IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 411 OF 2022

BETWEEN

JULIUS ROBERT CHIPALAMOTO ..... APPLICANT

VERSUS

EURO HOTEL & APARTMENTS ..... RESPONDENT

JUDGEMENT

Date of last Order: *16/03/2023*
Date of Judgement: *24/03/2023*

MLYAMBINA, J.

This application is for revision of the decision of the Commission for Mediation and Arbitration (hereinafter referred as 'CMA') in *Labour Dispute No. CMA/DSM/ILA/75//22/54/22* delivered on 21st October, 2022 by Hon. Kiangi, N. Arbitrator. The application has been filed under *Section 91(1)(a), 91(2)(a) and 94(1)(b)(ii) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* (hereinafter referred as 'ELRA') and *Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f) 24(3)(a), (b), (c), 28(1)(e) of the Labour Court Rules*, GN. No. 106 of 2007 (to be referred as '*GN. No. 106/2007*').

The facts giving rise to the present application can be briefly stated as follows; on 20th December, 2021 the Applicant was employed by the Respondent in the position of *F & B Supervisory with the Food and Beverage Department*. The contract was for fixed term of one year and it was agreed to end on 19/12/2022. The Applicant alleged to have been terminated from employment on 05th February, 2022. Aggrieved by the termination the Applicant referred the dispute of breach of contract at the CMA. After considering the evidence of both parties the CMA dismissed the Applicant's complaint on the ground that there was no breach in this application. Again, such decision aggrieved the Applicant. Hence, the present application inviting the Court to determine the following grounds:

i. Whether it was proper for Hon. Arbitrator to base on number of witnesses to testify while was not mandatory. Thus, according to the Law of Evidence, there is no a number of witnesses.

ii. Whether the Arbitrator was proper for not considering the invalid breach of contract done by the Respondent.

iii. Whether the Hon. Arbitrator was proper to base on the letter of breach of Contract of employment while the Applicant proved that the breach was conducted orally.

iv. Whether the Hon. Arbitrator was proper to base on the signed out of the Applicant during the breach of contract. It was impossible for the one who terminated or breached to signed out.

v. Whether the Hon. Arbitrator was proper for not granting the Applicant relief(s), despite the fact that, the Applicant was supposed to be granted due to invalid breach contract of employment.

The application was argued orally on 16th March, 2023. Before the Court, the Applicant was represented by Mr. Joakim Joliga, Personal Representative, whereas Mr. Emanuel Kimei, Learned Counsel appeared for the Respondent.

Mr. Joliga generally submitted on the above grounds. He stated that; the Arbitrator errored to base on number of witnesses who testified while it was not mandatory as per *Section 143 of the Law of Evidence Act [Cap 6 Revised Edition 2019] (to be referred as 'TEA')*.

As regards to the second ground, Mr. Joliga submitted that; the Arbitrator failed to consider the invalid breach of contract done by the Respondent. He insisted that the Applicant was terminated orally contrary to the law and procedure. The representative argued that

according to *Rule 18(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 ('GN. No. 67 of 2007')*, the Arbitrator erred in law/failed to base on the evidence of the Applicant that he was orally terminated.

As to the relief(s) granted, it was insisted by Mr. Joliga that the Applicant's contract was breached. Hence, he is entitled to the relief(s) provided under *Section 40(1) (a) & (b) of the ELRA*. It was added that; the Applicant proved through oath that he was illegally terminated. He concluded that the Arbitrator's decision was against and in breach of *Section 37(1) & (2) of the ELRA.*

On the allegation that the Arbitrator did not consider the Applicant's evidence, Mr. Kimei referred the Court to the case of **DPP v. Sabina I. Tesha & Others** [1992] TLR 237. He submitted that the complainant was given the right to be heard. He exercised his natural right to be heard under *Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977*. Mr. Kimei also referred the Court to the case of **Abbas Sherally & Another v. Abdul S.H.N. Fr. Alboy**, Civil Application No. 33 of 2002, High Court.

It was further submitted that; the main complaint here is that the CMA based on a number of witnesses in rendering its decision. The

Counsel argued that; *Section 143 of the Evidence Act (supra)* does not require quantity of evidence rather the quality of the evidence. He put reliance of his preposition to the case of **CRJ Construction Co. Ltd. v. Maneno Ndalije and Another**, Labour Revision No. 205 of 2015 (unreported); where it was held that the burden of proof on termination lies to the employee.

