IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 34 OF 2022

(Arising from Labour Dispute No. CMA/DSM/ILA/76/2021/134/21 from the Commission for Mediation and Arbitration of ILALA Dar es Salaam Zone)
(Hon. Igogo M, Arbitrator)

BETWEEN

EDITH DEOGRATIUS RWIZA .....APPLICANT

VERSUS

THE DAR TRINITI COMPANY LIMITED.....RESPONDENT

JUDGMENT

K.T.R. MTEULE, J.

21st July 2022 & 12th August, 2022

This application for revision is made under the Provision of Sections 91 (1) (a); 91 (2) (a), (b), 91 (4), (a) and (b) 94 (1), (b), (i) of the Employment and Labour Relation Act CAP 366 R.E 2019; Rules 24 (1), (2) (a), (b), (c), (d), (e), 0); 24 (3) (a), (b),(c), (d); and Rule 28 (1) (d) and (e) of the Labour Court Rules Government Notice No. 106 of 2007. The Applicant is seeking for this Court to call for the CMA records in Labour Dispute No. CMA/DSM/ILA/76/2021/134/21 and inspect the records and proceedings to satisfy itself as to the correctness, rationality and propriety of the findings of the Commission for Mediation and Arbitration and the entire Award

decided by Hon. IGOGO, M. Arbitrator on 31st December 2022. The Applicant further prays for the Court to revise, quash and set aside the misconceived proceedings and findings in the Award of the CMA to the effect that the Respondents be paid its entitlements in accordance with the law and any other reliefs that the Court deems fit to grant.

The Applicant had a fixed term employment contract with the Respondent which commenced from 1st June 2019 expected to come to an end in June 2021. This contract came as a promotion from the position of housekeeping/cleaner the applicant used to perform with the Respondent since 2015. According to the new contract, Applicant was being paid monthly salary of TZS. 680,000.00.

In 2020, basing on what the Respondent contended to be business fall caused by Covid 19 pandemic which crippled the capacity to pay the full salary of the applicant leading to its reduction to 50,000, which is disputed by the Applicant, their contractual relationship came to an end. How the contract ended is among the disputed facts of the case. Being dissatisfied with entire scenario, the Applicant lodged an Application before the CMA. The CMA found the Respondent to have

breached the employment contract and awarded a compensation of six months.

Feeling that the arbitrator should not have found valid the reasons for termination, and that she ought to have been awarded compensation for the entire remaining period of the contract and not six months only, the Applicant preferred this Application for revision to challenge the award.

In her affidavit, the Applicant has her own way of telling how the employment ended. She stated that she went to maternity leave and when she resumed back to office on 15th March 2020, she found that her position was given to another person by the name of Caroline who informed her that the owner of the Hotel left an instruction that he no longer have a job to give the applicant and continue paying her a salary of TZS. 680,000 but TZS. 50,000/= per month.

The Applicant deponed further that feeling that the employer was making intolerable working conditions, she communicated with the Director who finally told her to look for a job somewhere else. That she decided to refer the dispute before the CMA whereby the Respondent raised a defence of COVID 19.

She challenged the arbitrator for awarding only 6 months salaries as compensation while she found that the employer did breach the employment Contract. In Applicant's view, the arbitrator ought to have ordered compensation of the remained part of the Contract term. The applicant disputed existence of any valid reasons for breach of the employment Contract.

The Applicant raised the following legal issues:-

a. Whether it was proper for the Trial Arbitrator to make such a finding and declare that the Respondent had valid reason to breach the employment contract of the applicant.
b. Whether the Trial Arbitrator properly evaluated the evidence presented before her in deciding the matter in favour of Respondents.
c. Whether the Trial Arbitrator property determined the issue related to the reliefs entitled to the parties by awarding six-month compensation to the Applicant.

The Applicant thus prayed for this Court to revise, quash the proceedings and set aside the impugned Award with reference No. CMA/DSM/ILA/76/2021/134/21.

