

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 490 OF 2020

BETWEEN

YASINI ISMAIL MUNISHI APPLICANT

AND

KIKORE INVESTMENT CLEANING SERVICES..... RESPONDENT

JUDGMENT

Date of last order: 20/10/2021
Date of Judgment: 10/11/2021

B. E. K. Mganga, J.

On 11th December 2019 Applicant referred Labour dispute No. CMA/DSM/UBG/138/19 to the Commission for Mediation and Arbitration henceforth CMA claiming to be paid TZS 200,000/= as notice pay, TZS 200,000/= as annual leave pay, TZS 161,538/= as severance pay, TZS 2,400,000/= as compensation pay and TZS 2,000,000/= as general damages all amount to TZS 4,961,538/=. Applicant indicated further in CMA F.1 that the dispute arose on 2nd December 2019 and that reasons for termination are not known and further that procedure for termination was not followed. It was alleged that in May 2016 applicant entered into

oral contract of employment with the respondent to clean Mbezi bus stand, but his employment was terminated on 2nd December 2019.

Respondent did not enter appearance as a result the dispute was heard and determined ex parte. On 6th November 2020, Gerald, J, arbitrator issued an ex parte award in favour of the respondent on ground that there was no employment relationship between the applicant and the respondent.

Applicant was aggrieved by the said decision as a result on 30th November 2020 he filed a Notice of Application seeking the court to revise that award. The Notice of Application was supported by an affidavit affirmed by the applicant. In his affidavit, applicant raised two grounds namely:-

1. *1. That, the Honorable Arbitrator erred in law and facts to hold that there was no employment relationship between the Applicant and the Respondent despite the adduced evidence.*
2. *2. That, the Honorable Arbitrator erred in law and facts by determining the issue(s) which was not framed for determination.*

The respondent resisted the application and filed a counter affidavit sworn by Joyceline G. Mgonja who is trading in the name of the respondent.

When the application was called for hearing, applicant appeared in person while the respondent was represented by Stella Simkoko, advocate.

Applicant had no much to submit before the court, understandably as he is a layperson. He submitted that his employment was terminated by the respondent as he was demanding to be given written contract of employment. He went on that, at CMA he was claiming terminal benefits and that he was not afforded right to tender exhibits and call witnesses. He prayed to be allowed to tender exhibits before the court and call witnesses. He concluded by praying the application be granted.

On her part, Stella Simkoko, counsel for the respondent submitted that applicant did not prove his complaint at CMA and that he cannot be allowed to tender exhibits and call witnesses at revision stage. Counsel prayed the application be dismissed.

I should point out at the kickoff of this judgment that both the applicant and counsel for the respondent did not address grounds of revisions that is the base of this application, rather, centered their arguments on a new issue. I will therefore start with this new issue namely; that applicant was not afforded right to tender exhibits and call witnesses and the prayer to tender exhibits and call witnesses at this stage of revision. I have read the CMA record and find that in no time

applicant prayed to tender exhibits or call witnesses. There is no indication that he made that prayer and that the same was rejected by the Arbitrator. This complaint, in my view, is an afterthought as applicant has raised it to counter the decision of the arbitrator in the award that applicant did not tender any exhibit including how much salary he was being paid, as evidence that he was employed by the respondent. I understand that in special circumstances, new evidence or exhibits and witnesses can be called at revision stage (*see Chandrakant Joshubhai Patel v. The Republic [2004] TLR 2018* at page 221- 222) but, in the application at hand , I see no special circumstance for me to call for new evidence at this revision stage. The prayer to tender exhibits and call witnesses at revision stage in the circumstances of this application cannot be entertained and is accordingly dismissed.

In the 2nd ground applicant complained that Arbitrator erred in law and facts by determining the issue which was not framed for determination. In my careful examination of the proceedings and the award itself, I am of the considered opinion that this complaint has merit. CMA record shows that on 2nd April 2020 three issues were drafted namely (i) whether, there were valid reasons for termination, (ii) whether procedures for termination were adhered to, and (iii) what relief(s) are the parties entitled to. But in the award these issues were not covered, instead, arbitrator raised a different issue namely, whether

there was employment relationship between applicant and respondent. This new issue was raised at the time the arbitrator was composing the award as such applicant was not afforded right to be heard on that issue. Having framed this issue, arbitrator proceeded to determine the dispute based on this new framed issue without affording applicant right to be heard. In short, the disputed filed by the applicant was disposed based on this new framed issue leaving all issues that were framed earlier unresolved. Framing the new in absence of the applicant and without affording right to comment thereon is fundamental breach of the applicant's right. In the case of ***Kumwandumi Ndemfoo Ndossi v. Mtei Bus Services, Civil Appeal No. 257 of 2018*** (Unreported) the Court of Appeal held that:-

"It is also not in dispute that the said issue was introduced by the learned High Court Judge in the course of composing the judgment contrary to the law and principles of natural justice on the right to be heard.

Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court".

As pointed above, I have found that 2nd ground of revision has merit and therefore I hereby allow it. As arbitrator did not determine issues framed, I hereby allow the application and set aside the award. I direct that the CMA record be returned to CMA for the arbitrator to consider and determine the three issues that were

framed in presence of the applicant. the arbitrator should determine those issues and decide them based on the evidence adduced by the applicant and issue an award thereof.

It is so ordered.



B.E.K. Mganga
JUDGE
10/11/2021

Labour Court TZ.