IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 383 OF 2021

(Arising from ruling of the Commission for Mediation and Arbitration of DSM at Temeke) ***(Nyanguye: Arbitrator)*** *dated 20th August 2021 in*

Labour Dispute No. CMA/DSM/TEM/437/2020/198/2020.

HASSAN LADISLAUS MAHENDEKA.....APPLICANT

VERSUS

MBUZI TRANSPORT.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

12 August 2022 & 26th August 2022

HASSAN LADISLAUS MAHENDEKA, the Applicant herein, filed the present application for revision against the award issued by Hon. Nyanguye, H., Arbitrator in the Commission for Mediation and Arbitration of Dar es salaam, Temeke (CMA) on 20th August 2020 in Labour Dispute No. CMA/DSM/TEM/437/2020/198/2020. The Applicant is praying for the Court to revise and set aside the proceedings and the award of the Commission and order any relief it deem fit.

The application was supported by the chamber summons and affidavit affirmed by the applicant himself. At paragraph 3, the Affidavit contains four grounds of revision as follows: -

i) That Honorable Arbitrator erred in law and fact for making orders that the applicant was fairly terminated on the ground of misconduct.

ii) That, the Honourable arbitrator erred in law and fact for reaching to an award which is not supported by the evidence adduced during the hearing.

iii) That, Honourable arbitrator erred in law and fact for failure to award compensation to the Applicant even after he produced an NSSF card on which he was registered in 2013

iv) That, the arbitrator erred in law and fact for ignoring the strong evidence of the applicant.

Briefly, the background of the dispute is that, the above named dispute was lodged before the CMA where the Applicant alleged unfair termination claiming to have been employed by the Respondent since 12 October 2009 vide an oral contract but was unfairly terminated 9th November 2020. The Applicant claimed for severance allowance, notice pay and compensation for unfair termination. On the other hand the

Respondent, claimed to have employed the Applicant on a one year fixed contract which commenced from 11/11/2019 and lapsed on 11/11/2020 and therefore the Applicant is not entitled to what he claimed.

On 28th August 2020 the CMA having found there to have been one-year fixed term contract starting from 11th November 2019 to 11th November 2020 but terminated on 11th September 2020, awarded to the Applicant 2 months remuneration as the remained period of his yearly fixed term contract which was a total of TZS 600,000. Being dissatisfied with CMA award the applicant filed this Revision Application challenging the amount awarded.

In the statement of legal issues in the affidavit, the Applicant raised the following grounds of revision.

1. That Honorable Arbitrator erred in law and fact for making orders that the Applicant was fairly terminated on the ground of misconduct.
2. That, the Honorable Arbitrator erred in law and fact for reaching to an award which is not supported by the evidence adduced during the hearing.

3. That, the Arbitrator erred in law and fact for failure to award compensation to Applicant even after the Applicant produced an NSSF card on which he was registered in 2013.
4. That, the Arbitrator erred in law and fact for ignoring the strong evidence of the Applicant.

Hearing of the application proceeded by a way of written submission. The Applicant was represented by Ms. Magreth Joseph Advocate, whereas the Respondent was represented by Mr. Sigano Antony, Advocate.

From the parties sworn statements and submission, the issue to be addressed in this matter **is whether the applicant adduce justifiable grounds for this Court to revise the CMA award.** In addressing this issue, the grounds of revision as enumerated in affidavit will be considered one after another.

The first and the second grounds seems to originate from similar root. With regards to the first issue that the arbitrator errored in Law and fact in finding that the Applicant was fairly terminated, I have found a different scenario in the CMA award. At CMA, the arbitrator found that the applicant's termination was both substantively and procedurally unfair. It was on this basis that the arbitrator awarded the compensation

to the Applicant. It is clear in the award that the arbitrator found unfair termination in terms of both reasons and procedure. I could not understand the concern of the Applicant on this ground.

With regard to ground No 2, which is asserting the arbitrator's failure to analyze the evidence, I read the award and found that the evidence was properly analyzed in favour of the Applicant. The arbitrator used the contract which was tendered to prove the existence of the employment relationship amongst the parties. The arbitrator further referred to the evidence of the witnessed who testified for both parties and came up with a decision which found termination to be procedurally and substantively unfair. I find ground Nos 1 and 2 one to have no merit.