In the Respondent's counter affidavit sworn by her counsel Mr MESWIN JOSEPH MASINGA, the Applicant disputed to existence of any communication between the Applicant and the Respondent as both Respondent's directors were out of the country where Juliet Tibegila was nursing her husband in a hospital in South Africa.

According to the Counter affidavit, the outbreak of Covid 19 caused the complete close of the Hotel business as it depended much on the visitors from out of the Country, and that it was agreed with all the employees that whoever should continue working, would be paid Tanzania Shillings Fifty Thousand (Tshs. 50, 000/=) as allowance and breakfast until when the business would stabilize.

The deponent denied having the Respondent terminated the Applicant's employment and neither her contract breached. He asserted that the Applicant opted to remain home while waiting the stabilization of the business only to find a labour dispute claiming unfair termination lodged in the CMA.

The application was heard by a way of Written Submissions. The Applicant argued two issues together. These issues are **whether it was proper for the trial arbitrator to make such a finding and declare that the respondent had valid reason to breach the**

employment contract of the applicant, and **whether the Trial Arbitrator properly evaluated the evidence presented before her in deciding the matter in favour of Respondents"**

In Applicant's view, there has been no evidence before the CMA which proved any valid reason for the breach of the contract of Employment. Referring to the evidence given for the employer by the two witnesses who testified (DW1 & DW2), the applicant stated that none of these witnesses knew about the Applicant's claim. In his view, only the Applicant's Director who knew the claim, but he was not summoned to testify.

The Applicant's counsel refuted the present of COVID 19 as constituting sufficient reasons for termination since it was not a permanent situation because people resumed their normal business soon. He questioned the act of giving her position to another person is the reason of termination was Covid 19.

The Applicant described the employer's refusal to pay the agreed salary of TZS. 680,000.00 and pays 50,000 instead, and without any discussion with the Applicant as a breach of contract.

He challenged the mode of termination used if as all there was any excuse of poor business performance. In the Applicant's view, if at all there would have been such a reason, **Section 38 (1) of the Employment and Labour Relations Act Cap 366 R.E2019** should have applied.

The Applicant asserted the Respondent's contravention of Section 36 (iv) of the Employment and Labour Relations Act Cap 366 R.E 2019 which makes it clear that termination of contract includes a failure to allow an employee to resume work after taking maternity leave granted.

As to whether the trial arbitrator properly determined the issue related to the reliefs entitled to the parties, the Applicant submitted that the arbitrator failed to differentiate between dispute for unfair termination governed under part E of Section 35 Employment and Labour Relations Act No. 6 of 2004 and dispute for breach of contract which only deals with employee under the specific terms of contract. In his view, indefinite duration contracts, are governed by part E of Section 35 of the Employment and Labour Relations Act No. 6 of 2004 and their entitlements are governed by Section 40 (1), of the Employment and Labour Relations Act No. 6 of 2004 which imposes a

minimum compensation of 12 month's salary if the Arbitrator finds termination was substantively and procedurally unfair.

In Applicant's view, the compensation should not have been less than 12 month which is the minimum extent provided by Section 40 (1) when an arbitrator or Labour Court finds a termination to be unfair. While challenging applicability of Section 40 (1), of the Employment and Labour Relations Act No. 6 of 2004 in a fixed term Contract, the applicant is of the view that in this matter, under Rule 4 (2) of the Employment and Labour Relations (Code of Good practice) GN. 42 of 2007, the employer ought to have awarded a compensation for the remaining part of the contract which was 18 months to restore the Complainant into her former position before the breach of contract. To support his contention, the Applicant cited the case of **Tanzania Saruji Corporation V. African Maible Company Limited, 2004 TLR 155.**

The Applicant challenged the Trial Arbitrator asserting improper application of the principals of quantifying the reliefs entitled to the Applicant by mixing up reliefs entitled to employee under specific term of contract and employee for unspecified term of contract.

