IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 279 OF 2020

BETWEEN

IMMA WORLD HEALTH ..... APPLICANT

VERSUS

SUZANNE M. CHIMALIRO ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand is lodged under Section 91(1)(a), 91(2)(b) and (c) and Section 94 (1)(b)(i) of the Employment and Labour Relations Act, Act No. 6 of 2004 (as amended), Rules 24 (1), 24(2)(a),(b),(c),(d),(e) and (f), 24(3), (a), (b), (c) and (d), 28(1)(c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007. The applicant is moving the court for the following: -

1. That this Honourable Court be pleased to call for the records of the proceedings, revise and set aside the Award of the Commission for Mediation and Arbitration (CMA) in labour dispute No.

CMA/DSM/KIN/R.463/2018 dated and delivered on 11th day of May 2020 by Hon. Faraja Johnson Lemura (Arbitrator).

2. Any other relief(s) that this Honourable Court may deems it fit to grant.

The application was supported by an affidavit of Mr. Felix Mpambichile, the applicant's Human Resource Manager dated 15th July, 2020. The respondent opposed the application by filing a notice of opposition and counter affidavit of the respondent dated 02nd March, 2021. She prayed for the dismissal of the case. In this court the applicant was represented by Mr. Arnold Luoga, learned Advocate while the respondent was represented by Mr. Denis Mwamkwala, Personal Representative. The application was disposed by way of written submissions.

Brief background of the matter is that the Respondent filed labour dispute No. CMA/DSM/KIN/R.1341/17/118 in the Commission for Mediation and Arbitration ("the CMA") in which she claimed payment of USD 38,488.90 as compensation for unfair termination of her employment contract, leave payment of USD 3,207.25, payment of USD 3,207.25 in lieu of notice of termination, severance pay and to be issued a clean certificate of service. Upon conclusion of the arbitration proceedings, the arbitrator issued an award in favor of the respondent declaring the termination of the applicant

to be unfair and awarded the respondent a total sum of USD 46,628.38 as compensation for unfair termination, notice, leave allowance and gratuity. Aggrieved by the award of the CMA, the applicant has lodged the current revision raising the following legal issues:

1. Whether or not the required standards of proof of the Applicant's case have not been met.
2. Whether or not it is proper and rational for the Arbitrator to hold that the Respondent as a Professional Employee in Managerial Cadre had a contract for an unspecified period of time
3. Whether or not an Employee under a contract for a specified period of time can sue for unfair termination and be granted the reliefs that ought to be granted to an Employee under a contract for an unspecified period of time.

Starting with the first issue on the required standards of proof of her case have been met, the applicant submitted that the finding of trial Arbitrator at page 5 of the impugned award is that:-

"kwa maana hiyo ni sahihi kwa Tume hii kuamini kuwa mlalamikiwa ameshindwa kuwasilisha mkataba wa ajira ya mlalamikaji, kwa kuwa haukutolewa mezani pa Tume kama ushahidi na huo uliotolewa

ulikataliwa na mlalamikaji kwa kuwa sio wake, ni wa mwanaume na yeye mlalamikaji ni mwanamke na tena jina la mwajiri wake kama alivyowasilisha katika ushahidi wake ambao kwa sehemu kubwa mlalamikiwa alishindwa kudodosa mapungufu yake wakati wa kumhoji, hivyo mlalamikiwa ameshindwa kuthibitisha kesi yake kuwa huo anodai kuwa ndio mkataba wa ajira ya mlalamikaji ni kweli ndio wenyewe kwa kukidhi matakwa ya kisheria kama yanavyonukuliwa katika uamuzi huu.

He then referred to Section 15(6) of the ELRA which provides that:-

"if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of providing or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."

From the above position of the law, the Applicant argued that she was duty bound to prove the existence of the employment contract between her and the Respondent, and that the testimony of DW1 at page 3 of the impugned award was that the Respondent had a one (1) year employment contract with the Applicant. That to prove the same, DW1 tendered the employment contract which was admitted by the CMA as Exhibit D-1. That

the same employment contract was identified by the Respondent, PW 1 although she disputed some part of it on the alleged fact that the Applicant referred her as "he" under Clause 11 of Exhibit D-1.

The issue raised by the applicant is whether the Respondent to be referred to as he instead of she under one clause may vitiate all the terms of the contract. Her argument is that according to Section 8 (a) of The Interpretation of Laws Act, Cap. 1 revised Edition, 2019 words importing the masculine gender include the feminine. Borrowing the interpretation of this provision of the law and considering the fact that the said employment contract mentioned the names of the parties to it at page 1, the applicant argued that it is apparent that the contract was between the Applicant and the Respondent and, whenever the word he was used it meant she.

