IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 135 OF 2021

(Arising from Labour Dispute No. CMA/DSM/KIN/203/18/20, before Hon. Nyagaya, Arbitrator, Dar es Salaam Zone)

BETWEEN

OFGANG CORNEL BASIL.....APPLICANT

VERSUS

BUDGET ENTERTAINMENT RESORT LIMITED.....RESPONDENT

JUDGEMENT

13th May 2022 & 16th May 2022

K. T. R. MTEULE, J.

This Revision application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/203/18/20. **OFGANG CORNEL BASIL**, the Applicant herein is praying for the following orders:-

1. That this Honorable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration, (Hon. Nyagaya) the arbitrator, in Labour Dispute No. CMA/DSM/KIN/203/18/20, dated 26th February 2021 at Dar es Salaam Zone.
2. Any other order that the Court may deem fit to grant.

Stated hereunder is a brief background of the dispute as gathered from the Applicant's affidavit, the Respondent's counter affidavit, parties' submissions and the record of the CMA. The applicant was employed by the respondent as Assistant Chief Cooker. Their relationship ended on 23rd November 2018 for an alleged separation agreement based on applicant's illness. In protest of the said agreement, the applicant filed the matter at CMA where it was registered as Labour Dispute No. CMA/DSM/KIN/203/18/20.

At the arbitration stage, the applicant alleged among other claims that there was a conflict of interest for when the counsel for the Respondent exercised double roles in the matter. The Applicant contested the reason for termination basing of valid reasons, alleging violation of the procedures of termination. The CMA decided not in Applicant's favor, hence this application.

In the affidavit, the applicant advanced a list of errors he asserts to have been committed by the arbitrator which forms the grounds of revision. These include:-

(a) The holding that the applicant did not deny having signed the contract and thus he agreed to terminate the contract and that he was not aware of the contract.

(b) Failure to rule out that out that the respondent did not have reasons to terminate the contract.

(c) Failure to evaluate the evidence of the parties.

(d) Failure to take into consideration the parties' submissions.

(e) Taking the evidence of a person who appeared as both a counsel and a witness for the Respondent.

(f) Failure to rule out that the Applicant was not paid terminal benefits.

(g) Failure to hold the termination unfair, and substantially and procedurally.

Both parties were represented: Mr. August Mramba, Advocate represented the applicant, whereas the respondent was represented by Ms. Asia Tokutoola, Advocate. Hearing of the application proceeded by a way of written submissions.

In the submissions, the applicant's Counsel Mr. August Mramba reduced the above grounds of application into three issues. The first one is whether the arbitrator failed to address the issue of conflict of interest; the second issue is whether the respondent had a fair reason for termination; and third one is whether the employer followed procedure in applicant's termination. In my view, the two

last points are centered on the propriety of the termination hence, I see two grounds and even the Applicant's counsel addressed these two issues.

Submitting in support of the application and addressing the first issue, Mr. August Mramba averred that the arbitrator erred in law for failing to address the serious issue of conflict of interest on the ground that DW2 drafted and attested the alleged termination agreement and secondly, he represented the respondent during mediation and arbitration by drafting documents to be relied upon by the respondent. In his view, the act of DW2 to become a witness in this case is against rules of natural justice and it is contrary to Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations, GN. No.118 of 2018 which prohibits an advocate from acting where there is a conflict of interest. Supporting his submissions, he cited the case of **Registered Trustees of Social Action Fund and 2 Others v. Happy Sausage Limited and 10 others**, Civil Appeal No. 48 of 2000, Court of Appeal of Tanzania at Arusha (unreported).

On the **second** issue as to whether the respondent had fair reason for termination of the employment, Mr. August Mramba challenged

the existence of any termination agreement and argued that could there be such a termination agreement, the procedure stipulated under **Rule 4 (1) of GN. 42/2007 of the Employment and Labour Relations (Code of Good Practice), GN. 42 of 2007** should have been followed. Supporting his argument, he cited the case of **Yara Tanzania Limited vs Athuman Mtangi & others,** Revision Application No. 49 of 2019, High Court of Tanzania, Labour Division, at Dar es Salaam, (unreported). He added that the employer was duty bound to state the reasons for termination and must have proved that there were negotiations prior to signing of the agreement. On that basis he is of the view that there was no mutual agreement signed by the parties since there was no fair reason for termination apart from the reason of the illness of the applicant, which contravenes **section 37 (2) of Cap 366 R.E 2019.** Strengthening his stand, he cited the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another, Civil. Appl. No. 104 of 2004.**

Responding to the Applicants submissions, Ms. Asia Tokutoola disputed the applicant's assertion that he was employed as a chief cooker, and that he was terminated on medical ground.

