IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 319 OF 2021

(Arising from the Ruling of the Commission for Mediation & Arbitration of DSM at Kinondoni in Labour Dispute No. CMA/DSM/KIN/214/2020 Dated 23rd March 2021

HARBOUR MICROFINANCE COMPANY LIMITED .....APPLICANT

VERSUS

CHRISANT KITIME AND ANOTHER.....RESPONDENTS

JUDGEMENT

K. T. R. MTEULE, J.

29th August 2022 & 19th September 2022

This Revision application arises from the award delivered by Hon. Dickson, M. Arbitrator dated **23rd March 2021** in Labour Dispute **No. CMA/DSM/KIN/214/2020** in the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni. The Application is instituted by employer (the Applicant) against her employees (the Respondents), praying for an order for this Court to revise, quash and set aside the aforesaid award. The applicant is seeking for any other relief this Honorable Court may deem fit and just to grant.

A historical background of this application is traced from CMA record, affidavit and counter affidavit filed by the parties. The Respondents

were employed by the Applicant as a Loan Officers from 01st April 2018. On 2nd January 2020 there was a reduction of salary payment which was initiated by the applicant for what is said to be the purpose of improving performance. The respondents resisted action of salary reduction conflict arose therefrom where the applicant is claiming that the respondents absconded work while the respondents are claiming that they resisted salary deduction and in response thereof, the applicant terminated their employment by a letter and lastly an advertisement through newspaper.

Aggrieved by the decision, the Respondent filed the Labour Dispute. In the CMA. The arbitrator considered four issues covering whether there was a termination, if any, fairness of the reason and procedure and lastly the reliefs. The arbitrator found the advertisement and the letter dated 12 March 2020 to constitute termination with no evidence to prove fairness and reasons for such termination. The arbitrator awarded each respondent, payment of 12 months salaries as compensation, one month's salary, severance allowance, leave and two months unpaid salaries. The applicant was not satisfied with the award hence preferred this revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by Frank Milanzi, applicant's Principal Officer, in which after expounding

the chronological events leading to this application, refuted any termination against the employment of the respondents.

According to the affidavit, the applicants used to be paid TZS 749,700 per month and that the reduction to TZS 350,000 was agreed between the applicant and the loan department where it was further agreed that other payments will be made as bonus depending on the performance of the assigned duties.

It is further deponed in the applicants affidavit that in implementing the agreement, the applicant prepared a contract for service, but the respondents refused to sign and decided to abscond from work from March 2020 without a trace. According to the affidavit, in compliance with BoT regulations as a financial institution, the applicant issued a notice to inform the public that the respondents were no longer working with the applicants, but he was served with CMA Form No 1 where the respondents were claiming unfair termination.

The applicant advanced four legal issues of revision as stated at paragraph 4 of her affidavit as follows: -

i That, whether the Commission for Mediation and Arbitration had jurisdiction to entertain the Labour Dispute

No. CMA/DSM/KIN/214/2020 for unfair termination opened by the respondent who served at the applicant under the contract for services for specified period of time of 1 year.

ii That, the Arbitrator erred in law for determining the dispute which is pre-mature and hence exercised her jurisdiction illegally.

iii That, the Commission for Mediation and Arbitration erred in law and facts for failure to appreciate that the applicant did not terminated the respondents and the respondent failed to tender termination letter issued by the applicant on 12th March 2020.

iv That the Honourable Arbitrator erred in law by delivering illegal and ambiguous awards.

The application was challenged through a counter affidavit sworn by Ms. Herieth James Kasati, applicant's Principal Officer. The deponent in the counter affidavit vehemently and strongly disputed applicant's claim of having not terminated the respondents. All the material facts of the affidavit are disputed.

The application was disposed of by a way of written Submissions. The Applicant was represented by Mr. Frank Kashumba, Advocate from AMMEX Law Chambers, whereas the Respondent was represented by Mr. Sigano M. Antoni, Advocate from Arrow and Company Advocates. I appreciate their rival submissions which will be considered in addressing the disputed issued.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** and secondly, **to what reliefs are parties are entitled**?

In addressing the first issue, all grounds of revision raised by the applicant will be considered. Starting with the **first** ground regarding jurisdiction, Mr. Kashumba for the applicant averred that since the Respondents were under fixed term contract, they were not allowed to file a labour dispute claiming for unfair termination. Supporting the argument, Mr. Kashumba cited the case of **Asante Rabi Mkonyi v. Tanesco,** Civil Appeal No. 53 of 2019, Court of Appeal of Tanzania, at Dar es salaam, (unreported). On the other hand, the Respondent averred that they were employed by the applicant under unspecified

period. He is of the view that the CMA had a jurisdiction to entertain the matter relating to unfair termination.

