THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 212 OF 2021

(Arising from an Award issued on 4th December 2020 by Hon. Matalis R, Arbitrator in Labour Complaint No. CMA/DSM/KIN/1044/18/361 at Kinondoni)

BETWEEN

ERASTUS PRE & PRIMARY SCHOOL..... APPLICANT

AND

AYUB MSTAFFAH ..... 1ST RESPONDENT

GRACE PETER ..... 2ND RESPONDENT

JUDGMENT

Date of the last Order: 06/07/2022
Date of Judgment:15/7/2022

B. E. K. Mganga, J.

On 15th October 2018, Ayub Mstaffah and Grace Peter, the 1st and 2nd respondents respectively, filed Labour Complaint No. CMA/DSM/KIN/1044/18/361 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni complaining that they were unfairly terminated by the applicant. In the Referral of a dispute to CMA

(CMA F1), the 1st respondent indicated that he was claiming to be paid TZS 9,881,666/= being compensation for 12 months, severance pay, payment in lieu of notice and unpaid salary for 15 months. The 2nd respondent indicated in the CMA F1 that she was claiming to be paid TZS 1,460,000/=being compensation of not less than 1 month, payment in lieu of notice and unpaid salary.

At CMA, it was testified on behalf of the applicant that respondents were not her employees hence there was no termination of employment. On the other hand, it was testified by the respondents that they were employees of the applicant and that their employment was unfairly terminated. On 4th December 2020, Hon Matalis R, Arbitrator issued an award that respondents were employees of the applicant and further that termination was substantively unfair. The Arbitrator therefore ordered (i) the 1st respondent be paid TZS 700,000/= as one month salary in lieu of notice, TZS 700,000/= one Month salary as leave pay, TZS 188,461/53 as severance pay, TZS 1,400,000/= as 2 months' salary pay and TZS 8,400,000/= as 12 months' salary compensation all amounting to TZS 11,388,461/53 and (ii) the 2nd respondent be paid TZS 120,000/= as one month salary in lieu of notice, TZS 120, 000/= as one months' salary as annual leave pay, TZS 120,000/= one month salary pay and TZS

1,440,000/= being 12 months' salary compensation all amounting to TZS 1,800,000/=.

Applicant was aggrieved by the said award, as a result, she filed this application seeking the court to revise it. In the affidavit sworn by Elizabeth Erastus Mtenga, her Principal officer, raised three issues namely: -

1. *Whether the trial Arbitrator was conducted fair hearing when imposed the burden of proof of existence of employer and employee relationship to the applicant.*
2. *Whether the trial Arbitrator properly evaluated the evidence presented before her in deciding the matter in favour of the respondents.*
3. *Whether the trial Arbitrator properly evaluated the reliefs (sic) sought to the parties.*

Respondents filed their respective counter affidavits opposing the application.

When the application was called for hearing, Ms. Sarah Mkenda, learned Advocate appeared and argued for and on behalf of the applicant while Mr. Kheri Kusekwa, Learned Advocate appeared and argued for and on behalf of the respondents.

Ms. Mkenda learned counsel for the applicant submitted generally on the issues raised in the affidavit in support of the application that arbitrator failed to conduct fair hearing by failure to consider documentary exhibits

and other evidence of the applicant. She submitted that on termination, the employer had a duty to prove, but respondents were not employees of the applicant. She submitted further that; respondents did not tender letters showing that they were employees of the applicant. She went on that; respondents came to the applicant's place to conduct tuition. They were invited by Nelson Amar the person who was taking care of the area prior registration of the School. Ms. Mkenda submitted that applicant was registered on 14th February 2019, but respondents were invited by the said Nelson Amar prior registration. She submitted further that; respondents filed the dispute at CMA before even the applicant became registered. Counsel submitted further that in the CMA F1, respondents indicated *inter-alia* that they were claiming salary arrears for 15 months, but they did not file an application for condonation. That, during hearing, respondents tendered forged salary slips with different logo and concluded that they were not entitled to be awarded the reliefs because there was no employer and employee relationship.

While hearing the application, I drew the attention of learned counsels that evidence of Ayub Mstapha (PW1) the 1st respondent and Joyce Peter (PW2) were recorded not under oath. These are the only witnesses who testified on behalf of the respondents. I further drew their attention that

CMA record shows that Grace Peter, the 2nd did not testify but the person who testified is Joyce Peter, who her evidence was not recorded under oath. I also drew their attention that initially the complaint was heard by R. William, Arbitrator, who recorded evidence of Elizabeth Erastus Mtenga (DW1) the only witness of the applicant under oath, but the matter was thereafter heard by Matalis, R, Arbitrator, who recorded evidence of PW1 and PW2 not under oath and there is no reason for reassignment. The record also shows that Hon. Matalis, arbitrator, did not afford the applicant right to comment on whether she has objection or not before admission of exhibits in favour of the respondents. I, therefore, asked both counsels to address the court of the effect of these omissions.