Addressing the first issue regarding conflict-of-interest, Ms. Asia Tuktoola submitted that DW2 remains a competent and compellable witness because the Applicant has failed to show how he was prejudiced by his testimony. In her view the holding of CMA was pegged on both oral and documentary evidence adduced during the arbitration. She submitted that the rest of the Applicant's complaints remain mere words from the bar because they are not substantiated, nor do they form part of the Commission's records. Ms. Asia argued that the termination agreement remains relevant and admissible evidence because it was never disputed at the arbitration stage. She further argued that the applicant failed to establish which procedure was faulted to contravene **Rule 4 (1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007.** Ms. Asia averred that the arbitrator's award is conspicuously clear that the termination was mutual and the reason for termination is clearly stated.

Citing the case of **Barclays Bank (T) Ltd. v. Jacob Muro,** Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania, at Mbeya (unreported), Ms. Asia submitted that parties are bound by their pleadings and the applicant is precluded from inventing things which

were never pleaded during the arbitration.

Ms. Asia Tokutoola challenged the relevance of YARA's case cited by the applicant and submitted that it is distinguishable from this application as it imposes to the Respondent a burden which is not provided by any law, as no legal requirement to prove negotiation of a contract. She thus prayed for the application to be dismissed.

The Applicant filed a rejoinder which is as well considered in determining the merit of this revision application.

Having gone through the CMA records, the facts deponed in the parties' sworn statements and their submissions, this Court finds two issues for determination which are:-

i) Whether the Applicant has established sufficient grounds for this Court to exercise its jurisdiction to revise and set aside the disputed award.

ii) To what reliefs are parties entitled?

In addressing the above issues, I will start with the first one as to "whether the Applicant has established sufficient grounds for this Court to exercise its jurisdiction to revise and set aside the disputed award". The first three legal issues raised in the affidavit are

hereunder considered to see whether there is any error in the CMA which is associated with the issues in arriving at an appropriate finding. The **first** question to address is centered on the propriety of the advocate to represent a client and at the same time appear as a witness for the same client in the same case. What I note from the CMA award is that the arbitrator did not address this issue. It is not disputed that the record, including CMA proceedings reveal that it was raised by PW1 and parties as seen at page 4, paragraph 1 and 2 of the CMA proceeding. On that basis I cannot agree with the Respondent's counsel's claim that it is a new fact since it surfaced in the CMA proceedings.

Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations, GN. No. 118 of 2018 cited by the Applicant provides:-

> *"45 (1) A conflict of interest is one that would be likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client.*
>
> *(2) An advocate shall not act or continue to act in a matter where there is or is* ***likely to be at conflict unless the advocate has the informed consent of each client or prospective client for whom the advocate proposes to***

act.

In such circumstances where DW2 acted as a witness and appeared as an advocate the issue of conflict of interest ought to have been addressed by the arbitrator. The likelihood of having conflicting interest in this kind of situation may reasonably raise fear amongst the parties and this fear had to be cleared. It is my view that since the issue of advocate's conflict of interest was raised in the CMA proceedings, the arbitrator ought to have addressed it and that the arbitrator was wrong in not addressing it.

On the second issue as to whether there was a valid reason for termination, Ms. Asia Tukutoola contended that DW1 testified to the effect that in 2018 the applicant could not discharge his duties to the required standard. She further admitted that the complainant was ill and that he produced medical documents to her as per exhibit D1. She confessed that the complainant was ill, and it took him almost a week to resume on duty from the date he felt sick.

Ms. Asia maintained that the arbitrator's award is conspicuously clear that the termination was mutual and the reason for termination is clearly stated.

