IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 58 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Temeke, Labour Dispute No. CMA/DSM/KIN/488/21/16/2022 by Hon. Kiangi, N. Arbitrator dated 27th January, 2023)

BETWEEN

ROYAL OVEN LTD ..... APPLICANT

VERSUS

BENJAMIN AMOS ..... RESPONDENT

JUDGEMENT

Date of last Order: *19/06/2023*
Date of Judgement: *27/06/2023*

MLYAMBINA, J.

The Applicant being aggrieved with the proceeding and order of the Commission for Mediation and Arbitration (herein CMA) of the *Labour Dispute No. CMA/DSM/KIN/488/21/16/2022* delivered by Hon. Kiangi, N. Arbitrator dated 27th January, 2023 asked this Court to call, examine and revise them.

Briefly, the Respondent was employed by the Applicant in the year 2019. Later on, in the year 2021, the Respondent alleged to be terminated by the Applicant unfairly. He then filed a Labour Dispute at the Commission of Mediation and Arbitration (herein CMA). The application was heard and the Award was in favour of the Respondent. It was determined that the

termination was both substantially and procedurally unfair. That prompted the Applicant to file this revision application. The application is supported by the affidavit sworn by Jamila Shella (Principal Officer) of the Applicant. The grounds for revision are:

1. That, the trial honourable Arbitrator erred in law and in fact upon holding that the Applicant herein did not follow legal procedures of termination.
2. That, the trial honourable Arbitrator erred in law and in fact upon holding that the Applicant herein has failed to prove reasons for termination of the Respondent herein.
3. That, the trial honourable Arbitrator erred in law and in fact for not properly evaluating documentary evidence tendered during trial.

The matter was heard by way of written submission. Mr. Benard A. Chuwa, Advocate represented the Applicant while Mr. Mlyambelele Abedinego Levi Ng'weli appeared for the Respondent.

On the first ground, Mr. Chiwa submitted that; even though *Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 (herein the code)* reading together with *Section 37 of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]*

(herein ELRA) provides for procedures of termination but those procedures are not to be followed to the checklist.

It was the view of Mr. Chuwa that; the employer has to prove that the basic issues were considered and adhered to. To support the point, he referred to the case of **Rungwe District Council v. Daudi F. Juvenal**, Revision No. 27 of 2013, Labour Division at Mbeya, LCCD, 2014, part II, p.295. He added that; in the matter at hand, the Respondent summoned the Respondent to a meeting, they agreed to end the employment contract mutually. The Respondent was given right to be heard and was promised for another meeting all as per exhibits P1(termination letter), P3(emails correspondence) and P4 (majibu ya barua ya kusitisha ajira kwa hiari, to mean; response to voluntary employment termination letter).

Further, Mr. Chuwa submitted that; the efforts to comply with the procedural requirements were frustrated by the Respondent who after the meeting filed a complaint to the District Commissioner's office at Kinondoni and letter at the CMA. He added that; the Respondent's actions created hardships to the Applicant to comply with procedural requirement to the letter. He then supported his point by referring to the case of **Bakari Athuman Mtandika v. Superdoll Trailer Kimited**, Labour Division at Dar es Salaam, Revision No. 171 of 2913, LCCD, 2014-part II, p. 128. He then

prayed to this Court to hold that procedures were adhered to but did not come to an end for the matter was prematurely filed at the CMA.

On the second ground, Mr. Chuwa submitted that; the Arbitrator ignored evidence given by DW1 which were also admitted. He stated that new investors took over operations of the Applicant from the previous owners and that the Respondent was aware of the change of ownership, management and review of contracts by new management. He added the testimony of reviewing contracts was not cross examined by the Respondent.

Mr. Chuwa went on to submit that; failure to cross examine meant fully agreeing with the evidence. To cement the point, he referred to the case of **Goodluck Kyando v. Republic** (2006) TLR 363, p. 366. He then prayed for this Court to hold that arrival of new investors was a reason and justified termination as stated in *regulation 9(4)(d) of the code (supra)*. He lastly added that the Arbitrator did not touch the issue of new investors in reviewing the Respondent's contract. Mr. Chuwa considered it as a serious omission.

On the third ground, Mr. Chuwa submitted that there was no termination but rather ongoing negotiations between the Applicant and the Respondent about ending the employment on mutual agreed terms as

provided under *Rule 4(1) of G.N. No. 42 of 2007*. Mr. Chuwa added that; the Arbitrator wrongly based her arguments on exhibit P1 and ignored exhibits P3 and P4. Mr. Chuwa stated that the Arbitrator choose some of paragraphs in the letter and ignored other key words in the said letter.

It was the further view of Mr. Chuwa that the omission to evaluate exhibit P3 and P4 is fatal. To support his point, he referred the case of **Hussein Idd & Another v. Republic** (1986) TLR 166. He then added that since the matter was prematurely filed at CMA, the Respondent is not entitled to any relief. Finally, he prayed for the Award to be set aside and the application to be allowed.

Against the application, Mr. Ng'weli submitted that *Section 37(2) of ELRA (supra)* gives the obligation if the termination was fair to the employer. He added that failure to comply with *Section 37 (2) (supra)* amounts to breach of requirements. He supported his point by referring to the case of **Jimson Security Services v. Joseph Mdegele**, Civil Appeal No. 152 of 2019, Court of Appeal at Iringa., pp 6 and 7 (unreported).

