IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 539 OF 2020

BETWEEN

MAJALIWA ATHUMAN MBEMBEZI ..... APPLICANT

VERSUS

YAPI MARKEZI INSAAT VE SENAYI A. S. ..... RESPONDENT

JUDGMENT

Date of Last Order: 15/112021

Date of Judgment: 27/01/2022

I. Arufani, J.

The applicant filed the present application in this court urging the court to call, revise and set aside the decision of the Commission for Mediation and Arbitration (hereinafter referred as the CMA) in the Labour Dispute No. CMA/DSM/ILA/704/19/345 delivered by Hon. Lomayan Stephano, Arbitrator on 23rd November, 2020.

The applicant was employed by the respondent as a Steel Fixer on 27th March, 2018 on unspecified period of time. On 22nd August, 2019 the respondent terminated their employment relationship. Aggrieved by the termination of his employment, the applicant referred the matter to the CMA claiming for unfair termination. The

CMA found that there was termination by agreement and dismissed the applicant's claims. Being dissatisfied by the CMA's decision the applicant filed the present application in this court to challenge the decision of the CMA basing on the following grounds:-

i. *That the trial Arbitrator erred in law and fact by failure to keep record of the evidence.*
ii. *That the trial Arbitrator erred in law and fact to fabricate evidence of the applicant so that to create words which did not consist the evidence of the applicant.*
iii. *That the trial Arbitrator being informed that the exercise which led to termination of the employment of the applicant was caused by operational requirement he erred in law and fact to hold that such exercise was properly conducted only relying on agreement.*
iv. *That the trial Arbitrator erred in law to ignore the closing submission of the advocate of the applicant without assigning any reason.*
v. *That the trial Arbitrator erred in law and fact to hold termination was by agreement without evidence to the effect.*
vi. *That the trial Arbitrator erred in law and fact to hold that there was a consultation to the workers including the applicant before termination without evidence to the effect.*

When the application came for hearing the applicant appeared in the court in person and the respondent was represented by Mr. George Ambrose Shayo, learned advocate. The applicant prayed the application be argued by way of written submission and as there was no objection from the counsel for the respondent the prayer was granted. Therefore, the application was argued by way of written submission.

Mr. Issac Nassor Tasinga, Learned Advocate drew and filed in the court the submission of the applicant. He submitted in relation to the first ground of revision that, it is the duty of the Arbitrator to keep record of all key issues related to the dispute pursuant to Rule 32 (3) of the Labour Institutions (Mediation and Arbitration) Rules, GN. 64 of 2007. He stated that the records to be kept includes arguments and evidence adduced by the parties. He stated in this case the Arbitrator did not adhere to the cited rule.

He argued in relation to the second ground that the Arbitrator accepted that there was termination by agreement while the said agreement was not tendered at the CMA hence, fabrication of facts. He alluded that, the respondent relied on the termination letter

(exhibit. D2) of which the signature of the applicant thereon was just an admission of receiving the letter but not its contents.

Regarding the third ground it was strongly submitted that the applicant was illegally terminated. The counsel for the applicant stated that the respondent terminated the employment of the applicant on the ground of retrenchment without following the required procedures. He stated that they referred number of cases to be considered by the Arbitrator but were not considered. One of the cited cases is **NUMET V. North Mara Gold Mine Ltd.**, Revision No. 6 of 2015, HC Labour Division at Musoma (unreported).

Turning to the fourth ground the counsel for the applicant stressed that it is the directive of the law that, after all parties have finished to adduce their evidence, they are required to present their closing submissions. He stated that the presiding judge or arbitrator has an obligation to consider the same and if not, he has to state the reason thereof. He argued that, the said principle is stated in numerous decisions including the Court of Appeal case of **Tanzania Breweries Limited v. Antony Nyingi**, Civ. Appl. No. 119 of 2014.

