IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 321 OF 2022

(Arising from Labour Dispute No. CMA/DSM/KIN/902/20/158/21)

THE SCHOOL MANAGER,

LIBERMANN BOYS SECONDARY SCHOOL.....APPLICANT

VERSUS

AGNES N. LEMA.....RESPONDENT

JUDGMENT

K.T.R, Mteule, J

15th February, 2023 & 27th February, 2023

The applicant lodged this application for revision seeking for this Court to revise the decision of Commission for Mediation and Arbitration of Dar es Salaam in Labour Dispute **CMA/DSM/KIN/902/20/158/21** issued by Nyagaya, Arbitrator.

The Respondent is a former employee of the Applicant working as teacher since 2015. On 1st May 2018, the respondent submitted a resignation letter to the applicant. Along with the resignation letter, the respondent attached some claims she thought she was entitled upon her resignation. The applicant did not agree with what the respondent claimed. Consequently, the respondent referred the matter to the CMA vide CMA Form No. 1 claiming for payment of

unpaid allowances to the tune of TZS 66,295,500.00. The arbitrator allowed the respondent's claims which were attached with the letter of resignation to wit:- TZS 9,480,000 which is composed of allowances for remedial teachings; TZS 200,000, preparation for science practical from November 2017, TZS 280,000 and gratuity 9,000,000 all making a total of TZS 9,480,000.00. This decision aggrieved the employer who preferred this application.

The application is supported by an affidavit of Lulinga Jonathan Lulinga which set out 2 issues. The grounds for the application are:-

(a) That the arbitrator erred in holding that the employer did not object the claims listed in the respondent's resignation letter.

(b) That the arbitrator erred in holding that the respondent was entitled to additional salary and allowances without any agreement by the parties to that effect.

(c) That the arbitrator erred in awarding gratuity to the respondent which was not entitled to respondent according to their contract.

(d) That the arbitrator erred in evaluating the evidence which led to a wrong conclusion.

The application was argued by oral submissions where the applicant was represented by Lulinga Jonathan Lulinga Advocate while the Respondent was represented by Mr. Alfred Rweyemamu Advocate.

In his submission, Mr. Lulinga combined grounds (b) and (c) and argued them together. Submitting on the **first** ground, Mr Lulinga challenged the arbitrator's holding at page 9 paragraph 2 of the CMA award, that the respondent did not object the claims. According to him, this finding was based on exhibit D-1 which was tendered by the employer which was the letter of resignation. In his view the arbitrator misdirected herself, because **exhibit D-1** was not tendered by the respondent, but by the employer, through the witness of the applicant Father Gaudence Mushi who was DW1.

In the **second** and **third** ground, the applicant challenged the quantum awarded by the arbitrator who based on what was computed in the resignation letter, Exhibit D-1, which shows TZS 200,000 and 280,000.

About gratuity, Mr. Lulinga referred to exhibit D-1 which according to him the respondent said that she received TZS 9,000,000 which was part of her gratuity paid on her request when she was bereaved by her relatives. According to Mr. Lulinga, the Respondent indicated to

have received the said payment on exhibit D-1 but the Hon. Arbitrator awarded another 9,000,000 amount as gratuity. In his view, this was wrong.

In the last ground of revision, Mr. Lulinga faulted the arbitrator for having not properly evaluated. He referred to the recording at page 7, paragraph 4 of the award, where DW1 said that there was no agreement to pay any allowance apart from salaries; and at the same page at paragraph 3, where DW1 stated that the complainant acted the position of Principle where her salary was raised to TZS 1,200,000/= and that she was claiming nothing because her salary was increased because of her added responsibilities. In his view the above statements, are vivid that the employer was not agreeing with exhibit D-1. He submitted that they brought the matter to object what was being prayed by the respondent.

Mr. Lulinga reiterated what he submitted on the contents of exhibit D-1 where the Respondent admitted having been paid **TZS 9,000,000** as gratuity. In Lulinga's view, the respondent had to bring evidence to show that there was any agreement which involved what she was claiming. He cited Section 110 (2) of the Evidence Act, Cap 6 R.E 2019, which required whoever desires any Court to give judgment as to any right or liability dependent on existence of facts

which he asserts to prove that those facts exist. Mr. Lulinga submitted that the burden of proof lays on the person who alleges and since this case was not on unfair termination, the burden of proof was on the respondent and she failed to discharge it.

According to him, the arbitrator failed to evaluate exhibit D-1 and ascertain what the respondent was claiming which caused him to award TZS 9,000,000 as gratuity the amount which the Respondent agreed in exhibit D-1 to have been paid.

