IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 317 OF 2020

PENNA PURA OIL TANZANIA LTD.....APPLICANT

VERSUS

EKTA V. KARSANJI ..... RESPONDENT

JUDGMENT

Date of Last Order: 18/08/2021
Date of Judgment: 7/09/2021

B.E.K. MGANGA, J.

On 6th March 2019 the respondent signed an offer of employment for the position of Finance Manager of the FUCHS joint venture Tanzania with a basic gross salary of TZS 7,760,000 per month. On 30th August 2019 she was served with a letter of separation. On 8th October 2019 she filed Labour Dispute No. CMA /DSM/KIN/827/19/368 claiming to be paid TZS 465,600,000/= as 60 months' salary pay for the remaining employment contract, and payment of one-month salary in lieu of notice. She indicated in CMA Form 1 that the nature of the dispute was **breach of contract** and not termination and that the said breach occurred on 30th August 2019. The applicant raised a preliminary objection that the dispute was time barred but the same was overruled.

On 29th June 2020 Alfred Massay, Arbitrator awarded the respondent to be paid TZS 77,600,000/= as salary compensation for 10 months and 7,760,000/= as one month salary in lieu of notice, all amounting to TZS 85,360,000/=. Being aggrieved with the said award, on 6th August 2020, the Applicant filed a Notice of application supported with an affidavit praying this court to revise the said award. In the affidavit in support of the application, applicant raised seven legal issues namely:-

1. *That, the Honorable Arbitrator erred in fat and law by proceeding to determine the dispute and issue an award while the matter was filed out of time.*
2. *That, the Honorable Arbitrator erred in fat and law by deciding that the letter of separation does not indicate the reason that leads (sic) to separation whilst in the same paragraph (page 7 paragraph 2) stating the reason for termination as expressed by the respondent herself.*
3. *That, the Honorable Arbitrator erred in fat and law by awarding that the Respondent's contract was breached without availing her with the right to be heard while in fact the Respondent herein herself testified before the Commission that she was in a meeting with the Applicant and there was sufficient evidence adduced at the CMA to prov that.*
4. *That, the Honorable Arbitrator erred in fact and in law by failing to reasonably assess and come to a conclusion that the employment ended amicably and the separation agreement states as much and therefore the Respondent could not claim breach of contract on a termination agreement which ended to her advantage and which she negotiated.*
5. *That, the Honorable Arbitrator erred in fact and in law by interchanging the provisions of the law relating to unfair termination with those of breach of contract and therefore misguiding himself as to the outcome.*

6. *That, the Honorable Arbitrator erred in fact and in law by awarding general damage to the Respondent herein whilst there was no injury that she had suffered and that the Arbitrator did not take into consideration the fact that the Respondent herein only worked for 5 and a half months but instead the Arbitrator took into consideration things not mentioned at the Commission by the Respondent such as no alternative employment and the COVID- 19 situation which were both not stated or testified or pleaded by the Respondent.*
7. *That, the Honorable Arbitrator erred in fact and in law by awarding notice pay to be paid to the Respondent while this was already paid and doing so amounts to double jeopardy.*

The application was disposed by way of written submissions. The applicant enjoyed the service of Mercy -Grace Kisinza advocate while the respondent enjoyed the service of Anwar M. Katakweba advocate.

Arguing ground one of revision, counsel for the applicant submitted that employment of the respondent ended on 30th August 2019 and the matter was filed at CMA on 8th October 2019 that is more than 30 days provided for under Rule 10(1) of the Labour Institutions (mediation and Arbitration) Rules, GN. 64 of 2007 and there was no application for condonation. The dispute was supposed to be filed on or before 29th September 2019.

In arguing ground 2 of revision namely that the honorable Arbitrator erred in law and in fact by failing to acknowledge and find that the separation was mutual and amicable and that there was no breach

whatsoever, counsel submitted that the arbitrator and the respondent confused as to what was breached between the employment contract and the contract that ended the said employment. She argued that there was no breach of employment contract as there was no such terms. She also argued that there was no breach of contract that ended the said contract as the respondent was paid in full as agreed in the separation letter (**exhibit P4**). She insisted that the signing of separation letter clearly shows that there was no breach of contract but rather a mutual separation of the parties. She concluded by submitting that the arbitrator failed to consider correspondence post termination especially the emails that were admitted as exhibit D1.

Arguing ground 3 of the revision namely that the arbitrator erred in law and in fact in finding that termination was unfair in that there was no reason for separation, counsel for the applicant submitted that, reasons were given, and the parties agreed to part way amicably. She submitted that respondent admitted in her evidence that she was called in a meeting and informed that finance department would be outsourced. That DWI Salim Janmohamed testified that the applicant failed to reach agreement on remuneration with the respondent as shown in various email correspondence (exhibit D1 collectively) which

led the applicant to outsource the entire finance department. She concluded that, reasons for separation were given in separation letter (exh. P4) that was signed by the respondent.