As for the fifth ground of revision the counsel for the applicant reiterated his submission on the third ground and cited two cases of **World Vision Tanzania V. David Kimera & 9 Other**, Revision No. 11 of 2015 HC Labour Division and **Yara Tanzania Limited V. Athuman Mtangi & Other**, Revision No. 49 of 2009 HC Labour Division at DSM (Both unreported) to support his submission that the agreement entered by the parties was supposed to be tendered in the court as evidence. He submitted in relation to the last ground of revision that there was no consultation prior to termination of employment of the applicant on the ground of retrenchment thus, the procedures were not followed. At the end he urged the court to revise and set aside the CMA's award.

In response to the submission of the counsel for the applicant, the counsel for the respondent submitted in relation to the first ground of the revision that, it is not true that the Arbitrator did not keep the record of the proceeding as alleged by the applicant's counsel. He stated that the applicant did not mention the evidence alleged were not kept by the Arbitrator. He further submitted that the applicant tabled serious allegation against the Arbitrator that he has fabricated the proceedings without any proof thereof.

The counsel went on to submit that, in the impugned award the Arbitrator did not hold that there was a retrenchment agreement between the parties. He stated that to the contrary the Arbitrator found that there was mutual separation agreement between the parties to terminate the employment contract as reflected in exhibit D2. The learned counsel argued that the applicant's counsel is confusing the terminologies between retrenchment agreement provided under section 38 (2) of the Employment and Labour Relations Act, [CAP 366 RE 2019] (ELRA) and mutual separation agreement provided under Rule 4 (1) of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007 (GN. No. 42 of 2007).

It was further submitted that the applicant's assumption to include warrants and conditions in the separation agreement cannot stand. He stated if the same were ought to be included in the agreement it could also be the parties' agreement. As to the contention that the applicant's signature in the termination agreement signifies receipt and not admission of its content it was submitted by the counsel for the respondent that the same lacks proof. He added that, during cross examination at the CMA the

applicant admitted that he read and understood the contents of the termination letter before signing the same.

The respondent's counsel strongly disputed the allegation that the applicant was terminated from his employment on the ground of operational requirement. As to the assertion that the Arbitrator ignored the applicant's closing argument, he firmly submitted that the same were considered as reflected at page 3 of the impugned award. He added that the applicant's counsel failed to point out arguments which were disregarded by the Arbitrator.

At the end the counsel for the respondent submitted that, the present application lacks merit. He submitted further that, the laws cited by the applicant's counsel are distinguishable from the present case and urged the court to dismiss the application for lack of merit. In his rejoinder the counsel for the applicant reiterated his submission in chief. He stated that the case of **International Medical & Technological University V. Eliwangu Ngowi,** Revision No. 54 of 2008 HC Labour Division at DSM (unreported) cited in the submission of the counsel for the respondent is distinguishable from the circumstance of the case at hand. Lastly he prayed the court to allow the application.

After going through the rival submission from the parties, the record of the matter and the relevant laws the court has found the issues to determine in this matter are as follows:-

i. *Whether the Arbitrator properly recorded the evidence of the parties.*
ii. *Whether the Arbitrator made finding that the applicant was terminated for operational requirement.*
iii. *Whether there was termination by agreement in this case.*
iv. *What reliefs are the parties entitled.*

Starting with the first issue which states whether the Arbitrator properly recorded the evidence of the parties, the court has found the applicant strongly alleges that the Arbitrator did not record the evidence he adduced at the CMA. I have gone through the records of the matter and find as rightly submitted by the respondent's counsel the applicant did not point out which evidence he adduced at the CMA and were not recorded.

The applicant went further to press strong accusation against the Arbitrator that he fabricated the evidence to manipulate the decision. With due respect to the applicant's counsel submission the court has found that, as stated above such allegation is strong one and needs proof. Nevertheless, it was not stated by the counsel for

the applicant as to which evidence was fabricated by the trial Arbitrator.

