IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 39 OF 2022

SIWEMA HEMED MIKONGO.....APPLICANT

VERSUS

DHAHIRI AND HUSSEIN..... RESPONDENTS

JUDGMENT

K.T.R. Mteule, J

7th November 2022 & 16th November 2022

This application for revision arises from **Labour Dispute No. CMA/DSM/ILA/707/2020** of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA) in award dated 30th December 2021. The applicant is seeking for this Court to call for the record of the CMA, revise and set aside the Award issued therein by Arbitrator Lucia Chrisantus Chacha and order any relief it may think fit to grant.

The applicant was employed by the respondent as a house maid with effect from 1st June 2005 until 28th August 2020. It came a time when the respondent asked the applicant to stay at home to assist an old mother, but the applicant refused leading to ending of the employment.

The application is supported by an affidavit of the Applicant Siwema Hemed Mikongo who in item 4 raised 5 issues which forms grounds of revision. The issues can be paraphrased as follows:-

4.1. That, the honorable arbitrator misconceived the evidence by holding that the applicant was terminated fairly without sufficient prove.

4.2. That the arbitrator erred in law and facts by relying on void agreement between the applicant and the respondent.

4.3. The arbitrator erred in law and facts by ignoring the evidence adduced by the applicant during hearing.

4.4. It is in the best interest of justice that the applicant's application being granted.

4.5. That should this application not granted the applicant is likely to suffer irreparable loss due to her lengthy service of almost five years with the respondent.

Hearing of this Revision application proceeded by oral submission where the applicant was represented by Mr. MAALIM ABEID, Personal Representative for the Applicant and the respondent by Mr. Michael Mwambene, Advocate.

In his submission, Mr. Maalim grouped the five grounds of revision in 3 parts where the first part was composed of items 4.1 and 4.2 of the affidavit while the second part comprised of items 4.3 and the third part by items 4.5.

He stated by the background of the matter by stating that the applicant was employed by the respondent as a house maid with a salary of Tshs. 150,000, to be added 30,000 every month working hours being from 8am to 5pm.

He started that it was at the beginning of the 6th year, when she questioned about the promised annual increment of TZS. 30,000 when her employer told her to leave and not to come back until called. According to Mr. Maalim, the applicant stayed home and when she was called back she was given 2 options, one was to get her payment and leave or to proceed with the work full time taking care of a sick mother and she chose to stop working.

Mr. Maalimu submitted that the applicant was unfairly terminated because her new full time contract was against the law and she refused to breach the law by refusing to work for 24 hours. According to Mr. Maalim, working for 24 hours is forbidden by international

laws, Tanzanian Laws which confines working hours between 9 and 11 hour. He further cited the **Constitution of Tanzania Article 15** which prohibits deprivation of independence. He further submitted that scientists wants a person to sleep for 8 hours.

In his further submissions Mr. Maalim quoted items 8.2.4. of page 38 of the "Mwongozo wa Mafunzo katika kuzuia na kutatua migogoro ya kikazi" of 2012 and stated that where the employer's conduct causes the employee to stop working by notice or without notice, that act constitute termination. In his view, the act of the respondents to require the applicant to work for 24 hours constituted unfair termination.

He challenged the arbitrator for having not awarded the employee for having refused to breach the law and instead awarding the respondent who wanted to breach the law by requiring the applicant to work for 24 hours. Citing **Section 23 (1) of The Law of Contract Act, Cap 345 of 2002 R.E**, Mr. Maalim submitted that any contract can be valid except the one which breach the law. He said that the arbitrator was wrong to uphold a contract which was contrary to the law. He therefore prayed for the court to hold that the

applicant was unfairly terminated and award her what she is entitled due to the unfair termination.

Regarding item 4.2 of the affidavit alleging arbitrator's disregard to the applicant's evidence that she signed the contract unknowingly, Mr. Maalim submitted that the arbitrator did not record this evidence. In his view, this deprived the basic right of the applicant.