Termination of employment contract is guided by **Rule 4 (1) of GN. No. 42 of 2007** which directs that termination of an agreement should be in accordance with the employment contract. The ground advanced by the arbitrator in his holding was that parties agreed to terminate their contract due to the applicant's poor attendance in his working station. It is not disputed that the Applicant's work attendance was weakened due to sickness as per exhibit D-1 (medical report). The question which arises is "was there a mutual agreement in the termination?" This question was one of the debated points in the CMA proceedings. It is not disputed that the Applicant did sign the agreement. It appears that the applicant is pleading ignorance in terms of the contents of the termination agreement. According to the applicant, he was deceived to sign the papers without knowing that it was intending to terminate his employment contract. The applicant had a duty to prove that he did not sign the agreement voluntarily. In the CMA no evidence of duress or any other circumstances initiated by the Respondent to conceal the contents of the termination agreement. Signature of the parties in any agreement is a prove of mutual understanding of the terms and conditions contained in that agreement unless evidence is given that there was an intentional concealment of the facts in that contract or duress on

the parties who signed it. In absence of this evidence, the arbitrator would not have held otherwise. In such circumstance I am of the view that the arbitrator's finding was correct that parties agreed to the termination.

The termination agreement forms a part of the agreed terms governing the applicant employment and they had to be adhered to. In the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, where it was held that:-

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

Basing on above cited authority since parties agreed to terminate employment contract as per Exhibit D-2 (separation agreement) on reason of illness, then it is unwise for the CMA and this Court to interfere parties' agreement.

In addressing the termination procedure, it was found at the CMA that there was no procedure which was violated.

It is apparent that the applicant's termination was based on illness. This reason of termination has got its own procedures as per Guidelines 7 (1), (2) and (3) Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, forming party of the schedule to the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. Under this guideline, consultation to the employee in relation to termination must be done by the employer. Furthermore, alternatives to termination should be considered and there should be a calling of meeting with the employee's representatives prior to termination decision. In the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 it was held that:-

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37 (2) of the Act."*

In numerous Court of Appeal decisions, this position has been expounded and stated. The cases include **Salum Omary Mavunyira Vs. Director General of NHC** 2014 (2) LCCD No. 107; **Mohamed**

R. Mwenda & 5 Others Vs. Ultimate Security Ltd., Rev. No. 440/2013; **Deus Wambura Vs. Mtibwa Sugar Estates**, Rev. No. 03/2014 and Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social Work** the Court held that:-

> *'Where there is a valid reason for termination, but the procedures have not been complied with, then the remedy cannot be similar as in cases where both the termination was unfairly done substantively and procedurally."*

Again, in the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported), it was held:-

> *".....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA....."*

From the legal positions established in the above cited cases, it is an error where an arbitrator fails to distinguish the two scenarios in disregarding those legal requirements of termination which are well provided under Guidelines 7 of GN. No. 42 of 2007.

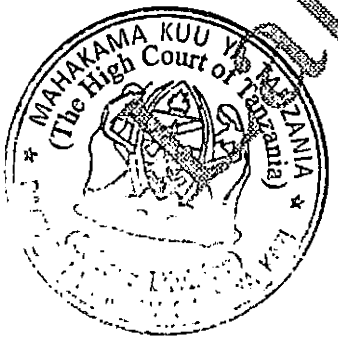
From the foregoing analysis it appears that, although there was a reason for termination which was based on mutual agreement by the Applicant and the Respondent due to illness, the procedure adopted was not appropriate in conformity with the above cited guidelines and case laws.

From the foregoing, although it is the finding of this court that there was a reason for termination as reflected in the party's separation agreement (Exhibit D2) there were some errors one being failure to consider the issue of Advocate's conflict of interest and the other one being failure to comply with the termination procedure. Nevertheless, the applicant did not explain how the issue of conflict of interest prejudiced her rights. In my view, if this issue is given consideration, I don't see any likelihood of changing the court verdict since there are sufficient facts which disclose the important aspects of the dispute. In this regard, I will disregard the issue of conflict of interest. The answer to the question of procedural fairness is sufficient to answer the framed issue affirmatively that the applicant has established a good ground to warrant the revision of the **Labour Dispute No. CMA/DSM/KIN/203/18/20.**

With regards to relief since there was unfair procedure in the termination of the applicant's employment, I grant the following reliefs. The twelve (12) months' compensation provided under Section 40 of the Employment and Labour Relation Act, Cap 366 R.E 2019 are reduced to six (6) months' salary compensation basing on his salary of TZS 300,000/=per month, as the same was never disputed. Leave allowance is not granted as it is time barred contrary to Rule 10 of GN. No. 64 of 2007.

In the result I revise the Arbitrator's findings to such extent discussed herein. Therefore, the revision application is partly allowed. Each party to the suit to take care of their own cost. It is so ordered.

Dated at Dar es Salaam this 16th day of May, 2022.



KATARINA REVOCATI MTEULE

JUDGE

16/05/2022