Mr. Ng'weli continued to reply that; exhibit P1 proves that the Respondent did not agree to the attempt of ending the contract. He same was not objected by the Applicant. He continued that the mutual agreement

between the parties was never proved by the Applicant and hence shows that the Applicant did not follow procedure. He added that there were no previous meetings, even the promise of the Applicant (exhibit P4) was never met.

Mr. Ng'weli submitted further that it was an after sought for the for the Applicant's Advocate to state that the actions of the Respondent created hardship to the Applicant to proceed with procedure for termination. Such fact was not stated at the CMA. He added that; the Respondent was terminated on 3rd November 2021(exhibit P1). The other series of transaction followed after the termination. He then distinguished the case of **Bakari Athumani Mtandika** (supra) with the case at hand.

On the second ground, Mr. Ng'weli submitted that DW1 stated that the reason was due to change of administration which suggested to omit some of employees, Respondent being one of them. Thus, if that was so, the Applicant ought to follow procedure provided under *Section 38 of ELRA,* of which he did not. He added that the Applicant was supposed to give notice to the Respondent and disclose all relevant information on the intended retrenchment but he had no reason for termination.

On the third ground, Mr. Ng'weli submitted that the Arbitrator while composing the judgement determined every part of evidence which led to the holding of unfair termination of the Respondent. He distinguished the referred case of **Hussein Idd & Another** (supra) to the matter at hand. At the end, he prayed for the application to be dismissed with costs as it has been brought to delay the implementation on the Respondent's right.

In rejoinder, Mr. Chuwa reiterated what he his submission in chief and stated that retrenchment procedure as provided under *Section 38 of ELRA* is a rigid procedure. He added that the best way was negotiation under mutual discussion which they applied.

On perusal of what has been submitted by the parties, I find the issues for determination are: *One*, whether there was termination of Respondent's employment contract by the Applicant. *Two,* if the answer is in affirmative; whether the termination of employment contract had reason. *Three*, whether the procedure for termination of employment contract was followed. *Four*, to what relief(s) do parties entitled to.

Dealing with the first issue, the Applicant stated that the matter at CMA was filed prematurely as they were still in negotiation mode with the Respondent. Whereas the Advocate for the Respondent stated that the

Respondent was unfairly terminated as there were neither reason nor procedure followed. He based his argument on exhibit P1.

The Court in perusal of exhibit P1 which is *"KUSITISHA AJIRA KWA MAKUBALIANO YA HIARI"* to mean termination of employment by agreement. Termination be agreement is one way of terminating of employment contract. This has been provided under *Rule 4(1) of G.N. No. 42 of 2007 which read:*

> An employer and employee shall agree to terminate the contract in accordance to agreement.

Looking at exhibit P1 closely, it was not signed by the Respondent. This means the agreement did come to its finality as it was not agreed by both parties. In order for the contract to be binding, it has to be entered by mutual agreement of both parties. This is according to *Section 10 of the Law of Contract Act [CAP. 345 Revised Edition 2019] which read:*

> All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

This shows that there was no termination of employment contract between the Applicant and the Respondent because the Respondent did not agree to it. This is according to exhibit P4 which read:

> YAH: MAJIBU YA BARUA YA KUSITISHA AJIRA KWA HIARI
>
> Husika na kichwa cha Habari hapo juu na barua yako ya tarehe 03.11.2021. Naandika barua hii kutokana na barua yako tajwa hapo juu iliyonitaka nikubali kusitisha ajira kwa makubaliano ya hiari.
>
> Sikubaliani kusaini barua hiyo kwa sababu zifuatazo...
>
> ..."

Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 states clear that the matter has to be taken to CMA for unfair termination after the employer terminates the employee or made the final determination for termination. For easy of reference *Rule 10 (1) (supra)* read:

> Disputes about the fairness of a employee's termination of employment must be referred to the Commission within thirty days *from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate* [Emphasis is mine]

Also, in the case of **Ayubu Alphonce Rubale v. Global Media Solutions Ltd,** Labour Revision No. 393 of 2022 at Dar es Salaam (unreported), it was held that:

> This means termination or final decision to terminate shall be in existence for a complaint to be lodged.

It follows therefore that till the final decision of termination is made that is when the employee has to take the matter to the CMA. In the matter at hand, the Arbitrator held that the termination was not fair basing on exhibits P1 (termination of employment by agreement) which was not signed meaning not finalized. He also based his decision on exhibit P3 (emails conversation between parties promising another meeting for more elaboration concerning separation by agreement) and exhibit P4 (response for not signing the agreement of termination letter). All the exhibits proves that the matter was still on motion (was not finalized).

Relying under *Rule 10 of G.N. No. 64 of 2019*, I fault the Arbitrators' findings. The records show and proves that the matter between the Applicant and the Respondent was not finalized and the employment contract of the Respondent was not terminated.

I therefore grant this application on merits. The CMA Award is quashed and set aside. Since this is the labour matter, I order no costs to either party.

Y.J. MLYAMBINA
JUDGE
27/06/2023

Judgement pronounced and dated 27th June, 2023 in the presence of Jamila Shella, Principal Officer of the Applicant and Counsel Sunday Msomi for the Respondent.

Y.J. MLYAMBINA
JUDGE
27/06/2023