In Applicant's view, although the appellate Court is not required to interfere with the discretionary powers exercised by the trial Court in imposing fine/sentence or compensation, such an interference is necessary where that Trial Court acted upon wrong principles. The Applicant cited the case of **James Yoram vs. Republic, (1948) 15 E.A.C.A 126 and the case of Bernadeta Paul vs. Republic [1992] TR 92.**

In reply submission, while reiterating the occurrence of Covid 19 pandemic as a reason for Respondent's failure to continue paying the Applicant the amount of TZS 680,000.00, the Respondent invited this court to take judicial notice of the consequences that occurred during the outbreak of the COVID 19 where travel restrictions where imposed with hotels receiving no customers.

The Respondent rebutted the applicant's assertion that she was denied working. He questioned how an employee can be terminated from employment by the unverified information from her fellow employee.

According to the Respondent, there was no evidence to prove that the Applicant was terminated from her employment rather she was not seen at work after she knew the condition of the salary after the

COVID 19. He acknowledged that the effects of COVID 19 which affected the influx of the customers at the hotel made the Respondent unable to get money for salaries and it was therefore agreed that the Respondent shall offer the breakfast and TZS 50,000 per month as allowance until when the business stabilizes.

In Respondent's view it was erroneous for the trial Arbitrator to hold that the Respondent had valid reasons for terminating the employer's employment because all the witnesses for the Respondent categorically testified that the Applicant is still the employee of the Respondent.

Citing Section 110 of the Law of Evidence Act, Cap 6 R. E. 2019 which imposes burden of proof on the one who wants the court to decide in its favour the Respondent submitted that the Applicant did not lay down evidence to show that it was the employer who breached the contract by telling her to seek employment elsewhere and that no proof that she communicated with the employer seeking for clarification of her position.

As to why the Respondent did not resort to retrenchment it is the Respondent's view that there was such a need because the applicant

was employed under a fixed term contract and not a permanent term contract.

Citing the case of MICHAEL KIROBE MWITA VERSUS AAA DRILLING MANAGER [2014] LCD 42, the Respondent submitted that according to the correct interpretation of the provisions of **Section 40 (D) of the Employment and Labour Relations Act** (supra), it is not correct to say that at every incidence of termination, then the court must award compensation of not less than twelve months.

Referring to page one of the CMA Award, the contract was terminated on the 01/08/2020 and not on 15/12/2019 as alleged by the Applicant. It is on record at 3rd page, Is paragraph of CMA Award shows on her applicant's own words that, on the 15/12/2019 she asked for maternity leave and she was accordingly granted and she returned for work on the 15/03/2020 she received her last salary on the 15/03/2020 after she returned from maternity leave.

Having considered the rival submissions by the parties, one question needs to be determined in this matter. The issue is **whether the Applicant has adduced sufficient reasons to warrant revision of CMA proceedings and quashing of the award thereof.** In this issue, the centre of debate lies on the way the Applicant's

employment ended. It is the arbitrator's finding that there was a breach of contract. While the applicant claims to have been terminated, the Respondent denies this fact. According to the respondent the applicant has never been terminated from the employment. To resolve this debate I had to visit the record and evidence in the CMA. It is apparent therein that there has never been a letter of termination and the Respondent denied having ever communicated with the applicant to tell her that her employment was terminated. It is obvious that there is no termination which was proved since the Respondent denied the fact and no tangible evidence to counter that denial employment. What I learn is that the Respondent failed to pay the Applicant the contractual salary. This was interpreted by the arbitrator as a breach of contract. In my view, the arbitrator was right and I see no reason to differ with findings of the award.

Another question which is in contest amongst the parties is the issue of remedies. The arbitrator weighed the circumstances surrounding the Respondent's business situation which led to that breach of contract. It was confirmed that the breach was due to Covid 19 outbreak which crippled the Respondent's business. It was on this

reason that the arbitrator exercised the discretion conferred to her under **Rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007** and award 6 months salaries as compensation. The arbitrator took notice of the situation which was caused by Covid 19 which the Respondent pleaded to have been severely affected the business. In my view, I see no reason to differ with the arbitrator's decision on what she awarded.

It is from the above reasons I dismiss the Application and uphold the decision of the CMA. No orders as to costs. It is so ordered.

Dated at Dar es Salaam this 12th day of August, 2022.

KATARINA REVOCATI MTEULE

JUDGE

12/08/2022