

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

REVISION APPLICATION NO. 250 OF 2022

(Arising from an Award issued on 20th June 2022 by Hon. Faraja, J.L, Arbitrator, in Labour dispute No. CMA/DSM/KIN/135/21 at Kinondoni)

OUT SACCOS.....APPLICANT

VERSUS

BEATRICE MANG'ANA..... RESPONDENT

EXPARTE JUDGMENT

*Date of Last Order:27/10/2022
Date of Judgment: 08/11/2022*

B.E.K. Mganga, J.

Brief facts of this application are that, on 8th June 2021, Beatrice Mang'ana, the respondent, referred Labour dispute No. CMA/DSM/KIN/135/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to have been unfairly terminated by OUT Saccos, the herein applicant. It was alleged by the respondent at CMA that in 2008, respondent employed her as Record Assistant. She alleged further that she worked for the applicant until on 25th May 2021 when she was constructively terminated. In the referral Form (CMA F1),

applicant claimed to be awarded TZS. 32,000,000/= as compensation for being unfairly terminated.

After hearing evidence of the parties, arbitrator formed an opinion that respondent was unfairly terminated and proceeded to award the respondent a total of TZS 23,750,000/= being 28 months' salary as compensation for unfair termination, severance pay, leave and general damages. Aggrieved with the award, applicant filed this application imploring the court to revise and set aside the award on the following grounds:-

- i. That, Honorable arbitrator erred in law and facts by failure to take into consideration evidence of applicant while giving his testimony.*
- ii. That, Honorable arbitrator erred in law and facts by declaring that respondent was the employee of the applicant on permanent terms based on the identity card and payment vouchers which were not signed by applicant.*
- iii. That, Honorable arbitrator erred in law and facts by declaring the respondent herein to be a lawful employee of the applicant while knowing that she was employed by Alphonse Hume and not the board of the OUT Saccos which has power to do the same.*
- iv. That, Honorable arbitrator erred in law and facts by blessing the unlawful act of Alphonse Hume of misappropriating the office including employing and paying the respondent without authorization from the board of OUT Saccos.*

In support of the application, applicant filed the affidavit sworn by Egbert Milanzi, advocate.

Respondent did not file a notice of opposition or the counter affidavit to oppose the application. Due to that failure, in terms of Rule 24(2)(e) and Rule 24(4) of the Labour Court Rules, G.N No. 106 of 2007, the application was heard exparte hence this exparte judgment.

Arguing in support of the application, Mr. Milanzi, learned advocate of the applicant submitted that, arbitrator erred to hold that respondent was a permanent employee of the applicant based on ID card and payment voucher. He argued further that arbitrator did not consider that the said payment voucher was unsigned by authorized persons of the applicant. Counsel for the applicant strongly argued that respondent was not an employee of the applicant. He went on to submit that in her evidence, respondent (PW3) testified that she worked with the applicant since 2008 and was terminated in 2021 which is untrue. Counsel maintained that respondent was not an employee of the applicant because the board of members who had the mandate to employ employees did not employ the respondent. Mr. Milanzi argued that the testimony of the respondent (PW1) that one Alphonse Hume is

the one who employed cannot be used to conclude that she was an employee of the applicant because the said Alphonse Hume was one of the applicant's employees and had no power to employ the respondent. with those submissions, counsel for the applicant prayed that the application be allowed by revising the CMA award.

I have examined evidence in the CMA record and considered submissions made on behalf of the applicant and find that the main contention of the applicant is that respondent was not her employee hence there was no unfair termination. From the forementioned grounds of revision, applicant is of the view that arbitrator did not properly analyze evidence adduced on behalf of the parties. I have carefully read evidence that was adduced at CMA on behalf of the parties and find that the complaint by the applicant is not justified.

At CMA, in the bid to prove her case, applicant fronted Dickson Senni (DW1) who was the board chairperson as the only witness. In his evidence, DW1 testified on matters that led the new provisional board under his chairmanship to be formed because there was swindling of money by the predecessor board. DW1 testified that the board that was under his chairmanship was appointed on 1st November 2019 and that

he assumed office on 7th October 2020. In his evidence, DW1 testified that applicant had no employees but that her members used to work on probono basis. While under cross examination, DW1 admitted that Alphonse Hume was the manager of the applicant prior DW1's assumption of chairmanship of the board of the applicant. He further admitted that staff identity Card (exhibit P1) bears the name of the respondent and that was issued by Alphonse Hume.

