IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 316 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration at Bagamoyo - Pwani) (Wibard G.M; Arbitrator) Dated 22nd August, 2022 in REF: CMA/PWN/BG/16/2022)

BETWEEN

POWER CHINA CONSTRUCTION..... APPLICANT

VERSUS

MARTIN MAIKO URIO ..... RESPONDENT

EX-PARTE JUDGEMENT

S.M. MAGHIMBI, J:

The Respondent was employed by the Applicant as a Driver on a fixed-term contract of one year commencing on 04/09/2021. According to the applicant, on 15th February, 2022 the Respondent was using the Applicant's Car for his personal use which is against the policy of the Company. He allegedly repeated the same offence on 16th February, 2022 which he caused great and serious damage to the Applicant's Car which resulted to loss. Dissatisfied by the respondent's behaviour the applicant terminated him on 18th February, 2022 on the ground of negligence and misuse of company's property. Aggrieved by the termination the respondent successfully referred the matter to the CMA

whereby the arbitrator found that the respondent's employment contract was unfairly breached hence, awarded him 18 month's salaries as compensation for the remaining period of the contract.

Dissatisfied by the CMA's decision, the applicant filed the present application urging the court to revise and set aside the CMA's award for being illegal, unlawful, illogical and improperly procured. Several attempts to serve the respondent were futile hence the application proceeded ex-parte by way of written submission. Before me the applicant was represented by Mr. Manyama Peter Nyambasi, Learned Counsel.

Arguing in support of the application Mr. Nyambasi submitted that the nature of dispute written in the Certificate of Non-settlement (CMA Form No. 6) is Termination of Employment whereas it is different from the nature of the ongoing dispute as indicated in the CMA Form No. 1 which is Breach of Employment Contract. It was further submitted that the names appearing on the impugned award are completely different from the names appearing in the CMA Form No. 1. He stated that the names in the impugned award were never incorporated or written on any of the proceedings or documents submitted to the CMA. The counsel argued that since the applicant was not sued on its company's name as per the requirement of the Companies' laws then, the

respondent sued a wrong party and the CMA delivered an award against non-existing entity.

Mr. Nyambasi went on to submit that the Arbitrator erred in law by failing to comply with the rules and justice by denying the applicant the right to present the documentary evidence supporting its case. He stated that the order to submit the documentary evidence to be relied upon by parties in this case, was not given to the Applicant. He added that during hearing DW1 tendered documents surprisingly, the same were rejected and hence not relied upon by the CMA. It was further submitted that the Arbitrator relied on unproved facts as the respondent did not tender any proof of his termination from the employment. He insisted that the respondent's claim that he was terminated by the applicant's supervisor was not proved.

Mr. Nyambasi continued to submit that the Arbitrator erred in law and facts by holding that the respondent had an employment contract for two years without considering that DW1 under oath testified that the contract was for one year. It was also submitted that the Arbitrator relied on contradictory evidence as to the amount of salary paid to the respondent. That the respondent's salary was TZS 364,000/= without overtime but with overtime is TZS 540,000/= however, the Arbitrator did not state how he relied at TZS 540,000/= while there is no proof that

the respondent worked for extra hours. As to the allegation of contradictory evidence the counsel relied on the case of **Sahoba Benjuda v. R**, CAT- Criminal Appeal No 96 of 1989 (unreported). The counsel also cited the case of **Geita Gold Mining Ltd & Another vs Ignas Athanas (Civil Appeal 227 of 2015) [2019] TZCA 55 (06 April 2019).** Mr. Nyambasi insisted that the respondent had the duty to prove that he was terminated from employment but he failed to discharge such duty.

Mr. Nyambasi went on submitting that the nature of the project that the Applicant was contracted by the Government of Tanzania was to construct the Wami Bridge, the project which lasts for one year and so was the respondent's employment contract. He further submitted that the Arbitrator erred by failing to consider that the applicant was on a six-month probation period. That, the Respondent was employed on 04/09/2021 and the dispute arose on 16/02/2022 therefore he was terminated at the 5th month of probation. As to the relevance of probation period the counsel cited the cases of **Absa Bank Tanzania Limited (Formerly, Barclays Bank Tanzania Vs. Beatrice Malecha (Labour Revision 40 Of 2021) and Mwaitenda Ahobokile Michael v. Interchick Co. Ltd, Labour Revision No. 30 of 2010,** High Court of Tanzania, at Dar es Salaam (unreported). He insisted that

the respondent was under probation, the fact which was ignored by the Arbitrator hence awarded him the reliefs not entitled to.

It was further submitted that the Arbitrator failed to analyse evidence on record and ordered compensation of TZS 6,552,000/= for 18 months without probable justification because the respondent failed to prove his claim on balance of probabilities pursuant to the provision of Section 60 (2) of the Labour Institutions Act [Cap R.E. 2019] which provides so. To support his submission the counsel cited the case of **Idd Athuman vs A to Z Textile Mills Ltd**, (**Revision no. 59 of 2020) [2021] TZHC 7117 (11 November 2021).** In the result Mr. Nyambasi urged the court to set aside and quash the whole decision and award of the CMA.

After considering the submissions of the applicant, and having perused the record of the CMA my task is to determine the following issues; whether the respondent sued the proper party, whether the Arbitrator ignored the documentary evidence presented by the applicant and whether the respondent was terminated from employment and what reliefs are the parties entitled.