With regards to the 3rd issue on the amount awarded which did not take into account the applicant's contributions to NSSF, in most of his submission, the applicant canvassed on the issue of National Social Security Fund (NSSF). I have gone through the award but I could not find anything concerning NSSF. The arbitrator was not tasked to address this matter and it has featured in this revision application for the first time. This being the case, I see nothing to fault the arbitrator for an issue which was never brought to his attention. As submitted by the Respondent, this issue was not raised in the CMA.

The fourth issue concerns an assertion that the arbitrator ignored the important evidence of the Applicant. It is already found above that the arbitrator was properly guided by the evidence adduced which finally determined the matter in his own favour.

In his submissions, the applicant appeared to challenge the amount awarded. In her view, Ms. Magreth computed the salary basing on the monthly contributions made to NSSF and alluded that from that computation the salary of the Applicant needed to be TZS 400,000.00 monthly. In her view, the applicant was to be paid two months salaries which is 800,000 plus other terminal benefits like payment in lieu of notice and severance allowance. Therefore, the arbitrator ought to have awarded him TZS 2,353,846/= as the total amount.

On other hand the respondent maintained that the arbitrator was right in awarding all the applicant's terminal benefits basing on his salary of TZS 200,000/= as per evidence adduced by the parties at CMA. In resolving the disputed facts, the relevant provision is **Section 15 (1) of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides that; -

> *15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee*

commences employment, with the following particulars in writing, namely-

(a) name, age, permanent address and sex of the employee;

(b) place of recruitment;

(c) job description;

(d) date of commencement;

(e) ***form and duration of the contract;***

(f) place of work;

(g) hours of work;

(h) ***remuneration, the method of its calculation, and details of any benefits or payments in kind; and***

(i) any other prescribed matter.

From the above provision it is an established principle of law, that employer owe duty to keep record of his/ her employee particulars, including duration of contract and remuneration. In this matter the CMA record, especially employment contract which was admitted as Exhibit D-1 and P-3 after being tendered by both parties, reveal that the latest contract entered by the parties was a yearly fixed term contract, starting from 11th November 2019. The contract reveals further that the agreed salary was TZS 200,000/= and not TZS 400000/= as alleged by the

applicant. It is my view that the salary of an employee is normally pegged on his employment contract and not computed basing on the amount of the contribution to the social security fund.

In the case of **Miriam E. Maro vs. Bank of Tanzania**, (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020) it was held;

> *"It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance in the position we took in* ***Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises****, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the supreme court of Nigeria in* ***Osun State Government v. Dalami Nigeria Limited,*** *Sc. 277/2002 to articulate:*
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> *Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves, it was up to the parties concerned to negotiate and to freely rectify clauses which find to be onerous. It is not role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

In the matter at hand the parties freely agreed their contract regarding the amount to be paid as a salary thus the same should be honoured as agreed. From the above finding since the applicant agreed to enter a contract and tendered it as exhibit at the CMA, (Exhibit P-3 - employment contract), then I am of the view that it will be a chaos for this Court to interfere parties' agreement. In such circumstances applicant's allegation regarding undue influence and less amount compensated at CMA holds no water.

Regarding severance allowance, **Section 42(1), (2) of the Employment and Labour Relation Act, Cap 366 R.E 2019** directs employer to pay severance pay on termination of employment if the employee has completed 12 months continuous service with an employer. Things differ in this matter the evidence tendered at CMA shows that the applicant was employed on 11th November 2019 as per Exhibit P-3 (employment contract) and he was terminated on 11th September 2020 as indicated in Exhibit D-2 (termination letter). This means that the remained period under yearly fixed term contract was two months. In such circumstance the applicant is not covered by **Section 42 of the ELRA.** Therefore, the arbitrator was right in his findings by not awarding severance allowances.

From the above legal reasoning I find no sufficient reasons adduced to warrant quashing and setting aside of the CMA award. The first issue is therefore answered negatively.

With regards to relief, from the foregoing reasons, I find this application devoid of merit. The only remedy is dismissal. Therefore the Application hereby dismissed. The CMA arbitral award in Labour Dispute No. CMA/DSM/TEM/437/2020/198/2020 is upheld. No order for costs.

It is so ordered.

Dated at Dar es Salaam this 26th day of August 2022.

KATARINA REVOCATI MTEULE

JUDGE

26/08/2022