IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 108 OF 2022

SHAMSIYE SECONDARY SCHOOL .... APPLICANT

VERSUS

SADATH KALIPHA KIMBANA .... 1st RESPONDENT

KASSIMU MDUNGI .... 2nd RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Mbeyale: Arbitrator)

Dated 23rd March, 2022

in

REF: CMA/KIN/535/2020/263

JUDGEMENT

20th September & 4th November, 2022

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KIN/535/2020/263. This Court has been asked to revise the proceedings, orders, an award and quash orders therefrom.

In brief facts, the respondents were employed as teachers by the applicant. That through spreading of the corona pandemic the

government announced measures to curb the rapid spread of the corona virus.

On 17th and 18th March 2021 the government ordered the closure of all schools for an indefinite period of time. The order caused negative economic impact to the education sector; the applicant was also serious hit.

The applicant, and her employees agreed for none payment of the March, 2020 salary. The applicant was then to strive to soothe the situation by inventing alternative ways of providing payment of the teachers' salaries.

The respondents however filed a labour dispute at the CMA claiming for unpaid salaries. The award was in favour of the respondents in a total sum of 7,450,000.00. Thus the 1st respondent was awarded TZS. 3,100,000.00 whereas the 2nd respondent was awarded TZS. 4,350,000.00. The applicant was not satisfied, hence this application.

The application is supported by the applicant's affidavit advancing the following grounds for revision: -

1. *That, it was irregular and legally unjustified for the learned arbitrator to award the 2nd respondent, Kassimu Mdungi, the sum of*

TZS. 4,350,000.00 without summoning him to prove his claims but instead relied on the evidence of the 1st respondent.

2. *That, it was irregular and improper for the learned arbitrator to raise a legal issue suo motto regarding as to who was the proper party to the proceedings between "Shamsiye Secondary School", "Shamsiye Boys and High School" and "Shamsiye Boys Secondary School" and decide upon that issue without calling the parties to address him on it.*
3. *That, it was improper and irregular for the learned arbitrator to shift the burden of proof from the respondent to the applicant.*

The matter proceeded by way of written submissions. Both parties were represented. The applicant was represented by Miss Aisha Yakub Othman learned advocate, whereas the respondent enjoyed the services of Mr. Godwin Anthony Fissoo learned Advocate.

Submitting on the first issue, advocate Aisha argued that the 2nd respondent had a duty to prove his case before CMA. To support her point, she cited section 110 of the Evidence Act [CAP. 6 R.E. 2019], which requires one to prove an allegation upon alleging it. She continued to state further that the arbitrator awarded the 2nd respondent without calling him to produce evidence to establish his claims. He stated that the arbitrator

heard the case as if it were a representative suit without complying with rule 44(2) of Labour Court Rules 2007, G.N. No. 106 of 2007. To support her point, she referred me to the cases of **Hamisi Kaka and 78 Others v Tanzania Railways Corporation and Kunduchi Leisure and Farming Co. Ltd**, Civil Application No. 68 of 2008, Court of Appeal at Dar es Salaam, **Christopher Gasper and Richard Rukizangambo and 437 Others v Tanzania Ports Authority**, Miscellaneous Application No. 281 of 2013 (unreported) and **Victoria John Mwakalasya and Others v First Nation Bank Tanzania Limited**, Revision No. 304 of 2020.

Regarding the second ground, MS Aisha submitted that when a point is raised by the court itself, parties should be called upon to address it, in respect of the said issue. She stated that the court must afford the parties with the right to be heard. According to her, the issue raised by the CMA Suo Moto in respect of "SHAMSIYE SECONDARY SCHOOL", "SHAMSIYE BOYS AND HIGH SCHOOL" and "SHAMSIYE BOYS SECONDARY SCHOOL" was decided without calling the parties to address it before the CMA. In her argument, the proper party is SHAMSIYE BOYS' SECONDARY AND HIGH SCHOOL as it can clearly be discerned from the headed paper of staff meeting held on 18th March, 2020. The respondents, she stated,

were bound to sue the proper party and the applicant had the burden to prove who was a party to be sued.

On the third issue, it was submitted that he who alleges must prove. She continued to argue that the respondent was claiming for unpaid salaries. It was stated that evidence ought to be led to establish their claims. She stated, the arbitrator imposed the burden of proof to the applicant instead of the respondents. She then prayed, the award be quashed and orders be set aside.

In reply, Mr. Fissoo submitted that the dispute was filed as a representative suit. He argued that the respondent filed it at the CMA notice of representation on 28th August 2020 as required under rule 5(2) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 of 2007. He stated further that rule 44(2) of the Labour Court Rules, 2007 does not apply to the CMA. To support his point, he cited the case of **Elia Kasalile and 20 Others v The Institute of Social Work**, Civil Appeal No. 145 of 2016, Court of Appeal. He continued to submit that rule 5(2) and (3) of the Mediation Rules allows one person who is mandated by other employees in writing to sign and institute the labour dispute involving more than one employee. He stated that even CMAF1 provides for the requirement of attaching a list of names. He concluded that the

evidence of the 1st respondent without the 2nd respondent proved the case, since it was a representative suit.

On the second issue, he submitted that the name of the applicant cannot be traced from the minutes of the staff meeting as suggested by the advocate of the applicant, it can be through the employment contract. He continued to argue that the arbitrator did not raise the issue of names of the applicant *suo moto,* it is the applicant who raised it. Arguing a point on proper names, he cited Rule 25 of G.N. No. 64 of 2007 which enjoins a party to apply for correction of errors, but the applicant opted to challenge the award.

