IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 733 OF 2019

MURUGWA STANSLAUS JOHN.....APPLICANT

VERSUS

I.T.V. LIMITED.....RESPONDENT

JUDGMENT

Date of last Order:29/03/2021
Date of Judgment: 16/04/2021
Z.G.Muruke, J.

Murungwa Stanslaus John was employed by respondent since 1986 as Mechanic until retrenched on 4th September, 2018, and paid Tshs. 6,437.509 as his package. Being dissatisfied he filed dispute at CMA on 4th October, 2018. Upon hearing both parties CMA ruled in applicant favour and ordered respondent to pray 1.332.703.07 severance pay and 495.004 shs. As one month salary in lieu of notice, totaling to 1.827.707.07 Tshs. The amount was paid by respondent to the applicant Bank Account at African Banking corporation, account number 10622763313 on August, 2019.

Despite decision being in applicant favour, and received payments, yet, he filed present revision on 4th September, 2019 raising following grounds.

(i) Arbitrator erred in law in allowing the respondent to file a document that was not in the list of documents to be relied upon nor in the opening statement.

(ii) Arbitrator further erred in law by considering the improperly filed document in her award while the said document was not tendered in evidence by any of the employers witness.

(iii) Arbitrator immensely failed to reasonably asses the evidence by both parties for and against the applicant and erroneously concluded in favour of the respondent who did not held a meeting properly and specifically convened to discuss retrenchment.

Respondent filed counter affidavit sworn by her principal Joyce Mhaville in opposing the application. After conclusion of pleadings, hearing was ordered to be by way of written submission. Applicant was represented by Nyaronyo Kicheere, while respondent was represented by Mr. Emmanuel Matondo, Advocate and Mr. Ayubu Semvua (Principal Officer). In the cause of submission ground one and two were consolidated to read one.

On the first issue, it was submitted by applicant counsel that respondent case commenced on 27th March, 2019, the first defense witness (DW!) Rajabu Bakari Mgaza, testified that there was no any document in form of minutes of a meeting to discuss retrenchment that was prepared on how retrenchment was discussed and done. However, on the next session respondent filed and CMA accepted documents to be relied by respondent which previously was not in the list of documents to be relied upon, nor were it matters raised in the opening statement. It was wrong

for the arbitrator to allow non-listed document to be used against the applicant in the proceedings that followed, insisted applicant counsel who asked this court to hold so.

Respondent counsel submit in first ground that, in terms of section 88(4)(a) of the employment and Labour Relations Act No. 6/2019 arbitrator is required to deals with substantive merits in a fairly and quickly manner to avoid technicalities and attain substantive justice. He insisted that not only Employment and Labour Relations Act No. 6 of 2004, that allows the arbitrator to admit documents when proceedings have commenced, but also order XII Rule 2 of the Civil Procedure Code, that reads.

> No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirement of rule shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for non-production thereof and the court receiving such evidence shall record the reason for doing so.

Respondent counsel asked this court to follow the decision in the case of **National Bank of Commerce Ltd Vs. Nabro Limited** and another, Commercial case No. 44/2001 at High Court of Tanzania Commercial Division at page 8 where Masati, J held that.

> " So on the ground that the documents might shed more light to the court in order for it to get the bottom of the controversy between the parties and since I do not see how their production might prejudice the plaintiff, I will allow the defendant to use the list of additional documents in their defense."

It was further insisted that, all material evidence were adduced and tendered before the Commission for Mediation and Arbitration during the hearing of the respondent case and before the hearing of applicant case.

According to the records, respondent case started, then followed with applicant case at CMA. The documents (minutes) subject of dispute in ground one, was tendered by second witness George Philipo. Applicant asked for time go through the document a prayer that was granted. For clarity, records of CMA typed proceedings from page 8 to 9 proving the same is hereby reproduced.

> Tume:- "Utaratibu wa kuongeza/additional document unapaswa kutoa taarifa (notice to produce) kwa vielelezo hivi mwakilishi wa mjibu maombi (R) ametoa taarifa ya mdomo tofauti na sheria. Kwa kuwa tume haibanwi na ufundi wa sheria za ushahidi na kwa kuwa kuruhusiwa kufailiwa kwa nyaraka si sawa na kuzikubali (admission) na kwa kuokoa muda wa pande zote, Tume imekubali kupokea nyaraka hizo na inatoa haki kwa mlalamikiwa kuzipitia na kama wapo tayari kwa leo, tuendelee na ushahidi."
>
> Masawe G.
> **MUAMUZI**
> 30/04/2019

Upande wa mlalamikaji wameomba kupitia nyaraka. Aihirisho 03/05 saa 6.

