IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 505 OF 2020

LAKSHMI NARAYAN RATHI ..... APPLICANT

VERSUS

CHEMI & COTEX INDUSTRIES LIMITED ..... RESPONDENT

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

(Mbeyale: Arbitrator)

dated 27th October 2020

in

REF: CMA/DSM/KIN/882/18/364

JUDGEMENT

29th & 30th March 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/882/18/364. This Court has been asked to revise and set aside the award on the ground that it is legally and factually wrong, irrational and illogical.

Facts that brought about this application can be, briefly stated as follows; That the applicant was employed as the managing director by the respondent.

On 16th September 2015, he resigned from employment in what he considered constructive termination. He therefore claimed from the respondent the sum of TZS 91,376,560.00 as terminal benefits and compensation of TZS 100,000,000.00 before the Commission. After a full hearing, the claims were dismissed. He was aggrieved and has filed this application. He has advanced the following grounds for which this application has to be dealt with;

i. *The arbitrator erred in law and in fact in holding that constructive termination was not proved.*

   (a) *The arbitrator failed to appreciate that exhibit D1 and D3 were signed under coercion.*

   (b) *The arbitrator relied on the evidence by RW1 while failing to note that RW1 was not privy to the events and communications leading up to the applicant's resignation. RW1 was junior to the applicant in terms of position and he was not part of the board, which was the applicant's hiring authority.*

(c) *The arbitrator failed to uphold that the applicant's testimony was unchallenged because the respondent failed to bring forth the chairperson of the board (Yogesh M. Manek) who was a material witness. Also, the respondent did not call any member of the board to come to testify hence the applicant's testimony remains uncontroverted.*

ii. *The arbitrator erred in law and in fact in holding that by virtue of exhibit D3 all claims and matters between the employee and employer arising out of the employment relationship stand resolved.*

(a) *The arbitrator was wrong to rely on exhibit D3 while there were overwhelming discrepancies in the said document as compared to exhibit AP2. Both documents were prepared by the respondent.*

(b) *That the arbitrator failed to consider exhibit AP2 was not signed by the applicant. Exhibit AP2 and exhibit D3 ought to have been considered in unison while considering whether all matters stood resolved or not.*

(c) *The arbitrator reached the finding in absence of proof that the Tshs. 44,099,620/= appearing on exhibit AP2 was actually paid through bank transfer as claimed or at all.*

(d) *That the arbitrator failed to appreciate or consider that RW1's testimony regarding set off contradicted the consents of exhibit AP2.*

(e) *The arbitrator failed to consider that throughout there was no issue of set off between the parties, that the matter was only raised at the CMA through RW1.*

(f) *The arbitrator relied on the evidence by RW1 while failing to note that RW1 was not privy to the discussions and agreements between the respondent's board and the applicant. RW1 is a junior officer and he was not part of the board, which was the authority which hired the applicant and to which he reported.*

(g) *That the arbitrator reached the finding in absence of any evidence as regards to the computation of the terminal benefits and the computation of the amount which was allegedly set off.*

(h) *The arbitrator reached the finding by erroneously holding that the Tshs. 91,376,560/= computed the respondent came out of the employment contract.*

(i) *The arbitrator failed to consider exhibit AP-3 collectively that clearly showcased that the applicant was not paid his terminal benefits.*

(j) *The arbitrator failed to hold that the respondent admitted that terminal benefits amounting to Tshs. 91,376,560/= were payable to the applicant as evidenced by exhibit AP-5 collectively and AP-6 collectively which was not controverted in evidence.*

iii. *That the arbitrator erred in holding that the claim for general damages was not proved. In the contrary, I state, there was abundance of evidence in support of the claim for general damages including: -*

(a) *The respondent continued to exploit services of the applicant without compensation by forcing him to work post termination of his employment contract.*

(b) *The respondent has remained with the applicant's money for over 5 years.*

(c) *Continued harassment of the complainant by Mr. Yogesh M. Manek.*

(d) *The respondent unfairly, wrongly and illegally barred the complainant from taking another employment for three years after his forced resignation.*

The application was supported by the affidavit of the applicant. Both parties to this application were represented. Mr. Daniel B. Welwel, learned Advocate appeared for the applicant, whereas the respondent was represented by Mr. Simon Barlow Lyimo, learned Advocate.

Before the hearing, parties were asked to address the court on the effect of the evidence of DW1, which was taken without oath or affirmation before the Commission.

Mr. Daniel stated that, upon perusing the record from the CMA, it was indeed found that Raja Swaminathan who testified for the respondent before the CMA did not take an oath/affirmation. He stated further that, it was contrary to Regulation 25(1) of the G.N. No. 67 of 2007. And that it is mandatory and so his evidence is invalid as held in the case of **Catholic University of Health and Allied Sciences (CUHAS) v Epiphania A. Mkunde**, Civil Appeal No. 257 of 2020, CAT.

Mr. Daniel therefore prayed for quashing the CMA award and the entire evidence of the respondent and return the record to the CMA to rehear the respondent's case before another arbitrator.

Mr. Barlow for the respondent had the similar view. He added that the evidence taken without oath becomes invalid. He referred to the case of **North Mara Gold Mine Limited v Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 CAT, and prayed that the evidence of the witness who did not testify under oath should be expunged and the rest of the evidence should remain. By re-joining, Mr. Daniel had nothing to add, but agreed with the respondent's submission and added that the defence had only one witness who testified without taking oath or affirmation.

Having heard the submissions of the parties, it is therefore in agreement that the evidence taken in contravention of the rules must be expunged from the record. In the case of **North Mara Gold Mine Limited v Khalid Abdallah Salum** (supra) it was held that: -

> *However, we are settled that according to the record of appeal, it is only PW1 and DW2 who did not take oath before they testified. We are therefore of the considered opinion that it is only the proceedings in respect of these two witnesses whose evidence should be nullified and quashed from the CMA's record of the proceedings..."*

Basing on the position above, it is now settled that the effect of failure to record evidence under oath as it is in this case, the evidence so recorded

gets affected. As observed, DW1 did not take oath before he testified. His evidence has no value. For the foregoing reason therefore, the court, nullifies the evidence of Dw1 and so is the award in Labour Dispute No. CMA/DSM/KIN/882/18/364. The record is therefore remitted to the CMA for rehearing the testimony of DW1. Let the same be done before another Arbitrator with competent jurisdiction. Parties to bear own costs.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

A.K. Rwizile

JUDGE

30.03.2022