IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 196 OF 2022

(Arising from an award issued on 16/5/2022 by Hon. William R, Arbitrator in Labour dispute No. CMA/DSM/ILA/756/19/349 at Ilala)

ASSAD ASSOCIATES ..... APPLICANT

VERSUS

GLADNESS JUSTINE MARANGO ..... RESPONDENT

JUDGMENT

Date of last Order: 20/10/2022
Date of judgment: 27/10/2022

B. E. K. Mganga, J.

Facts of this application briefly are that, on 29th February 2016, applicant employed the respondent as Tax Clerk for unspecified period. On 6th September 2019, applicant terminated employment of the respondent alleging that termination was due to operational requirements. Respondent was aggrieved with termination, as a result, she filed labour dispute No. CMA/DSM/ILA/756/19/349 before the Commission for Mediation and Arbitration (CMA) at Ilala complaining that she was unfairly terminated. In the Referral Form (CMA F1), respondent indicated that she was claiming to

be paid (i) TZS 12,039,996/= being compensation for unfair termination, (ii) TZS 11,000,000/= being payment for 50 hours ordinary overtime for three years and four months', and (iii) TZS 7,800,000/= being payment for 12 hours busy overtime for each June all amounting to TZS 30,839,996/=. On 16th May 2022 by Hon. William R, Arbitrator, having heard evidence and submissions of the parties issued an award in favour of the respondent that termination was unfair both substantively and procedurally. The arbitrator therefore awarded respondent to be paid TZS 9,000,000/= being 12 months' salary compensation and declined to award other claims.

This time, it was the applicant who was aggrieved, hence this application for revision. In the affidavit of Christopher Mumanyi in support of the Notice of Application, applicant raised two grounds namely :-

1. *That the arbitrator erred in law and facts by her failure to analyse evidence adduced by the parties.*
2. *That the arbitrator erred in law and facts to award the respondent twelve (12) months' salary compensation while respondent had accepted payment and admitted in writing that she will have no further claims against the applicant.*

Respondent filed both the notice of opposition and the counter affidavit resisting the application.

When the application was called on for hearing, Ms. Victoria Mgonja, learned Advocate, appeared and argued for and on behalf of the applicant, while Ms. Rosemay Kirigiti, Advocate, appeared and argued for and on behalf of the respondent.

In arguing the application, Ms. Mgonja, opted to argue the two grounds jointly. In her submissions, counsel for the applicant submitted that the arbitrator did not consider evidence of both sides. She complained that the arbitrator considered only evidence of the respondent. She argued that had the arbitrator considered evidence of the applicant, she could have found that termination was by mutual agreement. Counsel argued further that, Rule 13(11) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides that if there is consent of the employee, employer is not obliged to follow all procedures of termination. She therefore submitted that termination was fair.

It was further submissions of Ms. Mgonja that respondent admitted in writing that she had no claim against the applicant and referred the court to the contents of exhibit D2. Counsel concluded that, the arbitrator erred

to award 12 months compensation to the respondent and prayed the application be allowed.

On the other hand, Ms. Kirigiti, counsel for the respondent, also argued the two grounds jointly submitting that arbitrator correctly evaluated evidence of the parties. Ms. Kirigiti submitted further that, procedure for retrenchment as provided for under Section 38 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] was not complied with. She went on that; respondent was terminated allegedly due to operational requirement on ground that respondent is not a Public Certified Accountant (CPA holder) as required by TRA and NBAA but no document was tendered to prove that requirement. Counsel for the respondent submitted further that, respondent was a tax clerk according to the contract of employment (exhibit A1) hence she was not an accountant because the requirement of CPA was for the accountant and not tax clerk.

Ms. Kirigiti submitted that a meeting was held on 06th September 2019 after termination of the respondent on 4th September 2019. She submitted further that, respondent received terminal benefit on 06th September 2019 and signed to acknowledge receipt of TZS 2,700,000/=

being severance pay, days worked for leave pay, notice and gratuity because respondent was forced to sign. She went on that, prior to 04th September 2019, there was no meeting that was held and no notice was issued. Counsel for the respondent concluded her submissions by praying that the application be dismissed for want of merit.

In rejoinder, Ms. Mgonja submitted that respondent was terminated on 09th September 2019 and not on 04th September 2019 as evidenced by the termination letter (Exhibit D3) and payment voucher exhibit D1. She went on that in CMA F1, respondent indicated that the dispute arose on 06th September 2019 and not 04th September 2019.