Responding to the issues raised by the court, Ms. Mkenda, learned counsel for the applicant submitted that the record shows that evidence of the 1st respondent (PW1) Ayub Mstaffah and Grace Peter (PW2) were recorded not under oath. Therefore, there is no evidence that was adduced by the respondents. Ms. Mkenda submitted that there is nothing on the CMA record showing why the file moved from R. William, Arbitrator to Matalis R, Arbitrator. She submitted further that, R. William, arbitrator was supposed to record reasons why she failed to finalize hearing hence reassignment to Matalis R, Arbitrator. She went on that, Matalis R,

Arbitrator, was required also to record reasons in the file for taking over and ask parties whether the application should proceed from where it ended or not. She argued that the cumulative effect is that the CMA proceedings were vitiated. She therefore prayed CMA proceedings be nullified, the award be quashed and set aside and order trial de novo before a different arbitrator.

Responding to the submissions made on behalf of the applicant, Mr. Kusekwa learned counsel for the respondents submitted that there was relationship of employer and employee as provided under Section 61 of the Employment and Labour Relationship Act [Cap. 300 R.E. 2019] because 1st respondent was offered a contract that was admitted as Exhibit P1 without objection. Counsel submitted that the said contract was for unspecified term and that commenced on 10th July 2017. On the other hand, the 2nd respondent testified that she was interviewed and called over phone to commence employment from 05th February 2018. Counsel for the respondent submitted that evidence of the respondents was corroborated by evidence of DW1. He went on that; respondents were terminated by letters Exhibit P2 and P3. He argued that Mustaffah, the 1st respondent, was not paid salary, but Grace was paid as shown by the salary slip (Exhibit P1 collectively).

Counsel for the respondents countered the submissions by counsel for the applicant that applicant was not registered by submitting that, in terms of Section 28(g) of the Education Act [Cap. 353 R.E. 2019], a school intending to be registered, must send to the Ministry, the names, CV and contracts of teachers so that the Ministry can verify their competence and that, in terms of section 26(1) of Cap.353 R.E. 2019 (supra), after compliance, the school becomes registered. Counsel for the respondents submitted further that, employment of the respondents was not depending on registration of the applicant because, in terms of the aforementioned statute, the school employs teachers then, forward the names to the Ministry to comply with registration procedure as it was testified by DW1. Counsel for the respondents submitted that, in her evidence, applicant did not mention the names of employees whose CV were sent to the Ministry of Education for registration.

Mr. Kusekwa learned counsel for the respondents submitted that Mustaffah was claiming salary arrears, but the same was not awarded for being time barred. Responding on submission relating to forgery of logo, Mr. kusekwa submitted that applicant did not bring evidence showing that the logo was forged. More so, he insisted that contents of the documents were not disputed by the applicant. He maintained that evidence that was

adduced at CMA is that Nelson Amar was the Director. He argued that, that evidence was not contradicted. He argued that submissions that Nelson Amar invited the respondents to conduct tuition is a new fact that was not raised at CMA hence respondents will have no right to cross examine.

Counsel for the respondents submitted that according to Sections 39 and 37(2) both of the Employment and Labour Relations Act [Cap. 366 RE. 2019] and Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, the employer had a duty to prove fairness of termination. Counsel for the respondents cited the case of ***Kinondoni Municipal Council V. Rupia Said & 107 Others***, [2007] LCCD No. 82 at 269 to support his submission. He went on that, in terms of Section 60(1)(a) of Cap. 300 RE. 2019(supra), it is the duty of the employer to prove accuracy of the record of the employees and that section 96(1) of Cap. 366 RE. 2019 (supra), casts a duty to the employer to keep record of her employees.

On the complaint that evidence was not properly evaluated by the arbitrator, counsel for the respondents submitted that it was properly evaluated as admitted.

On the relief granted, counsel for the respondents submitted that they were properly granted as prayed in CMA F1 that was signed by each

respondent. He submitted that reliefs were granted in terms of Section 49 and 42 of Cap. 366 RE. 2019 (supra) and that compensation was awarded in terms of Section 40(1)(c) of Cap. 366 RE. 2019 (supra).

Responding to the issues raised by the court, Mr. Kusweka, Counsel for the respondent, submitted that the omissions to indicate that witnesses testified under oath or affirmation are on procedure and not substantive. He lamented that this omission was done by the arbitrator and not the parties. In his submissions he cited the case of ***COPYCAT Tanzania Ltd v. Mariam Chamba***, Civil Appeal No. 404 of 2020, CAT (unreported) to support his point that the omission vitiated the whole CMA proceedings and prayed that the court should order trial *de novo*.

