

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 338 OF 2021

*(From the award of Commission for Mediation & Arbitration) in Labour
Dispute No. CMA/DSM/ILA/762/20/389*

BETWEEN

ANGEL TWINS ORGANISATION.....APPLICANT

VERSUS

ISSA HEZRON & 3 OTHERS.....RESPONDENTS

JUDGEMENT

K. T. R. MTEULE, J.

12/07/2022 & 29/07/2022

The applicant Angel Twins Organization filed the present application challenging the decision of the Commission for Mediation and Arbitration (CMA) decided in favour of the respondents Issa Hezron and 3 Others. The dispute arose out of what the Respondent called "legal binding service agreement" according to their opening statement produced in the CMA. The Respondent lodged the matter in the CMA vide CMA Form No. 1 claiming breach of contract by the Applicant where the Respondents demanded payment of TZS 51,800,000.00. In the CMA, vide the opening statement, the applicant herein disputed existence of a contract which attained maturity.

The applicant's claims in the alternative that shall the contract be

considered to be a valid, it was based on a fixed term and subject to availability of funds. The respondents believed that they had fixed term contract of six months which started in August 2020 and ended on 10th September 2020 upon the breach by the Applicant.

The CMA found that there was a breach of contract, hence awarded six months compensation for the breach of contract which totalled **TZS 46,725,000**. Aggrieved by the CMA's award the applicants filed the present application for revision.

In her affidavit, the Application has three grounds of revision which are:-

- i. Whether the failure to pay one month's salary amounts to the breach of contract of employment and hence unfair termination.
- ii. Whether arbitrator's private opinion surpass provisions of the law;
- iii. That to order any other reliefs as may deem fit to grant.

The application was argued by way of written submissions. The applicant was represented by Ms. Neema Mwasongwe, Advocate from a law firm styled as Cornerstone Mwasongwe whereas Mr. Jeston Mzihwi, Advocate from Crestone Attorneys appeared for the

respondent.

Arguing in support of the Application, Ms. Neema Mwasongwe formulated 4 grounds of revision. The grounds allege **firstly**, an error on arbitrator's substitution of labour dispute from a breach of contract to unfair termination, **secondly**, issuance of an awards based on arbitrators' own opinion, **thirdly**, lack of reasons for the decision and **fourthly**, issuance of an award which is unlawful, illogical and irrational.

Arguing for the first ground on substitution of a claim of breach of contract with a claim of unfair termination, Ms. Neema is of the view that the decision of the arbitrator in awarding remedies based on unfair termination while the Respondents filled part B of the CMA award concerning breach of contract, rendered the form defective. In her view, the entire matter is confusing as to what exactly the application is all about. **Neema cited the case of Bosco Stephen versus Ng'amba Secondary School, Rev. No. 38 of 2017, Mongela, J.** where a form wrongly filled was rendered defective. According to Ms. Neema, this issue was raised by the applicant while defending the matter in the CMA but the arbitrator ignored her submission.

Ms. Neema further challenged the arbitrator's finding to confirm unfair termination in a matter whose employment was for a period of less than 6 months which contravenes **Section 35 of the Employment and Labour Relations Act.**

On the second ground of revision concerning application of Arbitrator's own opinion in deciding the matter, making reference to **Rule 10 (2) of GN. No. 64 of 2007**, Ms. Neema submitted that the arbitrator applied her own opinion to conclude that the applicant failed to pay that one month salary without taking into account the fact that there was still time available for the parties to settle.

With regard to the **third** ground on lack of proof and without a reason for the decision, Ms. Neema questions the appropriateness of the arbitrator's finding that none of the applicant in the CMA was able to prove the breach of contract and yet concluding that there was a breach of contract. She placed the burden of prove upon the Respondents who had to prove what they alleged in the CMA with reference to **Section 110 (1) and (2) of the Evidence Act, Cap 6, RE. 2019**. She was surprised that even one of the Applicants (Issa Hezron) whose contract was disqualified to form any admissible contract got awarded as the others.

