IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 449 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Temeke in labour dispute No. CMA/DSM/TEM/507/2020/83/2021, Nyang'uye H.A. Arbitrator dated 22/11/2022)

BETWEEN

ELLY DANIEL DUMA..... APPLICANT

VERSUS

MPEGAV AUTOLINK (T) LTD .....RESPONDENT

JUDGEMENT

12th – 30th May, 2023

OPIYO, J

This application was filed by the applicant asking this court to revise, quash and reverse the award of the Commission for Mediation and Arbitration (CMA) of the labour dispute No. CMA/DSM/TEM/507/2020/83/2021 of Nyangúye, H.A. Arbitrator held on 22nd November, 2022.

As per the records the applicant was employed by the respondent as Human Resource and Administration Officer o 04th November, 2015 with the salary of TZS. 600,000/= per month and transport allowance TZS. 150,000/=. On 23rd February, 2016 the salary increased to the tune of TZS. 1,350,000/= but form August, 2016 his salary was deducted to the tune of

TZS. 578,000/=. On 13th January, 2022 the applicant was terminated without being paid his salary arrears. Dissatisfied he filed for a labour dispute at CMA claiming for unfair labour practice. The matter was heard and the award favoured the respondent. Aggrieved he filed this application.

This application is supported with the applicant's affidavit having grounds for revision to be: -

(a) Whether there was an agreement between the applicant and the respondent as to salary deduction from TZS. 1,350,000/= to TZS. 578,000/=.

(b) Whether the respondent proved the existence of any other valid reason for applicant's salary deduction.

(c) Whether the applicant is entitled to payment of all his salary arrears as claimed in CMA Form 1.

Both parties got the opportunity to be represented. For the applicant appeared Mr. Boaz Mafwele while for the respondent it was Mr. George Sangúdi.

Mr. Mafwele on the first issue submitted that the applicant was employed from 4th November, 2015 as administrative officer paid the salary of TZS. 600,000/= and later on was promoted and his salary increased to TZS.

1,350,000/=. Following the promotion, he received new salary for six months up to July, 2016. The company passed through financial constraint there was agreed to reduce salary until the situation improves, but NSSF contribution continued to be deducted from the salary of 1,350,000/=.

He submitted further that, on 13th January, 2020 the applicant's employment was terminated, but his payments did not include the arrears of the salary that he was not paid during the difficult situation. He stated that the applicant was told the salary was reduced permanently, the fact he did not concede to. In his view, since there was no dispute that the salary was 1,350,000/= and no dispute that from August, 2016 the applicant was paid less salary of 578,000/= that was wrongful deduction of salary contrary to section 28(1)(a)(b) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] since there was no agreement to such deduction.

On the second issue, he submitted that the reason to salary deduction given at the CMA was financial constraint the company was facing but there was no agreement that the salary was to be permanently deducted and that is why the NSSF contribution continued to be pegged on 1,350,000/=. For him, this showed the employer had the intention of

paying the applicant the difference, but never adhered to and so was supposed to pay him when his employment was terminated.

He submitted on the third issue that, since there was no reason for deduction of applicant's salaries and any deductions had to be mutually agreed upon and since that was not done, all what is claimed is justified to be paid. He then prayed for this application be on favour of the applicant.

In reply Mr. Sangudi on the first issue submitted that the CMA found that there was an agreement on salary deduction and that the arbitrator reached that finding based on two reasons found at page 4 and 5 of typed award by the CMA. First, the conduct of the parties and second reason was convening meeting which was held by respondent and applicant who was also part of management.

His further contention is that, all types of contracts are regulated by the Law of Contract Act and so contract can be oral, written, partly oral and partly written or implied from conduct of the parties considering the case at hand. He continued that the issue whether there was a contract or not on salary deduction can be deduced from the following circumstances. The conduct of the applicant is number one. It is not disputed that the deduction started in August, 2016 where the applicant received the

reduced salary of Tshs. 578,600/= for the first time until 13th January, 2020 when his employment contract was terminated. By working under a deducted salary for almost four years without any protest or complaint suggests that, there was an agreement to salary deduction. To support his point, he referred to the case of **AEA Ltd Vs. Hilary Kerairyo,** Rev. No. 331 of 2019 he Labour Division at page 10 through page 11 where it was held that by Hon Wambura J. (as she then was):-

> *"The fact that the respondent did not sign the offer of employment does not invalidate the contract since the terms of that contract were partly executed by both parties. Hence, they accepted the contract by their conducts as it was held in the case of* ***Brodgen v Metropolitan Railways Co. (1987) LR 2 APP Cad 666****, that a contract can be accepted by the conduct of the parties."*

Therefore, since the applicant worked under the deducted salary for all that long without complaint, through his conduct, there was implied contract to deductions. In support to it he referred the case of **Global Hardware Ltd Vs. Tanzania Textiles Ltd** Commence **Case No. 39 of 2020 HC Commercial Div.** which cited the Court of Appeal decision of

Eugen Petroleum (T) Ltd vs. Tanganyika Investment Oil and transport Ltd, Civil No. 103 of 2003.

