IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 405 & 427 OF 2022

(Arising from an Award issued on 7/11/2022 by Hon. Lyimo Joyce Christopher, Arbitrator in Labour CMA/PWN/KBH/33/2021 at Kibaha)

HERI GIDION KUYENGA ..... APPLICANT/RESPONDENT

VERSUS

THE REGISTERED TRUSTEES OF THE SEVENTH-DAY ADVENTIST CHURCH OF TANZANIA ..... 1ST RESPONDENT/1ST APPLICANT

SEVENTH-DAY ADVENTIST CHURCH, SOUTH-EAST TANZANIA CONFERENCE ..... 2ND RESPONDENT/2ND APPLICANT

JUDGMENT

Date of last Order: 21/03/2023
Date of Judgment: 31/3/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st October 2012, the Registered Trustee of the Seventh-day Adventist Church of Tanzania, and Seventh-day Adventist Church, South-East Tanzania Conference, the 1st and 2nd respondents respectively in Revision No. 405 of 2022 and Applicants in Revision No. 427 of 2022 hereinafter referred to as the

employers, employed Heri Gidion Kuyenga, the Applicant in Revision No. 405 of 2022 and Respondent in Revision No. 427 of 2022 hereinafter referred to as the employee. The employee was employed by the employers as a church pastor to preach the gospel or word of God. On 28th June 2021, the employers terminated employment of the employee, allegedly, that the employee committed a misconduct namely, insubordination.

Aggrieved with termination of his employment, the employee filed Labour dispute No. CMA/PWN/KBH/33/2021 before the Commission for Mediation and Arbitration henceforth CMA at Kibaha claiming to be reinstated or be paid (i) TZS 36,553,176/= being 36 months' salaries compensation for unfair termination, (ii) TZS 1,015,176/= being leave pay, (iii)TZS 30,000,000/= being severance pay for ten years, (iv) TZS 30,000,000/= being payment for unpaid leave for ten years, (v) TZS 1,015,176/= being one month salary in lieu of notice, (vi) TZS 500,000,000/= being compensation for character injury, reputation and integrity. In short, the employee was claiming to be paid a total of TZS 598,583,528/=. The employee prayed also to be repatriated from Kongowe Pwani to Morogoro and be issued with a clean certificate of service.

On 7th November 2022, Hon. Lyimo Joyce Christoprher, Arbitrator, having heard evidence and submissions by the employee and the employers, issued an award that the employee committed a misconduct of insubordination, hence, termination was substantively fair. The arbitrator found that procedure for termination was not fully complied with, hence, termination was unfair procedurally. Based on those findings, the arbitrator awarded the employee to be paid (i) TZS5,653,900.02 being 6 months' salaries compensation, (ii)TZS 942,316.67 being leave pay, (iii) TZS 942,316.67 being Notice pay, (iv) TZS 300,000/= being faire for the employee and his dependents from Dar es Salaam to Morogoro, (v) TZS 1,000,000/=being transportation costs of three tones luggage of the employee and (v) unspecified amount of pension. In total the arbitrator awarded the employee to be paid TZS 8,843,533.36.

The employee was aggrieved with the award, as a result, he filed Revision Application No. 405 of 2022. In the affidavit in support of the Notice Application, raised five (5) grounds namely :-

1. *That the arbitrator erred in law and facts by holding that there was valid reason for termination of employment of the employee.*
2. *That the erred in law and fact in holding that applicant(employee) committed disciplinary misconduct of insubordination while he was not charged with the said misconduct.*

3. *That the arbitrator erred and fact in refusing to award gratuity to the employee on the ground that the employee committed the misconduct of insubordination while the employee was not charged with the said misconduct.*
4. *That the arbitrator erred in law and fact in holding that the employee is entitled to six months' salary compensation instead of twelve months.*
5. *That the arbitrator erred in law and facts in refusing to order reinstatement of the employee.*

The employers filed both the Notice of Opposition and the Counter Affidavit to resist the application.