Mr. Fissoo learned counsel submitted on the third issue, that the arbitrator did not shift the burden of proof to the respondents and so prayed for the application to be dismissed with costs.

In re-joining, the counsel reiterated what was submitted in chief and added by citing the case of **Richard Rukizangambo and 437 Others v Tanzania Ports Authority**, Miscellaneous Application No. 281 of 2013 (unreported) which provides for leave to file a representative suit before the CMA or Labour Court. He added that order 1 rule 8 of the Civil Procedure Code [CAP. 33 R.E. 2019] provides the procedure as in the case of **Abdallah Mohamed Msakandeo & Others v The City**

Commission of Dar es Salaam and Two Others (1998) TLR 439. It was his submission that, the respondents did not comply with the order because parties did not have the same interest (1st respondent a teacher teaching geography having own salary while the 2nd respondent a teacher teaching mathematics with other salary). This court was asked to set aside the award.

After going through the submissions and the CMA records, I have to start determining grounds as raised.

> *The first issue states that, it was irregular and legally unjustified for the learned arbitrator to award the 2nd respondent, Kassimu Mdungi, the sum of TZS. 4,350,000.00 without summoning him to prove his claims but instead rely on the evidence of the 1st respondent.*

The applicant stated that the 1st respondent represented the 2nd respondent without being legally allowed to do it. The advocate for the respondent stated that the 2nd respondent was represented by the 1st respondent, legally as CMAF1 also mentioned the 2nd respondent as the complainant.

The advocate for the respondents in the reply submission has attached the document which shows that the 1st respondent legally represented the 2nd respondent. The law under section 94(1)(b) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] provides that: -

"94(1) Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and over any employment or labour matter falling under common law, tortious liability, vicarious liability or breach of contract and to decide-

(a) ...

(b) Reviews and revisions of –

(i) Arbitrator's award made under this Part;

(ii) Decisions of the Essential Services Committee made under Part VII;"

It is evidentially proved that this Court is not a trial court. It cannot admit evidences tendered at this time rather to only deal with documents and evidence already admitted at CMA. For that that matter, the attachment by the advocate of the respondents cannot be considered.

But in the case of **Security Group (T) Ltd v Samson Yakobo and 10 Others**, Civil Appeal No. 76 of 2016, Court of Appeal of Tanzania at Dar es Salaam at pages 10, 11, 13 - 16 stated that: -

"From the submission made by the learned counsel for the appellant and the reply by the 1st respondent, the immediate issue for our determination, which arises from the 1st ground of appeal, is whether or not the complaint filed in the CMA was bad for want of leave to the 1st respondent to institute it on behalf of the other then employees. In his submission, the appellant's counsel was firm that, like in the case of a representative suit, the 1st respondent should have sought and obtained leave to file the complaint on behalf of the other ten employees. ... Rule 5 of GN No. 64 of 2007 allows one of the complainants to sign a document on behalf of others who are jointly involved in a complaint. ... The court had the occasion of considering the issue arising from interpretation of rule 5 of GN. No. 64 of 2007 in the case of ***Elia Kasalile & 20 Others V. The Institute of Social Work****, Civil Appeal No. 145 of 2016 (unreported)... They filed the complaint through CMA F1 signed by the 1st Appellant... The list of names of the other employees with their signatures appended thereto was attached to the CMA F1... the dispute was not referred by all the appellants, but only the first appellant and two, that the first appellant was not mandated by the other 20 employees to file the complaint on their behalf because leave to appear in a representative capacity was not sought and obtained. ... a pleading synonymous to a plaint which by definition is also a document. ... for the reason state above, we do not find merit in the first ground of appeal. ... we agree with the learned Judge that since the evidence was from the witness who were parties to the complaint (the*

complainants), the same was sufficient to prove the claim even though their representative, Samson Jacob did not testify. ... there is no gainsaying that the evidence may be given by some of the complainants, not necessarily all of them."

As to the matter at hand shows, the 2nd respondent signed CMAF1 signifying he was present and is to be represented by the 1st respondent. This is possible because of the nature of claims which are of unpaid salaries. I therefore fine no merit in the first ground.

> *On the second issue of whether it was irregular and improper for the learned arbitrator to raise a legal issue Suo Motto regarding as to who was the proper party to the proceedings between "Shamsiye Secondary School", "Shamsiye Boys and High School" and "Shamsiye Boys Secondary School" and decide upon that issue without calling the parties to address him on it.*

Records of the CMA show that the arbitrator did not raise the issue of names, *suo moto,* it was raised by the applicant herself. The record does not indicate there was a preliminary objection. Accordingly, it was raised at the hearing of the matter. This point was duly discussed and determined by the CMA in the award. This point therefore has no merit too.

On the third issue of whether it was improper and irregular for the learned arbitrator to shift the burden of proof from the respondent to the applicant.

The employer is bound to prove whether she had good reasons and followed procedures to terminate the respondents as it is provided under Rule 9(3) of G.N. No. 42 of 2007.

Looking at CMAF1, it shows the nature of the dispute are claims of salaries arears. There was therefore no issue of fairness or otherwise of termination. In this ground, I should as well not be detained.

The duty of the employer is clearly stated in the law. I think, it is not also the duty of the employee to prove he was paid salaries. The allegation that the employer did not pay arears of salaries needs the employer to prove because she has all records regarding the employees' status of employment. This ground as others has no merit.

Having discussed all the grounds raised. The application has no merit. It is dismissed with no order as to costs.

A.K. Rwizile

JUDGE

04.11.2022