The above reproduced CMA records speaks louder. Respondent second witness testified after applicant gone through the disputed document. After examination in chief of George Philipo, he was cross examined by applicant counsel as reflected at page 11 of CMA typed proceedings, as follows:-

Swali: About kikao kilifanyika siku gani

Jibu: Nakumbuka ni ijumaa.

Natambua kila ijumaa kulikuwa na vikao vya idara. Kikao hicho tulikuwa wenyewe na waliondolewa Idara ya ulinzi kutokana na agizo la mkurugenzi tulikaa na IRM.

Swali: Mliambiwa utaratibu kama mtaajiriwa tena?

Jibu: Alitueleza tunaachana vema hatugombani ipo siku mtu unaweza kurudi kazini.

Applicant counsel was able to cross examine the witness who tendered the minutes subject of dispute in ground one. Equally so, applicant had all the rights to recall respondent first witness, Bakari Rajab Mgaza, and cross examine on the minutes of the meeting for retrenchment, but did not take that opportunity. He cannot now complain on an opportunity that he did not take for his advantage, thus cannot now be heard complaining on the issue.

I understand, court and or Tribunal is a fountain of justice. Ought to receive as much information it can for deciding matter in controversy once and for all. It should be noted that party to the suit/dispute have come to court to seek redress. They have not come to be punished for small mistake they do in their conduct of the cases. Equally, they cannot be punished for small irregularities that can be easily corrected without injustice to the other party. And there is no injustice if the other party is given right to be heard or respond to the issue raised. Court of law does not exist for indispline but for deciding matters in controversy.

As said earlier, applicant was given copy of the minutes and granted time to read. It was followed with witness testimony on the minutes then applicant counsel cross – examined the witness. More so, applicant testified after closure of respondent case. So he had ample time to call witness to discredit the minutes in dispute. Yet he did not do so. To this court, an opportunity lost willfully cannot be complained off. From the evidence on record, and as correctly submitted by respondent counsel ground one lacks merits, thus dismissed.

On ground two, applicant is complaining of failure by arbitrator to analyze evidence. According to the records, specifically **exhibit T1** minutes of meeting on retrenchment, on the list of those who attended applicant John Murugwa is shown not to have attended but was with leave. The above document is the one that applicant was refusing to recognize, however it is the same document that has moved arbitrator to grant applicant severance pay, and one month salary in lieu of notice. Exhibit T1 was tendered by respondent, but gave advantage to the applicant.

Arbitrator analyzed evidence as seen from page 6,7, and 8 of the award. At page 6 of the award last paragraph arbitrator said;

> "Kutokana na ushahidi huo, hakuna ubishi kuwa kulikuwa na zoezi halali la kupunguza wafanyakazi kwa mlalamikiwa. Kwamba mlalamikaji analalamika kwa yeye kuwa wa kwanza kupunguzwa huku akidai ni chuki kati yake na IRM. Ikumbukwe kuwa mlalamikaji alikiri kwa ushahidi wake mwenyewe kufanya kazi chini ya bosi wake hivyo IRM kwa miaka 22 na kwa kipindi chote hakuwahi kupata onyo. Sasa Tume

inajiuliza iwapo ni kweli kulikuwa na chuki baina ya mlalamikaji na bosi wake. Jibu lake ni hapana."

Clearly analysis of evidence is seen, as reproduced above. More analysis of evidence is also found at page 7 up to 8 of the award last paragraph when arbitrator said:-

"Katika ushahidi, imethibitika uwepo wa taarifa juu ya uwepo wa zoezi la kuwapunguza kazi katika vikao vya kila ijumaa vya mlalamikiwa kuanzia mwanzoni mwa 2017 isipokuwa mlalamikaji hakuhuduria kikao rasmi cha majadiliano kwa udhuru kwa mujibu wa kielelezo T1, na hivyo tumekiona alinyimwa nafasi ya kujadiliana. Pamoja na kutokuwepo katika kikao mlalamikaji alitambua uwepo wa kikao hicho na kukubaliana na yaliyojadiliwa baada ya kuieleza Tume katika ushahidi wake itambue kielelezo T1 kwa kuwa kwa yaliyojadiliwa alipujwa kiinua mgongo katika malipo."

From the reproduced part of the award from page 7 to page 8 of the same, it is obvious analysis of evidence was done, more so, to the benefit of the applicant. Applicant cannot claim that arbitrator did not reasonably asses the evidence, thus ground two also lacks merit.

In totally revision application lacks merits, same is dismissed.

Z.G.Muruke

JUDGE

16/04/2021

Judgment delivered in the presence of applicant in person and Ayubu Semvua, Respondent's Principal Officer, for the respondent.

Z.G.Muruke

JUDGE

16/04/2021