**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 404 OF 2022**

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. REF: CMA/DSM/KIN/769/2020/231, Ng'washi, Y.: Arbitrator, Dated 26th October, 2022)

**MIVUMONI ISLAMIC SEMINARY..... APPLICANT**

**VERSUS**

**ABDULAZIZI ALLY KAZEMBE..... RESPONDENT**

**JUDGEMENT**

25th April – 30th May, 2023

**OPIYO, J.**

This application was filed by the applicant asking this court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) with the labour dispute No. CMA/DSM/KIN/769/2020/231 of Ng'washi, Y. Arbitrator held on 26th October, 2022.

Its background was that the respondent was employed by the applicant and later on was terminated. The respondent being disatsfied with termination filed for a labour dispute at CMA. The matter was heard and the award was in favour of the respondent. The applicant was ordered to

pay the respondent the total sum of TZS. 4,340,000/=. The applicant was aggrieved resulting to this application for revision. The application is supported by the applicant's affidavit sworn by Omary Saidi Msumba, Director of the applicant. Grounds for revision be: -

1. That, the honourable arbitrator erred in law after not considering the final submission of the applicant in which the honourable arbitrator wrote in his decision that the final submission of the parties would be taken into account.
2. That the honourable arbitrator erred in law when he failed to consider the evidence of the applicant's witness including their exhibits.
3. That the honourable arbitrator erred in law when he stated that the applicant did not prove the reason for terminating the employment, while at the same time the arbitrator received a letter of termination of employment in accordance with the application, and received as exhibit A1.
4. That, the honourable arbitrator errored in law when he refused to receive the applicant's evidence on the ground that the document

was not authentic i.e. it was a copy, while the letter has a stamp with fresh ink.

The matter proceded orally. Both parties were represented by personal representatives. Mr. Cosmas Maige for the applicant and Mr. Mustafa Said for the respondent. Mr. Maige in support of the application submitted that CMA did not consider the termiantion letter that showed the applicant had good reasons. He stated that testimonies of the applicant was heavy and even CMA considered that the fact at page two of its Judgement. He continued that, page 3 and 4 of CMA the respondent claimed that he did not know the reason for his termination while he admited that in his termination letter there was change in security detail of the company.

He submitted further that, in the counter affidavit he admited that applicant had a reason for termination when he admitted to paragraph 14 of the applicant's affidavit (see paragraph 11 of his counter affidavit). He stated further that the respondent knew the intention of the applicant that is why on 16/09/2020 the applicant started to execute their agreement by making payment as agreed as per the annextures attached which was to be pay for 3 months salary in three different monthly instalments.

Mr. Maige submitted further that the respondent started to receive TZS. 310,000/= as first instalment as per exhibit M1. The respondent received the letter to terminate employment on 07/09/2020 but kept quiet for 19 days without complaining to the applicant about it until when he started receiving ist instalment. He continued that, the respondent received the money on 26/09/2020 based on the same agreement.

In his view, the respondent breached the agreement that was mutually agreed between them. He then prayed for the decisions of CMA to be quashed and set aside so as to allow the applicant to finish paying the respondent as agreed.

Against the applicant's submission, Mr. Said submitted that the CMA award was valid and evidence of both parties were received without technicalities he then prayed for the application to be dismised for lack of merits.all their submissions were well considered by the CMA resulting to the award they reached.

On the second ground he stated that, the personal representative for the applicant stated that there was agrement between the applicant and respondent to terminate employment but he brought no evidence to prove

existence of such agreement. He continued that 26/09/2020 the receipt tendered was for respondents September salary and that the same was tendered without any objection.

Further, Mr. Saidi submitted that the personal representative for the applicant has not shown how CMA erred in reaching the award. To him what the personal representative for the applicant stated is different from what he set to be his grounds for revision. For him there was no plausible grounds for that matter. He continued that the personal representative for the applicant never brought any reason for termination of emplyment or his entitlement upon termination. He then stated that the agrement for 3 months payment stated was invalid as the law requires 12 months compensation.

