IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 05 OF 2023

BETWEEN

XIAO LONG ZHAN ..... APPLICANT

VERSUS

CHINESE HOTEL ..... RESPONDENT

JUDGEMENT

Date of last Order: *30/03/2023*
Date of Judgement: *28/04/2023*

MLYAMBINA, J.

This is an application for revision of the decision of the Commission for Mediation and Arbitration (herein CMA) in *Labour Dispute No. CMA/DSM/KIN/157/21/44/21.* The application is supported with an affidavit of the Applicant herein. On the other hand, the Respondent vehemently opposed the application by filing the counter affidavit sworn by Mr. Fragola Xu Fang, the Respondent's Principal Officer.

The application emanates from the following facts: The Applicant alleged to have been employed by the Respondent in a two years employment contract commenced on 20/07/2019 ending on

20/07/2021. The Applicant further alleges that; he was terminated from employment on 22/02/2021. Aggrieved by the termination, the Applicant referred the matter to the CMA. After considering the evidence of the parties, the CMA found that there was no termination of employment in this case. Thus, the Applicant was ordered to resume work. Again, being dissatisfied by the CMA's decision, the Applicant filed the present application on the following grounds:

i. That, the trial Arbitrator erred in law for the improper interpretation of *Rule 8(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007* while there was already tendered and admitted exhibit AP2 showing the Respondent confirmed to terminate the employee employment through announcement without following proper procedure required by the law.

ii. That, the trial Arbitrator erred in law and in fact by accepting the Respondent hearsay that the Applicant terminated the employment himself while there was no exhibit tendered by the Respondent and contradict to exhibit AP2.

iii. That, the trial Arbitrator erred in law and in fact in ignoring the Applicant evidence through exhibit AP2 for failure to interpret *Section 37(1), (2), (a) (c) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019] (hereinafter ELRA)* upon misdirecting himself and failed to examine and use properly the

evidence AP2 on record as a result, she came up with a wrong decision in favour of the Respondent herein.

iv. That, the trial Arbitrator erred in law and fact for not considering the evidence adduced by the Applicant before the CMA specifically AP2 proved that the Respondent terminated the employment without following proper procedure, calling to the disciplinary hearing without any evidence proved that there was a letter shown from when the Applicant was absconded from work.

v. That, the trial Arbitrator erred in law and in fact by holding that the Applicant should be re-engaged instead of reinstatement under *Section 40(1)(a) of the ELRA* while the Applicant already terminated through exhibit AP2 without following proper procedure.

vi. That, the trial Arbitrator erred in law and fact in falling to analyze and consider the exhibit AP2 before her thus arriving to a wrong finding.

vii. That, the trial Arbitrator erred in law and in fact due to the fact that he did not sign at the end of each witness and that this rendered their evidence unauthentic.

The matter proceeded orally. Before the Court, the Applicant was represented by Mr. Kelvin Mundo and Mr. Bernard Mkwati, Personal Representatives. Whereas Mr. Heriel Munis, Learned Counsel appeared for the Respondent.

While arguing in support of the application, Mr. Mundo abandoned the third and fifth grounds. He jointly submitted to the first and second grounds. He submitted that; during tendering of evidence before CMA, the Applicant tendered exhibit AP2 (Notice of termination of Contract). The exhibit stated that the Applicant was terminated since on 21/02/2022. Mr. Mundo contended that the Respondent did not object tendering of such exhibit. He argued that in the light of *Section 110 (1) & (2) of the Evidence Act, [Cap 6 Revised Edition 2019] (herein TEA),* whoever wants the Court to decide in his favour must prove. He strongly submitted that; the Applicant proved before CMA that his employment contract was illegally terminated. He added that; the Applicant tendered the Notice of termination of contract, but CMA disregarded it.

Mr. Mundo went on to submit that; the Respondent did not adduce any evidence to prove that the Applicant absconded from work for six months. He argued that there was no such proof before CMA if the Applicant absconded and from which date. He stated that; there was no any letter written by the Respondent to the Applicant on such abscondment. Mr. Mundo further submitted that; the Applicant was never summoned to appear before the disciplinary Committee which shows that the Applicant has been at work for all the time.