In reply, Mr. Mwamkula referred this court to the holding of the CMA at page 3 of the award while referring to EXD1 the arbitrator held:

"Katika maswali ya dodoso shahidi alikubali kuwa Mkataba wa Ajira alioutoa dhidi ya Mlalamikaji wa Shauri hili kwa maudhui yake unazungumzia Mwajiriwa ambaye ni wa jinsia ya kiume ili hali mlalamikaji wa Shauri hili ni wa kike"

He then submitted that the applicant's witness was testifying a hearsay evidence that was heard from one Luke King and further challenged the EXD1 to be a contract from a company registered as Ima Health while the applicant's company was Ima World Helath. It is unfortunate that the arbitrator yielded to the arguments of Mr. Mwamkala, the word unfortunate is used because it is obvious that the arbitrator was not aware of Section 100(1) of the Evidence Act, Cap. 6 R.E 2019 which provides:

> " *When* ***the terms of a contract****, grant, or any other disposition of property,* ***have been reduced to the form of a document****, and in all cases in which any matter is required by law to be reduced to the form of a document,* ***no evidence shall be given in proof of the terms of such contract****, grant, or other disposition of property, or of such matter* ***except the document itself****, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."* (Emphasis is mine)

The Section excludes oral evidence when the terms therein have been reduced in writing. Since the contract between the parties herein was in writing, then the contents of the document reduced in writing is the evidence to prove the existence of the said contract. Since the documents have been

admitted and its authenticity as to the signatures of the parties was not in question, the document proved the existence of the contract and parties were bound by the contents therein. Mere reason that a word "he" was used instead of "she" could not by any means be used to invalidate the said contract.

In this case, if the contract was the proof of the existence of the employment relationship between the parties, saying that it did not concern the respondent because of the word "he" (if at all that is crucial issue), would have been the reason to dismiss the claim and not used as a tool to impose a burden of monetary compensation to the applicant. I could not agree more with the applicant and it is actually disappointing to see that the learned arbitrator ignored the bigger picture of the contents of the contract for a simple reason like referring to he when it is she. As correctly argued, upon admitting the employment contract as Exhibit D-1, trial Arbitrator should have proceeded to scrutinize and analyze the validity of the admitted document, but the Arbitrator did not perform his duty and instead he relied on the mere denial of the Respondent regarding Clause 11 of the said Exhibit D-1. The pre

Further to that, shouldn't the arbitrator have asked herself of the existence of the different contract or if it isn't that same contract that the applicant received her salaries for over a year? Rights of a party cannot be played like a tennis ball on a mere fact that she is referred to as he in the terms of the contract, after all, the preamble of the contract clearly states the parties to that contract whereby the name of the respondent is clearly stated as the employee. On those findings, I therefore allow this ground of revision, the contract of employment between the parties EXD1 is a valid contract and it is that which shall be used to determine the other remaining issues.

The second issue is whether or not an Employee under a contract for specified period of time can sue for unfair termination and be granted the reliefs that ought to be granted to an Employee under a contract for an unspecified period of time. Mr. Luoga's submission is that the employee under a contract for a specified period of time cannot sue for unfair termination and be granted the reliefs that and employee under a contract for an unspecified period of time is entitled to. He referred to Section 14(1) of the ELRA which provides that:-

"a contract with an employee shall be of the following types:-

(a) A contract for an unspecified period of time;

(b) A contract for a specified period of time for professionals and managerial cadre;

(c) A contract for a specific task

Further reference was to Rule 6(1) of the Code which stipulates that:-

> *"where an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employee, the employee may lawfully terminate the contract before the expiry of the fixed term by getting the employer to agree to an early termination."*

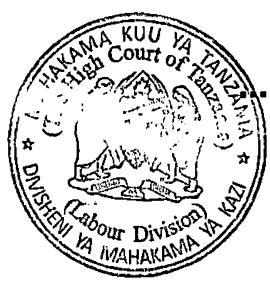
I am at this point in agreement with the applicant that Rule 8 (2)(c) of the Code allows only employees under contracts for an unspecified period of time to sue for unfair termination. For the category of employees under contracts for a specified period of time, their only remedy they can claim upon termination is breach of their employment contracts as per sub-rule (1) of Rule 6 of the Code. I see where the problem is, the arbitrator having imported the issue of gender in referring "she" and "he" she justified her exclusion of the contract so that the respondent may be categorized as a permanent pensionable employee, forgetting that under the circumstances,

the respondent should have had the burden of proving that the contract that existed was permanent. I find that the arbitrator fell into error in making such an assumption in her determination.

Going to the Exhibit D-1 and Exhibit D-2, it is clear that the Respondent's employment contract with the Applicant had expired automatically on 3rd day of March 2018 thus; there was neither termination no breach of the Respondent's employment contract by the applicant because the contract automatically came to an end. In conclusion, the applicant did not breach any contract neither was there any unfair termination of employment.

On the above analysis and finding, this revision is allowed. The respondent has no claims against the applicant as the contract automatically came to an end and the parties held a joint meeting to discuss the way forward and the applicant was eventually notified (EXD2). The award of the CMA is hereby quashed and set aside.

Dated at Dar-es-salaam this 25th day of March, 2022.



S.M. MAGHIMBI
JUDGE