On the fourth ground, Ms. Neema reiterated the previous three grounds and summed that the errors arising from these grounds are indication of unlawful, illogical and irrational findings of the arbitrator. In reply to the Applicant's submissions, Jeston Justin Mzihwi refuted the assertion that the arbitrator based his decision on termination of contract and not breach of contract. In his view, the arrears is based on breach of contract. He referred to the following concluding words of the arbitrator:- "Kwa kuwa mlalamikiwa kushindwa kuwalipa walalamikaji mshahara wa mwezi mmoja kinyume na makubaliano, ni sawa na kuvunja sharti kuu la mkataba. Hivyo Tume inaona mkataba umevunjwa. Mr. Jeston considered these words as presenting breach of contract and not termination. They disputed any substitution of claim in the award since even the issues were framed to focus on breach of contract. He challenged the relevance of the case of Sosco versus Ng'amba Sec. School cited by the applicant. He asserted that in that case there was a complete departure from breach of contract to termination, which is not the case in this matter which strictly focused on breach of contract.

Challenging the applicant's assertion of arbitrator's application of own opinion in ground 2 of the revision, Mr. Jeston is of the view that the breach of contract emerged when the Respondents ought to have

been paid their salaries which was 1st September 2020. He considered 19th October where the salaries were still unpaid to be the contract was in serious breach and the matter was instituted within the 60 days provided by the law.

With regards to the third issue asserting the arbitrator's award not supported by reasons Mr. Jeston cited page 8 of the award where the points of arguments are accounted for where the arbitrator indicated that her award is based on parties' evidence.

Mr. Jeston refuted all the assertion regarding the arbitrator's award being illogical, irrational and unlawful. In his view, this argument lack justification from the applicant.

Having gone through the submission of the parties, I have seen that the arbitrator decided on breach of contract. The words quoted by Mr. Jeston from the award, connotes such focus by the arbitrator. It was not disputed that the Respondents worked with the Applicant on a contract term of six months and that by the end of the first month, no salary was paid. It is expected that every end of month a salary must be paid. Staying without such payment to 10th day of next month is apparent that there is a breach of contract in terms salary payments. I will address the issue of remedies, but at this time, it

suffices to state that the arbitrator was right to find a breach on contract on the part of the employer.

With regards to application of arbitrators' own opinion in deciding this matter as asserted in the second ground of revision, in the award, I noticed that the arbitrator referred to various evidence provided during hearing. She cited several provisions of law and textbooks to guide her decision. The applicant's assertion that she applied her own opinion, in my view, is baseless.

This also applies to the 3rd issue there was neither proof nor reason given to support the arbitrator's decision. As stated in ground No 2, I noticed reference and analysis of evidence given in the decision with law citation which indicates that the arbitrator was guided not by her own opinion but was persuaded by the evidence and the law she cited.

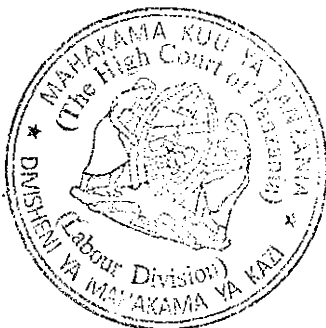
With regards to rationality of the award, it is not disputed that the applicants worked with the Respondent on a project which did not materialise. It is apparent that by the time the Respondent thought or discovered to have no capacity to keep them, they had already served him for one month. It is my opinion that the applicants ought to have been paid for this one month. Failure to pay this one month

amounts to breach of contract. It was on this basis the arbitrator awarded 6 months payment which was the remuneration of the entire term of contract including the time the Respondents never served. At this point, I agree with the Applicant on the irrationality of the award. I will differ with the arbitrator on this aspect.

I order that the applicants are entitled to that one-month salary which remained unpaid. Taking into account the reasons given by the employer which led to that termination of contract, which was the sponsor's withdrawal of support, I think there should not be a severe punitive damage to the applicant. In my view, another one-month salary suffices to compensate the Respondents for that breach of contract.

In this regard I revise the award of the CMA and vary the reliefs granted by substituting it with payment of unpaid one month salary plus one month remuneration as damages to the Respondents. No order as to costs. It is so ordered.

Dated at Dar es Salaam this 29th day of July, 2022.




KATARINA REVOCATI MTEULE
JUDGE
29/07/2022