It was further submitted that it was not proper for the Arbitrator to hold that the Applicant absconded from work for six months. He said, the Arbitrator considered oral evidence because there was no any documentary evidence. Mr. Mundo argued that since it was a Written Contract, the Respondent was supposed to present a written document to support his evidence.

As to procedural unfairness, it was strongly submitted that; the Applicant was not given a right to be heard. He was not summoned before the disciplinary Committee and he was not given the charges. He maintained that the Applicant was terminated based on disciplinary issues because he absconded from work for six months. Mr. Mundo argued that denial of the right to be heard by the employer and before CMA violated the right to be heard *stipulated under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1997*. He further submitted that the right to be heard is the natural and a Constitutional right. To support his submission, he cited the case of **Severo Mutegeki and Another v. Mamlata Usafi wa Mazingira Mjini Dodoma (DUWASA)** Civil Appeal No. 343 of 2019 Court of Appeal of Tanzania at Dodoma (unreported).

Mr. Mundo also submitted that the Applicant before CMA through Form No. 1 prayed to be paid salaries and not to be re-employed, reinstated at work. He said, the Arbitrator reinstated the Applicant, a relief which was not prayed for. The Counsel argued that such decision violated the law. To booster his stance he referred the Court to the case of **Tanzania Breweries Limited v. Erick Ernest,** Labour Revision Application No. 19 of 2019, High Court of Tanzania at Arusha nreported), p. 17-18 (unreported).

Mr. Mundo further alleged that the issues of reinstatement at work was raised by the Arbitrator *suo moto*. It was not an issue before the CMA. He insisted that it was a new issue. In reliance of his submission, he referred the Court to the case of **Jayantukumar Chandubhai Patel @ Jeetu Patel & 3 Others v. The Attorney General & 2 Others,** Civil Application No. 160 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported), p. 31.

Turning to the last ground Mr. Mundo submitted that the Arbitrator did not sign at the end of each witness testimony. However, it is not required under Labour Laws. He added that; non-signing at the end of each witness did not occasion injustice on their part. To support his submission, he cited the case of **Said Idd Sadala & Another v.**

Solomoni Pre & Primary School, Revision Application No. 437 of 2021, High Court Labour Division (unreported), p. 7.

In the upshot, Mr. Mundo urged the Court to set aside the CMA's decision, to be paid all the remaining unpaid salaries in his contract and be returned back to China.

In response to the application, Mr. Munisi objected this application. He also urged the Court to adopt the Respondent's Counter affidavit affirmed by Mr. Fragola XU Fang to form part of his reply submissions. He objected the prayer for the Applicant to be paid salaries and be returned back to China because there is no any employment contract tendered between the parties herein. He stated that the only contract tendered and admitted as exhibit AP1 was between the Applicant and Navigation Electronic Technology Co. Ltd. He insisted that there was no contract containing the prayed relief(s).

Mr. Munisi further submitted that the Applicant failed to prove the paid salaries and the term that he was supposed to be returned to China after his contract came to an end. He also disputed the allegation that the CMA raised a new issue. He stated that the alleged issue was decided on the third issue which was on to what relief(s) were the parties entitled to. Mr. Munisi went on to submit that the Applicant failed

to prove existence of the employment contract and that such contract was breached. He added that the Applicant was not affected by him being reinstated. The counsel insisted that the Applicant and the Respondent had verbal Contract and not a written contract.

It was further submitted by Mr. Munisi that, Exhibit AP2 does not show if Chinese Hotel is the one who terminated the contract of the Applicant. He stated that exh. AP2 is not a notice to fire the Applicant or lay charges against him. He insisted that it was a notice against other employees. He elaborated that the notice concerned all employees including the Applicant.

Mr. Munisi continued to submit that there is no evidence on the part of the Applicant to show that he never absconded from work. He stated that CMA F.1 shows that the Applicant was terminated by way of a letter but he never tendered such a letter. He strongly submitted that the Applicant was not fired from work. He contended that, even exhibit AP2 does not lay charges. Therefore, there was no necessity for the Applicant to be accorded right to be heard. Mr. Munisi distinguished the cited cases cited to the circumstances of this case and called upon the same be disregarded. At the conclusion he urged the Court to dismiss the application for lack of merits.

