IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 397 OF 2021

(Originating from the award issued on 27th August 2021 by Hon. Msina, H.H, arbitrator in Labour dispute NO. CMA/DSM/KIN/R.408/2016/477 at Kinondoni)

BETWEEN

TANZANIA TRADERS ENERGY
DEVELOPMENT & ENVIRONEMNT ..... APPLICANT

AND

GISELA NGOO ..... RESPONDENT

JUDGMENT

Date of the last order: 11/05/2022
Date of Judgment: 20/5/2022

B. E. K. Mganga, J.

Facts of this application are that, in November 1999, applicant employed the respondent under fixed term contract as Section Coordinator. In 2009 the parties entered another fixed term contract whereas respondent was promoted to the position of Senior Coordinator. On 1st January 2011 the parties entered a five-year contract whereas respondent was employed as Senior Professional Manager. The said five years fixed contract was expiring on 31st December 2015. Before expiry of the agreed

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period, in 2013, due to operational requirement, applicant retrenched some of her employees, respondent inclusive. It is undisputed by the parties that due to the said operation requirement or economic difficulty, on 25th February 2013, E.N. Sawe, the Executive Director of the applicant wrote a letter addressed to the respondent (exhibit AP4) informing the respondent that her employment was terminated with effect from February 2013. Respondent was informed further that her outstanding benefits including salaries (May-December 2012), annual leave (2012), NSSF savings for the past two years (2011 and 2012), gratuity for three years (2010, 2011, 2012) and severance allowance will be paid on installment or in lump sum within the period of three years upon the organization getting funds. It happened that applicant did not honour the agreement as a result, on 13th May 2016, respondent filed the dispute at CMA claiming to be paid TZS 173,748,858/=. Being aware that she was out of time, respondent filed the application for condonation and the same was granted.

Having heard evidence of both sides, on 27th August 2021, Hon. Msina, H. H, Arbitrator, issued an award in which she ordered the applicant to pay (i) TZS 48,000,000/= being salary arrears for May to December 2012, (ii) TZS 21,600,000/= being gratuity, (iii) TZS 6,461,532/= being

annual leave pay and TZS 4,846,149/= being severance pay, all amounting to TZS 80,907,681/=.

Applicant was aggrieved by the said award as a result, she filed this application seeking the court to revise it. In his affidavit in support of the application, Samson Lusumo, learned counsel for the applicant, raised four grounds, namely: -

1. *That the arbitrator erred in law and fact when she granted leave pay while not entitled to leave pay.*
2. *That the arbitrator erred in law and fact when she computed severance allowance wrongly.*
3. *That the arbitrator erred in law and fact by relying on a letter written by the respondent instead of employment contract.*
4. *That the benefit of Tshs 80,000,000/=(sic) granted is wrong and includes statutory payment.*

On the other hand, respondent filed the affidavit of Aidan Mutagahywa Kitare, learned advocate, to oppose the application.

When the application was called for hearing, Mr. Samson Lusumo, learned counsel appeared and argued for and on behalf of the applicant while Mr. Aidan Kitare, learned counsel, appeared, and argued for and on behalf of the respondent.

On the 1st ground, Mr. Lusumo submitted that the arbitrator erred in law and fact when she granted one month leave pay while respondent was

not entitled. He submitted that, prior to termination, respondent did not pray for leave pay. Counsel submitted that respondent testified that she did not pray for annual leave. But during submissions, counsel for the applicant conceded that applicant did not inform the respondent that she is supposed to take annual leave.

On the 2nd ground i.e., that the arbitrator erred in computation of severance allowance, counsel submitted that computation was not in conformity with Section 42 of the Employment and Labour Relations Act [Cap. 366 RE. 2019]. Counsel submitted that; respondent was employed under a fixed term contract of five (5) years expiring on 31st December 2015 but was terminated on operational requirement on 19th February 2013. Counsel went on that; respondent's salary was TZS 6,000,000/= and that she was awarded TZS 4,846,149/= as severance pay. Counsel for the applicant submitted further that in terms of Section 42(3)(b) of Cap. 366 R. E. 2019 (supra), an employee terminated on operational requirement is not entitled for severance allowance. Counsel submitted further that respondent was offered option to work with Sister Company of the applicant, but she rejected that offer.

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On 3rd ground namely that; the arbitrator erred to rely on a letter written by the respondent instead of the employment contract, counsel for the applicant submitted that the said letter was signed by the Executive Director of the applicant wherein the applicant admitted that respondent has some outstanding. In the 4th ground, counsel for the applicants submitted that the arbitrator did not show the basis of awarding the respondent TZS 80,000,000/=. He submitted further that the said amount is not based on computation and that it is excessive.

