THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVSION APPLICATION NO. 127 OF 2020

BETWEEN

SKYWARDS CONSTRUCTION LTD..... ..... APPLICANT

AND

ADAM JUMA PAKUWA..... ..... RESPONDENT

JUDGMENT

Last order: 14/02/2022
Date of Judgment: 18/02/2022

B.E.K. Mganga, J

On 20th February 2019, the respondent filed labour dispute No.CMA/DSM/ILA/R.141/19/155 before the Commission for Mediation and Arbitration (CMA) at Ilala complaining that on 28th January 2019 his employment was terminated by the applicant unfairly. The arbitrator at CMA heard evidence of both parties and on 27th February 2020, delivered an award in favour of the respondent that termination of his employment was unfair and ordered respondent be paid TZS 7,550, 000/= being twelve months salary, one-month salary in lieu of notice, and severance pay.

Applicant was aggrieved by the said award and filed this application seeking the court to revise it. In the affidavit affirmed by

Fauz Ishaq, the director of the applicant, the deponent raised seven grounds to be considered by this court in revising the aforementioned award as follows: -

1. 1. *That the trial arbitrator erred in law and fact by violating rules of procedure of tendering and admittance of evidence and finally mishandled exhibits presented/filed by parties, hence delivered erroneous award which prejudiced the applicant's rights.*
2. 2. *That the arbitrator misconstrued section 15(1) of the employment and Labour Relations Act, 2004 and arrived at erroneous decision that applicant was duty bound to supply an employee with a written contract without considering the facts.*
3. 3. *That the arbitrator erred in holding that the respondent had been in continuous employment relationship for nine years without considering the nature and tasks engaged to be performed by the respondent in the oral contract.*
4. 4. *That the arbitrator erred in law by according more weight and believing testimony of the respondent's witness and holding that the contract by the parties was indefinite duration as there was no proof of existence of specific task contract therefore disregarding or disbelieving testimony of the applicant.*
5. 5. *That the arbitrator erred in holding that there was no agreement between the parties without considering the existence of oral contract of specific tasks entered and recognized by the parties.*
6. 6. *The arbitrator erred in holding that respondent was unfairly terminated without considering authenticity of the respondent's documents.*
7. 7. *That arbitrator erred and failed to analyze properly evidence, hence delivered erroneous award in favour of the respondent.*

The respondent filed both a counter affidavit and a notice of opposition resisting the application.

When the application was called for hearing, parties opted to argue this application by way of written submissions, the prayer which was granted.

In the written submissions, Mr. Alpha Mchaki, learned counsel for applicant, abandoned the first ground in which applicant was complaining that arbitrator violated rules and procedures of tendering and admittance of evidence and mishandling of exhibits tendered which led him to issue an erroneous award.

In arguing the application, Mr. Mchaki argued ground No. 2 and 5 together and submitted that applicant and respondent entered into oral contract for a specific task as site technician/foreman and that they agreed respondent to be paid TZS 50,000/= as monthly salary. Counsel went on that, respondent was supervising project activities and that when one site ended, he was assigned a new site with different durations. Mr. Mchaki argued that, the arbitrator failed to construe the provisions of section 15(1) of the Employment and Labour Relations Act [Cap.366 R.E. 2019] by demanding written contract while applicant managed to establish existence of particulars stipulated under the said

section through evidence of DW1. Counsel cited the case of ***Ruku and Magori v. Magori [1971] HCD No. 16*** and ***Merali Hirji and sons v. General Tyre (E.A) Ltd [1983] T.L.R 175*** to cement on his argument that a contract can be oral.

Arguing the 3rd ground namely, that arbitrator erred in holding that respondent had been in continuous employment relationship for nine years without considering the nature and tasks engaged to be performed by the respondent in the oral contract, counsel for the applicant submitted that continuation of the contract between the employer and the employee does not change the nature of the contract the two entered into. He strongly submitted that evidence proved that the parties entered into a specific task contract and that respondent was relieved once the task was completed.

Mr. Mchaki, counsel for the applicant in arguing the 4th ground namely, that the arbitrator erred in law by affording more weight and believing testimony of the respondent's witness and holding that the contract by the parties was indefinite duration as there was no proof of existence of specific task contract and disregarded or disbelieved testimony of the applicant's witness that the oral contract was of specific task, he submitted that, there was no justification for the arbitrator to

accord more weight the evidence of the respondent that the contract was indefinite duration at the same time admitting that the nature of activities of the applicant was of specific task.

Arguing the 6th and 7th ground together, counsel for the applicant submitted that arbitrator accorded weight on the termination letter (exhibit D1) that was improperly admitted in evidence by the respondent instead of the applicant who filed it at CMA.

Mr. Masuna Gabriel Kunju, counsel for the respondent, responding to submissions made by counsel for the applicant in relation to the 2nd and 5th ground, submitted that, employment relationship between applicant and respondent started on 5th September 2009, and was terminated by the applicant on 18th January 2019. Counsel submitted that arbitrator correctly applied the law as applicant failed to prove that the contract between the two was oral. Responding to the 3rd ground, counsel for the respondent submitted that evidence adduced proved that the contract between the parties was permanent in nature.

