IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 20 OF 2021

SHILEONA MAMBOLEO ..... APPLICANT

VERSUS

DAR ES SALAAM INTERNATIONAL ACADEMY ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Kinondoni)

(Mwaisengela: Arbitrator)

Dated 30th November, 2020

in

REF: CMA/DSM/KIN/594/19/282

JUDGEMENT

15th June & 29th July 2022

Rwizile

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/594/19/282. This Court has been asked to call for and examine the proceedings and the subsequent award so as to revise it on the grounds of material irregularities offending the merit of the dispute.

The brief history to this case is; the applicant was employed by the respondent on 01st May, 2008 as assistant teacher and kiswahili teacher in the first contract. Then in 2017 and 2019 following the renewal was

promoted to a full teacher and kiswahili teacher. On 14th March, 2019, she was terminated without reason or following proper procedure. The applicant, unsuccessfully filed a labour dispute at CMA.

This application therefore, is another effort of the applicant to fight for what she considers her right.

The application is supported by the applicant's affidavit advancing four issues for determination.

i. *Whether the arbitration award issued by hon. Joshua Mwaisengela (arbitrator) in the CMA on 30th November, 2020 in dispute No. CMA/DSM/KIN/594/19/282 is based on the evidence adduced.*
ii. *Whether the arbitration award issued by the arbitrator hon. Joshua Mwaisengela (arbitrator) on 30th November, 2020 based on substantive and procedural law.*
iii. *Whether the reliefs not given to the applicant on reinstatement in the arbitration award are legally justifiable.*
iv. *That, the honourable arbitrator failed in law and fact to analyize the documentary evidence submitted before him. That, in the interest of justice the prayers set forth in the notice of application and the chamber summons be granted.*

The application was heard way of written submissions. The applicant was represented by Michael Deograthias Mgombozi, Personal Representative whereas the respondent was represented by Amos Paul, learned Advocate.

Mr. Mgombozi submitted that the arbitrator was wrong in translating the employment relationship between the applicant and the respondent in terms of the documents tendered to prove the employment relationship. to support his submission, he cited section 60(1) and (2) of The Labour Institutions Act [CAP. 300 R.E. 2019] read together with section 39 of The Employment and Labour Relations Act.

His argument was further that, the respondent has failed to prove that the applicant was fairly terminated. He stated that the applicant was not given a chance to discuss any change of employment. It was his submission that the respondent terminated the applicant contrary to section 3 and 37 of the Employment and Labour relation Act [CAP. 366 R.E. 2019], ELRA. Continuing to argue, the applicant held the view that termination was without the reason. He went on submitting that, termination did not comply with section 15(4) of ELRA. For the applicant, signing the agreement did not mean, it complied with the law.

Mr. Mgombozi, was clear that it was against the law when the respondent decided to change the employment terms from permanent contract to fixed term contract. To support his argument, he cited section 36(a)(ii) and (iii) of ELRA. He stated further that the arbitrator acted contrary to section 4 of ELRA by not defining the employer and by following the four contracts which were given to the employee. He stated that those contracts were not fixed term contracts. On terminal benefits, Mr. Mgombozi clearly pointed out that the respondent did not pay terminal benefits to the applicant from one contract to the other.

Mr. Mgombozi said, the arbitrator acted contrary to section 15(1) and (4) and 39 of ELRA since there was no evidence proving the terms of the contract that were disputed. Further, he made his case that, all done was in conflict with section 37(2)(c) of the ELRA and, rule 8,9 and 13 of the Code of Good Practice G.N. No. 42 of 2007 providing for procedure to terminate the contract. He cited the case of **Macmillian Aidan Ltd v Blandina Lucas Mohamed**, No. 29 of 2010 at page 13 paragraph 2 (unreported).

Rule 8 and 9(1) of G.N. No. 42 of 2007 read with section 15(4) of ELRA, as well as section 37, 41 and 44 of the ELRA were to be complied with. In line with the stated provision, he referred the case of **Abdallah Sigano**

v Stanbank (T) Ltd, Revision No. 358 of 2015 at pages 5 to 10 and article 22 of The Constitution of United Republic of Tanzania.

Lastly, he was of the view that the applicant has a right to reliefs, as per CMA F1, derived from section 44 and 40(2) and (3) of Act.

In reply Mr. Amos submitted that Mr. Mgombozi raised new issues in respect of the employment relationship between the applicant and the respondent. He argued, since the same were not discussed at the CMA, this court lacks jurisdiction to deal with the same at this stage, even though the new issue raised was not contested by the respondent.

The learned counsel was of the view that his submission will in material terms hinge on two issues namely; whether the arbitrator was right in holding that there was an agreement on termination of the employment and whether there were reasons for termination of the applicant's employment.

On the first one, he submitted that the applicant and the respondent reached on the agreement to terminate the employment contract as provided under rule 4(1) of The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. He cited part b and part 3 the contract between the two and the respondent to prove that the

agreement was reached by both parties to end the employment contract. He stated further that the applicant did not state anywhere, that she was forced or was insane or did not understand terms of the same. To make is submission well understood he cited cases of **Simon Kichele Chacha V. Aveline M. Kilawe** Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania at Mwanza and **Abualy Alibhai Azizi v Bhatia Brothers Ltd** [2000] T.L.R. 288 at page 289. In his view the arbitrator was right to hold that termination based on mutual agreement and that the applicant has no right under the law to deny the contract which she consented to.

