IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DARES SALAAM

LABOUR REVISION NO 314 OF 2021

(Arising from the Commission for Mediation and Arbitration at Dar es Salaam, Ilala in Labour Dispute No. CMA/ DSM/ILA/UBG/130/19/10/2020)

NAS DAR AIRCO .....APPLICANT

VERSUS

HAPPINESS MOSHI .....RESPONDENT

JUDGMENT

K. T. R. Mteule, J

24th August 2022 & 8th September 2022

This is an application for revision made to challenge the decision of the Commission for Mediation and Arbitration at Dar es Salaam, Ilala (CMA) in Labour Dispute No. CMA/ DSM/ILA/UBG/130/19/10/2020. The Application contained the following prayers:

a) That this Honourable Court may be pleased to call for the record of the proceedings of the Commission for Mediation and Arbitration at Dar es Salaam in Dispute No. CMA/ DSM/ILA/UBG/130/19/10/2020 and revise it.

(b) That, upon revising the said proceedings, this Honourable Court may be pleased to make orders as follows: -

i. That, the honorable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in holding that the Respondent was unfairly terminated, hence led to an erroneous award,

ii. That, the honourable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in proceeding with the matter that was already dismissed and with no any other application that was heard pertaining to setting aside of earlier order.

iii. That, the honorable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in proceeding with the matter that was time barred,

iv. That, the honorable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in proceeding with the matter of termination of employment that involved employee who was under probation and with less than six months of employment,

v. That, the honourable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in holding and considering that confirmation of employment(probation) is automatic,

vi. That, the honorable Court be pleased to declare that the trial arbitrator made an error on points of law and facts in failing to evaluate applicant's evidence.

vii. That, the honourable Court be pleased to declare that the trial arbitrator made an error on points of law and facts by giving an Arbitral Order that is based on assumptions rather than evidence tendered,

viii. That, the honourable Court be pleased to declare that the Applicant herein fairly unconfirmed the respondent's probation/employment,

ix. That, the honourable Court be pleased to issue an order setting aside and quash the award that was delivered in favour of the respondent and nullify the order for payment of Tanzania shilling Seven Million Nine hundred and ninety six thousand one fifty four (7,996,154/=)

x. Any other reliefs this Honourable Court deems fit and just to grant thereof.

The Application is supported by an affidavit deponed by Mussa Daud Coudoger who is the Applicant's Human Resource manager. This affidavit is countered by a counter affidavit sworn by the Respondent Happyness Moshi.

According to what I gather from parties sworn statements in the Affidavit and counter affidavit and from the CMA record, the facts leading to this application can be traced from the dispute which arose between the applicant who was the employer of the Respondent. The dispute was referred to CMA where the Respondent, vide CMA Form No. 1 claimed to have been unfairly terminated and sought for among other things, payment of notice, unpaid salaries, Severance allowance, compensation for unpaid leave, compensation for unfair termination and clean certificate. According to the Respondent in the CMA, she was employed as a Passenger Service Agent from 1st October 2017 until 4th October 2019 when she was unfairly terminated.

The Applicant disputed the Respondent's claim on reason that the Respondent was a probationer hence she was not entitled to what she was claiming. According to the Applicant, the Respondent was employed on 1 April 2019 to 30th September 2019 when her probation period expired without confirmation.

The Arbitrator found no valid contract which placed the Respondent under probation and awarded her 12 months compensation for unfair termination, Notice, leave, severance allowance and clean certificate all making a total of TZS 7,996,154.00.

In his affidavit, the Applicant continued to maintain that the Respondent was on probation period which was unconfirmed on 30th September 2019 out of probation assessment that was conducted by her head of Department on 24th September 2021 on overall suitability with the Company and its objectives. The deponent alleged the respondent with a tendency of divulging into acts of refusal to sign documents (employment records and disciplinary records) with no reasonable justification).

The affidavit raised the following legal issues:

i. Whether the trial arbitrator made an error on points of law and facts in proceeding with the matter that was already dismissed and with no application that was heard pertaining to setting aside of earlier order.

ii. Whether the trial arbitrator made an error on points of law and facts in proceeding with the matter that was time barred.

iii. Whether the trial arbitrator made an error on points of law and facts in proceeding with the matter of termination of employment that involved employee who was under probation and with less than six months of employment.

iv. Whether the trial arbitrator made an error on points of law and facts in holding and considering that Confirmation of employment (probation) is automatic.

v. Whether the trial arbitrator made an error on points of law and facts in failing to evaluate applicant's evidence.

vi. Whether the trial arbitrator made an error on points of law and facts by giving an Arbitral Order that is based on assumptions rather than evidence tendered.

vii. Whether the Arbitrator made an error on points of law and facts in holding that the Respondent was unfairly terminated.

viii. Whether the Arbitrator erred in law and facts in ordering the Applicant to pay the respondent (TZS 7,996,154/=) as terminal benefits for unfair termination.