On the other hand, Beatrice Mang'ana(PW1), respondent testified that she was employed by the applicant since August 2008 and that her employment was unfairly terminated in May 2021 after applicant has unjustifiably changed door padlocks and denied her access to office. In her evidence, PW1 tendered staff identity card, a copy of attendance register, and payment voucher that were received as exhibit P1, P2 and P3 respectively without objection. PW1 testified further that, her monthly salary was TZS 500,000/= as reflected in the payment voucher. While under cross examination, PW1 testified that the said staff identity (exhibit P1) was issued to her by Alphonse Hume, who was the manager and that, the latter is the one who employed him. Evidence that respondent was an employee of the applicant also came from the

testimony of Samoe Rashid Omari (PW2) who is a member of the applicant. In her evidence, PW2 narrated how respondent secured employment with the applicant and the duration respondent worked for the applicant.

From evidence of the parties at CMA, I confidently hold that respondent was an employee of the applicant. The argument that Alphonse Hume had no mandate to employ the respondent lacks merits. Applicant had her own internal problems that led sacking the predecessor board including the said Alphonse Hume, the manager. There is no evidence to show that respondent participated in one way or another in swindling money of the applicant. It is my view that, internal problems of the applicant cannot be a ground of terminating employment of the respondent or denying the truth by stating that respondent was not her employee. I am confident that evidence of both PW1 and PW2 proved existence of employment relationship between applicant and the respondent. In other words, evidence of PW1 and PW2 sufficiently drew on board the provisions of section 61 of the Labour Institutions Act, [CAP 300 RE 2019] on determination of who is an employee.

It was evidence of the respondent that she was unfairly terminated by the applicant but applicant's view was that respondent was not her employee hence she could not be terminated. I have held hereinabove that respondent was employed by the applicant and since there is no contention from the applicant that termination was fair, I uphold the findings of the arbitrator that termination of the respondent was unfair both substantively and procedurally. Arbitrator awarded respondent to be paid TZS 12,000,000/= being 24 months' salary compensation for unfair termination, TZS 10,000,000/= being general damages, TZS 1,250,000/= as severance pay and TZS 500,000/= being one month salary in lieu of notice all amounting to TZS 23,750,000/=. It is an established principle that general damages are awardable at the discretion of the Court and that reasons must be given as it was held by the Court of Appeal in the case of *Trade Union Congress of Tanzania (TUCTA) vs. Engineering Systems Communication and Another*, Civil Appeal No. 51 of 2016[2020]TCA 251. In TUCTA's case , the Court of Appeal held that :-

*"The law also requires the court to assign reasons for awarding general damages. In **Alfred Fundi v. Geled Mango and Two Others**, Civil*

Appeal No. 49 of 2017 (unreported), we said the following on general damages;

'The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same'

I have read the award and find that arbitrator gave reasons for awarding respondent TZS 10,000,000/=. However, in my view, the said amount is unjustifiable because it was neither claimed by the respondent in the referral Form(CMA F1) nor in her evidence. In other words, there is no evidence justifying awarding the said general damages. In her evidence, PW1 prayed to be paid 13 months' salary arrears from 2020 to May 2021, leave pay, compensation for unfair termination and costs. In awarding the said general damages, though arbitrator gave reasons to justify his order, those reasons were unsupported by claims by the respondent. I have considered the provisions of section 52(1)(b) of the Labour Institutions Act [Cap. 300 R.E. 2019] that require the court to maintain and expand the level of employment in the country and convinced that the said award of general damages was unnecessary. I therefore, revise the order to such extent. I have also noted that severance pay was not properly calculated.

Proper calculation shows that respondent was entitled to be paid TZS 1,346,153.8 and not 1,250,000/=. I therefore revise that amount.

For the fore going, I hold that respondent is entitled to be paid TZS 12,000,000/= being 24 months' salary compensation for unfair termination, TZS.1,346,153.8 severance pay, and TZS.500,000/= being leave pay for 2021. Therefore, applicant is hereby ordered a total of TZS. 13,846,153.8 to the respondent.

For all said hereinabove, I allow the application only to the extent explained.

Dated at Dar es Salaam this 08th November 2022



B. E. K. Mganga
JUDGE

Judgment delivered on this 08th November 2022 in chambers in the presence of Egbert Milanzi, Advocate for the applicant and Augustine Tutakolezibwa, Advocate for the respondent.



B. E. K. Mganga
JUDGE