IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 457 OF 2021

(Originating from the ward of Hon. Faraja Johnson. L, Arbitrated dated 15th October 2021 in Labour dispute No. CMA/DSM/ILA/360/19/250 at Ilala)

BETWEEN

UDA MANAGEMENT AGENCY LTD ..... APPLICANT

AND

HAPPINESS KILABUKO ..... RESPONDENT

JUDGMENT

Date of last order: 28/03/2022
Date of judgment: 25/4/2022

B. E. K. Mganga, J.

The facts of this application briefly are that, on 1st September 2018 applicant entered into two years fixed term contract with the respondent expiring on 31st August 2020. In the said two years fixed term contract, respondent was employed as Assistant Delivery Manager for BRT Station. Employment relationship between the two did not last long because on 2nd October 2018, hardly one month after employment, applicant terminated employment of the respondent while under probation.

Aggrieved with termination of her employment, on 2nd May 2019, Respondent filed Labour dispute No. CMA/DSM/ILA/360/19/250 before the Commission for Mediation and Arbitration (CMA) at Ilala claiming to be paid TZS 20,000,000/= as compensation for breach of contract, TZS 20,000,000/= being general damages, TZS 1,000,000/= being salary for October 2018. In CMA F1 respondent showed that on 1st November 2018, she filed Labour dispute No. CMA/DSM/KIN/1024/2018 which was withdrawn with leave to refile this dispute. In the said CMA F1, respondent showed that the dispute arose on 2nd October 2018. She showed further that applicant did not give valid reason for termination and that procedures were not followed.

Having heard evidence of both sides and their submissions, on 15th October 2021, Hon Faraja Johnson, L, arbitrator, delivered an award that there was unfair labour practice. The arbitrator therefore awarded respondent to be paid TZS 11,000,000/= being 10 months' salary compensation and one month salary in lieu of notice.

Applicant was aggrieved by the award hence this application for revision. Applicant filed the affidavit of Ms. Sechelela Chitinka her advocate to support the notice of application. In the said affidavit, Chitinka raised three issues namely:-

1. *Whether it was roper for the trial arbitrator to hold that the applicant had no reason to terminate the contract of employment.*
2. *Whether it was proper for the trial Arbitrator to hold that applicant did not follow procedure in terminating the respondent.*
3. *Whether it was proper and just for the trial arbitrator to award ten (10) months salaries as compensation and one (1) month salary as notice to the tune of Tanzanian Shillings 11,000,000= to an employee who was not confirmed.*

Respondent filed the counter affidavit sworn by Mr. Mbuga Emmanuel, her advocate to resist the application. In the counter affidavit, the deponent stated that respondent was employed on permanent term, but she was appointed to the new position under probation with ill motive.

When the application was called for hearing, Ms. Sechelela Chitinka, learned counsel appeared and argued for and on behalf of the applicant while Mr. Emmanuel Mbuga, learned counsel appeared and argued for and on behalf of the respondent.

Submitting on the 1st ground, Ms. Chitinka, counsel for the applicant submitted that arbitrator erred to hold that applicant had no valid reasons to terminate the respondent. She submitted that respondent was terminated based on poor performance because she was supposed to supervise Cashiers and Station attendants i.e., fare collection system, but she failed. She concluded that applicant had valid reason for termination.

On the 2nd ground, counsel for the applicant submitted that the arbitrator erred in holding that applicant did not follow proper procedure for termination of employment of the respondent. She submitted further that Clause 7 of the fixed term contract between the parties laid down the procedure for termination at the time respondent was on probation. Counsel went on that respondent signed the said fixed term contract hence she was aware of the terms. Counsel submitted that respondent was terminated while on probation. Ms. Chitinka submitted further that, section 99(3) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] requires parties to apply the Code of Good Practice but any departure is allowed if the parties give justification for the departure. She concluded that the nature of the position necessitated departure from the Code of Good Practice and that applicant applied and observed what is contained in Clause 7 of the contract.

On the 3rd ground, counsel for the applicant submitted that arbitrator erred to award 10 months' salary as compensation and one month salary (TZS 11,000,000/=) to the respondent who was on probation. She submitted that Arbitrator used his discretion under Section 40(1)(c) of Cap. 366 RE. 2007 (supra), but in terms of Section 35 of Cap. 366 RE. 2007(supra) respondent was not entitled to be awarded that amount

because she worked for one month only. Counsel for the applicant went on that Arbitrator had no discretion to override the law and cited the case of ***David Nzaligo V. National Microfinance Bank PLC, Civil Appeal No. 61 of 2016***, CAT (unreported) to support her argument that a probationer is excluded to enjoy the remedy under section 40 of Cap. 366 R. E. 2019(supra). She therefore prayed the application be allowed.