Replying to the 4th ground, counsel for the respondent submitted that applicant did not comply with the law and further that arbitrator's award is based on sound reasons. On the 6th and 7th grounds, counsel for the respondent submitted that the said termination letter (exhibit

D1) was prepared, stamped and tendered in evidence by the applicant himself hence no need of complaining. Counsel concluded that arbitrator evaluated evidence and gave reasons for the award.

I should point that applicant did not file a rejoinder hence, in this judgment there will be no reference to rejoinder submission.

I have carefully considered submissions and evidence of the parties where they locked horns on the type of the contract and find that exhibit D1 gives an answer. The said exhibit was also a heart of arguments of the parties in the 6th and 7th grounds of revision. It was argued by the applicant that arbitrator accorded weight on the termination letter (exhibit D1) that was improperly admitted in evidence by the respondent instead of the applicant who filed it at CMA. On the other hand, counsel for the respondent submitted that the said termination letter (exhibit D1) was prepared, stamped and tendered in evidence by the applicant himself hence no need of complaining. I have closely examined the CMA record and find that the said exhibit D1 was tendered without objection on 13th September 2019 by Godwin Sauli (DW1) on behalf of the herein applicant. Being tendered by the applicant, it became to be her evidence. Applicant was not forced to tender it and cannot be heard complaining now if the said exhibit turned

against him by supporting the case of the respondent. In my view, at the time of tendering that evidence, applicant thought it would have helped her case against the respondent, instead, it has turned to be a sword to destroy it. However bitter as it is, she should learn how to swallow it and remain calm. It is unjustifiable for the applicant to criticize the arbitrator for using evidence that she tendered intending to be acted upon. It cannot be said that the exhibit was improperly relied upon simply because it advanced the case of the opponent.

The said termination letter (exh. D1) reads: -

"TERMINATION OF EMPLOYMENT

You will recall I discussed with you on my intentions to terminate you on the ground of lack of work for which you were employed to do.

In our discussions, we noted that you were employed in this Company on 05" August 2009. From the time you were employed, the Company had been getting a number of projects for construction work which had sustained our business operations. We are currently note getting construction work as was the case before.

In addition, the current economic climate worldwide has had a negative impact on the Company's financial affordability to retain our existing labour force.

Consequently, I have been forced to terminate you on the ground of lack of work for which you were employed to do. You will be terminated with effect from January 28, 2019

You will be paid the following termination benefits:-

1. One month pay in lieu of notice of termination.

2. Unpaid salary at the time of termination.

3. ***Payment in respect of all untaken leave during the last Eight years.***

4. Severance pay equivalent to seven days pay for each completed year of continuous service with us to a maximum of 10 years.

5. ***I note that you were not contributing to any pension fund. In our discussions on this matter we agreed to pay you the company's share of the same to be computed at the rate of 10% of your salary from the time you were employed to the time of termination.***

6. You will be given a certificate of service.

I wish to thank you on behalf of this company for your contribution during the all period of employment and wish you all the best.

1. Fauz Eshaq

Sgd
Managing director

Reading the above quoted letter of termination of employment (exh. D1) it is clear that respondent was not employed by oral contract and for specific task. It is illogical to argue that respondent was employed for a specific task and that his employment came to an end upon completion of the task while the afore quoted letter does not suggest so. No one employed for specific task can be promised to be paid all what is

contained in the said letter. Applicant appears to disassociate herself with that letter. As pointed hereinabove, it was tendered by her witness. The author of the said letter or the person whose name and signature appears to that letter was not called to testify on its validity or otherwise. As that person was not called, and no reasons were assigned for that failure, no other person can challenge its validity. The only interpretation remaining is that, the said Fauz Eshaq, the Managing Director of the company, knows that the said letter is valid and was authored by him.

It was submitted by counsel for the applicant that arbitrator accorded more weight the evidence of the respondent that the contract was indefinite duration but disregarding the nature of activities of the applicant which was of specific task. This argument is barren of merit for two reasons, (i) the nature of activities alone of the applicant is not a sufficient proof that the contract was of specific task. In his evidence, Godwin Sauli (DW1) testified that applicant had employees with permanent or unspecified period contract and specific task contract. It is the same applicant we are asked to decide in his favour because of the nature of activities. This argument is a self-defeating so to speak. (ii) Exhibit D1 does not state that the employment contract between

applicant and the respondent was of specific nature. In his evidence, Adamu Juma Pakuwa (PW1), the respondent, testified that his employment contract was of unspecified contract. For all I have explained hereinabove, I agree with the respondent. The burden was on the applicant to prove that applicant was amongst employees who were under specific task employment, but she did not discharge that duty.

In the upshot, I uphold the CMA award and an order issued that respondent be paid TZS 7,550,000/= for unfair termination. I therefore dismiss this application for want of merit.

Dated at Dar es Salaam this 18th February 2022.

B.E.K. Mganga
JUDGE