When she was referred to the contract of employment, Ms. Mgonja conceded that respondent was employed as tax clerk since 2016 and that at the time of employment, CPA was not a requirement because that requirement came after auditors who audited the applicant in 2019. She further conceded that there is neither audit report nor a letter from TRA or NBAA that was tendered to prove that respondent was supposed to hold a CPA to continue with her employment. on whether respondent was consulted, Ms. Mgonja submitted that respondent was consulted in July

2019. She went on that in accepting payments, respondent indicated /declared that she will have no further claim against the applicant.

I have read the CMA record and considered submissions of the parties in this application and find that respondent's employment was terminated on 6th September 2019 for operational requirement as evidenced by termination letter (exhibit D3). The issues to be answered is whether; there was valid reason for termination and whether; fair procedures for termination for operational requirements were adhered to.

In answering the issue as whether; applicant had valid reason to terminate employment of the respondent, I have read evidence of Christopher Mumanyi (DW1), the only witness for the applicant and find that applicant had no valid reason. I am of that view because, in his evidence, DW1 testified that in 2019 TRA told the applicant that accountants should be holders of CPA. He testified further that non-CPA holders were given one month up to the end of August to secure CPA otherwise that will mark the end of their employment. In her evidence, Gladness Justine Marango (PW1) testified that she was employed as Tax Clerk and not Accountant. In fact, evidence of PW1 that she was employed

as a Tax Clerk and not as an accountant is supported by the contract of employment (exhibit A1). Therefore, respondent who was not an accountant was not in the categories of persons who were supposed to hold CPA in order to continue with employment. Again, there is no proof that either TRA or NBAA issued an order to the applicant that all accountants should be holders of CPA. Even if it can be assumed that there was such a directive and that the same covered also the respondent, yet, it was unreasonable and unrealistic to grant an employee one month within which to secure a professional Certificate. I have never known any school, University or a Board of profession that has granted a certificate certifying a particular person to be competent within one month. In his evidence, DW1 did not explain whether, it was possible for the non-CPA holders to secure CPA within that short period and whether, there was another alternative to it. In my view, applicant used the requirement of holding CPA as a pretext to make sure that she terminates employment of the respondent. There is no proof that NBAA, which is a professional Board, can offer CPA within that short range of period.

It was alleged that termination of the respondent was due to operational requirement because she was not a CPA holder. But in termination based on operational requirement to be valid, an employer must comply with the procedure provided under the law. Section 38 of the Employment and Labour Relations Act [Cap.366 R.E. 2019] clearly provides that in termination for operational requirement(retrenchment), employer shall (i) give notice to employees as soon as contemplates retrenchment, (ii) disclose all relevant information on the intended retrenchment, (iii) consult prior retrenchment. The said section requires the employer to give reasons as to why retrenchment should be done, find measures to avoid retrenchment, disclose method of selection of employees to be retrenched and timing of retrenchment. In the application at hand, no consultation meeting was held. It was testified by DW1 that there was consultation meeting and tendered what he called as minutes of a meeting held on 6th September 2019(exhibit D1). It is my view that, exhibit D1 cannot be regarded as consultation meeting because the same was conducted on the date respondent was terminated. More so, exhibit D1 does not show that it was a meeting, rather, it was an interrogation to the respondent. The

purpose of the alleged meeting and reason for termination is also not disclosed.

I have noted further that on 6th September 2019, the date of the alleged consultation, respondent was made to sign exhibit D2 showing calculations of the amount she was entitled to be paid namely, TZS 2,700,000/= and a cheque (exhibit D4) for the said amount and endorsed thereon that it is payment for terminal dues.it should be recalled that all these exhibits were signed by the respondent on the date of termination of her employment. It is my strong opinion that there was no consultation because the alleged consultation minutes were signed on the date of termination of employment of the respondent. In her evidence, respondent(PW1) testified that she was forced to sign those documents and since she was in economic difficult, she succumbed to the pressure and signed. That evidence was not shaken during cross examination and I have no reason for disbelieving it. It was submitted by Ms. Mgonja that respondent was consulted in July and accepted payment. With due respect, that submission is not supported by evidence on the record. Again,

submissions that termination was by mutual agreement has no roots in the CMA record.

For the foregoing, I hold that termination of employment of the respondent was unfair both substantively and procedurally as it was held by the arbitrator. I therefore uphold the CMA award and dismiss this application for being meritless.

Dated in Dar es Salaam on this 27th October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 27th October 2022 in chambers in the presence of Gladness Justine Marango, respondent but in absence of the applicant.

B. E. K. Mganga
JUDGE