He concluded that from what he said, it is obvious that Hon. Nyagaya misdirected himself and issued a wrong decision. He prayed for the Court to revise the proceedings and set aside the award.

In reply, Mr. Rweyemamu, Advocate for the Respondent, raised a concern on who tendered exhibit D-1. In his knowledge Exhibit D7 was tendered by the Respondent because it was a resignation letter.

Regarding the 1st ground that the arbitrator errored in law in finding that the employer did not object the claims, Mr. Rweyemamu submitted that the respondent tendered evidence of various positions she held as academic master. The exhibits are A-1 which was a letter of appointment as academic dean, A-2 a letter of appointment as a deputy Headmistress and A-4 which was a letter of appointment as a

head of school, the Bank Statement and a resignation letter. According to him, all these exhibits showed that the respondent was employed and held various position. He stated that salary is fixed by school and allowances are not negotiable because they are known for the positions they apply.

According to Mr. Rweyemamu, the respondent was employed by a contract and all her claims were in the contract. He referred tp Exhibit D-1 which according to his interpretation, talks about the totality of all the claims. He is of the view that the arbitrator properly directed herself at page 8 and 9 as she used section 15 (1) (b) and 15 (6) of the Employment and Labour Relations Act, Cap 366. He wondered why the burden of prove should lie on the employee as submitted by the applicant's counsel. According to him, it was the burden of the employer to disprove what was alleged as the arbitrator knew that the exhibits were not challenged.

Mr. Rweyemamu submitted that Exhibit A-4 specifies the amounts of allowances. The employer said he did not pay the allowances because the salary of the respondent was higher than that of the other staff. It is true they did not object.

Regarding the ground that the arbitrator awarded what was not entitled to the respondent, and failed to evaluate evidence, Mr. Rweyemamu submitted that it is apparent that there was nowhere where the arbitrator talked about salaries. He stated that in all the positions she held, the respondent was not paid with anything. According to him, the respondent enumerated various claims with evidence but that evidence was not countered by the applicant and it was the responsibility of the applicant to say what was the respondent's responsibility. In his view, the arbitrator was correct in evaluating the evidence.

Regarding the 3rd issues challenging the gratuity, Mr. Rweyemamu submitted that the prayer of gratuity is contractual, and the respondent was yet to be paid. He admitted that the respondent was paid only a part of the gratuity. Referring to **Section 15 of Cap 366,** Mr. Rweyemamu submitted that it was the duty of the employer to prove that gratuity was not a matter of contract and that the applicant was paid just a part of it.

He finalized his submission by stating that, it is apparent that the arbitrator was correct and all the exhibits were properly admitted without being challenged by any evidence from the applicant. He therefore prayed for this Court to dismiss the application.

Mr. Lulinga, made a rejoinder in which he reiterated his submission that at page 5 paragraph 2 of the award the applicant is recorded to have brought witness DW1 and he tendered the resignation letter which was admitted as exhibit D-1 indicating that the respondent was paid gratuity in full. He complained that paying her again is not right.

From what I gather from the CMA record and the submissions of the parties, the issue to be determined is whether the applicant has established sufficient grounds to warrant revision and setting aside of the CMA award. Another issue is to what reliefs are the parties entitled. In resolving this issue, all the grounds of revision will be addressed in the same order as presented by the parties.

I start with the first ground on the assertion that the arbitrator erred in finding that the applicant did not challenge the evidence of the respondent. The arbitrator addressed the issue as to whether the claimant (respondent) was entitled to what she was claiming. Although in CMA Form No. 1 the respondent claimed **TZS 66,295,500.00** being various allowances for the various positions she held, in evidence, this amount could not be explained. The Arbitrator based her decision on **Exhibit D-1** which is a letter of resignation containing respondents claims arising from the allowances which does not correspond with what is contained in CMA Form No.

1. What is quantified in **Exhibit D-1** consist of allowances for preparations for science practical – **TZS 200,000.00** for the dates of 9th, 12th, 14th, and 16th November and **TZS 280,000.00** and for 10th, 13th, 15th and 17th **TZS 280,000** and allowances for remedial teaching amounting to TZS 200,000.00. The arbitrator found that this amount was not challenged by the applicant through evidence as required by Section **15 of Cap 366**. I have examined the evidence of the applicant in the CMA. DW1 stated that the respondent was not entitled to any allowance because their contract did not state allowances. However, DW1 did not tender the said contract to show the terms and conditions of the employment so as to ascertain whether allowances are prescribed therein or not. This is what made the arbitrator to think that the evidence of the respondent remained unchallenged.