On ground four of revision i.e., that the honorable Arbitrator erred in law and in fact in finding that the procedure for termination was unfair in that the Respondent was not heard while in fact she was, counsel for the applicant submitted by referring to the separation letter (exh. P4) and emails prior separation (exh. D1 collectively). She submitted that all these shows that there was consensus by both parties on separation and that the respondent's claims were also incorporated in the said separation letter. She was of the view that the respondent frivolously filed a dispute at CMA as an afterthought but with an intention of earning more money than what she demanded and agreed to, by both party prior separation. She concluded that procedure was adhered to as both DW1 and the Respondent (Pw1) testified that there was a meeting which resulted into terms of separation (exh. P3) and mutual separation letter (exh. P4) and a recommendation letter issued to the respondent.

In ground 5 of revision, namely that the honorable arbitrator erred in law and in fact by interchangeably using provisions of unfair termination and breach of contract, counsel for the applicant submitted that, the

respondent was employed by the applicant for the period below 6 moths hence cannot claim unfair termination. She cited the case of ***Mwaitenda Abobokile Michael v. Interchick Limited, Labour Dispute No. 30 of 2010*** ,High Court,(Unreported). She went on that the arbitrator erred in law and fact to use requirement of unfair termination to adjudicate the matter and that the Arbitrator relied on section 41(3) of the Employment and Labour Relations Act (ELRA) which is part of the reliefs for unfair termination. Submitted further that the order of compensation awarded to the respondent is a relief for unfair termination since breach of contract attracts damages which have to be proved. That at the time of referring the dispute at CMA, the respondent based her claim on breach of contract and not on unfair termination.

In arguing ground 6 of revision, namely that, the arbitrator erred in law and in fact in awarding the relief as he did, counsel for the applicant submitted that compensation is awarded in cases of unfair termination and that the remedy for breach of contract is either specific performance, specific damage or general damages and any other legally stipulated outcome and not compensation. She went on that, in the application at hand, the respondent did not pray for specific damages and neither did she prove them. She cited the case of ***Marine Services***

Company Ltd v. Willbard R. Kilenzi, Revision No. 133 of 2015 [2015] LCCD in support of her argument that general damage has to be proved by evidence. She went on that the arbitrator awarded the said damages on ground that the respondent has not secured an alternative employment while nothing was mentioned by the respondent to such effect. She strongly submitted that the arbitrator was biased when he held that given the current state of COVID- 19 chances of the respondent to secure an alternative employment is small while this claim was not substantiated or supported by evidence and in fact it was not argued by the respondent. Counsel submitted also that; the arbitrator ordered the respondent to be paid one months' salary pay while she was already paid as evidenced by emails of the respondent dated 29th August 2019 part of collective exhibit D2 that was admitted without objection. She concluded that this was double jeopardy and caused miscarriage of justice on part of the applicant.

On the other hand, counsel for the respondent has argued that the application was filed within time and that it was improper for counsel for the applicant to rely on Rule 10(1) of GN. No.64 of 2007 for unfair termination. Counsel argued further that the application by the respondent anchored on Rule 10(2) of GN. No. 64 of 2007 as other

disputed other than unfair termination and that it was supposed to be filed within 60 days. Counsel went on that, the dispute arose when respondent got a letter of termination of employment on the 30th August 2019 and the matter was referred to the Commission on the 8th October 2019 therefore the dispute was filed within the time range prescribed by the law. He cited the case of ***Aizack Adam Malya v. Willy Mlinga, Revision No. 443 of 2019*** to cement on his argument that disputes falling under Rule 10(2) of the said GN has to be filed at CMA within 60 days and that the application was filed within time.

On ground No. 2, Mr. Katakweba argued that there was no mutual agreement rather, a separation letter after the respondent was terminated and that there was no proof of negotiation between the parties. He submitted that email communications relied upon by applicant shows that the respondent acted under command and instructions of the applicant and that there was no negotiation. He concluded that it was admitted under re-examination that applicant had to get rid of the respondent because they could not agree on terms hence there was no mutual agreement.

Arguing ground No.3, counsel for the respondent submitted that, it is undisputed that reasons advanced forward for terminating the

employment was outsourcing finance department. He was of the view that respondent was terminated after failing to agree on certain terms of the agreement. He went on that the two reasons given for termination of employment of the respondent namely (i) outsourcing the finance department and (ii) failure to reach common terms for remuneration were ambiguous yet procedures for termination were not followed. Counsel for the respondent cited the case of ***MIC Tanzania PLC v. Sinai Mwakisisile, Revision No. 387 of 2019*** (unreported) in which this court (Mwipopo, J) held that failure of giving reasons in the letter of termination amounted to infringement of right to know reasons for termination.

