IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 10 OF 2022

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala (Mpulla: Arbitrator) dated 8th Day of December 2020 in

Labour Dispute No. CMA/DSM/ILA/83/2020)

YAPI MERKEZ INSAAT SANAYA ANONIM .....APPLICANT

VERSUS

HATBAH BAKARI MDUMA.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

10th October 2022 & 25th October 2022

Aggrieved with the award of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala [herein after to be referred to as CMA] the applicant has filed this application for revision under Sections 91(1)(a), (2)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(l)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007 and any other enabling provisions of the law, praying for the Orders in the following terms:-

i) This Honorable Court be pleased to call for records, inspects and examine such records and its proceeding to satisfy itself as to the correctness, rationality, propriety and legality of the award of the Labour Dispute No. CMA/ DSM/ILA/83/2020 delivered by Hon. U.N. MPULLA-Arbitrator dated 08th December 2021.

ii) This Honourable Court be pleased to revise and set and aside the whole proceedings and subsequent award of the Labour Dispute No. CMA/DSM/ILA/83/2020 delivered by Hon. U.N. MPULA-Arbitrator dated 08th December 2021.

iii) Any other reliefs this Honourable Court deems fit and just to grant.

What follows is a brief background of facts leading to this application as grasped from CMA record and parties sworn statements in the affidavit and counter affidavit. On 1st February 2019, the respondent was employed by the applicant as a Dispatch Officer under permanent terms. On 05th December 2019 the respondent was terminated on ground of reduction in workload (See Exhibit D1, the termination letter). Before termination there was a tension which prompted intense discussion regarding a debate which was centered on allegation of applicant's

misconduct such as leaving workplace without permission on one hand and the respondent's claim of being limited in terms of right of breast feeding her infant baby on the other hand.

The termination of the respondent from the employment did not please her. Being so aggrieved, on 5th Day of December 2019 she referred the matter to the CMA claiming compensation for breach of contract to the tune of TZS 211,200,000/= and to be paid TZS 200,000,000/= as general damages for depression and death threat upon the respondent.

At the CMA, the arbitrator found that there was a breach of employment contract on the reason that the applicant acted contrary to the terms of contract as the respondent was employed under unspecified period of time. The respondent was awarded 14 months remuneration as compensation for breach of contract and general damages of TZS 50,000,000.00, all making a total of TZS 99,280,000. The applicant being aggrieved with the award, preferred this application for revision.

Along with the Chamber summons, the affidavit of the applicant was filed, in which the background of events leading to this application is narrated and asserted that, the arbitrator decided to frame issues and determine matters which were never referred by the respondent to be arbitrated at CMA. In the affidavit, the applicant further claimed that the

arbitrator was not right to determine the matter under the ambit of breach of contract and vicariously liability.

The affidavit advanced eleven ground of revision as stated at paragraph 4 as follows: -

a) Whether the trial mediator exercised jurisdiction properly in granting condonation.

b) Whether trial arbitrator had jurisdiction to frame issues and determine on matters never referred to arbitration by the respondent.

c) Whether the trial arbitrator was legally right not to raise jurisdictional issue and proceed to determine matter relating to breach of contract which was improperly filed.

d) Whether it was legally proper for the trial arbitrator to hold that, respondent suffered damage due to working condition at the applicant's work premise.

e) Whether it was legally proper for the trial arbitrator to hold applicant vicariously liable for tort.

f) Whether the trial arbitrator had jurisdiction to entertain matters relating to tort improperly filed at the Commission for Mediation and Arbitration.

g) Whether the trial arbitrator had jurisdiction to determine the matter under the ambit of breach of contract.

h) Whether the trial arbitrator properly exercised his jurisdiction relying on uncollaborated testimony in reaching his decision.

i) Whether the trial arbitrator was right to hold that the respondent was denied the right of breast feeding.

j) Whether the trial arbitrator properly interpreted clause 10 of Exhibit P1 regarding termination of employment.

k) Whether the trial arbitrator framed proper issues in regard to the dispute referred to arbitration.

To challenge the application, the respondent filed a counter affidavit sworn by herself disputing the assertion that the findings of the Mediator and Arbitrator were not correct and justifiable.