Before allowing counsel for the respondent to respond on submissions by counsel for the applicant, I asked counsel for the applicant to address the Court whether CMA had jurisdiction i.e., whether the dispute was filed within time or not.

Responding to the jurisdictional issue raise by the court, Ms. Chitinka submitted that respondent was terminated on 2nd October 2018, but she filed the dispute at CMA on 2nd May 2019 without an application for condonation. She went on that the law requires the dispute relating to termination to be filed within 30 days. She submitted further that on 1st November 2018 respondent filed labour dispute No. CMA/DSM/KIN/1024/18 within Kinondoni but she withdrew it and filed Labour dispute No. CMA/DSM/ILA/368/19/250 at Ilala. Counsel for the applicant submitted that the dispute that was filed at Ilala, the subject of

this application, was filed and heard out of time without condonation. She concluded that the dispute was time barred.

Mr. Mbuga, counsel for the respondent, opted to respond first to the jurisdiction issue raised the court. On his part, Mr. Mbuga submitted that CMA had jurisdiction. He argued that CMA F1 annexed to the applicant's affidavit as UDAMA 5 shows that the dispute was filed on 1st November 2018 as it arose on 2nd October 2018. He went on that the said CMA F1 was received by TAS Attorneys on 2nd May 2019. Mr. Mbuga submitted further that respondent was granted 14 days leave in CMA/DSM/KIN/1024/18 as she prayed to withdraw the dispute with leave to refile. Counsel for the respondent submitted further that, time that was available to the respondent is sixty (60) days because the dispute was based on breach of contract that occurred on 2nd October 2018. Counsel maintained that the dispute was instituted at CMA Ilala. During submissions, counsel for the respondent conceded that he did not have record showing the date dispute No. CMA/DSM/KIN/1024/18 was withdrawn. He was quick to add that after withdrawal of the said CMA/DSM/KIN/1024/18 and grant of 14 days leave, respondent filed the dispute that is the subject of this revision. He therefore strongly argued that the dispute was filed within time.

When asked on the title of the dispute, counsel maintained that respondent filed the dispute at Ilala and that errors in dispute title number i.e., CMA/DSM/KIN/1024/18 should not prejudice the parties because this is administrative issues. He argued that it is not clear whether "KIN" means Kinondoni or otherwise and that he does not know what "ILA" stands for, but respondent filed the dispute at Ilala.

Responding on the 1st ground of revision, counsel for the respondent submitted that there is no evidence proving that termination of employment of respondent was due to poor performance. He submitted that the salary review letter (exhibit P.1) shows that respondent was hard working employee. He went on that the nature of the contract is two folded i.e., (i) as per exhibit P.1 respondent was employed on 30th September 2017 on unspecified term, and (ii) on 1st September 2018 for two years fixed term contract for the same position. He concluded that respondent was employed under fixed term contract of two years commencing on 1st September 2018 and that she was terminated after she had worked for 25 days with the applicant.

On the 2nd ground, counsel for the respondent submitted that procedures for termination were not followed. He argued that whether respondent was a probationary or not, procedures need to be adhered to.

He further submitted that the said Clause 7 of the contract cannot circumvent the procedures under the law. He pointed that under Rule 10(1) and (2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, applicant was supposed to follow the guideline in terminating the respondent who was a probationer. Counsel cited the decisions of this court in the case of ***Edi Secondary School V. Ezekiel Damas Sinyangwe, Revision No. 10 of 2013*** and ***Hope Kivule Secondary School V. Matiku Alfred & 2 Others, Revision Application No. 124 of 2021*** (both unreported). He concluded that evidence adduced by the respondent shows that procedures were not followed.

On the 3rd ground of revision, counsel for the respondent submitted that respondent's case was on breach of contract as she was terminated without consent. He cited the case of ***Good Samaritan V. Joseph Robert Savari Munthu, Revision No. 165 of 2011***, HC (unreported) to support his argument and submitted further that respondent was entitled to be paid the remaining period of the contract. Counsel submitted also that the amount awarded to the respondent was not adequate and prayed that respondent be paid the remaining period of her contract and that the provisions of section 40 of Cap. 366 R. E. 2019 (supra) is applicable.