Mr. Kimei maintained that; in this case, the Applicant failed to prove that there was unfair termination. He insisted; it is very clear that the Award of CMA was not based on number of witnesses. It was based on the quality of evidence rendered before it.

In rejoinder, Mr. Joliga insisted that; the Applicant's evidence was on quality but the Arbitrator based his decision on quantity of witness. He argued that; under *Section 39 of the ELRA*, the burden of proof that the termination was fair lies to the employer and not on the employee.

Generally, in this application, after considering the grounds for revision, parties' submissions, CMA and Court records, I find the Court is called upon to determine the following issue; *whether the Applicant's contract was unfairly breached.* In determining such issue, the Court will examine if the Arbitrator considered the evidence on record.

At the CMA, the Applicant strongly submitted that; he was orally terminated from his employment without any justifiable cause. On his part, the Respondent strongly disputed the Applicant's allegation and maintained that they did not terminate the Respondent. The Applicant strongly submitted that; it was the duty of the employer to prove that the termination was fair and in accordance with *Section 37 of ELRA*.

On the nature of this dispute, I have revisited the provision of the law under *Rule 24(3) of GN. No. 67 of 2007* which provides that:

> The first party to make an opening statement shall present its case first throughout the proceedings. If the parties do not agree about who shall start, the Arbitrator shall be required to make a ruling on this regard.
>
> Provided that, in a dispute over an alleged unfair termination of employment, the employer will be required to start as it has to prove that the termination was fair.

In the matter at hand, the dispute was about breach of contract as indicated in the CMA F1. Therefore, the burden of proving that the contract was unfairly breached lies to the Applicant himself. The above position is in line with the established principle of law that who alleges must prove. The principle has been restated in various Court decisions including the case of **Barelia Karangirangi v. Asteria Nyalwamba**,

Civil Appeal No. 237 of 2017, CAT (Unreported) where the Court held inter alia that;

> At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove.

At the CMA, the Applicant testified that; on 05th February, 2022 he was called to the office where his Manager (Mr. Ramesh) was with Mr. Ramadhan (DW2) and they told him that he has been terminated from employment. The Applicant questioned the reason for his termination and he was informed that his fellow employee namely Charles, had an argument with the Manager's wife and when he was taken to the police station, he said, he cooperated with the Applicant, the allegation which is not true.

However, the Applicant's testimony is contrary to the documentary evidence tendered by the Respondent. The Respondent tendered an apology letter of Mr. Charles (exhibit D3). When the said letter was tendered, the Applicant had no any objection in its content. In the said letter, Mr. Charles admitted that, together with his fellow employees including the Applicant, they conducted an unauthorized meeting. He therefore apologized to the management. Such evidence is supported by

the Respondent's witnesses (DW1 & DW2) who testified that; on the alleged date of termination, 05th February, 2022 they called the Applicant at the Manager's office to give him his salary, to ask him his side of the story regarding the apology made by Mr. Charles and the missing inventory for the month of January, 2022. The Applicant failed to respond to the allegation levelled against him and left the office without signing out properly as evidenced by the attendance register (exhibit D5).

On the basis of such evidence, it is my view that the Respondent proved that the Applicant's contract was not terminated as alleged. The Applicant has no proof of his termination and his testimony is not backed up with any documentary evidence. Therefore, the Arbitrator was right to conclude that the Applicant was not terminated from employment. The Arbitrator properly considered the evidence of the parties to arrive in his findings.

I have noted the Applicant's allegation that the Arbitrator considered the number of witnesses who testified. In my view, the Applicant's allegation lacks merit. The Respondent's testimony before the CMA was based on documentary evidence as analyzed above, which was not rebutted by the Applicant. Even the impugned Award do not

state that the decision is based on number of witnesses who testified. I therefore, join hands with Mr. Kimei that the Applicant was afforded the right to be heard but he failed to prove his allegation.

In the result, the application is hereby dismissed for lack of merits.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

24/03/2023

Judgement pronounced and dated 24th day of March, 2023 in the presence Learned Counsel Emmanuel Kimei for Mr. Joakim Joliga, Personal Representative of the Applicant and Mr. Emmanuel Kimei, Learned Counsel, for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

Y.J. MLYAMBINA

JUDGE

24/03/2023