

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 339 OF 2021

BETWEEN

GOOD SAMARITAN ENGLISH MEDIUM SCHOOL APPLICANT

AND

EMILE MWASESE RESPONDENT

JUDGMENT

Date of the last order: 17/02/2022
Date of judgment: 4/3/2022

B. E. K. Mganga, J

On 6th December 2019, applicant entered into one year fixed contract of employment commencing on 1st January 2020 to 31st December 2020. The said fixed term contract of employment was signed by Emile Mwasese, the respondent, on 10th December 2019 accepting to be employed as a teacher at the applicant's school. On 1st August 2020, applicant terminated employment of the respondent due to operational requirement. Respondent was unhappy with the said termination of her employment as a result she filed Labour dispute No. CMA/DSM/ILA/676/2020 before the Commission for Mediation and Arbitration

henceforth CMA. In a referral of a dispute to the Commission for Mediation and Arbitration Form (CMA F.1) respondent indicated that, she was claiming to be paid TZS 6,099,030/= being 5 months' salary compensation for the unexpired period of the contract, Notice pay, annual, leave, Maternity leave, severance pay and certificate of service. In the said CMA F1, respondent indicated further that procedures for retrenchment were not followed, there was no communication that number of students were decreasing and further that the dispute arose on 1st August 2020.

On 9th July 2021, Hon. Makanyaga. A.A., arbitrator, having heard evidence of both parties, delivered the award in favour of the respondent that retrenchment was both substantive and procedurally unfair. Applicant was ordered to pay the respondent TZS 144,885/= being severance pay, TZS 538,150/= being leave pay, TZS 2,690,750/= being salary for the unexpired 5 months of the fixed contract and TZS 538,150/= being notice pay all amounting to TZS 3,911,935/=.

The employer, the herein applicant was aggrieved by the said award as a result, on 24th August 2021, she filed this application seeking the court to revise the aforementioned award. In the affidavit of

Emmanuel Mugabe in support of the application, the deponent raised two grounds namely;-

- 1. That the arbitrator was bias for relying only on the evidence of the respondent and completely ignored evidence that was adduced by the applicant.*
- 2. That the arbitrator erred in law by awarding the respondent severance pay without considering that respondent had a contract and does not deserve to be paid severance.*

The application was opposed by the respondent who filed the counter affidavit of Harry A. Mwakalasya, advocate.

At the hearing of the application, applicant was represented by Victoria Mgonja, learned counsel, while the respondent was represented by Harry Mwakalasya, learned counsel.

In arguing the 1st ground, Ms. Mgonja, learned counsel briefly submitted that arbitrator was biased as he did not consider evidence of the applicant that was to the effect that respondent prayed to resign, of which, applicant had no objection. That, in order to assist the respondent to be paid by NSSF, applicant wrote a letter of termination because NSSF does not pay when an employee resigns.

On the 2nd ground, MS. Mgonja, counsel for the applicant, submitted that arbitrator erred to award severance pay to the

respondent who had a fixed term contract of one year. Counsel for the applicant did not explain more.

Submitting for and on behalf of the respondent, Mr. Mwakalasya, advocate, submitted that, in the award, arbitrator considered evidence of both parties. He submitted that reasons for termination of respondent's employment, according to termination letter, was due to operational requirement, but that applicant failed to prove this reason by evidence. Counsel for the respondent submitted that, respondent was terminated because she demanded to be paid maternity leave. Counsel for the respondent countered the submissions that respondent resigned and that in order to be paid by NSSF, applicant wrote a termination letter. Counsel for the respondent submitted that, that allegation is fraud against NSSF.

Responding to the 2nd ground, Mr. Mwakalasya, counsel for the respondent submitted that severance pay is waived if there is grave misconduct, which is not the case to the application at hand. Counsel for the respondent submitted that the fixed term contract between the parties started on 1st January 2020 and was expiring on 31st December 2020 but respondent was terminated on 30th July 2020. Counsel concluded that respondent was entitled to be paid severance pay.

In rejoinder, Ms. Mgonja only reiterated her submissions in chief and had nothing to add.