Mr. Maalim challenged the arbitrator for having not recorded the respondent's statement in the CMA that he will pay the amount only if the court will uphold it. He asserted that there are many other unrecorded facts and he wondered why it is so.

With regards to reliefs, Mr. Maalim addressed two types of claim, **one** being unfair termination and the **second** being the payment due to the applicant even when she was fairly terminated. According to Mr. Maalim, all these are computed to 20 months or more.

He referred to the benefits the applicant is claiming from the respondent in paragraph 5.1 of the affidavit and the provision of **Rule 7 (1) GN 42/2007.** He stated that due to the unfair termination, if the applicant is not granted what she is seeking, she will be so much affected because she has a family and she worked for 5 years for the respondents. He asked for the court's mercy to the

applicant to save her from being mistreated. Recalling an American book he read, Mr. Maalim stated that the employee cannot deny anything told by the employer because those employees have no other alternative.

In reply submissions, having prayed to adopt the respondent's counter affidavit as part of his submission, Mr. Michael Mwambene, Advocate disputed all the applicant's assertion and prayed for the court to dismiss the revision application.

Starting with the 1st issue Mr. Mwambene challenged the applicant's assertion that there were two options made to the applicant to choose working for 24 hours or taking her money and that, the respondent said that he will pay if the CMA so decide. He stated that these facts are not in the applicant's affidavit but from the bar. Referring to the case of **Little More Company Limited versus Grace Gasper Kessy, Revision No. 473 of 2020** page 5, Mr. Mwambene submitted that it is confirmed that parties are to confine themselves to their pleadings and not to formulate new issues outside their pleadings. In his view, what the applicant has stated is pure words which do not substantiate any reality. He treated as

personal opinion the applicant's assertion that the employer intended to mistreat the employee.

Regarding the parties' relationship, Mr. Mwambene submitted that it is not disputed that parties ended their work relationship by an agreement. He alerted that termination of employment by agreement is one of the employment termination modalities accepted by the law in accordance with **Rule 4 (1) (a) of the Employment and labour Relations Act (Code of good conduct) Rules of 2007, GN No 42 of 2007.** He submitted that the applicant and the respondent reached the end of their contract on **21 August 2020** after a meeting held before between her and the respondent on 20th August where on 21st the payment was effected and signed by the applicant to agree ending their employment relationship.

In his view, it is the law that as the parties are free to enter a contract, it is as the same are they free to end it and that since the Applicant was not forced to enter the contract, then she was free to end it.

He cited the case of **Yara Tanzania Limited versus Athumani Mtangi and Others, Revision No. 49 of 2019**, at page 6 where the court stated that parties can decide to end their contract. It is

therefore Mr. Mwambene's submission that the applicant was right to end the contract with the respondent.

Regarding applicant's signing of the contract unknowingly, Mr. Mwambene averred that the applicant ought to have deponed in the affidavit to show the kind of coercion or threat exercised upon her to force her to sign the contract without knowing the details and otherwise the contract was correct and the applicant read it and understood it and signed with free will. He challenged the assertion that she was forced to sign for lacking substantiation even in the CMA, as no exhibits were tendered and no any legal implication to show that there was undue influence which forced the applicant to sign the contract.

Regarding the entitlements, Mr. Mwambene averred that what was submitted in the CMA is different form what is in the instant matter. Referring to CMA Form No 1, Mwambene submitted that the applicant prayed for compensation of 24 moths, overtime, notice, severance pay, NSSF and certificate of service but before this court, he is praying for unpaid dues for working in public holidays for five years, unpaid arrear of salary increment, psychological injury for unfair termination and that all these were never mediated in the CMA and never arbitrated. In his view, this court cannot exercise revisional

power over a thing which was never decided by the CMA. He cited the authority of the Court of Appeal in **Remigius Mganga versus Barrick Bulyankuru Gold Mining, Civil Appeal No 47 of 2017,** page 13, where the court held that it is a settled principle that a matter not decided by the lower court cannot be discussed at revisional or appellate level.

It is the submission of Mr. Mwambene that the application does not have any legal justification and he therefore prayed for it to be dismissed.