He further submitted that another indicator that there was a contract is based on the doctrine of waiver. He stated that by mere remaining calm and working under the deducted salary for four years without objection, the employee waived his right if any. To cement his point, he referred the case of **Global are Hardware Ltd** (supra) at Pg. 14 which cited the case of **Zanzibar Telecom Ltd Vs. Petrojuel Tanzania Ltd,** Civil Appeal No. 69 of 2014, Court of Appeal (unreported) which held that by remaining calm one insinuates acceptance to the changed situation.

He continued contending that, also by convening a meeting shows one agreed to all the resolutions made to that meeting, including the issue of deduction of salary as per exhibit D1 (Letter for rectification of salaries) reflecting the resolution to be put in motion by the applicant. He stated that the applicant was also present in the meeting and was equally informed on issue of salary deduction. That, the evidence shows that, this fact was not challenged in anyway by the applicant during trial at CMA. He argued that, the applicant averment that he was promised that he will be given the same amount of the former salary of 1,350,000/= was not

proved at trial and even when he was asked during cross examination he admitted that there was no written document to that effect, but he was orally promised. Also he stated, as per exhibit D1 the issue of NSSF contribution was also clearly sorted to remain the same as under the former salary of 1,350,000/= and not at the deducted salary of 578,000/=other proof comes from receiving terminal benefits.

Mr. Sangúdi submitted that the applicant received a termination letter on 13rd January, 2020 on which all his terminal benefits was given as seen under exhibit D2 (Barua ya kupunguzwa kazini). He stated that the applicant received all his terminal benefits to the tune of 1,928,668/= consented by indorsing his signature and all were calculated in the deducted salary. In his view re – claiming on terminal benefit amounts to double payment.

On the issue of whether there was valid reason for salary deduction he submitted that the respondent lawfully reduced the applicant's salary because there was an agreement to that effect. In his view it is important to note that parties were regulated under employment contract they entered therefore their relationship and affairs were to be in adherence to the contract. He continued that the contract which they entered (exhibit

P1) allowed making changes when necessary. Pg. 2 of Exhibit P1, at the bottom of the page and "Masharti Mangineyo". He stated that changes of salary were also allowed under the contract and that section 28 of the CAP. 366 R.E. 2019 refers to collective agreement which cannot apply into this circumstance. He continued that this is the agreement between trade union, employee and employer, in our case all terms were in accordance to CAP. 366 R.E. 2019.

He further submitted that the reason for salary was also provided in exhibit D1 as being financial difficulties by the company and it was one of the reasons provided and the parties consented to. To support his point he referred the case of **Ngorongoro Chino Lodge Vs. Joshua Moses Bayo and 4 others** Labour Revision No. 56 of 2021 Philip J. were it was stated that the key issue was centred on whether there was contract for salary deduction of which the respondent proved that there was. Then he prayed for the applicant's application to be dismissed.

In rejoinder Mr. Mafwele submitted that CMA based its decision on conduct of the applicant. He stated that the employment of the employee is governed by rules and regulations and cannot be based on conduct of applicant.

He continued that the applicant believed that the employer deducted his salary and retained the deductions and retained NSSF deduction it is usually based on salary one is getting. He stated the counsel did not state why upon deduction of salary the amount paid to social security find did not change.

He submitted further that, it was stated at CMA that the meeting was convened on August 2016, 12th but the meeting was prepared when the issue was at CMA. In his view, it was an afterthough after they were taken to court.

He stated that on the issue of waiver, the applicant continued to work on the understanding that his salary was retained because social security fund deductions remained the same and that was what made him believe that he will be paid arrears thereafter.

On the issue of terminal benefits, he stated it includes NSSF deduction, it was paid on reduced amount that is why this matter is before this court today. He was of the view that the discussion touching remuneration of applicant/employees has to be approved by the company as a whole, but not by individuals.