Having considered submissions of the parties and evidence in the CMA record, I have opted to start with the 1st ground i.e., biasness of the arbitrator and failure to consider evidence of the applicant. I have examined evidence of Emmanuel Mugabe (DW1) the only witness who testified at CMA on behalf of the applicant and find that, according to this witness, respondent resigned but she was given termination letter to facilitate her to be paid by NSSF. In his own words, DW1 is recorded stating:-

"...Mwaka 2020 kulitokea janga la Corona mpaka ilipofika tarehe 30/6/2020 shule zote zilikuwa zimefungwa. Mlalamikaji wakati huo hakuwepo shuleni. Ilipofika tarehe 30/7/2020 mlalamikaji alimpigia simu mwajiri kwamba hana nia ya kuendelea kufanya kazi hivyo anaomba apewe barua kwa ajili ya kufuatilia mafao yake NSSF. Kwa utaratibu pale NSSF kama mfanyakazi akipeleka barua ya kuacha kazi hapewi mafao hivyo mwajiri wake kwa kumsaidia akamwandikia barua ya kumuachisha kazi ili aweze kupata mafao yake kwa haraka na urahisi...mlalamikaji alilipwa notisi na likizo..."

During cross examination, DW1 admitted that respondent made a call to Shilaz, the head teacher informing him that she is no longer interest in the job. Unfortunately, the said Shilaz did not testify, as such, that evidence, is hearsay and cannot be acted upon by the court. On

both leave and notice pay, DW1 admitted during cross examination that he had no evidence to show how respondent was paid. In the award, the arbitrator disbelieved the evidence that respondent resigned and that she was given termination letter to facilitate her NSSF payment. In my view, I see no justification to fault the arbitrator on that issue. As I have pointed out, that is hearsay, because DW1 received the said information from another person who did not testify. Even if we assume that the said information is true, applicant should learn that assisting another person to circumvent the law, will certainly, at sometimes, be against her. Applicant should learn that the support she gives to others, might turn against herself and that if that happens, she should learn how to swallow it however bitter it may, and remain calm as if nothing happened. That may be a lesson in future to herself and others too. In my view, in no way the arbitrator could have accepted the evidence of DW1 and disregarded evidence of the respondent including termination letter (exh. E4) that she was unfairly terminated. In the termination letter (exh. E4) it is indicated that respondent was retrenched due to operational requirement, but the evidence of DW1 is contrary to that letter. Nothing was said by DW1 in relation to retrenchment, as such, I find that there was no valid reason for termination. I therefore hold that

termination of the respondent was substantively unfair as it was held by the arbitrator. The 1st ground of the application fails.

It was submitted by Ms. Mgonja, counsel for the applicant that, arbitrator erred to award respondent to be paid severance while she had a fixed term contract of one year. On the other hand, Mr. Mwakalasya, counsel for the respondent submitted that respondent was entitled to that payment. This issue cannot detain me. It is undisputed that, on the 1st January 2020, the parties entered into a one year fixed term contract that was expected to expire on 31st December 2020, but it was terminated on 1st August 2020. In short, the contract was terminated after respondent has worked only for seven months. Section 42(1) and (2)(a) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] is clear as to how and who should be paid severance pay. The said section provides:-

42.-(1) For the purposes of this section.

"severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that that employer up to a maximum of ten years.

(2) An employer shall pay severance pay on termination of employment if -

(a) the employee has completed 12 months continuous service in with an employer:

From the evidence on record, employment of the respondent was terminated after 7 months. At the time of termination, respondent did

not qualify to be paid severance as she worked less than one year. The 2nd ground of revision has merit. I therefore allow it. In the award, applicant was ordered to pay the respondent TZS 144,885/= being severance pay. I therefore set aside this order of payment of severance pay.

Having allowed the 2nd ground and dismissed the 1st ground of revision, I revise the award and order that respondent should be paid (i) TZS 538,150/= being leave pay, (ii) TZS 2,690,750/= being salary for the unexpired 5 months of the fixed contract, and (iii) TZS 538,150/= being notice pay all amounting to Three Million Seven Hundred Sixty Seven Thousand and Fifty Tanzanian Shillings (TZS 3,767,050/=) only. It is so ordered.

Dated at Dar es Salaam this 4th day of March 2022.




B.E.K. Mganga
JUDGE