In rejoinder, Ms. Chitinka, counsel for the applicant, reiterated that Arbitrator had no jurisdiction under Section 40(1)(c) of Cap. 366 RE. 2019 to award compensation to an employee who is excluded under Section 35 of the same Act.

I have carefully examined the CMA record and submissions by both sides before this court and at CMA. In disposing this application, I will first deal with the jurisdictional issue raised by the court namely whether the dispute was filed within time or not.

Counsel for the applicant submitted that the dispute was filed and heard out of time without condonation. On the other hand, counsel for the respondent was of the view that the dispute was filed within time. Both Counsels agree that initially respondent filed a dispute but later withdrew it. Their point of departure is where was it filed. Counsel for the applicant submitted that it was at Kinondoni while counsel for the respondent submitted that it was at Ilala. Counsel for the respondent submitted that respondent prayed to withdraw the dispute and was granted 14 days leave within which to file a new dispute that is the cause of the revision under discussion. With due respect to counsel for the respondent, his submission that respondent prayed to withdraw the dispute and that the prayer was granted with 14 days leave within which to file a new dispute is not

supported by evidence. I have painstakingly read the CMA record and find that CMA F1 was received on 2nd May 2019 and stamped with CMA rubber stamp on the same date. In the CMA record, the only record available is from 22nd May 2019 to the conclusion of the dispute. There is no record showing that respondent prayed to withdraw the dispute and further that she was granted 14 days leave. More so, there is no order granting leave to the respondent. Had what was submitted by counsel for the respondent been true, then, they were supposed to be found in the counter affidavit of the respondent. In short, all claims that respondent filed a dispute and then withdrew with leave to refile within 14 days are mere submissions from the bar and not evidence. I will therefore not act on them.

I have examined CMA record and find that respondent wrote on CMA F1 that ***"dispute rose on 02/10/2018 instituted a suit on 01/11/2018 being CMA/DSM/KIN/1024/18 which was withdrawn with leave to file this application"***. It was open to the respondent to bring evidence proving that leave was granted to her. It is worth to note that in the said CMA F1, respondent showed that the dispute arose in Ilala Dar es Salaam. Even if she filed the dispute at Kinondoni and leave granted, of which evidence is wanting, then, the mediator or arbitrator at Kinondoni has no power to grant leave for the dispute to be

instituted at Ilala. That is the domain of the arbitrator at Ilala. In other words, the power of the arbitrator at Kinondoni cannot be exercised at Ilala which is why Rule 8(1) of the Labour Institutions (mediation and Arbitration) Rules, GN. No. 64 of 2007 requires disputes to be filed in the area in which the dispute arose. Since the dispute arose in Ilala, the Arbitrator in Kinondoni had no power.

Counsel for the respondent further twisted arguments that the dispute was filed within time because (i) complaint by the respondent was based on breach of contract and that time available to her was sixty days, and (ii) that it was filed within time but the CMA F1 was received by TAS Attorneys on 2nd May 2019. With due respect to counsel for the respondent. As pointed hereinabove, the CMA F1 was received at CMA on 2nd May 2019 and stamped with CMA stamp on the same date. The date CMA F1 was received by TAS Attorneys whether on that date or prior, bears no consequence at all, because the controlling documents are the ones kept at CMA and not by Attorneys. The sixty days argument based on breach of contract does not also help the respondent for two reasons, i.e., (i) from 2nd October 2018 the date the dispute arose, as correctly filled in the CMA F1 by the respondent to 2nd May 2019, the date CMA F1 was received, is more than sixty days and there is no order for condonation,

and (ii) in CMA F1 respondent filled Part B that relates to fairness of termination and went on that no valid reason for termination was given by the applicant and further that procedures were flawed. By filling part B of CMA F1, respondent pleaded that the dispute related to fairness of termination. In terms of Rule 10(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, disputes relating to fairness of termination must be filed within 30 days. The application at hand was filed at CMA beyond 30 days provided for under the law and no condonation was granted.

For all these, I hold that the dispute was filed and heard out of time without condonation. In short, it was time barred and CMA had no jurisdiction to determine it.

This ground disposes the whole application. I will not therefore consider grounds raised by the applicant. For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam this 25th April 2022.

B.E.K. Mganga
JUDGE

Judgment delivered today 25th April 2022 in the presence of Ms. Sechelela Chitinka, advocate for the applicant and Emmanuel Mbuga, advocate for the respondent.

B.E.K. Mganga
JUDGE