In rejoinder, Mr. Mundo added that; the witness (Fragola) admitted in his evidence that the Applicant was his employee. He argued that, since there was an employer/employee relationship, the Respondent was duty bound to comply with the contract. Additionally, Mr. Mundo added that; Navigation Electronic is the mother company of the Respondent herein.

Having considered the rival submissions of the parties, CMA and Court records as well as relevant laws, I find the Court is called upon to determine the following issues: *First*, whether the Applicant had employment relationship with the Respondent. *Second*; whether the Respondent followed procedures in terminating the Applicant and lastly; what reliefs are the parties entitled to.

To start with the first issue, whether there was employment contract between the parties herein; at the CMA and even before this Court, the Applicant insisted that he had employment contract with the Respondent. On the other hand, the Respondent alleges that he had no employment contract with the Respondent and no employment contract was tendered to prove relationship of the parties herein. The record shows that at the CMA the Applicant tendered the employment contract (exhibit AP1) which was between Guangdong Fu Tang Beidou

Navigation Electric Technology Co. Ltd and the Applicant herein. The contract commenced on 20/07/2019 and it was to end on 20/07/2021. In his findings to the issue at hand, the Arbitrator at page 6 paragraph 2 of the impugned Award stated as follows:

> ...pamoja na kwamba katika kielelezo AP1 kinaonesha Mlalamikiwa ni Guang Fu Tang Beidou Navigation Electric Technology Co. Ltd lakini hili haliondoi uhusiano wa ajira baina ya Mlalamikaji na Chinese Hotel sababu hata DW1 alikubali kuwa Mlalamikaji alikuwa Mwajiriwa wao kwa nafasi ya Meneja Msaidizi/Assistant Manager. Hivyo hoja hii inajibika kuwa ulikuwepo mkataba wa ajira baina ya Wadaawa.

The above passage can be loosely translated as follows:

> Although exhibit AP1 shows the Respondent is Guang Fu Tang Beidou Navigation Electric Technology Co. Ltd but this does not eliminate the employment relationship between the Complainant and Chinese Hotel because even DW1 admitted that the complainant was their employee for the position of assistant Manager, hence it is found that there was an employment contract between the parties.

There is no doubt that the above contract tendered was between the Applicant and Guang Fu Tang Beidou Navigation Electric Technology Co. Ltd as correctly contested by Mr. Munisi. The Applicant went further

to tender the company profile (exhibit AP3) which had the list of companies owned by the Applicant's employer. One of the Companies listed is the Respondent's company herein. However, there is no any document showing transfer of the Applicant from his original company to the Respondent's one.

Now the crucial issue to address is; whether there was a contract between the Applicant and the Respondent herein. In my view, the parties had an employment relationship based on the following reasons. *First*, during tendering of the available employment contract (exhibit AP1), the Respondent had no any objection thereto. The allegation that such contract was between the Applicant and another employer was neither raised.

Second, as already pointed out herein above, the Applicant also tendered the list of companies owned by his employer (exhibit AP3) which was not objected by the Respondent.

Third, when adducing his testimony at the CMA, DW1 clearly stated that he knew the Applicant as one of the Respondent's employees who started to work in 2019. The time when the Applicant signed the employment contract between him and his employer.

Fourth, through the termination announcement (exhibit AP2), the Respondent recognized the Applicant as one of his employees and proceeded to terminate him from employment.

Therefore, in absence of any evidence to counter the Applicant's evidence it is my finding that though in his employment contract it was between the Applicant and the company known as Guang Fu Tang Beidou Navigation Electric Technology Co. Ltd the Applicant was directly working under the Respondent's company.