The Application was heard by written submissions where the Applicant was represented by Mr. Arnold Peter Shayo Advocate while Mr. Gilbert Mushi represented the Respondent.

In his submissions Mr. Arnold Shayo approached the issues raised in the affidavit one after another.

With regard to the **first** issue as to whether the trial arbitrator made an error on points of law and facts in proceeding with the matter that was already dismissed, Mr. Shayo submitted that the arbitrator errored in law and fact in proceeding with hearing of a matter which was already dismissed without an application to set aside the earlier order. He stated that following several non-appearance of the Respondent and her representatives at the CMA, the Labour Dispute/Complaint was dismissed as per Page 2 of the CMA ruling and paragraph 9 of the Respondent's Counter Affidavit but on the date of procuring the copies of the ruling, the order was set aside in the absence of Applicant's legal representative (Arnold Peter) and in the presence of applicant's staff (Mussa Coudoger) who was only ordered to procure the copy of the ruling only. According to Mr. Peter, this was contrary to principles of natural justice and Rule 29 of GN 64/2007 that requires Application to be made since the Applicant was not informed of the reasons that made several non-appearance of the respondent at CMA.

On whether the trial arbitrator made an error on points of law and facts in proceeding with the matter that was time barred, Mr. Anold submitted that it is true through CMA Exhibit P2 that the Respondent was terminated on 30th September 2019 which is also confirmed by the respondent through CMA Form No.1 page 8 that states the date of

termination being 30th September 2019 but the referral was filed on 31st October beyond the time limit contrary to Rule 10(1) of GN 64/2007 that requires the Complaint to be filed within 30 days from the date of termination. Citing Section. 14 (1) of the Law of Limitation Act Mr. Arnold contended that the only remedy for the complaint filed out of time is the dismissal.

Regarding the **third** issue as to whether the trial arbitrator made an error on points of law and facts in proceeding with the matter of termination of employment that involved employee who was under probation and with less than six months of employment, Mr. Arnold averred that it is evidently true through CMA Exhibit P2 that the respondent was employed on the 1st April 2019 and was terminated on 30th September 2019. He submitted that the Respondent worked for a period of less than six months hence filing the dispute on unfair termination is contrary to the provisions of S.35 of Employment and Labour Relations Act Cap 366 R.E 2019.

With regards to the **fourth** issue as to whether the trial arbitrator made an error on points of law and facts in holding and considering that confirmation of employment (probation) is automatic Mr. Arnold is of the view that since the respondent's probation was not converted into

employment after being evaluated on the performance and overall suitability with the Company as per CMA Exhibit P2 and P5 then the Respondent was still under probation when the Probation assessment was conducted. Hardly had it been the case, it wouldn't have not proper. Citing the case of case of **David Nzalingo v National Microfinance Bank PLC Civil Appeal No. 1 of 2016** he faulted the CMA in ruling out that the Confirmation is automatic as the respondent was never confirmed before.

Approaching the **fifth** issue as to whether the Arbitrator made an error on points of law and facts by failing to consider and evaluate evidence by the Applicant Mr. Arnold contended that evaluation of evidence and weighing of the evidence tendered is the most important component that gives rise to a fair decision. In his view the Arbitrator was one sided and failed to determine evidence by the respondent as he only relied on facts by respondent as there was no any evidence (exhibit) tendered by the respondent at CMA. According to him, the credibility of Oral evidence by Respondent was measured at CMA contrary to the rules of evidence to the disadvantage of the Applicant's evidence (EXHIBITS) herein which is unacceptable.

Mr. Arnold challenging the reasoning of the arbitrator there was no balance in considering Examination in Chief, Cross Examination and Re - examination of parties that makes it clear that the evidence of parties especially Employer (Applicant) was not evaluated in reaching to a fair decision and this made the trial arbitrator giving an Arbitral Order that is based on assumptions rather than evidence tendered.

