IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO 7 OF 2022

ISTANBLUE INDUSTRIES LIMITED .....APPLICANT

VERSUS

JUSTINE ISHENGOMA..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of Pwani at Bagamoyo)

(Makundi: Arbitrator)

Dated 30th November, 2021

in

REF: No. CMA/PWN/BAG/38/020/05/021

JUDGEMENT

27th July & 08th September 2022

Rwizile, J

This application is for revision. It has been preferred by the applicant to challenge the decision of the Commission for Mediation and Arbitration (CMA). It has been alleged that the applicant employed the respondent in an oral contract as a carpenter. Sometimes later, the respondent got an accident when on duty. The accident was fatal to claim his right-hand fingers. He was taken to the hospital and attended. Upon recovery, the parties agreed to terminate the contract. After some time, the respondent filed a dispute with the CMA, claiming for unfair termination.

The Commission, after a full hearing of the parties, was of the opinion that termination was unfair. It was ordered that the applicant pay him the sum of TZS 2,700,000.00, which is compensation of 4 months of the remaining period of the contract, the sum of TZS 1,800,000.00 and TZS 900000.00 which was agreed in their termination agreement. The applicant was not satisfied with the decision of the CMA, hence this application.

It has been supported by the affidavit stating grounds for revision as hereunder:

i. *whether the Arbitrator made an error on point of law or facts in holding that the Applicant contravened the agreement contained in Exhibit DW1 "C" regarding ending date of the employment contract with the Respondent herein.*
ii. *whether the Arbitrator erred in law by holding that the Applicant did not pay the Respondent the agreed terminal dues amounting to 900,000/= as contained in the Exhibit DW1 "C".*
iii. *whether the Honourable arbitrator erred in law and facts in awarding the Respondent Tshs. 900,000/= while the same was not pleaded/ prayed in the labour complaint form, CMA F.1.*
iv. *whether the Arbitrator erred in law and fact in ordering the Applicant to pay the Respondent Tshs. 2,700,000/= in total disregard that the*

Respondent was paid the entire agreed amount and signed to acknowledge the receipt.

The applicant, in the service of Doris Kawonga learned counsel, submitted on the first ground that the commission was not justified to award compensation because parties had agreed to end the contract on 16th October 2020 as per exhibit DW1C.

It was further submitted that the agreement was to the effect of payment of TZS 900,000.00. Since parties are bound by the terms of the contract, she said, the case of **Magoti Butiro Magera vs Trustees of Tanzania Mennonite Church**, Civil Case No. 34 of 2020, be considered by this court. Concluding this point, it was the applicant's argument that payment of TZS 1,800,000.00, for 4 months as the remaining salary was not proper because there was no clause in exhibit Dw1 C which said the contract would end on 31st January 2021

The second ground was argued in line with the first ground. She was of the view that the terms of exhibit Dw1 C, was plain that the respondent be paid the sum of TZS 900,000.00 as a salary for two months. It was no correct therefore, it was argued to hold that the same was not paid to him.

On the 3rd ground, it is the view of the learned counsel that since the amount of TZS 900,000.00 was not pleaded in CMAF.1, it was wrong to award it. According to her, in civil proceedings parties are bound by their pleadings, awarding it, based on what was not pleaded. In this point, I was referred to the case of **Sarrchem International (T) Limited vs Wande Printing and Packaging Company Ltd,** HC Commercial Case No. 31 of 2020.

Arguing the last issue, it was submitted that the respondent was not supposed to pay TZS 2,700,000.00 because termination was by agreement as per exhibit DW1C. According to the terms of the same, it was argued, the respondent was to have no more claims whatsoever over the same matter. The applicant therefore asked this court to quash the award.

Based on the record, the application as I said was argued by written submissions. The respondent according to the court schedule was to file the submission on 23rd August which turned out to be a *dies non.* The respondent was therefore to file the same on the next working days ie on 24th. It was not filed until 25th. I agree with the applicant in her rejoinder that the submission was filed out of time without leave of this court. It is therefore unworthy and will not be considered. That being the case therefore, there is no need to go by the rejoinder.

I think, in this application, the contested issue is *whether the applicant terminated the respondent or termination was by mutual agreement.*

The existence of this point, I may say, is exhibit DW1 C. Perusing the record, it shows that the applicant tendered an agreement, through Dw1. Although it is not marked, but the arbitrator admitted it as exhibit DW1 C. It is plain, the parties agreed that the applicant pay the respondent the TZS 900,000.00 in order to end the contract. It was signed by both parties. The reasons for so doing are clear that they should not extent the same as it was coming close to an end in October 2020.

But before that, it is shown, the respondent had been on injury. He was undergoing medical treatment according to the Medical Report, exhibit Dw1 B. This was issued on 8th October 2020. It shows, the respondent was diagnosed with traumatic amputation of 2nd ,3rd , and 4th fingers of the right hand. The respondent in CMAF1, claimed, his termination arose on 16th October 2020. This is the day, the alleged exhibit Dw1 C was executed.

There is therefore, undisputed evidence that the applicant and respondent had employment relationship. The same was terminated on 16th October 2020. The reasons were succeeded by an injury that claimed the three right hand fingers of the respondent. Both parties are at variance on the

terms of the said agreement. Looking at it, I can hold without doubt that the same was executed by the parties.

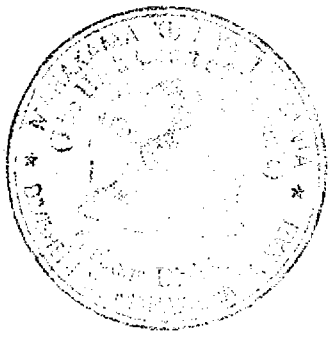
The respondent disputes its terms but one would be convinced that it was done for the purpose of getting rid of him. As the carpenter who had been in hospital for 5 months. Based on the nature of his duty, and given the fact that he had sustained permanent injury, the applicant had reasonable grounds to let him. That is why, I agree with the applicant that the same agreement was for the purposes of ending the contract. The timing of the same suggest so. This is because, the respondent was out of duty for 5 months. The medical report was issued on 08th October 2020 and on 16th termination agreement occurred. By its letter, it did not specify when exactly in October, the contract was to come to an end.

It should also be noted that the applicant had no written contract with the respondent. It is therefore difficult to gauge, when did their relationship start and had to end. The evidence of the applicant is they were ending it by October. In law, it is the duty of the applicant as an employer to keep records of the employees.

The respondent in his evidence raised the fact that he was not paid his salaries all the time he was sick. All he admits is that the applicant paid all his hospital bills. The applicant on this part was clear that he paid his

salaries through his friend Omary Chacharika. This was not proved. The applicant had to call evidence to prove so. But all in all, the same was not pleaded in CMAF1. That is why perhaps, the applicant did not prepare to deal with it. I therefore agree with the applicant as well that the same cannot be granted.

Lastly, the respondent claimed for compensation. I have gauged the manner in which his termination was timed and the fact that the applicant did not have clear records of his employment. It is clear to me that the applicant did a fishy activity in order to do away with the respondent based in his state of health which he sustained working for her. This makes me agree that the amount of compensation in terms of 4 months salary awarded is fair. I do not need to interfere with the findings of the commission. Therefore, this application has no merit. It is dismissed.



A. K. Rwizile

JUDGE

08.09.2022