IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 195 OF 2022

(Arising from an Award issued on 8/4/2022 by Hon. Lucia Chrisantus Chacha, Arbitrator in Labour dispute No. CMA/DSM/KIN/584/2020 at Kinondoni)

EROLINK LIMITED..... APPLICANT

VERSUS

VICENT C. KIMARIO..... ..... RESPONDENT

JUDGMENT

Date of the last order: 25/08/2022
Date of Judgment: 5/9/2022

B. E. K. Mganga, J.

Respondent was an employee of the applicant since June 2019. It was alleged by the respondent that he was employed for unspecified period and that on 20th July 2020 applicant terminated his employment. On the other hand, it was contended by the applicant that respondent was employed for specific task and that parties agreed to end the contract after completion of the specific task. The contention between the two sides led the respondent to file Labour dispute No. CMA/DSM/KIN/584/2020 before the Commission for Mediation and Arbitration at Kinondoni claiming to be paid TZS 11,130,000 being 12 months' salaries compensation, leave pay, one month salary in lieu of notice and severance.

Having heard evidence of the parties, on 8th April 2022, Hon. Lucia Christantus Chacha, Arbitrator issued an award that the parties had unspecified period contract of employment and that termination of employment of the respondent was unfair both substantively and procedurally. The arbitrator therefore awarded the respondent be paid TZS 9,360,000/= being 12 months' salaries compensation, TZS 780,000/= being one month salary in lieu of notice and TZS 780,000/= being one month salary as leave pay all amounting to TZS 11,130,000/=.

Applicant was aggrieved with the award hence this application for revision. James Kahatano, the Human Resources officer of the applicant filed his affidavit in support of the application containing 7 grounds as follows: -

1. *That the arbitrator erred in law and fact for failure to analyze evidence relating to the nature or type of the contract the parties had.*
2. *That, the arbitrator erred in law and fact in holding that respondent was employed for unspecified period.*
3. *That, the arbitrator erred both in law and facts in holding that there was no resignation due to absence of minutes proving that parties agreed to terminate the contract.*
4. *That, the arbitrator erred in law and fact in holding that procedure for termination was not adhered to, while there was mutual agreement between the parties to end the contract.*
5. *That, the arbitrator both in law and fact to award reliefs to the respondent while there was mutual agreement to terminate the contract.*

6. *That, the arbitrator erred both in law and facts to award the respondent other reliefs while he was already paid.*

Respondent filed his counter affidavit to oppose this application.

When the application was called on for hearing, Flavian Assenga John, learned Advocate appeared and argued for and on behalf of the applicant while Denis Mwamkwala, Personal Representative, appeared and argued for and on behalf of the respondent.

Arguing the 1st ground, Mr. John, Advocate for the applicant submitted that the arbitrator erred for failure to evaluate evidence relating to the nature/type of the contract the parties entered. He submitted that respondent was employed as Machine Operator for specific task and referred the court to exhibit D1. He went on that respondent did not prove that he had a permanent contract of employment. He argued further that in the award, the arbitrator gave contradictory findings that the contract was for unspecified period on one hand but on the other hand, that the contract was not for unspecified period.

Arguing the 2nd ground, counsel for the applicant submitted that Arbitrator failed to interpret section 14 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] by interpreting that the contract between the parties was supposed to be in writing. Counsel submitted

further that the law allows oral contract unless the employee is sourced out of Tanzania.

On the 3rd ground, Mr. John submitted that the arbitrator erred to hold that there was no resignation due to absence of minutes. He went on that there was written agreement to terminate employment and referred the court to exhibit D1. He submitted further that the arbitrator erred to hold that exhibit D1 was void on ground that at the time of signing, respondent was not free and was not afforded right to read. Counsel argued that the arbitrator did not give justification for this conclusion. Counsel argued that the agreement between the parties is valid because it is not amongst the ones excluded in terms of section 10 and 14(1)(a) to (e) of the law of contract [Cap. 345 RE. 2019]. Counsel cited the case of ***Simon Kichele Chacha v. Aveline M. Kilawe,*** Civil Appeal No. 160 of 2018, CAT (unreported) on sanctity of contracts and argued that the contract between the parties was not obtained by fraud or misrepresentation for the said contract to be voidable.

Submitting on the 4th ground, Mr. John argued that arbitrator erred in law and fact in holding that procedure for termination was not adhered to while there was mutual agreement between the parties to terminate employment as per exhibit D1. He added that there was no

disciplinary issue against the respondent hence the holding that procedure was not adhered was an error.