On the effect of failure to assign reasons when transferring the dispute from one arbitrator to another, the learned counsel submitted that CMA records are supposed to be recorded and kept properly and that, that is the duty of the arbitrator. He went on that, there is a presumption that record of the Court, CMA inclusive, cannot be doubted because it shows what happened during hearing. He submitted that in the application at hand, CMA proceedings were not properly recorded. He was of the view that these irregularities vitiated CMA proceedings. Counsel for the respondent joined hands with submissions by counsel for the applicant by

praying that CMA proceedings be nullified, the award quashed and set aside and order trial *de novo* before a different arbitrator without delay. Counsel cited further the case of ***MIC Tanzania Ltd V. Albert P. Milanzi,*** Civil Appeal No. 16 of 2022, (unreported) to support his submissions.

In rejoinder, Ms. Mkenda learned counsel for the applicant reiterated her submissions in chief and went on that Section 61 of Cap. 300 RE. 2019 (supra) does not apply in the circumstances of this application because at no time, respondents were under control of the applicant. She submitted further that Exhibit P1, P2 and P3 were objected at the time of tendering but the arbitrator admitted them on ground that reasons will be given in the award. She insisted that Nelson Amar was not the Director of the applicant. On duty of employer to keep record, counsel submitted that CV were not part of the dispute at CMA.

In disposing this application, I will first consider the issues raised by the court. It was submitted by both counsels that failure of the witnesses to take oath or affirm before testifying vitiates the entire proceedings and the award arising therefrom. I agree with them because that is the correct position of the law as it was held by the Court of Appeal in the cases cited

by counsel for the respondents and the case of ***Iringa International School v. Elizabeth post***, Civil Application No. 155 of 2019, **Tanzania Portland Cement Co. Ltd v. Ekwabi Majigo**, Civil Appeal No. 173 of 2019 (unreported), ***Joseph Elisha v. Tanzania Postal Bank***, Civil Appeal No. 157 of 2019 [unreported], ***Unilever Tea Tanzania Limited v. Davis Paulo Chaula,*** Civil Appeal No. 290 of 2019 (unreported) to mention by a few. Taking an oath or affirmation before a witness testifies is a mandatory requirement of under the provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007. The arbitrator, in terms of section 20(1)(c) of the Labour Institutions Act [Cap. 300 R.E. 2019) and Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, has power to administer an oath or affirmation. From the record, Matalis, R, arbitrator did not administer oath or affirmation at the time of recording evidence of both PW1 and PW2. This was a fatal omission. In all the afore cited cases, the Court of Appeal nullified proceedings and ordered trial *de novo*. I take the same position in the application at hand.

It is clear from the record that initially, the matter was handled by R. William Arbitrator, who recoded evidence of DW1 under oath. It is not known how the matter came in the hands of Matalis, R, arbitrator who, heard evidence of both PW1 and PW2 not under oath or affirmation. There is nothing on the record showing why R. William failed to hear the matter to the conclusion and why Matalis took over. More so, there is nothing on the record showing that the Commission consented for Matalis, R, to take over the matter. Therefore, there was in violation of Rule 7(5) the Labour Institutions (ethics and Code of Conduct for Mediators and Arbitrators) Rules, GN. No.66 of 2007. The said Rule provides: -

> *"7(5) Mediators and Arbitrators shall not delegate their functions in any matter to any person, without prior notice to and the consent of the Commission".*

In absence of reasons on the record showing why R. William Arbitrator did not hear the matter to the conclusion, I hold that R. William delegated her functions of arbitration in this application without consent of the commission. This was irregular.

As pointed above, the record is clear that applicant was not afforded right to comment, prior exhibits that were tendered by the respondents were admitted in evidence, whether they should be admitted as exhibits or

not. This failure is the base of the complaint by the applicant that respondents forged some exhibits because they have a different logo. In his submissions, counsel for the respondent admitted that some exhibits bear different logo. Had the arbitrator afforded right to the applicant before admission of those exhibits, this complaint could have been avoided. I have not decided and for obvious reasons, I will not decide on the merit of the complaint relating to forgery of the said exhibits. It suffices to say that the irregularity is fatal because it denied the other party a fair hearing.

For all discussed hereinabove, I find that the issues raised by the court has disposed the whole application. I will therefore not consider grounds raised by the applicant.

For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and order that the Parties should go back to CMA for the dispute to be heard by a different arbitrator without delay.

Dated at Dar es Salaam this 15th July 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 15th July 2022 in the presence of Sarah Mkenda, Advocate for the applicant and Kheri Kusekwa, Advocate for the respondents.

B. E. K. Mganga
JUDGE