In this application parties were represented. The applicant enjoyed the service of Mr. Anold Luoga, Advocate whereas the Respondent was represented by Mr. Amos Paul, Advocate. The hearing of the matter proceeded by a way of oral submissions.

Arguing in support of the application starting with the first ground of revision, Mr. Anold Luoga submitted that the arbitrator exercised jurisdiction which he did not possess. He based his argument on the

ground that the matter before the arbitrator was not related to breach of contract. He stated that the arbitrator decided on breach of contract and was satisfied that there was a breach while the matter was not concerned with breach of contract.

On the second ground, Mr. Luoga submitted that the Hon. Mediator failed to exercise her duty to decide the timeliness of the application in the CMA contrary to **Rule 10 (1) of the Arbitration and Mediation Rules, G.N. No. 64**, which guides the filing of a Labour dispute in the CMA. According to him, **Sub Rule (1)** allows filing of revision within 30 days from the date the employer made the decision to terminate the employee, while **Sub Rule (2)** gives 60 days of filing other dispute not relating to termination. He averred that the Mediator condoned the matter which was lodged out of time without following legal procedures and without considering why the respondent lodged it out of 60 days. He is of the view that the applicant ought to have accounted for each day of delay.

Concerning the jurisdiction of the mediator in framing of issues, Mr. Luoga cited **Rule 24 (4) of G.N. No. 67 of 2007** which in his view, gives a duty to the arbitrator to frame issues. He asserted that when this matter was at the arbitration stage, the arbitrator framed issues which

were not relevant to the matter at hand. He stated that the arbitrator framed issue concerning breach of contract which was not disputed amongst the parties.

According to Mr. Luoga, the last ground for setting aside the CMA decision is that the arbitrator erred in law and exercised his jurisdiction illegally for failure to evaluate the evidence adduced therein. He referred to one of the complaints of the respondent in the CMA which was a denial of right to breast feed. Making reference to page 4 of the CMA award, Mr. Luoga stated that the arbitrator quoted the respondent to have admitted to have been given right to breast feed while on the other hand the arbitrator held that the respondent was denied the right to breast feed. According to Mr. Luoga, the arbitrator erred since the respondent had the time to breast feed.

Finally, Mr. Luoga challenged the arbitrator's holding that the respondent was psychologically affected by the actions of her employer. According to Mr. Luoga the applicant is contesting this decision because the respondent's evidence shows that the applicant started to attend medical treatment in January 2019 which she claimed to have been caused by the harassment she got from the work, while the record reveals that the respondent was employed in February 2019. In Mr.

Luoga's view, this is obvious that the applicant's problem of depression was not a result of the acts of the employer since the problem began before she was employed. He thus prayed for this Court to set aside the CMA award.

In reply to the 1st ground that the arbitrator decided the dispute of breach while there was no breach, Mr. Amos submitted that, the disputes of breach of contract and tort were submitted in the CMA on 30/1/2020 vide Form No. 2 & 1 and that since the dispute of Tort was out of time, the respondent's application for condonation was lodged and leave was granted to condone it on 4th March 2020, and thereafter the disputes were consolidated and a date of mediation was fixed on 11th Day of March 2020. Mr. Amos stated that at the arbitration stage, three issues were framed including those asserted by the applicant to be new ones.

Mr. Amos emphasized that it is an established principle that parties are bound by their own pleadings. She blamed the applicant for denying what she participated to frame.

On the second ground, concerning timeliness of the application, where the applicant asserted contravention to **Rule 10 (1) of G.N N0. 64 of 2007** claiming the mediator to have failed to hold the respondent to

account for every day of delay, Mr. Amos referred to section 110 The Tanzania Evidence Act, Cap 6 of 2019 R.E, and submitted that the burden of proof lies on whoever is alleging. According to Mr. Amos, there are no number of days which were not accounted for. He stated that the applicant's accountability is apparent at page 3 paragraph 2 of the award where it stated that the applicant was waiting for medical report after getting health challenges and that the report was issued on 7th Day of January 2020. According to Mr. Amos since the respondent was waiting for the medical report, then the applicant's claim that each day is not accounted for lacks merits.