After perusal of parties' submissions, CMA records and exhibits this court has been called to determine whether there were salary arrears and to what reliefs do parties are entitled to.

On determination of the issue at hand, there is no dispute that the applicant was the employee of the respondent. Also, that at some point of working the applicant's salary was deducted and later on he was terminated from employment. The dispute araised after the termination of the employment contract of the applicant as the advocate for the applicant stated that he was not consulted by the respondent on deduction of his salary. Whereas the respondent through her advocate stated that the respondent consulted the applicant and they agreed to salary deductions.

The law under section 15(4) of CAP. 366 R.E. 2019 states that: -

> *(4) Where any matter stipulated in subsection (1) changes,* ***the employer shall, in consultation with the employee, revise the written particular to reflect the change and notify the employee of the change in writing (Emphasis is mine).***"

This provision of the law clearly stipulate that when any changes needed to be done in the contract the employer has to first consult the employee and then put the changes in writing. The word is **"shall"** that means it is a

mandatory procedure. In the case at hand the respondent alleges that she was in agreement with the applicant regarding the issue of salary deduction, but there is no documentary evidence that was produced categorically to that effect. That agreement can only be inferred from the letter by the respondent of 12th August, 2016 directing the accountant to reduce employee's salary for the management cadre (applicant being one of them) as per what they had agreed (see exhibit D1). For easy reference the letter reads in part that: -

"*...Kufuatia kikao cha Menejimenti kilichofanyika ofisini kwa Mkurugenzi (Gawile/Geofrey/Dunia) ilikubalika kwamba kutokana na kuyumba kwa hali ya Kampuni mishahara ya wafanyakazi walio katika kada ya Menejimenti wapunguziwe mishahara kama inavyoonekana kwenye jedwali hapa chini kuanzia mwezi wa Agosti, 2016.*
Hivyo ninakuagiza kurekebisha mishahara ya Menejimenti kwa mujibu wa makubaliano hayo kama ifuatavyo;

..." to mean
Please refer to the heading of this letter.
Following the Management meeting held at the Director's Office (Gawile/Geofrey/Duma) it was agreed that due to the distabilization of th Company's situation the salaries of the employees in the Managemer Department should be reduced as shown in the table below from Augus 2016.

I therefore instruct you to adjust the salaries of Management in accordance with the agreement as follows..."

The letter made reference to a meeting that resolved salary deductions for the management cadre employees, applicant inclusive as shown by the same letter. The deductions started in August 2016. And the date the applicant was terminated from his employment was on 13th January, 2020 being three years and almost five months. For that period the applicant remained quiet as record does not show if he ever complained at any authority about his salary deduction.

Therefore, even though there was no copy of that agreement to salary deductions was tendered apart from being referred to in the above quoted letter, the act of the applicant to continue working with the respondent for over three years and five months receiving the deducted amount of the salary, reasonably insinuates his knowledge of the said agreement and was comfortable with it. He only went to file for a labour dispute at CMA after being terminated, but claiming for what he had already voluntarily waived. This shows that if he could have not been terminated, he could have continued staying mute over the matter. In the case of **Wananchi Group Tanzania Ltd vs Maxcom Africa Ltd**, Commercial case No. 120 of 2019 (unreported) as was cited in the case of **IBM Tanzania Limited vs**

Sunheralex Consulting Co. Ltd, Commercial Case No. 9 of 2019, High Court at Dar es Salaam at page 10 the contract is not only established by presence of a written and signed document, but can be established from the conduct of the parties.

This proves that even though the applicant and the respondent had no written agreement on deduction of the applicant's salary, the act of the applicant to continue to work with the respondent under the deducted salary for over three years and five months amounted for the agreement of the deduction of his salary.

Again, there is no concrete evidence to prove that the salary arrears were to be paid upon improvement of the situation as argued by the applicant. And this is not proved by the fact that the pension funds deductions remained to be pegged at the salary before deductions as he also submits. This is because, if exhibit D1 is the document we infer the agreement between these parties from, then, within its four corners no such resolution can be glanced. It remains that the applicant failed to prove the fact he alleged contrary to the provision of the section 110 of the Law of Evidence Act, Cap 6 RE 2019.

Based on the above finding, I find no reason to fault the CMA in its findings in this matter. The application therefore is devoid of merits. I proceed to accordingly dismiss it. No order as to costs as this is the labour matter.

M.P. OPIYO,

JUDGE

30/05/2023