In resolving this contention, I find it worth to have a glance at the CMA record to see the contents of the parties' employment contracts **(Exhibit P3)**. I have noted that under Clause 1 of the contract, the Respondents were employed under unspecified period. This can be seen under the contracts signed by the parties, Mr. Gwamaka Mwakyusa and Chrisant Kitime on 1st April 2018. The applicant claimed to have issued another contract with a specified period of one year which was signed on 1st January 2020. The one-year term contract claimed by the applicant was not signed by the respondents and therefore, it can note bind them. It remains that the terms which guided the respondent's working terms were the ones under the contract dated 1st April 2018 and not the other contract which they refused to sign. Between 1st January, 2020 the respondents seem to have worked with the applicant with their minds divided. While the respondent believed to operate on unspecified contract the applicant believed that the respondents were working basing on the terms of the contract which they did not sign. I could not see the basis of the applicant's averments that the respondents contract signed don 1st April 2018 was for one year term.

Since this contract was for unspecified period, the respondents were right to work with belief that they were still under its terms. Therefore the arbitrator correctly considered the guiding contract to be that of 1st April 2018.

As to whether the CMA had jurisdiction, Section 14 of the Labour Institution Act, Cap 300 of 2019 R.E gives power to the Commission to mediate and arbitrate all labour dispute relating to employment. **SUB PART E under Section 35 of the employment and Labour Relations Act, Cap 366 R.E 2019** provides about unfair termination, and it recognizes all employment contract except contract of less than six months as was held in the case of **St. Joseph Kolping Secondary School v. Alvera Kashushura,** Civil Appeal No.377 of 2021, Court of Tanzania, at Bukoba, (unreported) to be an enable to termination. I agree with Mr. Anthony that, the contract dated 1st April 2021 falls within the powers of the CMA to entertain a claim of termination arising therefrom. The applicant cited the case of **Mtambua Shamte and 64 Others versus Care Sanitation and Supplies,** Revision Application No. 154 of 2010. The principle quoted therefrom covers the specified term contract which came into an end. It is not relevant in the instant circumstances where there is no specified

contract which lapsed. Therefore, the applicant's Counsel's argument that the CMA had no jurisdiction to entertain the matter is unfounded. The arbitrator was right to entertain the matter.

On the **second** issue, that the Arbitrator erred in law in determining the dispute, which is premature hence exercised her jurisdiction illegally, Mr. Kashumba submitted that labour dispute needs to be referred to CMA within 30 days from the date the employer made the decision to terminate. Mr. Kashumba stated that the CMA form seems to have been lodged to open the labour dispute on 13 March 2020 claiming to have been terminated by a letter on 12th March 2020. According to the Applicant, the respondents did not tender the termination letter in the CMA. Mr. Kashumba challenged the arbitrator's reliance on the oral evidence of the respondents that they were issued with a letter of termination while the applicant testified to have never issued such letter of termination.

According to the applicant, the only document which the arbitrator relied upon to prove termination was the advertisement issued on 17th March 2020. In his view, the labour dispute having been filed on 12 March 2020 vide CMA Form No 1, the CMA Form No 1 indicating termination to have been done on 12 March 2020, then there was no labour dispute at

the date when the termination is said to have occurred. Citing the case **of Barckleys Bank Tanzania Limited versus Jacob Muro**, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania page 11. He quoted some words which requires the court to ignore evidence which does not support pleadings.

It is Mr. Kashumba's submissions that since the respondents were not terminated on 12th March 2020 when the labour dispute was lodged, then the arbitrator did not have jurisdiction to entertain the dispute.

Regarding the **third** ground, on arbitrator's failure to appreciate the respondent failed to tender the alleged termination letter, Mr. Kashumba challenged reliance on the newspaper advertisement of 17th March 2020 to confirm termination of 12th March 2020. He reiterated the contents of what was submitted in the second ground and insisted that the matter was filed prematurely and therefore the court did not have jurisdiction to determine it.

In response Mr. Anthony consolidated the **second** and the **third** grounds of revision and stated that the letter of termination was adduced by the respondents, but the applicant denied it. Mr. Anthony considered the 70% change of salary as termination of employment. In

his view, the series of events which involved the reduction of salary and the public announcement, all constitute a prove of termination which was already done. Mr. Anthony denied any premature filing of dispute.

