

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 50 OF 2022

ESSAU CONSTRUCTION COMPANY LIMITED APPLICANT

VERSUS

MOHAMED MOHAMED AND 10 OTHERS RESPONDENTS

JUDGEMENT

S. M. MAGHIMBI, J.

The respondents herein were employed by the applicant as casual labourers from 12/08/2019. The employment was on a fixed term contracts of three months which was renewed upon its expiry. The respondents alleged to have been unfairly terminated from employment on 09/12/2020. Aggrieved by the termination, they referred the matter to the Commission of Mediation and Arbitration ('CMA') registered as CMA/DSM/TEM/620/2020/11/2021 ("the Dispute"). After considering the evidence of the parties, the Arbitrator awarded concluded that the termination was unfair and awarded the respondents a compensation in terms of their wages for the remaining period of the contract, four days salary in lieu of notice of termination as well as severance allowance. Each respondent was to be paid TZS 800,000/=.

Being dissatisfied by the CMA's award, the applicant filed the present application raising the following issues:-

- i. Whether it was proper for Honourable Arbitrator to ignore and not to consider annexures and evidences of the applicant during the hearing at Commission for Mediation and Arbitration.
- ii. Whether the Honourable Arbitrator failed to consider the thumbs and signatures of the respondents in the end of employment agreement.
- iii. Whether the Honourable Arbitrator was proper for not granting the applicant relief(s) despite they were supposed to acquire it.

The application proceeded by way of written submissions. Before this court the applicant was represented by, Mr. Jeston Justin Mzihwi, Learned Counsel whereas Ms. Janeth Kazimoto, Learned Counsel appeared for the respondents. I appreciate the comprehensive submissions of both counsels which shall be taken on board in due course of constructing this judgement.

Starting with the first ground Mr. Mzihwi submitted that the respondents were terminated by mutual agreement and signed the agreement thereto which is titled as '***End of employment/work by***

agreement at the construction project'. He stated that on 10/06/2021, during hearing the termination agreement was accepted and labelled as D1. However, later on the Arbitrator gave an order to write a letter to the Forensic bureau for clarification of thumbs and signatures because the employees denied them.

Mr. Mzihwi went on to submit that on 24/06/2021 the Arbitrator instead of signing the letter addressed to the Forensic bureau, she came up with her opinion that the signatures in the contested document are similar with the ones appearing in the list of names of complainants attached with CMA F1. The counsel further submitted that the Arbitrator promised to consider the contested document in her decision but the same was not done. The counsel strongly submitted that failure of the Arbitrator to regard annexure D1 led her to award the employees money which they were paid already hence, resulted to double payment.

Responding to that ground Ms. Kazimoto strongly submitted that the said annexure was properly disregarded by the Arbitrator because the same was not admitted as evidence. She argued that the documents not admitted as evidence cannot be relied upon. To support her submissions, the counsel cited numerous decisions including the case of

Shemsa Khalifa and Others v. Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012 (unreported).

After considering the rival submissions on the first issue, I find it prudent that I determine this issue first, whether it was proper for the Arbitrator to ignore the alleged annexure D1. I have revisited the records of the CMA and on 10/06/2021 during hearing at the CMA, DW1, Godson Solomon tendered the contested annexure D1 which is the alleged termination agreement. The record shows that the said annexure was objected by respondents herein hence the applicant's counsel urged the CMA to order forensic examination.

The records further shows that the Arbitrator ordered the applicant's Counsel to collect the letter on 27/06/2021 and send it to forensic for investigation. From the date of the order, the record is silent on the existence of the said copy of the letter which was addressed to the Forensic to examine the relevant documents, nor a report that the examination was done. The record is clear that the Arbitrator proceeded with hearing as if there was no order made, and that disputed part of the evidence was never cured. Under such circumstance, it is my view that the Arbitrator wrongly proceeded with hearing of the matter

without determining the admission of the annexure tendered, because the applicant herein depended on that evidence to prove her case.


It has been argued that even in his decision, the Arbitrator did not consider the relevant annexures, at this point I am at one with Ms. Kazimoto that the documents not tendered as evidence cannot be used while making a decision and analysing evidence (see the cited case of **Shemsa Khalifa and Others v. Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012**). Since the issue of signing an agreement to terminate the contract was crucial, in my view, the validity of the relevant document was a necessary for determination of the dispute and omission to admit the documents as evidence should have been accompanied by reasons. Since the same was not done, I find the subsequent proceeding after the order of sending the document to forensic expert are a nullity because the applicant was denied her right to be heard on the admissibility of the said documents and reasons for the refusal to admit if any. On this finding, I find the first issue to be sufficient to dispose this application without a need to determine the remaining issue.

Consequently the proceedings of the CMA after the order of sending the letter to the forensic bureau dated 10/06/2021 and the

subsequent award are hereby nullified. The dispute file is remitted back to the CMA to proceed from the date of the order dated 10/06/2021, have the document examined by the forensic bureau and proceed to determine whether it is admissible as evidence. It is so ordered.

Dated at Dar es Salaam this 20th day of July, 2022.




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S.M. MAGHIMBI
JUDGE

Labour Court