IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 268 OF 2021

BETWEEN

GOODWILL (T) CERAMIC COMPANY LTD. ..... APPLICANT

VERSUS

PETER BONIFACE MUBA ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under Section 91(1) (a) and (b), 91(2)(b) and (c), 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 ("ELRA") and Rules 24 (1) and (2)(a),(b),(c),(d),(e),(f), 24(3) (a)(b)(c) and (d) 28(1) (c),(d)(c) and (e) of the Labour Court Rules for an order in the following terms.

1. That the Honourable Court be pleased to revise the award delivered by Honourable Arbitrator Massawe, Y. dated 11^{the} June 2021 and received by the Applicant on 16th June, 2021 in labour dispute No. CMA/PWN/MKR/30/2020 on grounds that the said award is illegal, unlawful and improperly procured.

2. Any other relief(s) be granted as the Honourable Court deems fit and just to grant.

The application was supported by an affidavit of Mr. Edrick Luimuka, Legal Consultant of the applicant, dated 25th June 2021. The respondent opposed the application by filing a counter affidavit deponed by himself on 23rd August, 2021. He moved the court for the dismissal of the application. The application was disposed by way of written submissions, the applicant's submissions were drawn and file by Mr. Luimuka while the respondent's submissions were drawn and filed by the respondent in person.

Brief background of the matter is that the Respondent was employed by the Applicant on 1/6/2017 with the Fixed term contract of One year, and his salary was 4424/= per each working day. Sometimes from April to 21st May, 2020, the Applicant had negotiations with the Respondent to be awarded a new and current fixed term contract as per the compliance order issued by Labour office on April, 2020. In the said order, each employee was to be given employment contract. It is alleged by the applicant that the Respondent rejected to sign the new agreement on reasons known to him. He was called upon to show cause but still in his

response he insisted on rejecting to sign the new employment contract and in several meeting he had tendency of recording internal conversation to dispose same to outsiders with reasons best known to him. Upon being called several times to work and from 21st May, 2020 the respondent has never showed up to work meanwhile, he was also called in disciplinary hearing but he did not attend. He was eventually terminated by the applicant. He successfully lodged a dispute at the CMA hence this revision on the following grounds:

(a) That the Arbitrator erred in law by delivering a decision in favor of the Respondent without considering that an issue of starting date of the employment was 01st June and not 30th November as both the Applicant and Respondent acknowledged to be 01st June.

(b) That the Arbitrator erred in law and fact in assessing the evidence on record and thereby reaching an erroneous finding that the Respondent's contract was breached meanwhile there was tangible evidence from the Applicant prove that the Respondent ended due to the Respondent's own misconducts as even the Respondent in testimony acknowledged the same.

(c) That the Arbitrator erred in law by failure on delivering Award within the prescribed time by the Law without any reason.

(d) That the Arbitrator failed to analyse evidence on record and ordered compensation of TZS 796,320/= to which the said copy being dated 11th June, 2021, and being received by the Applicant on 16th June, 2021 where as the said award was granted in favour to the Respondent without considering that the Respondent refuse to sign the employment agreement on his own will. Copy of the Award is attach here to and marked as GW1 to form part of this application.

I appreciate the lengthy submissions by the parties which shall be taken on board on writing this judgment. It was Mr. Luimuka's submission that arbitrator erred in law by deciding that there was a constructive termination and breach of contract in favor of the respondent without considering that the respondent failed to prove that he was terminated in anyhow by the applicant. That no proof of such termination was tendered and the arbitrator relied on mere allegations that the respondent was terminated. He supported his submissions by citing the provisions of Section 60(2) of the Labor Institutions Act, Cao. 300 R,E 2019 which

required a person who alleges contraventions of the provisions of the labor law to prove that allegation. He also buttressed his submissions by citing the case of **Iddi Athumani Vs. A to Z textile Mills Ltd. Revision No. 59/2020** High Court Labor Division, Arusha Registry where the same position was held.

In reply, the respondent submitted that in employment cases involving fairness of termination, the burden of proof lies on the employer as per section 39 of the ELRA. That the burden of proof lied on the applicant to prove that the termination was fair. He supported his submission by citing the case of **Abdallah Kidunda & Another Vs. C.M. Co. Limited, Revision No. 227/2013**, High Court Labor Division at Dar-es-salaam where the said position was held.

Having considered the submissions of the parties my findings are elaborated. Looking at the records of the CMA, as per the evidence, it was undisputed that the respondent was employed by the appellant from the year 2017, June 01st (EXD1). The contract was renewed every year until the year 2020 whereby upon what is alleged by the applicant to have refusal of the respondent to sign a new contract and recording the conversation with the applicant's representative, the respondent was

terminated from employment 01/07/2020 (EXD7). According to the DW1, on the 19/05/2020 the respondent refused to sign the contract and he was subsequently charged for that. EXD4 was the notice to appear before the disciplinary hearing committee and EXD5 was the attendance record of the committee and postponement.

According to Mr. Luimuka, the respondent had a tendency of recording internal conversation and disclosing to the public without permission. He also alleged that the respondent was urged to resume work but he never showed up and he didn't attend the disciplinary meeting that he was called to attend. However looking at the evidence adduced during arbitration, the DW1's evidence concentrated much on the issue of refusal to sign a new contract and not the issue of disclosing information that he illegally recorded. This was also the evidence of DW2 who also alleged that the respondent refused to sign a contract for the year 2020/2021 on allegation of refusal to add him an extra hour for resting. He also testified that the respondent was caught by the Human Resource Manager recording their conversation and not that he had a habit of doing so.

Further to the above, according to the respondent, in his CMA Form No. 1 the respondent's claim was based on termination of employment and

not breach of contract. However, in the same form, the summary of facts of the dispute were that the applicant herein breached the terms of the contract after failure to comply with statutory procedures before dismissal order. At this point therefore, it is clear from his pleadings that the respondent was not challenging the substantive part of the termination; rather he was just challenging the procedural part of it. Furthermore, if the respondent was employed on a fixed term contract, he wrongly sued for termination of employment. And if he sued for termination of employment then he was supposed to fill in the CMA Form No.1-B, something which he did and in the said form, he alleged that the procedure was not followed because he was not given an opportunity to be heard. On the substantive part he alleged that the applicant herein terminated him for not signing a new contract. Therefore the issue of none-signing of a new contract was not disputed at the CMA.

Looking at the award of the CMA, the decision is based on the issue of breach of contract and not termination of employment. This can be evidenced at page 11 of the decision of the CMA where the arbitrator cited Rule 8(2) of the Code which deals with the difference between termination on a fixed contract and indefinite period contract. Her findings were

concentrated on Rule 8(2)(a)&(b) of the Code which deals with termination of a fixed term contract. On that bases, the respondent was required to have lodge a complaint on breach of contract and not unfair termination and then have the CMA determine the issue of breach of contract. That being the case, the arbitrator took off on a wrong footing by entertaining a matter that was not backed by evidence as the issue before her was breach of contract while the pleadings which the parties are bound with, the CMA Form No.1 was on unfair termination.

In conclusion, the proceedings before the CMA were irregular because what was alleged was not was proved and/or determined by the Arbitrator. The defect has the effect of vitiating the whole proceedings. Consequently, this application is allowed by setting aside the award of the CMA.

Dated at Dar-es-salaam this 23rd day of May, 2022.

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S.M. MAGHIMBI
JUDGE