Mr. Maalim, Personal Representative, made a rejoinder where he refuted the assertion that the claims are missing in the CMA. He stated that all the claim are contained in the Applicant's statement in the CMA. Regarding to having distinct claims in this revision compared to the ones in the CMA, Mr. Maalim opined that this has no harm because in the CMA the applicant prayed for 24 months but here, she reduced it to 20 months, therefore, reduction is not bad. In his opinion, there could be an increase.

Regarding the validity of the contract, Mr. Maalim reiterated that the source of the contract is the problem because it is the employer's conduct which was the reason for the applicant's termination. In his

view, the applicant was kept on a trap by the unacceptable contract forcing her to work for 24 hours.

From the parties' rival submissions, two issues need to be resolved. The first issue is **whether the applicant has established sufficient grounds to revise and set aside the CMA award**. The second issue is **what reliefs are the parties entitled to.**

To start with the first issue, it is not in dispute that the parties had employment contract. It is further not in dispute that there are documents which contain parties' agreement to end the said contract. It is on record that the contract ended due to the new requirement that needed a domestic worker who could stay at the respondent's home to take care of the respondent's sick mother even during the night hours which the applicant failed to manage. It was on this account the applicant signed the agreement of stopping the work.

One of what seems to be the center of debate is the validity of the agreement entered between the applicant and the respondent in ending their employment relationship. Mr. Maalim complained against the CMA alleging the arbitrator's failure to record and consider the applicant's evidence that she signed the contract unknowingly. To ascertain the veracity of Mr. Maalim's claim, I had to visit the CMA

record. It is apparent on the arbitrator's award that the CMA focused on the issue as to whether the applicant unknowingly signed the termination agreement. It is on record that the claim that the applicant signed the agreement unknowingly clearly features in the CMA award. I hereunder reproduce a part of page 4 of the award which indicates a record of this matter as it states:-

> *"Kuhusu kilichotokea kazini, PW1 aliieleza Tume kwamba, walimpa karatasi asaini na alisaini bila kusoma na walimwambia kwamba kazi basi na akalipwa pesa basi. Yeye alijua anasaini malipo na kwamba hajui ni kwa nini aliachishwa kazi. PW1 alieleza kwamba alijua nasaini malipo basi. Nilisaini sikujua sababu ya mwisho wa kazi ni nini."*

Basing on these words, the arbitrator held:-

> *"Kusaini bila kusoma si sababu kwa kuwa mlalamikaji alipaswa kusoma kwa kuwa anajua kusoma na kuandika na kwa ushahidi wa kusaini minutes inathibitisha kwamba kweli kulikuwa na kikao ambacho kilioneshwa na kuelezwa sababu ya kuacha kufanya kazi wote.*
>
> .....

Mlalamikaji yeye mwenyewe alisaini minutes za kikao suala la yeye mlalamikaji kuacha kusoma kwa uzembe wake si utetezi na kwa kuwa yeye mwenyewe kaeleza kwamba kweli walikaa watu watatu.

Kutokana na maamuzi ambayo yaliwahi kutolewa, maamuzi ya ***Sluis Brothers (E.A) Ltd Vs. Mathias & Tawari, Civil Appeal No. 11 of 1979 Court of Appeal of Tanzania at Arusha*** *ilieleza kwamba:-*

> *"it is broad principle of law that whatever a man full of age and understanding who can read and write signs a document which, it is apparent on the face of it, is intended to have legal consequences, then, if he does not take a trouble to read it, but sign it as it is, relying on the words of another as to its character or content or effects, he cannot be heard say it is not his document...."*

Kwa sababu hizo hapo juu katika uamuzi huo ambao TUME imeunukuu, mlalamikaji alisaini makubaliano na aliweza kujua

anasaini nini na sasa hawezi kukataa kwakuwa hakulazimishwa kusaini kwa vyovyote vile."

The above quoted words from the CMA award from page 4 to 5 are clear indication that the claim of signing of agreement unknowingly was on record and clearly considered by the arbitrator in arriving at the conclusion in the award.