It was submissions of Mr. John learned counsel for the applicant on the 5th ground that the arbitrator erred to award respondent to be paid 12 months compensation while there was mutual agreement to terminate contract as per exhibit D1. He submitted further that respondent accepted payment to terminate the contract as per exhibit D2. He concluded that the reliefs that were awarded to the respondent was for unfair termination while there was no termination of employement.

Arguing the 6th ground, counsel for the applicant submitted that the arbitrator erred to award other reliefs to the respondent while he was already paid. Counsel for the applicant elaborated that exhibit D2 shows terminal benefits that were paid to the respondent and that respondent signed to acknowledge receipt. Counsel wound his submission praying that the application be allowed, the Award be quashed and set aside and that submissions made also covered the 7th ground.

Responding to submissions made on behalf of the applicant, Mr. Mwamkwala, personal representative of the respondent submitted that the arbitrator did not error. He argued that there was no proof of the

nature/type of the contract between the parties because applicant testified that he entered oral contract with the applicant. He went on that, on his part, respondent testified that the contract between the parties was written contract and that it was signed. Mr. Mwamkwala submitted further that respondent was not availed with a copy of the said contract. He argued further that exhibit D2 shows that respondent was paid severance and argued based on that payment that parties had unspecified term contract. He added that severance is only payable to employees with unspecified term as per section 42 of the Employment and Labour Relations Act [Cap 366 R.E. 2019].

Mr. Mwamkwala submitted further that it is not true that parties mutually terminated the contract. He went on that exhibit D2 shows that terminal benefits were processed on 15th July 2020 as it is also shown by exhibit P2. He contended that at the time of termination there was no agreement and that exhibit D1 was issued on 17th July 2020 after termination because at that time, respondent was making follow up of his NSSF benefits. He insisted that exhibit D1 was written after termination and not before.

Mr. Mwamkwala submitted further that it was testified that all payments were made through bank, but no bank statement was tendered. He argued that exhibit D2 is not a bank statement. Mr.

Mwamkwala argued further that **Chacha's case** is not applicable in the circumstances of this application. He concluded that termination was unfair and prayed that the application be dismissed.

In rejoinder, Mr. John, learned Advocate for the applicant submitted that parties started negotiation on 15th July 2020 and that respondent prayed to be early paid as he needed money and that he was paid cash in hand. He submitted further that, submissions that exhibit D1 was issued to the respondent to facilitate him to get his benefits at NSSF is not in evidence of the respondent. He added that there is no evidence to show that respondent was induced by fraud to sign the documents he signed. He concluded that exhibit D2 cannot be used as a guideline to determine the type of the contract between the parties.

I have examined the CMA record and submissions made on behalf of the parties and find that the central issue of controversy between the parties are on the type of the contract the two had and how the said contract came to an end. I am of the view that all other issues relating to fairness of termination and reliefs thereof revolves around those issues.

It was submitted on behalf of the applicant that the arbitrator did not properly evaluate evidence relating to the type or nature of the

contract between the parties and that due to that failure reached a wrong conclusion. I have examined evidence of James Kahatano (DW1) and find that he testified that the parties had a Specific task contract that came to an end on mutual agreement when the task itself came to an end. He testified further that parties agreed to terminate the contract and tendered exhibit D1 to that effect and that respondent signed the said agreement. In his evidence, Vicent Constantino Kimario (PW1) respondent, testified that his unspecified period contract with the applicant started on 8th June 2019 and that was unfairly terminated on 15th July 2020. While under cross examination, respondent (PW1) testified that he signed documents that he doesn't understand or know.

I have examined an agreement to terminate the contract (exh. D1) titled "**MAKUBALIANO YA KUTULIA NA KUELEWANA NA PANDE ZOTE**" and find that it was signed by the parties on 17th July 2020. The said agreement (exh. D1) reads in part: -

"MAKUBALIANO YA KUTULIA NA KUELEWANA NA PANDE ZOTE

Makubaliano haya yamefanyika Mikocheni, Dar es Salaam, Tanzania, tarehe 1707/2020 kati ya ***Erolink Ltd****" Muajiri" na* ***Vicent C. Kimario****" Muajiriwa"*

USHAHIDI

Kwamba muajiriwa alikuwa ameajiriwa kutokea Mkoa wa pwani na alifanya kazi maeneo hayo muda wote.

