of action which was breach of contract. It was therefore argued that, the new application for breach of contract was also filed out of time. It was also stated that, according to the termination letter the respondent was terminated on 18/08/2017 and the dispute on breach of contract was filed on 30/11/2017 which was about 102 days beyond the time limit. It was further submitted that, breach of contract was a new case based on new cause of action.

The learned Counsel went on to argue that, the Arbitrator had no such powers to give any order whatsoever after he found that the CMA had no jurisdiction. He argued that, the proper procedure was

for the respondent to apply for condonation before filing the complaint for breach of contract as he did.

On the second ground it was submitted that, the evidence on record from DW1 to DW5 and the exhibits tendered at the CMA proved on the required standard that the applicant had valid reason to terminate the respondent and had followed all the required procedures. It was added that, the evidence which proved the valid reason and proper procedures are in exhibit E12 collectively which also clearly shows admission from the respondent. It was further submitted that, in the hearing form (exhibit E12) at page 2, item 1.3 the respondent accepted that he received 9 million but he had no receipts to account on how he spent the money in question. It was argued that, more than 2 million was not accounted for and no explanation was given to that effect. The Learned Counsel submitted that, the respondent also committed an offence of breach of trust and this issue is reflected in page 2 and 3 of exhibit E12 where the respondent said he had nothing to explain.

Regarding the third ground it was submitted that, Exhibit E5 was the appointment letter, which indicates the respondent's salary was Tshs. 3,500,000/=, however in computing compensation the

Arbitrator used a monthly salary of Tshs. 12,700,000/=. It was also submitted that, the respondent termination was before he completed six months and, there was no any evidence which was tendered to prove the salary rate which the Arbitrator relied on computing the compensation he awarded to him.

On the last ground it was submitted that, the award was unlawful because the purported employment contract was not yet signed. It was stated that, there was an offer only by the time the respondent was terminated. It was thus argued that, the contract which was not yet signed cannot be breached hence, the cause of action as it is cannot stand in stet this case. To support his submission the Learned Counsel referred the court to the case of **Joseph Mutashobya Vs. Kibomet Group Ltd**, Civil Appeal No. 53 of 2001, TLR 2004, page 242, where it is clearly stated that, fixed term contract is the one which shows how the contract should be terminated and parties are guided by the terms of employment contract. It was stated that, in this case since there was no between the parties it means they had not yet agreed on the mode of termination.

It was strongly submitted that, the evidence on record shows the applicant had a valid reason to terminate the respondent and followed the required procedures. Therefore, the Learned Counsel prayed for the CMA's award be quashed and set aside.

Responding to the application Mr. Michael Kasungu adopted the respondent's counter affidavit to form part of his submission. Regarding the first ground he submitted that, the filed complaint at the CMA was not timed barred. It was stated that, the respondent herein obtained powers to file the said complaint from an order of the mediator dated 28/11/2017 therefore, the CMA had jurisdiction. He added that, it is not true that the initial complaint of unfair termination was filed on 14/12/2017 which should have been filed within 60 days.

On the second ground it was submitted that, the weight of evidenced relied by Mediator was on balance of probability and as a matter of fact in this case the evidence adduced by the respondent at the CMA greatly outweighed the evidence of the applicant herein. It was further submitted that, exhibit E4 which was service sheet for batteries proved that it was not the respondent who ordered the replacement of those batteries. It was argued that, on the exhibit in

question the respondent had question on what was submitted by the mechanic and therefore he was not in support of the mechanic person. It was further submitted that, the service sheet (exhibit E1) was signed by the respondent two days after the workshop supervisor and the mechanic. Thus, there was no possibility for the respondent to authorize the replacement and fixing of the alleged truck.

The Learned Counsel went on to submit that, the applicant's Counsel submission on the admission of the misconducts on exhibit E12 is not true. He said, the respondent submitted the receipts to the applicant and that even the money deducted from the respondent was refunded to him as evidenced by receipt of payment of terminal benefits (exhibit E14).

On the third ground it was submitted that, it not true that the computation was supposed to be based on Tshs. 3,500,000/=. The Learned Counsel admitted that it is true that the respondent did not have a signed employment contract, however he strongly argued that the employer had the responsibility to produce the written contract pursuant to section 15 of the Act.