On the second, he submitted that reasons for termination of the contract have been stated in the said agreement as shown in exhibit P5. He stated, the law does not allow the Court to interfere with terms of the agreement freely entered by the parties. He cited the case of **Lulu Victor Kayombo v Oceanic Bay Limited and Mchinga Bay Limited**, Consolidated Civil Appeals No. 22 & 155 of 2020, Court of Appeal of Tanzania at Mtwara which referred to the case of **Unilever Tanzania Ltd V. Benedict Mkasa Trading as BEMA Enterprises**, Civil Appeal No. 74 of 2019 at page 16. He then said, what was agreed by the parties was valid and fair. In exhibit D1, he explained, there was evidence of consultation before the agreement came about.

Mr. Amos submitted based on exhibit D3 which shows the applicant has taken all her annual leave, she has no leave claims pending. Referring to exhibit D2, in the view of Mr. Amos, the applicant was paid all her terminal benefits such as severance pay, salary as of June 2019 and notice. There was no reason for compensation, he argued, because termination of the same was by mutual agreement.

Mr. Amos submitted further that the prayers listed in the notice of application are pleaded in CMA F.1. For that reason, he prayed for the notice of application and chamber summons to be nullified as this application has been brought under section 91(1)(a)(b), 91(2)(a)(b)(c) and 94(1)(i) of the Act, which gives power to this Court to revise what was heard or awarded at CMA. He prayed, the application be dismissed with costs.

After going through the pleadings, submissions, CMA proceedings and exhibits, it is prudent to determine one key contested issue *Whether the agreement was valid*

There is no dispute that the applicant was the employee of the respondent. That there was an agreement to terminate the contract which is contested by the parties. Under rule 3 and 4 of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007

provides. Precisely, under rule 3(2) among forms of termination of contract under common law is by agreement. This is amplified by rule Rule 4(1) providing, an employer and employee shall agree to terminate contract in accordance to the agreement. This means, for the agreement to be terminated, if not done automatically by operation of the law, it may be done by either party subject to the terms of the agreement or on agreement by the parties. This is sometimes called, by mutual consent/agreement.

Going back to the testimonies of parties, the applicant stated that, she was called by the human resource officer and was told school condition was not good. They want to terminate the contract and pay her terminal benefits. She was told to come back in the next day. She stated further that she was told to sign the mutual agreement and then they will talk, she signed but the employer refused to talk to her upon signing.

While the respondent stated that there was a meeting and discussed about the situation as to decreasing of the students which had financial impact. The respondent also stated that the applicant was given time to review the agreement and signed it.

Exhibit P5 is the mutual termination by agreement and release of obligations. The agreement shows, the applicant and the respondent at part "b" it shows that they had a mutual agreement. It stated: -

> *"Pursuant to this written agreement effective as of 14th March 2019, both parties have agreed to separate or differ their contractual obligations under the existed employment relationship through mutual agreement and general release."*

By this contest, it is proved that the applicant and the respondent had mutual agreement to terminate applicant's employment contract. In going further to the agreement, it seems, parties had their terms of agreement whereby termination to be effected and to have no further force or effect in as far as the relationship between them is concerned. It also stated that the contract was executed voluntarily and that its contents were fully explained to the parties. For easy reference, it is shown below: -

"MUTUAL TERMINAL BY AGREEMENT AND RELEASE OF OBLIGATIONS

This separation by agreement and mutual release of obligation ***[agreement]*** *is entered...**BETWEEN** Dar Es Salaam International*

*Academy... (hereinafter referred to as the "Employer")... **AND** SHILLEONA MAMBOLEO...(hereinafter referred to as the "Employee")...*

*b) **Pursuant** to this written agreement effective as of 14th March 2019, both parties have agreed to separate or differ their contractual obligations under the existed employment relationship through mutual agreement and general release.*

NOW IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. *The parties agree that upon the date of this agreement, the contract between **Dar Es Salaam International Academy** signed on 29 August 2017, shall be terminated in its entirety and shall be no further force or effect in as far as the relationship between employer-employee is concerned.*
2. *Reasons for separation are based on mutual agreement...*
3. *This contract is executed voluntarily and without duress or undue influence...*
4. *...*
5. *Parties acted in their personal capacity or representation have read this agreement and have had it fully explained to them, and that they are fully aware of the contests of this agreement and of its legal effect..."*

All agreed as shown above, is proved that parties to this case had an agreement which they appended their signatures and their witnesses. That means the allegations of the applicant that she did not know the content of the agreement does not hold water. Section 10 of The Law of Contract Act [CAP. 345 R.E. 2019] provides: -

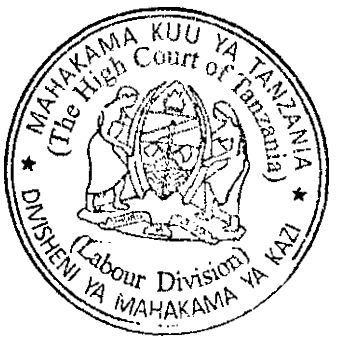
> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:*
>
> *... by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."*

The agreement has to be respected by parties. This has been stated in the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004 (unreported), where it was held that: -

> *"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

For what has been stated above in the basis of the evidence brought and tendered such as exhibit P5, I am satisfied that termination of the applicant's employment contract was valid.

Having held so, this application has no merit. It is dismissed. Since this is a labour matter, no order as to costs.



A.K. Rwizile

JUDGE

29.07.2022