On the **sixth** issue as to whether the Arbitrator made an error on points of law and facts in holding that the Respondent was unfairly terminated, Mr. Arnold contended that the respondent's probation was not converted into employment after being evaluated on the performance as per CMA Exhibit P2 and P5 and she had two warning letters before the Probation Assessment as per CMA EXHIBIT P3, P4 and P7 and the respondent was still under probation when probation assessment was conducted. In his view, the employer complied with the requirements of the law as per **Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007** where the Assessment and she was unconfirmed from employment.

On the **seventh** issue as to whether the Arbitrator erred in law and facts in ordering the Applicant to pay the respondent (TZS 7,996,154/=) as terminal benefits for unfair termination, Mr. Arnold is of the view that

the Respondent is not entitled to any relief whatsoever and Compensation and all other remedies awarded at MA are not legally tenable as there was a valid and fair reason for non-confirmation of employment and all the required legal procedures were followed and the employee when unconfirmed had less than six months of employment.

Mr. Arnold finally reiterated all the prayers made in his chamber application.

In response to the **first** ground of appeal to wit, "whether the trial arbitrator made an error on points of law and facts in proceedings with the matter that was already dismissed and with no application that was heard pertaining to setting aside of earlier order," Mr. Gilbert submitted that, the ex-parte order was set aside after proper application was made, this can be easily seen in the CMA proceedings and Award, and in his view this ground lacks Merit.

Responding to the **second** ground as to ***"whether the trial arbitrator made an error on point of law and facts in proceeding with the matter that was time barred."*** Mr. Gilbert submitted that from the from the record, at page 4 of the award DW1 testified that, the respondent was informed to collect her termination letter on 4th October 2019 and not 30th September 2019, time limit should start to run when

the complainant is made aware of her termination and not when the alleged termination letter was issued and therefore the complaint was filed on time.

With regards to the **third** issue as to, "***whether the trial arbitrator made an error on points of law and facts in proceeding with the matter of termination employment that involved employee who was under probation and with less than six months of employment,"*** Mr. Gilbert contended that the applicant submission was based on CMA Exhibit P2, (alleged employment contract) whose reliability and authenticity was questionable because the respondent denies knowledge of it and she never signed it. In Gilbert's view, it is applicant's duty to keep records lies upon the applicant. He submitted that the applicant has failed to prove that the respondent was under probation period when her contract was terminated.

In replying to the **fourth** ground of appeal which is that "***whether the trial arbitrator made an error on point of law and facts in holding and considering that confirmation of employment (probation) is automatic",*** Mr. Gilbert disputed the Applicant's argument that the respondent was under probation period when her contract was terminated. He submitted that the Respondent was not

under probation period when she was unfairly terminated. He referred to page 2 of the award, which in his view, clearly indicates that the respondent was employed on 1st October 2017 until 4th October 2019 and that the respondent was under permanent contract and no probation clause. In his view, the applicant has failed to prove that the respondent was on probation period when she was terminated.

Submitting against the **firth** ground as to, "***whether the Arbitrator made an error on points of law and facts by failing to consider and evaluate the evidence by the applicant***", Mr. Gilbert submitted that the duty to prove whether the Termination is fair or not lies upon the applicant, and the decision of the Court/CMA should be based on the strength of the applicant submission and not weakness of the Respondent. Mr. Gilbert lastly submitted that on balance of probability the applicant has failed to show she had valid reason and procedures were duly followed.

Regarding the **Sixth** ground of appeal as to, "***whether the Arbitrator made an error on points of law and facts in holding that the respondent was unfairly terminated***" It is respondent's submission that the Honorable Arbitrator reached in a fair and just decision after rightfully evaluated the testimonies and evidences tendered during

hearing and remedies granted were in compliance with the law. Therefore, it is the respondent submission that, this application is baseless and bound to collapse.

In addressing this matter, I will align myself to the trend followed by the parties' submission by approaching one issue after another in a bid to answer the main issue as to **whether the Applicant has adduced sufficient ground to warrant setting aside the CMA award.**

Regarding the **first** ground as to whether the trial arbitrator made an error on points of law and facts in proceedings with the matter that was already dismissed and with no application that was heard pertaining to setting aside of the earlier order. I have gone through the record of the CMA. I could not see the order which dismissed the Application therein. What I noted is that there was a pending ruling to decide on whether the matter should be dismissed or not following the nonappearance of the complainant. Before the delivery of the ruling the applicant appeared and adduced the reasons for nonappearance and prayed for the matter to proceed on merit. The ruling was not delivered but the matter was remitted back for necessary order on the reason that the respective arbitrator was presiding over the matter only for purposes of BRN which had already lapsed.