Starting with the first issue as to whether the respondent sued the proper party; in his submission Mr. Nyambasi alleged that the respondent sued wrong party at the CMA as the applicant was not sued

on its company's name as per the requirement of the Companies' laws. On my part I have examined the records and noted that in the CMA F1 the respondent indicated the employer's name as POWER CONSTRUCTION CORPORATION OF CHINA. However, the summons issued and other documents from the CMA the applicant's name was addressed as POWER CHINA CONSTRUCTION CORPORATION. Again, in the impugned award the applicant's name was addressed as POWER CHINA CONSTRUCTION. In his submissions, Mr. Nyambasi did not state which among the referred names the applicant's correct name is. Be as it may, the applicant had the opportunity to pray before the CMA for his name to be addressed properly pursuant to the provision of Rule 25(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007 (GN 64/2007) which is to the following effect: -

> *"Rule 25(1) Where a party to any proceedings has been incorrectly or defectively cited, any party may apply to the Commission and give notice to the parties concerned for correction of error or defect."*

Again, the applicant had another option of applying for correction of an award if the name in the award did not tally with the name in the proceedings, in terms of Rule 33(1) of The Labour Institutions

(Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 (GN. 67/2007). Therefore, the alleged ground cannot stand as a sufficient ground to nullify the whole CMA proceedings as it was not raised at the first instance. As stated above, the clerical error done by the Arbitrator can be rectified.

On the second issue as to whether the Arbitrator ignored the documentary evidence presented by the applicant, the record shows that on 27/05/2020 the Arbitrator made an order for the parties to file their opening statements. On the next session, 17/06/2022 the Arbitrator framed issues and no exhibits were mentioned to be relied upon by the parties during hearing. Filing of exhibits or documents to be relied upon during hearing is the requirement of the law regardless of whether there is an order from the Arbitrator or not. This is in accordance with Rule 24(6) of G.N. 67/2007 which provides as follows:-

> *"Parties shall provide copies of each document intended to be used as evidence, for the Arbitrator and for each party to the dispute."*

Pursuant to the provision cited above, each party had an obligation to submit copies of the documents intended to be relied during hearing. To the contrary, neither of the parties filed the required list of

documents to be relied upon. The applicant attached the pictures to be relied upon in the final submissions which is contrary to the procedures. Even during hearing, the applicant's witness did not mention or tender any document to be relied as evidence. Under such circumstances, I find no document to have been neglected by the Arbitrator as alleged.

Coming to the third issue as to whether the respondent was terminated from employment, I have noted the Mr. Nyambasi's submission that it is the duty of the party who allege a certain fact to prove existence of such fact. However, in employment matters like the one at hand, the duty to prove that the termination was fair lies to the employer pursuant to the provision of section 39 of the Employment and Labour Relations Act, [CAP 366 RE 2019] ("ELRA"). At the CMA, the respondent alleged that his employment contract was breached before the agreed term for unknown reasons. The fact which was also admitted by the applicant in his opening statement and testified by DW1 during cross examination at the CMA where he testified as follows:-

"Kwasasa mlalamikaji hayupo kazini na alifukuzwa kwa uharibifu wa gari"

According to the evidence on record, there is no dispute that the alleged car was damaged since even the respondent admitted in his

testimony at the CMA. However, there is no proof that the damage was negligently caused by the respondent and that the alleged car was used by the respondent for personal gain. Evidence should have been adduced to prove those allegations. As rightly analysed by the Arbitrator, even if the respondent committed the alleged misconduct, the termination procedures on such ground should have been adhered as they are provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ("GN 42/2007"). Looking at the matter at hand, the required procedures were not followed at all. Thus, the respondent was unfairly terminated from employment as correctly found by the Arbitrator.

On the basis of such evidence, there is no doubt that the respondent was terminated from employment before the agreed period hence the applicant was under obligation; pursuant to Section 39 of the ELRA to prove that the termination was fair. She could not discharge that duty. The termination of the respondent's contract was therefore substantively and procedurally unfair.

The applicant further alleges that upon his termination, the respondent was on probationary period. Going through the records there is no evidence to prove such allegation as there is no written

employment contract in this case and even the particular of employment were no proved by the applicant pursuant to the provision of section 15(6) of the ELRA.

Turning to the last issue as to parties' reliefs, the applicant alleges that the respondent had one year employment contract. On the other hand, the respondent insisted that he had two years employment contract. Looking at the records available, there is no proof that the respondent had two years employment contract as claimed. I have therefore relied on the evidence from a person of similar calibre like the respondent, DW1 who was also employed as a driver, the same position as the respondent had. The DW1 testified that he had one year employment contract as a driver and for this reason, in the absence of any written contract, I find it safe to make a presumption that the position of a driver was hiring in a one year fixed term contract. Therefore, considering the evidence on record, I am convinced that the respondent had one year employment contract.

In his CMA F1 the respondent prayed for 18 months salaries as remaining period of the contract and the Arbitrator awarded the same. The record shows that the respondent was employed on 04/09/2021 and he was terminated on 18/02/2022, in simple calculation for a

contract of one year the respondent remained with only 6 months and 16 days of work. The applicant further alleges that the Arbitrator awarded the respondent his salary with overtime the allegation which is contrary to the record as the Arbitrator awarded the respondent based on the salary of TZS. 364,000/=.

In the result, I find the present application to have partly succeeded. The Arbitrator's award of 18 month's salaries is hereby reduced to 6 months and 16 days. Instead, the applicant is ordered to pay the respondent salaries for the remaining period of the contract as compensation for breach of contract. The remaining period is 6 months X 364,000 = 2,184,000/-. As said, there are also 16 days remaining in the month hence calculated at 364,000/30X16 which is TZS 194,133.33. In total the applicant shall pay the respondent a sum of **TZS. 2,378,000.33** as salaries for the remaining period of the contract.

It is so ordered.

Dated at Dar es Salaam this 25th day of November, 2022.

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

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S.M. MAGHIMBI
JUDGE