Not only that, but also, the employers were aggrieved with the award hence they filed Revision Application No. 427 of 2022. In support of the Notice of Application, the employers filed the affidavit of Justice Mchome. In the said affidavit, employers raised two issues namely:-

1. *Whether the arbitrator directed herself correctly to hold that in terminating the employee, procedures were not followed without mentioning the said procedures.*
2. *Whether the arbitrator acted correctly by awarding the employee.*

The employee resisted the application by the employers by filing both the Notice of Application and the counter affidavit.

Since both Revision Application No. 405 and 427 of 2022 arose from the same CMA proceedings and award, on 12th February 2023, in the presence of counsel for the employee and the employers, I issued a consolidation order, consolidating the two Revisions as consolidated

Revision Applications No. 405 & 427 of 2022 hence this consolidated judgement.

When this consolidated Application was called on for hearing, Mr. Wabeya Kung'e, advocate, appeared and argued for and on behalf of the employee, while Mr. Isaac Tasinga, Advocate, appeared and argued for and on behalf of the employers.

Submitting on the 1st ground on behalf of the employee in Revision Application No. 405 of 2022, Mr. Kung'e, learned counsel for the employee argued that the arbitrator erred in law to hold that the employer had valid reason for termination. He submitted further that; all evidence adduced on behalf of the employer at CMA was that the employee wrote a letter to his employer. Counsel went on that, there is no evidence showing that it was an offence or a misconduct for the employee to write a letter to the employer. Counsel for the employee submitted further that, the alleged misconduct of insubordination came out only in the minutes (exhibit R3) and termination letter (exhibit R1).

Arguing the 2nd and 3rd grounds, counsel for the employee submitted that, there was no allegation of insubordination committed by the employee. He submitted further that, there was no charge against the

employee because the employee attended the meeting like any other member. Counsel for the employee argued that it was unfair for the employers not to serve the employee with a formal charge showing the alleged misconduct. To support his submissions, counsel for the employee cited the case of ***Jimson Security Service v. Joseph Mdegela***, Civil Appeal No. 152 of 2019 CAT (unreported). He argued further that, failure to serve the employee with the formal charge showing the misconduct committed, violated the principle of natural justice, namely, right to be heard. Counsel for the employee submitted further that, when there is unfair termination, the employee is entitled to be compensated as claimed in the CMA F1. He cited the case of ***St. Joseph Kolping Secondary School v. Alvera Kashushura***, Civil Appeal No. 377 of 2021 CAT (unreported) to support his submissions.

Arguing the 4th ground, counsel for the employee submitted that, the arbitrator erred to award the employee 6 months instead of 12 months. He added that, after finding that termination was unfair procedurally, the arbitrator was supposed to award the employee 12 months and not 6 months.

Arguing the 5th ground, counsel for the employee submitted that, CMA F1, the employee claimed to be reinstated but the arbitrator did not grant that prayer. He submitted further that, when termination is unfair both substantively and procedurally, an employee is entitled to be reinstated. He cited the case of ***Magnus K. Laurean v. Tanzania Breweries Limited,*** Civil Appeal No. 25 of 2018 CAT (unreported) to support his submissions. During submissions, counsel for the employee conceded that the nature of employment of the employee was to preach the word of God as required by the employers and that, the said work is based on faith and obedience. Counsel for the employee therefore prayed that the application be allowed.

Before concluding his submissions, the court asked counsel for the employee to address (i) whether condonation was properly granted and (ii) whether exhibits were properly tendered and admitted in evidence.

Responding to the issues raised by the court, Mr. Kung'e learned counsel for the employee, initially submitted that condonation was properly granted. But, upon being shown the CMA record, he changed his submission and submitted that the employee filed an application for condonation (CMA F2) showing that he was out of time for 16 days.

Counsel for the employee submitted that the application for condonation was not heard and that, there is no Ruling granting condonation. For that reason, counsel for the employee submitted that CMA proceedings are a nullity.