Neither of the parties has supplied the copies of the decision which dismissed the Application. But I could notice the Applicant's prayer made before the delivery of the ruling in which the arbitrator remitted the record to the in charge for her necessary steps. Neither of the parties drew the attention of the other arbitrator on the existence of an undecided motion. I consider this silence as an agreement for the matter to proceed with hearing on merit and since it was not raised in the CMA for the arbitrator to decide, I see no reason to raise it at this revisional stage.

Shall we presume it to be an irregularity, in my view, this could have been cured by the arbitrator if the matter would have taken into his attention. As well, if at all it is irregularity, I don't see any injustice occasioned. It was good for the matter to be heard on merit and interparties since substantive justice is the best preference in our laws. On this basis, I find this ground lacking merit.

On the **second** issue, as to whether the trial arbitrator made an error on points of law and facts in proceeding with the matter that was time barred, I have gone through the record of CMA. The arbitrator regarded the termination to have occurred on 3 October 2019 due to the evidence he found which showed that the respondent's presence in the office with full access to office facilities such as a computer continued until 3

October 2019. Since she signed the letter of termination on 4th October 2019 the arbitrator considered the last working day for the respondent to be on 3 October 2019. I agree with the wisdom of the arbitrator on this matter which I find to be more suitable for employment matters. I say so because in employment every single day in office counts. The presence of an employee in the office signifies that she is still a valid staff of the employer. The Applicant should have served the employee on the same date when the letter was written. The consequences of keeping it cannot be to the detriment of the employee. I therefore find this argument unfounded.

In the **third** ground, the applicant is challenging the arbitrator asserting her of having made an error on points of law and facts in proceeding with the matter of termination of employment that involved employee who was under probation and with less than six months of employment. It was the finding of the arbitrator that the respondent was not a probationary employee. In the CMA decision, the arbitrator was guided by Exhibit P1 which was the employment contract signed by only the employer with no signature of the employee. In the view of the arbitrator, the contract was not binding on the respondent. This confirms that there was no valid contract to show that the Respondent was a probationer it has to be noted that there was another contract

which was the basis of the applicant's existence in the office prior to the unilateral contract. In my view, the arbitrator was right in considering the matter of unfair termination having found that the Respondent was not on probation period.

As to the **fourth** ground as to whether the trial arbitrator made an error on point of law and facts in holding and considering that confirmation of employment (probation) is automatic, I have gone through the award, but I could not find any holding that a confirmation of probation is automatic. I could not comprehend the basis of this assertion. I find it unfounded.

On the **fifth** ground asserting the Arbitrator's failure to consider and evaluate the evidence by the applicant, the Applicant alleged improper evaluation of Exhibit P2 and P5 in finding as to whether the respondent was a probationer of not. Exhibit P2 was the letter of termination. The arbitrator vide exhibit P5 noted that the contract alleged to have placed a probation period to the Respondent was not signed by the respondent. She formed an opinion that there was no probation period in the respondent's employment. The arbitrator was properly guided by the evidence which confirmed that there was no valid contract with probation clause. I don't see the rationale of the applicant's argument

that the evidence was not evaluated. The arbitrator was not bound to talk about exhibit P 2 which was the letter of termination based on non-existent probation clause. I find this argument unfounded.

On the **sixth** as to whether the Arbitrator made an error on points of law and facts in holding that the respondent was unfairly terminated, I have considered the submissions from both sides. The respondent insisted on non-confirmation of employment after probation which does not attract terminal benefits awarded in the CMA. The arbitrator having found there to have no valid contract regarding the period of probation, found the termination to be unfair and awarded compensation of 12 months and other benefits which accumulated to TZS 7,996,154.00. Since I have agreed with the arbitrator that there was no valid contract which established a probation clause, similarly, I have to agree with the CMA's findings that there was unfair termination. This is because the respondent, believing the applicant to be a probationer, invoked wrong procedure to end her employment. Nowhere is it shown that the procedure of termination was invoked in accordance with **Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007**. In my view, even what is awarded by the arbitrator is just and reasonable.

From the foregoing, the issue as to whether there is a sufficient ground to revise the CMA decision is answered negatively as none of the grounds has been found with merit. The only relief available is the dismissal of the application for being devoid of merit.

Consequently, the application is dismissed and the CMA award is upheld. No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 8th Day of September 2022

KATARINA REVOCATI MTEULE

JUDGE

8/9/2022