Kwamba, ***alikuwa anafanya kazi kama operator na ilikuwa kazi ya muda maalum.***

Kwamba, ***kazi kwa muda maalum imefikia mwisho****.*

Kwamba, makubaliano haya yamefikiwa na pande zote mbili ya muajiriwa a mwajiri kwa kuzingatia tofauti zinazoweza kujitokeza sasa na hapo mbeleni.

Kwamba, kumbukumbu za muajiriwa Ndg. Vicent Kimario zitasomeka kama ameacha kazi kwa makubaliano.

…

MIMI(Muajiriwa) Vicent C. Kimario Nimekubaliana na makubaliano haya tarehe 17/07/2020

Sgd.

…"(Emphasis is mine).

I have noted that respondent wrote on the said letter to acknowledge to have received it. Exhibit D1 is clear from what I have quoted above that the contract of employment between the parties was for specific task and that the same came to an end. There is no other evidence on record showing that the parties had unspecified period contract of employment. In his evidence, respondent (PW1) testified that he signed unspecified period contract, but applicant retained the copy. It was the opinion of the arbitrator that since there was no written contract, then, the contract between the parties was for unspecified period. With due respect, that conclusion is erroneous. There is no law provides that all oral contracts are for unspecified period.

That story by the respondent that he signed unspecified period contract, but applicant retained the copy was easily believed by the

arbitrator who did not carefully examine evidence of the parties. I am of that view because in the award the arbitrator noted that respondent admitted that he signed exhibit D1 but that he was not given chance to read it. Both stories by the respondent that he signed unspecified contract, a copy of which was not issued to him and that he signed exhibit D1 without being afforded time to read is hard to be believed considering that on 17th July 2020 he signed exhibit D1 showing that his contract of employment was for specific task and that the same came to an end. In the case of ***Simon Kichele Chacha v. Aveline M. Kilawe*** (supra) the court of Appeal had an advantage of discussing on enforcement of contracts the parties had entered and held:-

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R 288 at page 289 thus:-*
>
> *'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

In addition to the foregoing, exhibit D1 is written in Swahili language and respondent signed it and endorsed on the said exhibit in Swahili that he received it. Evidence of the respondent while under cross examination that he signed documents that he doesn't understand or

know, in my view, is laden with lies or was a demonstration to hide the truth making his evidence worth not to be believed. See the case of ***Patrick Sanga v. Republic***, Criminal Appeal No. 213 of 2008, CAT (unreported). It is my view that the arbitrator erred in holding that at the time of signing exhibit D1 respondent was not free and was not afforded right to read. The conclusion by the arbitrator respondent was not free or that he was not afforded right to read is not supported by evidence. As pointed hereinabove, respondent testified that he signed documents that he didn't know or understand. The contention that he signed without knowing its meaning is highly questionable because as I have pointed herein, the said exhibit D1 is written in Swahili the language respondent used to endorse on the said exhibit that he has received it. It is a trite law that after signing, a person cannot plead that at the time of signing, his hand did not go together with his brain and dispute what he signed that he signed without reasoning or understanding what he was signing. Respondent cannot be allowed at this time to argue that he did understand what he signed. To accept that argument will be an invitation to open a flood gate because everyone might be coming before the court with the same story and frustrate agreements lawfully entered. That cannot be accepted.

The arbitrator discredited exhibit D1 for another reason namely, absence of minutes of the meeting held by the parties discussing how to end employment contract. With due respect to the arbitrator, that is not the requirement of the law. It is my view that if all agreements the parties are entered must be evidence by minutes of the meetings prior conclusions of the agreement, then, no contract will be enforced. That will make life unnecessarily difficult and will unnecessarily over burden the parties who intend to enter in lawful agreement and will cause chaos in the society. I can't imagine what will happen if that requirement applies in all agreements such as marriage, sale, employment etc. I don't want to predict the answers but certainly, it will be difficult to enforce those agreements. Without pretending to be an advocate of the whole world, no spouse, including myself, can tender minutes of the meeting they had before entering marriage contract, or no employee can tender minutes of the meeting or interview before securing the job as proof that he /she is an employee of a certain employer. I am sure, even the arbitrator cannot provide those minutes. The least I can say is that the arbitrator, unnecessarily demanded what is not required under the law.

Having held that the contract between the parties was for specific task and came to an end as agreed by the parties as per exhibit D1,

respondent was not entitled to the relief he was awarded. I therefore allow the application, quash, and set aside the CMA award.

Dated at Dar es Salaam this 5th September 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 5th September 2022 in chambers in the presence of Adolf Temba, Advocate for the applicant and Denis Mwamkwala, the personal representative of the respondent.

B. E. K. Mganga
JUDGE