Resisting the application, Mr. Kitare, counsel for the respondent submitted on the 1st ground that, in acceptance of termination (Exhibit AP4), it was agreed by the parties that respondent shall be paid leave. Therefore, there was no need of filling the form or applying for leave. Counsel went on that no evidence was adduced at CMA to the effect that respondent was supposed to fill leave form but did not. Counsel argued further that, in terms of Section 31(1) of Cap. 366 R. E. (supra), leave is a statutory requirement and entitlement of the respondent.

On the 2nd ground, counsel for the respondent submitted that severance allowance awarded to the respondent was properly calculated. He argued that respondent was not offered option to work with Sister

Company of the applicant and that there is no evidence to that effect. Counsel for the respondent submitted further that Section 42(3) Cap. 366 R.E. (supra) cannot apply in the circumstances of this application. Counsel concluded that even in Exhibit AP4, nothing was mentioned that respondent was offered employment to a sister Company of the applicant.

On the 3rd ground, counsel for the respondent submitted that the arbitrator did not error to rely on the letter Exhibit AP4 written by the applicant. He went on that, the arbitrator relied on Exhibit AP4 and the contract between the parties because what was agreed in the said letter included matters in the contract.

On the 4th ground, counsel for the respondent submitted that, respondent was awarded a total benefit of TZS 80,907,681/=. He submitted further that computation was made by the arbitrator in accordance with what the parties had agreed on earlier. Counsel summed up by praying the application be dismissed.

In rejoinder, counsel for the applicant reiterated that calculations made by the arbitrator in relation to severance is not proper. He maintained that respondent refused to work with sister company of the

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applicant and that the total amount awarded to the respondent has no basis and is excessive.

I have carefully considered the rival arguments of the parties and evidence in the CMA record. As pointed out herein above, on 19th February 2013 respondent wrote a letter to the applicant (exh. D2) accepting to be retrenched or to rescind/ cancel the contract of employment and asked the applicant to arrange the date for discussion of terminal benefits. On 19th February 2013 applicant wrote a letter of acceptance of cancellation of employment contract of the respondent (exh. D3) and invited the respondent to the meeting to be held on the same date to bargain terminal benefits payable and modality of payment. According to the letter dated 25th February 2013 (exh. AP4) after discussion with the respondent, applicant agreed to pay the respondent some of the entitlements that are centre of argument by the parties in this applicant. Exhibit AP4 reads in part: -

"RE: ACCEPTANCE FOR TERMINATION OF YOUR EMPLOYMENT CONTRACT

... Based on your letter and the discussions conducted in the office of the Executive Director on 19th February 2013 from 12.00 to 7.30 noon. We have agreed with you that you will not continue working with TaTEDO with effect from February 2013. We understand that you still have some pending terminal benefits payable to you. Due to financial constraints currently facing

our organization, your outstanding benefits including salaries (may- December 2012), ***annual leave****(2012), NSSF savings for the past two years (2011 and 2012),gratuities for three years (2010, 2011 and 2012), and* ***severance allowance*** *will be paid to you either on installment (as shall be agreed with you) or in lump sum with (sic) the period of three years upon the organization getting funds.*

We thank you for working with TaTEDO and accepting the ongoing efforts and processes to finalize payment of your outstanding benefits.

Yours faithfully.

Sgd
E.N. Sawe
EXECUTIVE DIRECTOR"

From the quoted letter, the criticism relating to payment of annual leave in the 1st ground of the revision lacks supports. The same applies to the 2nd ground relating to payment of severance. It was submitted by counsel for the applicant that respondent refused to work in a sister company of the applicant. With due respect, there is no evidence in the CMA record to support that submission. More so, parties agreed in exhibit AP4 as to what should be paid. I therefore find that the 2nd ground also lacks merit.

Counsel for the applicant criticized the arbitrator that she relied on the letter written by the respondent instead of the contract. Counsel for the respondent submitted that the letter complained of was written by the

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applicant and included what the parties agreed in the contract. This ground cannot detain me because the letter complained of is exhibit AP4 quoted above. The said letter (exhibit AP4) was written by the applicant, and it is loud as to what the parties agreed after bargaining. I see no reason to fault the arbitrator. So longer the parties agreed in the said exhibit, they cannot distance themselves from that agreement.

In the 4th ground, the applicant criticized the arbitrator that the award of TZS 80,907,681/= is excessive and that arbitrator did not show the basis of calculations. With due respect to counsel for the applicant, I have read the award and find that the said amount was justified, and calculations were made in accordance with the law hence it is not excessive. I find that this ground also has no merit.

For the foregoing, I hereby uphold the CMA award and dismiss this application for lack of merit.

Dated at Dar es Salaam this 20th May 2022.

B. E. K. Mganga
JUDGE

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