He continued that there was no evidence to prove procedure that was used in terminating the respondent's employment. He then stated that the law is clear on procedure to follow in terminating employment and does not involve just writing termiantion letter. He then prayed for the application to be dismissed for lack of merits.

In rejoinder Mr. Maige submitted in CMA's decision at page 4 the temination letter was admitted as exhibit, according to which the respondent was to be paid his entitlement in three consecutive instalments and he had already received the first instalment. He argued that the payment was not September salary as claimed by the respondent since the employer could not pay salary to someone he has already termianted from employment.

After perusal of parties submissions, CMA proceedings and exhibit tendered, the task of this court is to determine whether there was a reason for termination and whether the procedure was followed in terminating the respondent's contract of employment.

On determination of issues raised, there is no dispute that the respondent was once employed by the applicant. Also that he was later on terminated; this is according to exhibit A1. The dispute here is; the complaint by the applicant that she terminated the respondent by way of agreement and that she had reason and she followed procedure on terminating the employment contract of the respondent. While the respondent contends that his employment contract was terminated unfairly for there being there being no reason for termination and also procedure to it was not followed.

On the issue of termination section 37(1) and (2)(a) and (c) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. Under sub section 2 of the same section a termination of employment by the employer is unfair if the employer fails to prove that he had a valid reason for termination and that the emplyment was terminated in accordance with a fair procedure.

The above two elements in the above provision of law on validity of reason for termination and sdherence to procedure must be proved by the employer in terms of section 39 of CAP. 366 (supra) which provides that:-

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

As the law provide, in our circumstance where the termination was by the employer, the one who has obligation to prove the fairness of termination is the employer. In determining the issue raised of whether there was a reason for termination; the applicant stated that she had reason for termination. The reason stated was change of security detail as they started using security companies services as per termination letter

tendered as exhibit during trial. And in terms of adherence to procedure she stated that they deployed termination by way of agreement between her and the respondent. The respondent denied that allegation by stating that there were no agreement entered between them to that effect.

This court is very much aware that termination by agreement is one of the ways recognised by the law to terminate the employment contract between parties. This is according to rule 3(1)(a) read together with subrule (2)(a) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 which identify termination of employment by agreement as one of the lawful termination of employment under the common law.

Going through CMA records and exhibits tendered there is no document showing that there was an agreement between the applicant and the respondent to terminate their employment contract. The applicant ought to prove by tendering the document which shows the agreement reached between her and the respondent on terminating the employment contract of the respondent. This is because the law under section 110 of the Evidence Act [CAP. 6 R.E 2022] provides for whoever desires any court to give judgement as to any legal right or liability dependent on the existence

of facts which he asserts must prove that those facts exist. Thus, in our case, the applicant ought to prove at CMA the facts of existence of the agreement he alleges. The case of **Barelia Karangirangi vs Asterua Nyalwamba**, Civil Appeal No. 237 of 2017, CAT at Mwanza puts emphasis on that requirement by stating that, at page 7

> *"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."*

This means the applicant who was the employer of the respondent and the one who alleged there was termination of employment contract with the respondent by way of agreement; had all obligations to prove that such agreement existed. By failing to do so and ended up terminating the respondent's employment contract proves that the termination was unfair, albeit procedurally, as no proof of any procedure in reaching agreement

The issue of fairness of procedure is governed by provision is rule 13 of G.N. No. 42 of 2007. Records shows that termination letter and payment voucher only were tendered as exhibits during trial. According to the termination letter, it is clear that the applicant terminated the respondent

contract unilaterally. It does not show that the termination occurred because both parties were in agreement. It merely communicated the applicants reason for termination and what the applicant was entitled to in the circumstances without making any reference to any prior consultation or agreement between them to that effect. For easy reference the letter reads: -

*"07/09/2020*

*NDUGU: ABDUL AZIZI KAZEMBE IDARA: ULINZI*

*YAH: KUSITISHWA KWA AJIRA*

*Rejea kichwa cha habari hapo juu.*

*Nasikitika kukufahamisha kwamba* ***uongozi wa MIVUMONI ISLAMIC SEMINARY umeamua kufanya mabadiliko ya mfumo mzima wa ulinzi*** *na usalama katika kituo chetu na kuweka mfumo mpya wa ulinzi wa kampuni ili kuimarisha zaidi ulinzi wa kituo, wanajumuia na mali hasa kutokana na matukio mbalimbali yaliyotokea kituoni katika siku za hivi karibuni.*