On the 3rd ground, regarding failure to evaluate the evidence concerning the respondent's right to breast feed, Mr. Amos read the relevant paragraph of CMA award and stated that the respondent suffered difficult environment of breast feeding, as stated in Exhibit P1 which was a letter of the respondent to the employer explaining on the need to honor her right of breast feeding. He further referred to page 1 paragraph 3 of exhibit P2, where the respondent wrote to the applicant complaining on refusal to be allowed to breast feed. According to Mr. Amos this letter was never responded to. It is the submission of Mr. Amos that in such circumstances the respondent opted to force any

means of having her baby for breast feeding, including use of her car, office desk etc. According to Mr. Amos, the applicant was never given such right and there were no proper maternal facilities in the work place and therefore exhibit P2 will remain as never been challenged.

Lastly on the assertion that the respondent started her health problem before she was employed, Mr. Amos submitted that, January 2020 was the time when the respondent delivered the baby. Referring to Exhibit P6, which is a medical report from Muhimbili National Institute, Mr. Amos submitted that it is apparent that after delivery, she developed lack of sleep due to nursing care of her premature baby and stressful working environment. In his view, this corroborated the testimony of the witnesses, that the work environment contributed to the respondent's sickness.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address one issue as **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award issued in Labour Dispute No. CMA/DSM/ILA/83/2020**.

In addressing the above issue, the grounds identified in the affidavit will be considered all together compressed to formulate four sub issues, the

fist being whether the trial mediator exercised jurisdiction properly in granting condonation, **second** whether the arbitrator had jurisdiction to frame new issues and determine matters which were never referred to arbitration, **third,** whether the arbitrator had jurisdiction to entertain the matter under the ambit of breach of contract, and **fourth,** whether it was legally proper for the trial arbitrator to hold the applicant liable for tort. These issues are framed in line with how the parties made their submissions.

Starting with the first issue, the applicant contended that mediator failed to exercise her duty to decide the timeliness of the application in the CMA by condoning the matter contrary to **Rule 10 of G.N. No. 64 of 2007.** According to the applicant, the respondent did not account all the days of delay. On other hand the respondent maintained that the applicant's accountability of the days of delay was justified at page 3 paragraph 2 of the award where it stated that the applicant was waiting for medical report after getting health complications, the report which was issued on 7th January 2020. Since the respondent was waiting for the health report, she is of the view that applicant's claims of failure to account on each day of delay lacks merits.

It is in accordance with the law that to grant or not to grant an application for extension of time depends on the reasons adduced by a party seeking for such an extension of time, if the said reasons constituted sufficient cause for not doing what he ought to have done within the prescribed time. What amounts to sufficient cause has been discussed in a number of cases [see. **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd.**, Civil Application No. 13 of 2010, Court of Appeal of Tanzania, (Unreported); and **Praygod Mbaga V. Government of Kenya Criminal Investigation 5 Department and Another, Civil Reference No. 4 of 2019, Court of Appeal of Tanzania**, at Dar Es Salaam, (Unreported). From these authorities, accounting of each day of delay is one of the factors to be considered in granting extension of time. Nevertheless, good cause must be determined by reference to the circumstances of each particular case.

In the present case the respondent submitted in the CMA that the delay in filing the application was due to health report which was still on process to be finalized and the report thereto was issued on 07th Day of January 2020. The arbitrator by this reason condoned the late filing of the labour dispute.

Much as I agree with the counsel for the applicant that each day of delay needs to be accounted for, basing on nature of this application, as the respondent contended that her sickness was due to stressful situation which resulted from working environment, each case needs to be considered on its own circumstances. The accountability of the days is reflected from the CMA Form No.1 which shows that the application was filed on 22nd Day of January 2022. Considering the health problem, the applicant spent 20 days from when she received the medical report to the date of filing the application after consultation with her lawyer and preparation of the application. In my view, 20 days to prepare the application is not inordinate. Waiting for doctor's report as well in my view constitute proper accounting of the days as no way could the respondent control the work of the doctor.

On the above analysis, and taking into account that the delay was not inordinate by considering her sickness and time of preparing the application, I agree with the Respondent that the Mediator was right to extend time. Therefore, applicant's allegation regarding improper grant of condonation lacks merits.

