

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 70 OF 2021

BETWEEN

REGENCY MEDICAL CENTRE LIMITED..... APPLICANT

VERSUS

FLORA JOHN..... RESPONDENT

JUDGMENT

Date of the last order: 17/01/2022

Date of judgment : 01/3/2022

B.E.K. Mganga, J

The respondent was a nurse officer. On various dates, she entered into one-year fixed term contract of employment with the applicant. The said fixed term contract was renewable at the options of the parties. On 1st March 2019, instead of entering into a one-year fixed term contract, the parties entered into a three months fixed term contract of employment. The said three months fixed term contract was expiring on 1st May 2019. On 30th April 2019, applicant wrote a letter notifying the respondent that there will be no renewal of the said fixed term contract when it comes to an end.

Aggrieved by the said non-renewal of contract, on 13th June 2019, respondent filed a Labour dispute to the Commission for Mediation and Arbitration henceforth CMA claiming to be paid TZS 23,979,200/= as compensation for 12 months' salary for unfair termination. In the CMA F1, respondent indicated that no valid reason for termination of her employment was disclosed, and further that, fair procedure of termination was not followed.

Both the applicant and respondent filed their respective pleadings at CMA as a result on 6th August 2019, issues for determination were framed. On 20th February 2020, after none appearance of the applicant, arbitrator allowed the respondent to prove her case exparte. Respondent gave her evidence as PW1 on the same date and closed her case. On 15th June 2020, Hon. Faraja Johnson Lemura, arbitrator, delivered an exparte-award in favour of the respondent. The arbitrator held that there was no valid reason for breach of contract and that, the respondent was not consulted hence unfair termination. Based on that holding, the arbitrator awarded respondent to be paid TZS 5,932,800/=.

Applicant was aggrieved by the said exparte award as a result she filed an application at CMA to set aside the aforementioned exparte award. In the affidavit in support of the application to set aside an

exparte award, it was averred that applicant was not served with summons for hearing and for the date of delivery of the award. Respondent filed a counter affidavit to oppose the application. Having received both the affidavit and counter affidavit, arbitrator ordered the application to be argued by way of written submissions. It happened that only the applicant complied with the order.

On 7th January 2021, Faraja Johnson Lemura, arbitrator, delivered his ruling dismissing the application by the applicant holding that there was no sufficient cause, because applicant did not abide by the Commission's order of last adjournment and that, the dispute took long time due to several prayers of adjournments advanced by the applicant.

Further aggrieved by the said ruling, applicant filed this application seeking the court to revise the said ruling and the exparte award. In the affidavit sworn by Lalit Ratilal Kanabar, the principal officer of the applicant, deponed that, applicant was not served with summons for hearing or for award and that applicant became aware of the exparte award at the time she was served with Execution application No. 293 of 2020. Amongst the issues raised by the applicant are:-

1. *(i) whether the Honorable arbitrator acted judiciously in granting an exparte award.*

2. (ii) whether the Honorable arbitrator acted judiciously in denying setting aside the *ex parte* award.
3. (iii) Whether it was proper for the arbitrator to award terminal benefits which were already paid to the respondent.
4. (iv) Whether it was proper for the arbitrator to rule that termination was unfair without affording the applicant right to be heard.

When the application was called for hearing, Mariam Ismail advocate appeared and argued for and on behalf of the applicant while Jimmy Mkeni, an officer from TAROTWU, a trade union, appeared and argued for and on behalf of the respondent.

Arguing the application, Ms. Ismail, counsel for the applicant, submitted that applicant was not served with notice of hearing that led to the said *ex parte* award. She submitted that there was change of counsels of the applicant and that applicant missed appearance just once. She cited the case of ***District Executive Director Moshi District Council v. Alfred Mbuya***, Labour Revision No. 7 of 2020 (unreported) wherein this Court (Mkapa, J) held that the objectives of the court is not to punish parties for the mistakes they make and prayed the same to apply to this application so that *ex parte* award can be set aside and parties ordered to go back to CMA to be heard.

Mr. Mkeni on behalf of the respondent, submitted that on 18th September 2019, applicant prayed for adjournment as a result the matter was adjourned to 31st October 2019. That, on the later date, applicant prayed for adjournment on ground that her advocate was sick as a result the matter was adjourned to 26th November 2019, but on the later date, the matter did not proceed as it was reported that applicant's witness had an emergency. Due to that, the matter was adjourned to 9th January 2020. On the latter date, applicant prayed also adjournment as a result the prayer was granted as last adjournment, an order of hearing on 20th February 2020 was issued. Mr. Mkeni submitted further that, when the matter came for hearing on 20th February 2020, applicant prayed for adjournment on ground that her advocate was sick, but the prayer was rejected and the matter proceeded exparte on the same date. For all these, Mr. Mkeni prayed that the application be dismissed.

In rejoinder, Ms. Ismail submitted that in all the dates mentioned by the respondent, applicant entered appearance. She maintained that the application be granted.