Furthermore, it was submitted that, in his employment contract the respondent was paid in USD and not Tanzania Shillings (Tshs) as reflect in exhibit E14 where the deduction was made in Tshs. Therefore, the Arbitrator was right in computing the amount the respondent was to be paid equivalent to USD. The Learned Counsel therefore urged the court to uphold the CMA's award.

In rejoinder Mr. Evold Mushi strongly submitted that, the matter at the CMA was time barred and there was no valid condonation.

On the issue of breach of contract, it was argued that according to the principle established, burden of proof is on the complainant and in this case at the CMA the respondent was the complainant. Regarding the issue of salary, it was submitted that, there was no any confusion at the currency to be used as it was previously provided in employment letter that the salary was in Tshs. He therefore prayed for the application to be allowed.

Having considered parties submissions, court records as well as relevant applicable labour laws and practice with eyes of caution, I find the key issues for determination are; whether the CMA had jurisdiction to entertain the matter, whether the applicant proved the

misconducts levelled against the respondent, whether the applicant followed procedures in terminating the respondent, whether the Arbitrator applied the correct salary scale of the respondent and, what reliefs are the parties entitled.

On the first issue as to whether the CMA had jurisdiction to entertain the matter. It is an established principle that, objection relating to jurisdiction and limitation of time can be raised at any stage even that of an appeal. This is also the position of the Court of Appeal case of **Tanzania Revenue Authority Vs. Tango Transport Company Ltd.** Civil Appeal No. 84 of 2009 where it was held that:-

> *'The law is well settled and Mr. Bundala is perfectly correct that* ***a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court suo moto, as it goes to the root of the trial*** *(See, Michael Leseni Kweka; Kotra Company Ltd; New Musoma Textiles Ltd. cases, supra). Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests.'*

In this application the applicant strongly argued that the CMA had no jurisdiction to entertain the matter because it was not filed on time. The record shows that, initially the respondent instituted the dispute of unfair termination at the CMA where the applicant raised preliminary objection thereto. The preliminary objection was to the effect that, the Commission had no jurisdiction to entertain the dispute. The respondent's Counsel Mr. Benard conceded to the preliminary objection that they made a mistake on the nature of the dispute indicated in the CMA F1. Therefore, the Arbitrator struck out the matter and his order was to the following effect:-

> *'CMA: due to the fact that the applicant conceded with the P/O, this matter is struck out and the applicant is granted a leave of 7 days to re-file the matter afresh if he wishes so. It is so ordered.'*

The applicant argued that after the matter was struck out by the CMA, the arbitrator had no jurisdiction to extend time for the respondent to file a new case with a new cause of action. As it is clearly shown in the above order, the matter was struck out because the CMA lacked jurisdiction to entertain it. Under such circumstances, I fully agree with the applicant's Counsel that since the matter was

struck out for lack of jurisdiction the CMA had no powers to extend time suo motto and allow the respondent to file new case basing on new cause of action which was breach of contract out of time. In this case the first dispute instituted by the respondent was for unfair termination which was different from the new one of breach of contract as it is contested in this court.

In my view, after the Arbitrator ruled that he had no jurisdiction and proceeded to struck out the application he had no mandate over a new dispute which was to be filed by the respondent. Therefore, the respondent was required to follow proper procedure and file an application for condonation as rightly submitted by the applicant's Counsel.

The record shows that the respondent was terminated from employment on 18/08/2017 and the dispute about breach of contract was filed on 05/12/2017, which was about 102 days from the date of termination. As rightly submitted by the applicant's Counsel the law governing time limit for reference of disputes at the CMA is GN 64 of 2007 specifically Rule 10 (1) (2) which provides as follows: -

> *'Rule 10 (1) Disputes about the fairness of an employee's termination of employment must*

be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.

(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute arised.'

In the event, since the dispute about breach of contract was filed out of time without proper order of condonation it is my view that the CMA improperly entertained the matter. As a matter of procedure, the CMA was required to determine the application for condonation before going to the merit of the application however, that was not done in the present application. Under the circumstances I find such procedural irregularity to be fatal and renders the whole CMA's proceeding nullity as the CMA proceeded to determine the application without having jurisdiction.

On the basis of the above discussion, it is my view the point of jurisdiction raised by the applicant herein has merit. The CMA had no jurisdiction to determine this application as stated above. Consequently, the proceedings and award acquired thereto is

quashed and set aside. The respondent is at liberty to still persue his right by following proper procedures.

It is so ordered.

I.D. Aboud

JUDGE

16/07/2021