On the second issue as to whether the arbitrator had jurisdiction to frame new issue and determine matters never referred to arbitration

process, I have cautiously gone through the award at page 2 and 3, and noted that three issues were framed. These issues are: *i. Whether or not there was breach of contract by the respondent. ii. Whether or not the complainant suffered any damages under tort. iii. To what reliefs are the parties entitled.* **Rule 22 (1) and 27(3) of GN 67 of 2007** guides stages for arbitration and the content of the award respectively. It apparent in CMA Form No 1 that breach of contract and tort were one of the claims filled by the respondent herein. By reading the issues framed by the arbitrator, I note that he addressed all issues agreed by the parties as indicated at page 17 to 33 of the award. There could be no way under which the arbitrator should have considered the matter without framing an issue to ascertain these primary claims in CMA Form No 1 which also featured in the parties' opening statements. In this matter the arbitrator considered those arbitration stages by framing issues from parties' opening statement and CMA Form No.1. In such circumstances the applicant's allegation that the arbitrator framed and determined new issues holds no water.

Regarding jurisdiction to determine the matter under the ambit of breach of contract, in this matter the respondent's claim in the CMA was for breach of contract. She complained that her termination was

contrary to Clause 10 of the Employment contract as she was terminated without genuine reason. She was claiming her right of breast feeding. On the other hand, the applicant averred that the respondent was terminated for shortage of work. The record of the CMA reveals nothing about shortage of work. Shortage of work featured neither in the evidence in the proceedings nor in the parties' statements. With regards to employment contract, it is on record parties had an unspecified contract (Exhibit P-1 (employment contract)). I have gone through that contract between the applicant and respondent and noted that clause 10 of the said contract provided a mode of terminating the employment relation amongst the parties which was 28 days' notice where the employment was for a duration of more than one month. If the respondent complained about breach of this contract, it was within the powers of the arbitrator to ascertain the existence of the breach.

As well, I have gone through the record and found that the respondent was terminated on the reason of shortage of work as per Exhibit P-5 (termination letter). However, nothing from the record neither justifies the existences of shortage of work at applicant's business nor adherence of Clause 10 of the employment contract (Exhibit P-1). In the case of

Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another, Civil. Appl. No. 104 of 2004, where it was held that: -

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

Thus, basing on above cited authority since parties had their own contract and applicant failed to comply with **clause 10 of employment contract**, I agree with the arbitrator that the contract was breached and he properly interpreted clause 10 and therefore, he did not act outside his jurisdiction. On that basis, the applicant's allegation regarding jurisdiction to determine the matter under the ambit of breach of contract lacks merits. Therefore, it is my holding that the arbitrator had a power to arbitrate the matter as the dispute falls under the coverage of labour laws, and the power is conferred to the arbitrator by **Section 14 of The Labour Institution Act, Cap 300 R.E 2019**.

Regarding tortious liability, since the applicant breached clause 10 of the employment contract in terminating respondent's employment, it means

that there was a breach of employment contract hence damages is a directly foreseeable and reasonable consequence of the employer's wrongful actions. It was found by the Doctor that the Respondent developed stress related complication and that according to Doctor's report, one of the reasons for such complications was stressful working environment conditions. (See Exhibit P-6 (Medical Report). For that reason, I am of the view that the arbitrator was right in his findings regarding tortious liability as recognized under Section 88 (1)(b) (ii) of the Employment and Labour Relations Act, Cap 366, R.E 2019. In such circumstances, I find that the arbitrator was correct in awarding damages under tortious liability.

From the parties sworn statements and submissions, I could not find any argument to challenge the amount awarded. I therefore do not see any reason to interfere with the arbitrator's assessment of award.

From the upshot, it is my finding that the major issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award issued in Labour Dispute No. CMA/DSM/ILA/83/2020** is answered negatively.

From the above reasons the application for revision has no merits. I hereby uphold the CMA award and dismiss this application for revision for want of merit. Each party to take care of its own cost. It is so ordered.

Dated at Dar es salaam this 25th Day of October 2022

KATARINA REVOCATI MTEULE

JUDGE

25/10/2022