I have carefully examined CMA record and find that the matter came for the first time before Lemurua, arbitrator, on 16th July 2019, as all parties were present but was adjourned to 6th August 2019 for

drafting of issues. On the later date, all parties appeared, and issues were framed. The issues that were framed are (i) whether respondent had a fixed term contract that expired or was employed on permanent terms, (ii) if issue number one is in affirmative in favour of the employee, whether there were valid reasons for termination of contract of employment and (iii) what are the reliefs the parties are entitled to. After framing issues, the matter was adjourned for hearing to 18th September 2019. When the matter came on 18th September 2019, Mr. Luoga, advocate for the applicant, prayed for short adjournment on ground that (i) the witness for the applicant was indisposed and (ii) to enable the parties to exchange documentary evidence. Mr. Mkeni for the respondent had no objection. The matter was therefore adjourned for hearing on 31st October 2019, of which, advocate for the applicant failed to enter appearance as a result the matter was adjourned to 26th November 2019. On 26th November 2019, all parties appeared, but the matter was adjourned. It is not indicated as who initiated adjournment but the arbitrator only recorded:-

"Tume: Shauri limehairishwa hadi 9/1/19(sic) saa 4:00 asubuhi kwa Ushahidi wa mlalamikiwa, leo shahidi wao amepata dharura, pili kupisha majadiliano ya mapatano"

It is my view that there was typing error instead of 9/1/2020 the arbitrator wrote 9/1/19. The CMA record on 9/1/2020 shows:-

AKIDI: Mbele yangu JOHNSON F.L, MWAMUZI

WADAAWA:

M/kaji: Flora John – Hayupo

Mwakilishi: JIMMY MKENI -TAROTU -yupo

M/kiwa: REGENCY M. CENTER LTD

ADV LUOGA. A- yupo

Hali ya shauri: kusikilizwa

TUME: shauri limehairishwa hadi tarehe 20/2/20 saa 6:00 mchana kwa Ushahidi wa m/kiwa akishindwa Ushahidi wao utafungwa siku hiyo kama alivyoomba mwenyewe kwa kuwa shauri hili ni la muda mrefu sasa".

Let me pause here and comment briefly. From the quoted paragraph, there is nothing on record showing that counsel for applicant prayed for adjournment and that committed himself that failure to bring witnesses the case for the employer will be closed. The words in the order bears no root. In my view, the arbitrator imported in the record words not uttered by the parties.

On 20/2/2020 the record reads:-

"AKIDI: mbele yangu Johnson F. L, MWAMUZI

WADAAWA

M/kaji: FLORA JOHN-yupo

Mwakilishi: JIMMY MKENI-yupo

M/kiwa: REGENCY MEDICAL CENTRE LTD

SHAHIDI: WILLIAM CHARLES – yupo

HR Assignee -DW1

Adv-Hayupo

Hali ya shauri: kusikilizwa

DW1/M/kiwa: ikupendeze MH. Adv leo anatumwa hivyo tunaomba hairisho.

M/kaji: shauri ni la muda mrefu sasa tangu kuandaa issues/hoja bishaniwa, hatujasikilizwa hadi leo, wanahairisha kila siku, leo ilipangwa Ushahidi usikilizwe wakishindwa tuendeleo-naomba iwe hivyo.

TUME: *Kwa kuwa AMRI ya mwisho ilikuwa leo shauri ni lazima lisikilizwe ushahidi wa pande zote. Kwa kuwa M/kiwa leo ameshindwa kumleta Adv wao ili kusikilizwa upande wao, na hakuna Ushahidi wa kuthibitisha hayo, mbaya zaidi kumekuwa na historia ya kuhairishwa kwa shauri hili mara kwa mara toka upande wa m/kiwa pasipo uthibitisho.*

*Hivyo naamini kuwa ni sahihi kuendelea kusikiliza ushahidi wa m/kaji leo kama AMRI ya 9/1/2020 ilivyoelekeza. **Upande wa M/kiwa watakuwa na haki ya kufuata maelezo ya kisheria kama watakuwa na nia ya kutengua Tuzo ya upande mmoja itayotokana na exparte hearing ya leo.***

Ushahidi wa mlalamikaji unapata kuanza kama ifuatavyo..."

I have carefully read the above quoted proceedings of 20th February 2020, and it has come clear in my mind that, the arbitrator

was biased. This is because, he indicated even before hearing the herein respondent that, the herein applicant can follow procedure to set aside the ex parte award. In my view, the arbitrator made a decision of awarding respondent ex parte even before receiving evidence of the respondent. I am of that view because, not every case that is heard ex parte, has to be decided in favour of the person who was so heard.

In the ruling dismissing an application to set aside an ex parte award, Lemurua, Arbitrator, held that applicant was praying several adjournments on ground that her counsel or witnesses are sick and concluded that applicant was negligent. Having carefully read the CMA record as quoted hereinabove, I am of strong view that the arbitrator erred both in ordering the respondent to prove the case ex parte, in issuing an ex parte award, and further, in dismissing the application to set aside the said ex parte award. It was prudent for the arbitrator to adjourn the matter to another date as it was reported that counsel for the applicant was sick. The reason for non-appearance of applicant's counsel on 20th February 2020 was beyond his control. The arbitrator was aware of this fact as it was so reported to him. I therefore, find that there was justification for non-appearance of counsel for the applicant on 20th February 2020, the date the matter was proved ex parte. Further

to that, the exparte award was issue based on bias on part of the arbitrator. For that reason, I hereby allow the application and quash CMA proceedings from 20th February 2020 to the end and set aside the exparte arising therefrom. I therefore order that the CMA record should be remitted to CMA, so that the matter can be heard inter-parties before another arbitrator without delay.

Dated at Dar es Salaam this 1st day of March 2022



B.E.K. Mganga
JUDGE