On whether exhibits were properly admitted in evidence, Mr. Kung'e, learned counsel for the employee, submitted that witnesses prayed to tender exhibits but the arbitrator did not give the other party right to comment whether, there is objection or not, before admitting the exhibit. He added that, the record does not show that exhibits were admitted in evidence, instead, the arbitrator only marked and signed on the exhibits. In short, counsel for the employee submitted that, there were irregularities in admission of exhibits. He submitted further that; the effect thereof is that there is no documentary exhibit that were tendered. He added that, most of evidence of the parties is based on documentary evidence and that, if documentary evidence is expunged, there will be no evidence left to prove or disapprove the case of each party.

Based on the two issues raised by the court, counsel for the employee prayed the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo*.

On the other hand, Mr. Tasinga, learned counsel for the employers, for obvious reason, opted only to respond to the issues raised by the court without address or responding to arguments raised by counsel of the employee in Revision Application No. 405 of 2022 or grounds advanced by the employers in Revision Application No. 427 of 2022.

Responding to the issues raised by the court, Mr. Tasing, learned counsel for the employers, concurred with submissions by Counsel for the employee in relation to condonation that, condonation was not determined hence was not granted.

Responding to the issue relating to admissibility of exhibits, counsel for the employers submitted that, exhibits were not properly admitted as was submitted by Counsel for the employee. Counsel for the employers concurred with the prayer by counsel for the employee to nullify CMA proceedings and order trial *de novo*.

There is no dispute from submissions by both counsel on the issue of condonation raised by the court that, the arbitrator did not determine an application for condonation, hence, the dispute was heard without the order for condonation. It is clear in my mind that, condonation goes to the

jurisdiction because the dispute was out of time. Since the dispute was heard without condonation being granted, CMA had no jurisdiction over the matter, because the matter was filed out time. I have noted that, both counsel and the arbitrator, were preoccupied by several unnecessary preliminary objections and forgot to argue the application for condonation that was filed by the employee. It is my view that, since the application for condonation was filed by the employee but was only not determined, the only remedy available is to nullify proceedings because at the time of hearing evidence of the parties, the arbitrator had no jurisdiction. For the dispute filed out time, the arbitrator can have jurisdiction after granting the application for condonation.

Again, as correctly submitted by both counsel, CMA proceedings suffers another blow because, exhibits were not admitted in evidence. What is clear in CMA proceedings is that, when a witness was testifying, the witness mentioned a particular document and the arbitrator simply marked it without affording the other party right to comment whether, there is objection or not. Not only that, but also, the record does not show that the arbitrator admitted those exhibits as evidence. The arbitrator simply signed on the exhibit and marked as exhibit. In my view, that was

fatal, because it deprived the other party right to be heard. See the case of ***Mhubiri Rogega Mong'ateko vs Mak Medics Ltd*** (Civil Appeal 106 of 2019) [2022] TZCA 452 wherein the Court of Appeal held *inter-alia*:-

> *"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record… Therefore, it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence…"*

See also the case of ***M.S SDV Transami Limited vs M.S Ste Datco*** (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International Cooperation Agency vs. Khaki Complex Limited** [2006] T.L.R 343 and ***Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd*** (Rev. Appl 253 of 2022) [2023] TZHCLD 1170. In all the above cited cases, both the Court of Appeal and this court nullified proceedings and ordered trial *de novo*.

Since the two issues that were raised by the court have disposed the application, I will not consider grounds raised by the parties.

For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the CMA award and direct the parties to go back to CMA so that the

application for condonation can be heard by the arbitrator, and if granted, then, the dispute be heard *de novo* before a different arbitrator without delay.

Dated at Dar es Salaam on this 31st March 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 31st March 2023 in chambers in the presence of Wabeya Kung'e, Advocate, for the employee, applicant in Revision application No. 405 of 2022 and respondent in Revision No. 427 of 2022 and Isaac Tasinga, Advocate, for the employers, applicants in Revision No. 427 of 2022 and respondent in Revision No. 405 of 2022.

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

B. E. K. Mganga
JUDGE