Arguing the fourth ground, counsel for the respondent submitted that, respondent was merely notified that she will be retrenched as finance department was to be outsourced as there is no evidence that she was afforded right to be heard. Counsel argued that the provisions of section 38(1) of the Employment and Labour Relations Act [Cap. 366. R.E. 2019] were not complied with by the applicant before termination of employment of the respondent. Counsel cited the case of ***TANLEC Ltd v. the Commissioner General of Tanzania Revenue Authority, Civil Appeal No. 20 of 2018, CAT*** (unreported) to

support his argument that right to be heard is a constitutional right and that every person has to be heard before an action affecting his right is taken. In short, it was argued that respondent was denied right to be heard before a decision of termination was reached by the applicant.

Counsel for the respondent argued that the arbitrator did not interchangeably use provisions of unfair termination and breach of contract and argued further that, the amount awarded to the respondent as compensation were in order. He submitted that compensation was awarded as remedies to the respondent who was injured after breach of contract. He cited the Ugandan case of ***Ewadra Emmanuel v. Spencon Services Limited, Civil suit No.0022 of 2017 UGHCCD 136*** in which the case of ***Robinson v. Harman [1848] 1 Exch. 850*** was cited to bolster his argument that, where a party sustains a loss by reasons of breach of a contract, has to be compensated.

In the final ground of revision, counsel for the respondent submitted that, Arbitrator did not error in awarding reliefs he awarded the respondent as they were compensation for 10 months salary remaining duration of the contract. Counsel supported the arbitrator by taking into consideration of difficulties the respondent can encounter to secure

another employment and issue of COVID 19 as mitigation factors in favour of the applicant and not aggregate factor.

I have carefully considered rival arguments of the parties in this revision application. I appreciate the energy and time spent by both counsels in their respective submissions. Reading their submissions, it came clear to me that the central issues are whether the cause of action in this revision application is breach of contract or termination and that all other arguments based on reliefs and or procedures can best be answered after those main two issues.

In this judgment I will, therefore, start with the issue of breach of contract between the applicant and the respondent as the cause of action. It was argued by the applicant that there was mutual separation and that there was no breach as there was no such terms breached. But respondent insisted that there was breach of contract. At the time of filing the dispute at CMA, respondent indicated that the cause of action against the applicant is breach of contract therefore proceedings proceeded in that line. I have examined evidence adduced by the respondent to see whether she explained on how terms of the contract, if any, was breached. In her evidence, Respondent, (PW1) testified that her employment with the applicant started on 1st March 2019 when she

was employed as Finance Manager. She tendered copy of offer of employment as exhibit P1. She stated further that there was a written contract (exh. P2) which she was promised to be given but the same was not signed because there were terms which needed clarifications. She tendered emails correspondences (exh. P3) showing reasons as to why the said contract was not signed. She testified that on 26th August 2019, having worked for five and a half (5½) months, she separated with the applicant on ground that, applicant needed to restructure the finance department which would be outsourced as a result, she was informed that her employment will be terminated. It is in her evidence that on 30th August 2019 she received an email informing her that, that day was her last working date. That, she was served with letter of separation (exh. P4) and recommendation letter (exh. P5). She testified further that there was breach of contract as neither reason nor procedure was followed and no opportunity of hearing before termination was issued and that she was the only employee terminated. In concluding her evidence, she prayed for declaration order that there was breach of contract and be paid salary for the remaining period of the contract which is 60 months and notice pay. While on cross examination, respondent testified that no prior notice of termination was given, that offer of contract does not say there is period of probation,

that Employment contract was not signed because some clauses needed clarifications and that there was no proof of financial crisis that necessitated my termination.

On the other hand, **DW1. Salim Janmohamed** testified that the contract was not signed as the respondent wanted change of terms including increase of net salary and other benefits as a result no agreement was reached. Dw1 tendered emails exchanged with the respondent as exhibit D1. When under cross examination, Dw1 testified that parties agreed terms of employment before he issued the letter of offer. He concluded that in August 2019 parties agreed separation.