From the aforesaid, it is my view that the applicant agreed to end the employment by signing the agreement and I agree with the arbitrator that the applicant cannot deny responsibility over an agreement she volunteered to sign without reading. Taking into account the decision cited by the arbitrator, (***Sluis Brothers supra),*** I am also holding that the applicant cannot deny having participated in the said agreement to end her employment.

Mr. Maalimu described the agreement as imposition of 24 hours of working upon the applicant which is contrary to law. He wanted the court to take it as a respondent's unfair act which caused the applicant's resignation. This fact is challenged by Mr. Mwambene for having been raised from the bar without having it in the affidavit. I have gone through the affidavit. It is true this allegation does not feature therein. It was not even an issue in the CMA. This court

cannot revise a matter which was not adjudicated in the CMA. To ascertain the legality of the claim that the applicant was forced to work for 24 hours one needs evidence to firstly establish the existence of that fact and then to find out as to whether it is legal or not. As said before, it was on record that the respondent needed a domestic worker who could stay at home to take care of the respondent's sick mother. As to whether this amounted to 24 hours on work needed evidence in the CMA to ascertain it. This was not a matter of discussion in the CMA and therefore no evidence was given to prove it, and neither in the affidavit to support this application. Therefore it cannot be discussed herein as per the position in the case of **Remigius Mganga** cited supra by Mr. Mwambene. In this case, it was stated:-

> *"It is a settled principle that a matter which did not arise in the lower court cannot be entertained by this court on appeal".*

As such, the court will disregard all the new facts raised by the Applicant during submissions without being proved by either evidence or affidavit in the CMA. These matters were not even a subject of discussion in the CMA.

It therefore remains that the parties' employment contract was terminated by an agreement reached amongst them. As rightly submitted by Mr. Mwambene, this mode of termination of employment contract is guided by **Rule 4 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007**. It provides:-

> *"4 .-(I) An employer and employee shall agree to terminate the contract in accordance to agreement."*

Since the applicant agreed to terminate the contract, she cannot claim unfair termination of a contract she participated to terminate by agreement.

With regards to the appropriateness of the reliefs in the CMA, in the submission Mr. Maalim made reference to item 5.1 of the affidavit and sought for the court to grant what is listed as the applicant's entitlement. The said list contains:-

1. One month salary in lieu of notice
2. Unpaid leave
3. Compensation of 24 months
4. Unpaid overtime

5. Unpaid worked public holidays
6. Unpaid severance pay
7. Unpaid arrears of salary increments
8. NSSF contributions
9. Psychological injury for unfair termination.

In the CMA Form No 1, the applicant's listed:-

1. 24 months compensation for unfair termination
2. Overtime
3. Notice
4. Severance pay
5. NSSF Contributions
6. And Certificate of Service

Since the claims of Unpaid worked public holidays, unpaid arrears of salary increments and psychological injury for unfair termination were not pleaded in the CMA, they cannot be raised at this revisional stage. The claims are disregarded. As well, I have gone through the CMA, the claim of overtime was not proved.

Regarding compensation for unfair termination, the applicant is not entitled to the claim because there is no unfair termination sufficiently proved.

It appears that other claims are not disputed due to what the contents of exhibits D2 which was the contract termination agreement where the respondent promised to pay one month salary in lieu of notice, unpaid salary for the month of August 2020, unpaid leave, and severance pay for the 5 years. If not yet paid, these are the entitlements of the applicants plus certificate of service. The CMA award is therefore revised to that extent. This answers the first issue as to whether there are sufficient grounds to revise the CMA award.

As to what reliefs are the parties' entitled, it is my finding that the applicant is entitled to the statutory entitlement as agreed under exhibit D2 (Separation Agreement) if not yet paid plus certificate of service. The CMA award is revised only to that extent. It is so ordered.

Dated at Dar es Salaam this 16th Day of November 2022.

KATARINA REVOCATI MTEULE

JUDGE

16/11/2022