I agree with the arbitrator that the employer has a duty to supply the contract which guides the employment relationship, and this was the evidence required to challenge the evidence of the respondent. Short of this evidence rendered the respondent's evidence to remain unchallenged. Since the applicant never tendered such a contract, the arbitrator was correct to rely on any document tendered by the

respondent containing amounts claimed. The 1st ground of revision has no merit.

The second and third grounds were combined in the submissions. They are challenging the holding of the arbitrator that the respondent was entitled to allowances and salary increase together with gratuity without having them provided in the contract of employment. Starting with what I have already said that the arbitrator was correct to find the evidence of the respondent regarding the allowances unchallenged. This finding applies in this ground. I see no reason to fault the findings of the arbitrator regarding to allowances entitlement to the respondent. But regarding quantum of the said allowance, the arbitrator overlooked what is contained in Exhibit D-1. The arbitrator noted the allowances fore remedial teaching which is TZS 200,000 and the allowances for science practical preparation for TZS 280,000. He did not notice the amount of TZS 200,000 for science practical preparations for the dates of 9th, 12th, 14th, and 16th November, 2017. Could the arbitrator have noticed this amount, the total of the allowances would have been TZS 680,000 instead of TZS 480,000 as indicated in the award. With the exception of the quantum, I see no reason to differ with the findings of the arbitrator regarding the allowance entitlement.

I could not see anything in the award concerning increase of salary. The applicant raised it in the issues in this application but I don't see any reason to dwell on something not addressed in the CMA. It is an established positions that higher court should not deal with a matter not considered in the lower court. It was so held in the case of **Raphael Enea Mngazija versus Abdallah Kafonjo Junta, Civil Appeal No. 240 of 2018 that was decided on 21st February and 8th April, 2020 (Unreported).** In this case the Hon Justices of Appeal stated:-

> *"This Court in the case **Galus Kitaya v. Republic, Criminal Appeal No 196 of 2015(unreported)** was confronted with the issue whether it can decide on a matter not raised in and decided by the High Court on first appeal. It stated as follows:*
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> *"on comparing grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, ground one to five are new grounds. As the court said in the case of Nurd in Mussa Waiiu v. Republic1(supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not*

consider grounds number one to number five of the appellant's grounds of appeal."

On the basis of the preceding cited authority, it is therefore settled that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by7

neither the trial court nor the High Court on appeal."

I now consider the fourth issue as to whether the arbitrator was correct to award gratuity. As noted above, the arbitrator's finding was based on **Exhibit D-1** which is the letter of resignation containing the respondents outstanding claims. The Respondent challenged the holding of the arbitrator in awarding **TZS 9,000,000.00** as gratuity while **Exhibit D-1** indicated that the respondent admitted having been paid that amount. I have gone through **exhibit D1**. I noted an oversight on the part of the arbitrator in comprehending the contents relating to gratuity. The respondent claimed the remaining amount of gratuity while admitting having received **TZS 9,000,000.00**. In my view, the arbitrator had to first compute the payable gratuity and minus **TZS 9,000,000.00** from that total and the balance would be the amount payable to the respondent. I see an error in awarding **TZS 9,000,000.00** which is not even claimed. Unfortunately, the

respondent did not mention what was her contractual gratuity and therefore it is not known how much the respondent was claiming as a remaining gratuity. It was upon the claimant (the respondent) in the CMA to establish how much she was claiming as a remaining gratuity. In the evidence the respondent just prayed to be paid 15% as gratuity but the basis of that 15% is not stated. Should I assume 15% to have been computer out of her salary of **TZS 1,200,000.00** times the number of months she served, then the respondent would have been entitled to **TZS 7,020,000.00.** As well, it appears that this issue of gratuity came as an afterthought because it was not mentioned neither in the CMA form No 1 nor in the opening statement. It was not even stated in evidence apart from the last prayer made after the testimony of PW1. On this issue, I agree with the Applicant that the arbitrator erred in allowing the gratuity which was not justified.

On the above analysis, I find the first issue as to whether the applicant has established sufficient grounds for this court to interfere with the award of the CMA answered affirmatively.

As such, the application is allowed to the extent above. Therefore, I hereby revise the record of the CMA in **CMA/DSM/KIN/902/20/158/21,** and vary the award issued therein by

increasing the allowances entitled to the respondent from **TZS 480,000** to **TZS 680,000.00**. The respondent is not entitled to any gratuity; therefore the grant of gratuity is set aside. It is so ordered.

Dated at Dar es Salaam this 27th Day of February 2023

KATARINA REVOCATI MTEULE

JUDGE

27/2/2023