Turning to the second issue on procedures for termination, the Respondent strongly disputed the fact that she terminated the Respondent. On the other hand, the Applicant maintains that according to the announcement (exhibit AP2), he was terminated from employment. For easy of reference the content of the exhibit in question is hereunder reproduced for easy of reference:

> **Announcement**
>
> Due to serious loss of the Chinese hotel every month since May 2020 till now, the hotel income is not enough to pay monthly salary of the employees, and it is not enough to pay the monthly fixed expenses, such as electricity, garbage, TV, internet, etc. The hotel is facing closure.
>
> Therefore, Manager Zhan Xiaolong temporarily left the hotel for six months to one year. Mr. Zhan's last working

day is February 21, 2021. Starting from February 22, Mr. Zhan will no longer be responsible for all work in the Chinese Hotel. From now on, Wang Fang will take over all the work of Mr. Zhan.

According to the above announcement, it is my view that the Applicant was terminated from employment. The notice was addressed to the Applicant's colleagues that his last working day will be February 21st, 2021 and his position was already replaced with another employee. It is my conviction that such announcement consists sufficient information to be termed as termination notice. Therefore, since the Respondent did not deny the exhibit in question, it is my finding that the Respondent terminated the Applicant.

As to the announcement in question, the Respondent's business faced some economic crisis which required closure of the business. In my view, if the Respondent had proof of the economic crisis of her business, it was a good ground to undergo retrenchment process. Economic need is one of the circumstances that might legitimately form the basis of termination on operational requirement as recognized under *Rule 23(2)(a) of GN. No. 42/2007*.

In additional to the above, the procedures for termination on the ground of retrenchment or operational requirement are provided under

Section *38 of ELRA* read together with *Rule 23, 24 and 25 of GN. No. 42/2007.*

Looking at the matter at hand, neither of the stipulated procedures were followed by the Respondent in terminating the Applicant. He had no prior notice of his termination. The information about his termination was received by him through an announcement. The Respondent alleged further that; the Applicant absconded himself from work for more than six months. Let alone the fact that there is no proof of the alleged absenteeism, the Respondent was still duty bound to follow the termination procedures on such regard. As the record clearly shows, neither of the procedures for termination on the ground of misconduct to wit absenteeism has been followed in this application. Generally, before terminating an employee he/she should be afforded with an opportunity to defend himself/herself. This is also in accordance with the International Labour Law Standards pursuant to *Article 7 of the Termination of Employment Convention, 1982 (No. 158)* which provides that:

> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself

against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

In this case, the Applicant was condemned unheard. Therefore, there was unfair termination in this case.

Coming to the last issue on the parties' reliefs; at the CMA, the Applicant prayed for the salaries of January and February, 2021, salaries for the remaining period of the contract as well as transportation allowance to China. The arbitrator dismissed all claims of the Applicant. To start with salaries for the months of January and February, 2021, since the Respondent did not tender any proof that he paid the Applicant the same, it is my view that the Applicant is entitled to the relief claimed.

As to the salaries for the remaining period of contract, the contract was for two years commenced from July, 20th, 2019 to July, 20th, 2021. The Applicant was terminated on February 21, 2021. Therefore, the remaining period of the contract was five months as properly claimed by the Applicant. Thus, the Applicant is entitled to the same.

In respect to the claim of transport allowance, it is the requirement of the law that upon termination of the employment contract, the

employer shall terminate the employee to the place of recruitment. This is in accordance with *Section 43 of the ELRA.* The employment contract (exhibit AP1) shows that the Applicant was recruited in Tanzania and there is no agreement between the parties that if the contract will be terminated the Applicant will be transported back to China. On such basis, the Applicant's prayer of transport allowance is declined.

In the end result, since it has been found that the Applicant was unfairly terminated from employment, the present application is found to have merit. The Arbitrator's Award is hereby quashed and set aside. The Respondent is ordered to pay the Applicant a total of TZS 35,175,000 equivalent to 105,000 YUAN as salaries for the months of January and February, 2021 as well as five months' salaries for the remaining period of the contract. The total payments should be subject to deductions of PAYE in terms of *Section 28 (1) (a) of the ERLA (supra) read together with Section 7 of the Income Tax Act (Cap 332 Revised Edition 2019).*

It is so ordered.

Y.J. MLYAMBINA

JUDGE

28/04/2023