Since the arguments in support of the second ground are similar to the ones in the third ground, and since the respondent consolidated the two, I will as well address these two issues in consolidation.

It is true, the arbitrator relied on the advertisement which was issued on 17th March 2020 to prove a termination claimed to have been committed on 12 March 2020. I agree with the applicant the arbitrator was wrong in relying on evidence which could not prove what was pleaded. But the question which remains unanswered is; was there a termination?

What constitute termination is well elaborated by section 36 of the Employment and Labour Relations Act which states:

> *"36. For purposes of this Sub-Part-*
>
> *(a) "termination of employment" includes-*
>
> *(i) a lawful termination of employment under the common law*
>
> *(ii) a termination by an employee because the employer made continued employment intolerable for the employee;*

(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;

(iv) a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave; and

(v) a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to reemploy one or more of them;

(b) "terminate employment" has a meaning corresponding to "termination of employment".

It is not disputed that the applicant and the respondent were not in good terms prior to the date claimed to have been involved in termination, that is 12th March 2020. From the history, the applicant and the respondents were not in good relationship from the time when the respondents refused to sign the contract which reduced their salaries. It was not at all a healthy work relationship when the applicant believed that the applicants were working under the conditions of a contract which they did not sign where the salaries were reduced to a big extent while the applicants believed to be working under the previously signed contract of unspecified term. I do not agree with the applicant that the arbitrator considered nonexistent dispute while on the alleged date of termination on 12 March 2020, the respondents were not at work due to the misunderstandings which were already there. From

the history, this was the time when the dispute was hot and may be intolerable work environment. At this point paragraph (ii) of item (a) of the provision of **section 36 of Cap 366** comes to application. This is called constructive termination. In my view, there was intolerable condition which forced the respondents to leave the job. The arbitrator should have found a constructive termination rather than relying on the advertisement which did not support the pleadings. Nevertheless this error did not prejudice the ends of the justice as it is obvious that circumstances of the case justifies existence of termination of the applicant's employment.

It is on record that the first respondent left the office on 3rd March 2020 while the second one in the mid of March 2020. If the applicant knew this to be abscondence, she should have taken disciplinary action within 5 days from the date of the abscondence. The act of keeping silent from 3rd March to 17th March when he issued the public notice indicates that the applicant was satisfied with the absence of the respondents and did not invoke any procedure to ensure fairness in reasons and procedure. See **Guidelines 1 of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007.**

Under this guideline, absence of an employee from the work for more than five days without permission, falls under offences which may constitute serious misconduct leading to termination of an employee. The applicant did not tender any evidence of abscondence neither evidence to show that there was a procedure invoked to ensure fairness in ending the employment with the parties was observed. From the foregoing, it is my finding that there was no fairness in terms of reasons and procedure in terminating the respondents. The second and the third grounds therefore fails for lacking merit.

From the foregoing the second and the third grounds are answered that the arbitrator did not determine a premature dispute hence the CMA had jurisdiction in the matter and that the failure to tender termination letter did not render the termination nonexistent.

Regarding the fourth issue the applicant is challenging the award for being illegal and ambiguous. The applicant asserted some defects in the proceedings. I have gone through the submissions, in my view all what is identified as defect in the proceedings did not occasion any injustice. The applicant's failure to show injustice occasioned by the alleged defects make the said errors to have no effect of vitiating the labour dispute as long as the ends of justice rendered a fair justice to the

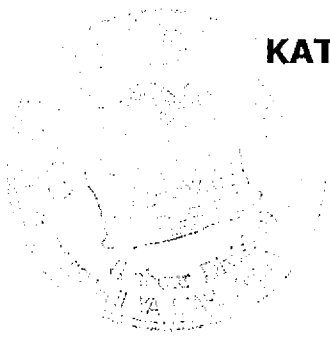
parties. The fourth ground may constitute merit, but it does not change the end result of the decision of the CMA.

From the above analysis, it is my finding that the applicant has failed to adduce sufficient reasons for this court to revise the CMA award. The main issue is therefore answered negatively.

With regards to reliefs to the parties, since the applicant failed to adduce reason for this Court to revise the CMA award, I find no need to depart from the CMA award.

On that basis this Court finds that the application has no merit, therefore I dismiss the application for want of merit. The CMA award is hereby upheld. Each party to the suit to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 19th day of September 2022.



KATARINA REVOCATI MTEULE

JUDGE

19/09/2022