*Hivyo kutokana na sababu tajwa hapo juu* ***uongozi wa shule umeamua kusitisha ajira yako katika idara ya ulinzi kuanzia leo siku ya Jumatatu tarehe 07/09/2020.*** *Tunatambua na kuthaminI mchango wako wa dhati katika kituo chetu. Uongozi unatoa shukurani za dhati kwako ktokana na utumishi wako mwema. Tunaomba radhi kwa yote yaliyojitokeza katika kipindi chote ulichokuwepo kazini pia kutokana na usumbufu wowote utakaojitokeza kutokana na madadiliko hayo.*

*Uongozi wa shule utawajibika kukulia deni la mshahara wako wa mwezi Mei (kipindi cha janga la Corona). Pia utalipwa mishahara yako ya miezi*

*mitatu kuanzia Septemba, Oktoba na Novemba 2020. Malipo hayo hayatalipwa kwa mkupuo mmoja bali yatakuwa yakilipwa kwa awamu.*
*Pamoja na dua nakutakia maisha mema.*
*MOHAMED S. AWADH*

*MKUU WA SHULE (msisitizo ni wangu)"*

Reterally translated the wording of the above letter are that:- '*I regret to inform you that the Leadership of the MIVUMONI ISLAMIC SEMINARY has decided to reform the entire security and security system at our facility and to employ a new corporate security system to further strengthen the protection of the facility, community and property, especially of the various incidents that have occurred at the station in recent days.*
*Therefore, for the above reasons the school administration has decided to terminate your employment at the Department of Security from Monday 07/09/2020. We recognize and appreciate your sincere contributions to our facility. Leadership gives you heartfelt thanks for your good service. We apologize for all that has happened during your time at work and for any inconvenience that may arise from this change.*
*The school administration will be responsible for raising your salary debt in May (the period of the Corona pandemic). You will also be paid your three months salary from September, October and November 2020. The payment will not be paid in one lump but will be paid in installments.*
*With prayer I wish you a good life.'*

The termination letter as quoted and literally translated above shows that the school administartion is the one which made a decision to terminate the employemt contract of the respondent. In my view, this constitutes a bare truth that the applicant did not follow any procedure on terminating the employment contract. Thus, resulting to unfair termination as claimed by the respondent. Thus the applicants grounds on that claim are dismissed.

After the above finding, I would have simply dismissed the application for lack of merits, if not for what transpered after the alleged termination. The applicant states that the responent on 26th September 2020 received the amount equal to one month salary as part of the implementation of the alleged agreement to terminate their contract. The respondent claims it was a usual september salary. The records show that he received the termination letter complained about on 7th September, about 20 days before he received what he termed as his monthly salary for september. The issue is how could someone who is already terminated, supposedly unfair, be entitled to a salary there after? Obviously, that was not a september salary, but implementation of what was stated in the termination letter. Therefore, had it been that the the letter was out of

agreement, the respondent would have been estoped from repudiating what they had agreed after starting its implementation. That means, he knew about the termination well in advance before receiving the alleged September salary. From the records, the CMA award amounted to a total of 4,340,000/ including the amount of 310,000/= as one month salary in lieu of notice. This is irrespective of the fact that the applicant had received the same amount 20 days after he was allegedely unfairly terminated. In my view this should amount to the one month's salary in lieu of notice as it was received after the respondent knew about the termination. For the reasons let the amount of 310,000/ he received he received as September salary, almost a month after he was teminated be deducted from the total amount of the award by the CMA which is 4340,000/=. After deduction the applicant is entitled to the total of Tshs. 4,030,000/-only.

Consequently the appeal partly allowed to the extent explained. I make no order as to costs this being a labour matter.

**M.P. OPIYO,**

**JUDGE**

**30/05/2023**