There is no dispute that up to the date of separation, there was no contract signed by the parties due to reasons that parties did not agree on the terms as stated in evidence of both PW1 and DW1 and in email correspondence exhibit P3. As there was no contract signed, it cannot be said that there was breach of contract as terms thereof were not either brought to the Arbitrator or to my attention. In her evidence, respondent (PW1) did not explain how and what term of employment contract was breached. In my view, failure to give reasons or to follow procedure or failure to be afforded right to be heard before termination as testified to by the respondent, cannot be said is a breach of

employment contract, or the fact that she was the only employee terminated on ground of outsourcing finance department is not breach of contract. Termination based on the latter is discrimination and not breach of contract. More so, absence of proof of financial crisis cannot be termed as breach of contract. As I understand, respondent was challenging termination on ground that there was no valid reasons for termination and that procedure for termination was not followed which is why, she was led so to testify. For the foregoing, I hold that the allegation of breach of contract was not proved by the respondent. It was not enough just to allege that there was breach of contract without substantiating that allegation with evidence. ~~Respondent indicated in CMA Form 1 that the cause of action is breach of contract for reasons that I will disclose latter on in this judgment.~~

In the 1st ground of revision, counsel for the applicant argued that the respondent filed the dispute at CMA while already time barred. She submitted that respondent was terminated on 30th August 2019 and she filed the dispute at CMA on 8th October 2019 that is more than 30 days provided for under Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. 64 of 2007 and that there was no application for condonation. She concluded that, the dispute was supposed to be filed

on or before 29th September 2019. Counsel for the respondent relied on breach of contract as the cause of action and that the same has to be filed at CMA within 60 days in terms of Rule 10(2) of the said GN. The Aizack ***Adam malya's case,*** supra, was relied on. It is true that disputes relating to unfair termination has to be filed at CMA within 30 days as per Rule 10(1) supra, and that other disputes has to be filed within 60 days as per Rule 10(2) supra. In the application at hand, though trickery the respondent indicated that the cause of action was breach of contract, the evidence she tendered proves that it was unfair termination. Respondent chose to prefer the dispute under breach of contract for two reasons namely (i) she was aware that she has worked only for five and half (5½) months hence not covered by the provision of section 35 of the Employment and Labour Relations Act [Cap.366 R.E. 2019] that requires an employee to have worked for more than six months for the provisions relating to unfair termination to apply and (ii) that her claim for unfair termination was not maintainable as she was out of time. It is unfortunate to the respondent as she was caught by a spider web. It was argued on her behalf that, the two reasons given for termination of employment namely (i) outsourcing the finance department and (ii) failure to reach common terms for remuneration were ambiguous and that procedures for termination were not followed

and the case of ***MIC Tanzania, supra,*** suggest unfair termination and not breach of contract as I have pointed out hereinabove. Since the evidence suggest that the dispute was based on unfair termination and since it was filed more than 30 days from the date the cause of action arose, i.e. termination, it was time barred and the arbitrator was supposed to raise a jurisdictional issue and require parties to submit thereafter and make a ruling thereon. But since, issue of jurisdiction can be raised at any stage even on appeal, I find, that the dispute was time barred as such the arbitrator had no jurisdiction to entertain it. The complaint by the applicant has merit and is hereby allowed. As pointed out, evidence adduced by the respondent and acted on by the Arbitrator, suggests unfair termination and not breach of contract. Based on that evidence, the dispute was time barred.

Normally parties are bound by their pleadings. In the application at hand, at CMA, respondent indicated that the cause of action is breach of contract. Again, as pointed correctly argued by counsel for the applicant, in her evidence, respondent did not prove the terms of the contract that was breached. In short, there was nothing on record to justify the reason reached at by the Arbitrator.

It was argued by the applicant that the respondent was not entitled for the relief she was awarded but counsel for the respondent was of a different view. I have examined the evidence at CMA and find that nothing was testified by the respondent that she suffered injury or loss for her to be entitled to be paid the damages she was awarded. The respondent was supposed to prove first breach of contract and then, the alleged general damages she suffered. It was therefore not open to her just to allege and leave it to the Arbitrator to decide. Again, the cases of ***Ewadra Emmanuel (supra)*** and ***Robinson (supra)*** cited by counsel for the respondent are to the effect that a party has to prove loss or injury suffered due to breach of contract. In the case at hand, the respondent did neither state that she suffered loss/ injury nor gave evidence as to the extent of that loss/injury. Counsel for the respondent submitted that arbitrator did not error in awarding the reliefs he awarded the respondent as they were compensation for 10 months remaining duration of the contract. With due respect, these were not proved by evidence hence there was no justification for her to be awarded.

It was further argued on behalf of the applicant that, the Arbitrator took into consideration extraneous issues not pleaded or raised during

hearing and that those extraneous matters came in at the awarding stage. Counsel for respondent supported the arbitrator by taking into consideration difficulties the respondent may face to secure another employment and issue of COVID 19 as mitigation factors. With due respect to counsel for the respondent, these are extraneous matters. They are not supported by evidence on record. Nowhere in her evidence the respondent stated that it is not easy for her to secure an alternative employment or that COVID 19 will cause her not to get employment in time.

In the upshot, I allow the application and set aside the award.

It is so ordered.

B.E.K. Mganga
JUDGE
13/09/2021