The court has considered the argument by the counsel for the applicant that, as there is no agreement tendered before the CMA then the Arbitrator fabricated the evidence to find there was separation agreement entered by the parties but failed to see merit in the said argument. The court has found the Arbitrator fabricated no any evidence but he used the evidence adduced before the CMA like exhibit D2 to find there were separation agreement entered by the parties. The above finding is getting support from the case of **Danford Evans Omari v. Tazama Pipeline Limited**, Revision No. 684 of 2019 HC Labour Division at DSM where Muruke, J. held that:-

> *"It is my conviction that parties to labour dispute should not turn mediator/arbitrator as punching bag, simply because their decision was not in their favour."*

I have also considered the allegation that the Arbitrator did not consider the closing submission of the applicant. Indeed, as rightly submitted by the respondent's counsel his assertion is contrary to the records because the alleged closing submissions were well considered as reflected at page 3 of the impugned award.

Coming to the second issue which asks whether the arbitrator made a finding that the applicant was terminated on the ground of operational requirement, the counsel for the applicant strongly argued that the Arbitrator made a finding that the applicant was terminated for operation requirement. The applicant's allegation is contrary to the findings of the arbitrator in the impugned award. The Arbitrator did not state whatsoever that the applicant was terminated on the ground of operational requirement. The trial arbitrator stated in the impugned award that, the CMA was satisfied the applicant's employment was terminated by agreement in accordance with the law. Therefore, the second ground is devoid of merit.

As for the third issue which asks whether there was termination by agreement in this case; the court has found termination by agreement is provided under Rule 3 (2) (a) and 4 (1) of the Employment and Labour Relations (Code of Good Practice) Rule, GN. No. 42 of 2007. The counsel for the applicant strongly disputes the fact that there was termination by agreement in this case. On his part the counsel for the respondent insisted that there was termination by agreement in this case by relying on the termination letter (exhibit D2).

After going through the said letter, I have found it shows clearly that the parties agreed to terminate the contract by agreement. For clarity purpose the said letter state as follows:-

> *"We wish to inform you that, following our earlier communication on our mutual agreement we are now formally advice you that the employment contract between you and* ***YAPI MARKEZI*** *signed on 27th of March, 2018 is officially come to an end on 22nd of August, 2019 this is your last working day with YAPI MERKEZI."*

The above clause of the letter clearly indicates that the parties had prior mutual agreement of terminating the employment contract before the letter being written to the applicant. The applicant accepted the agreed terms by signing the disputed termination letter. Before this court the applicant alleges that he did not understand the content of the said letter. He alluded that he signed the same to signify receipt of the same to accept the terms of the contract.

The said argument is contrary to what is in the record of the matter. The court has found the termination letter which is talking of the mutual agreement entered by the parties is written in both languages of Swahili and English. If the applicant did not understand the content of the alleged letter, he should have asked for

explanation from the respondent but he did not do so. Thus, the court has found the complaint of the applicant that he did not understand the contents of the letter is devoid of merit.

There is no evidence in record showing that the applicant was forced or manipulated in any way to sign the disputed letter. Therefore, his claim that there was no agreement to terminate his employment has no legs to stand on. I am in agreement with the submission by the counsel for the applicant about the content of a valid agreement. However, with the evidence available in the record of the matter the court is satisfied that the termination letter in question shows there was valid agreement entered by the parties which clearly serves the meaning of separation agreement.

Coming to the last issue relating to the parties' reliefs, the court has found that, as it has been found all grounds brought to the court by the applicant and argued by his counsel are devoid of merit the appropriate relief which can be granted in this matter is to dismiss the application for being devoid of merit. In the premises the application brought to this court by the applicant is accordingly

dismissed in its entirety for being devoid of merit and the CMA's award is hereby upheld. It is so ordered.

Dated at Dar es Salaam this 27th January, 2022.

I. Arufani

JUDGE

27/01/2022

Court: Judgment delivered today 27th day of January, 2022 in the presence of the applicant in person and in the presence of Mr. George Shayo, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained to the parties.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

I. Arufani

JUDGE

27/01/2022