IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 73 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 17th day of February 2023 in Labour Dispute No. CMA/DSM/KIN/145/21 by Muhanika, Arbitrator)

REDAVE NURSERY AND PRIMARY SCHOOL..... APPLICANT

VERSUS

EMMANUEL E. NDOWO.....RESPONDENT

JUDGEMENT

Date of last order: *19/07/2023*

Date of Judgement: *28/07/2023*

MLYAMBINA, J.

In this revision application, the Applicant is seeking for this Court to call for the record of *Labour Dispute No. CMA/DSM/KIN/143/21* from the Commission for Mediation and Arbitration of Dar es Salaam (herein CMA) before Mhanika J. Arbitrator to satisfy itself on the legality, correctness, propriety, set aside and quash the same.

The historical background of this application can be traced from the affidavit of the Applicant, counter affidavit of the Respondent and CMA record, the Respondent was employed by the Applicant as a Teacher in a position of Headmaster under a fixed term contract of seven years. It was alleged by the Respondent that his termination resulted from nonpayment of his salaries.

According to the Applicant, the termination was initiated by the employer after claiming his salary arrears. Being resentful with the employer's decision of terminating his employment by breaching the contract, the Applicant filed the *Labour Dispute No. CMA/DSM/KIN/143/21* claiming to have been unfairly terminated both *substantively* and *procedurally* Before the CMA, the Arbitrator found that there was a constructive termination, followed by breach of contract. Hence, the Arbitrator awarded *compensation of 58 months as remained period, salary of January 2021, leave, 10 days salary arrears and salary arrears of October, November, and December 2020 to the tune of TZS 28,523,076/=*. This decision aggrieved the Applicant which triggered this application for revision.

Along with the Chamber summons, the Applicant filed an affidavit sworn by Levina Alphonce, Applicant in which after explaining the series of events leading to this application, alleged that the Respondent deserted the office for two weeks, before deserting the office, his attendance was contrary to school regulation by not signing attendance register. Paragraph 15 to 19 of the Applicant's affidavit contains five major legal issues as reproduced hereunder:

i. That, the Arbitrator illegally erred in law and facts by creating a non-existing witness (DW2) and explanations on the part of the Applicant; an act that is against the required ethical manner.

ii. That, the Arbitrator illegally erred in law and in facts by changing the nature of dispute from breach of contract to constructive termination of employment.

iii. That, the Arbitrator erred in law and facts by agreeing that the Respondent was terminated by letter, while the same was not proved by the Respondent during the hearing.

iv. That, the Arbitrator erred in law and facts to reject the proved documentary evidence by the Applicant.

v. That, the honourable Arbitrator misdirected herself to entertain the premature dispute which was not effected by the Applicant.

The Application was opposed through the counter affidavit sworn by Mr. Emmanuel E. Ndowo, Respondent.

The application was heard orally. The Applicant was represented by Mr. Salum Rugwiza, Applicant's Administrator, while the Respondent was represented by Mr. Nehemia Munga, Personal Representative. I appreciate, their rival submissions which will be duly considered.

To start with the first ground, Mr. Rugwiza submitted that the Arbitrator erred in law and facts by creating a non-existing witness (DW2) and explanations on the part of the Applicant, an act that is against the required ethical manner. He stated that at CMA only one witness (DW1) namely Revina Uisso testified for the Applicant. There was no DW2 as reflected in the Award.

It was submitted by Mr. Rugwiza that the proceedings do not reflect that there was DW2 who testified at CMA but the Award at page 8 line 14 and 15 as well as at page 22 line 14 & page 23 line 10 reflects to have DW2.

On second issue, Mr. Rugwiza submitted that the Arbitrator erred in law and facts by changing the nature of dispute from breach of contract to constructive termination of employment. CMA Form No.1 item three shows that it was breach of contract. But the Arbitrator in his Award directed his mind on constructive termination of which was not part of the claim.

As regard the third issue, Mr. Rugwiza submitted that the Arbitrator erred in law and facts by agreeing that the Respondent was terminated by letter while the same was not proved by the Respondent during the hearing. He added that the CMA Form No.1 exposed at Part B of the form

the complainant ticked that he was terminated by letter. The letter presented at CMA was not a termination letter but it was a letter requiring him to come and handle over the school properties and get his explanation.

On fourth ground, Mr. Rugwiza submitted that the Arbitrator erred in law and facts to reject the proved documentary evidence adduced by the Applicant. He stated that the Arbitrator admitted some documents, but he never considered them during hearing. Such documents are Exhibit D-2 (a Staff Daily Attendance Register from 2018 – June 2021) and Exhibit D-1 (letter to show cause). He added that; the School owner used it for verbal reprimand but the Arbitrator failed to consider Exhibit D-1.

Lastly, it was submitted by Mr. Rugwiza that the Arbitrator misdirected herself to entertain the pre-mature dispute, which was not initiated by the Applicant, as there was no termination letter, but it was a verbal reprimand seeking to explain his absence from working. He thus prayed for this Court to nullify and set aside the Award of CMA.

In reply to the first issue, Mr. Nehemia submitted that it was a typo error to write DW2. All the exhibits were tendered by DW1 and it is true there was only one witness (DW1).

On the second ground, Mr. Nehemia submitted that the Respondent complained on breach of contract, even the decision issued was based on breach of contract and not constructive termination. The same can be proved at page 24 of the Award, as the Arbitrator ordered compensation of 58 months as the remained period of the breached contract.

As regards to the third ground, Mr. Nehemia submitted that it is true that the employer gave the Respondent a letter dated 8th February 2021, requiring him to handle over the school properties and explain the employee absence. He stated that the Applicant absenteeism from the office for more than three months was resulted by Police case.

On allegation regarding Exhibits, Mr. Nehemia submitted that the Arbitrator considered all the five exhibits tendered and admitted.

On the fifth ground, it was argued that the matter was not premature dispute, as the Respondent was released from the allegation of misusing school fees, but the Applicant never prosecuted the matter. Thus, he prayed for this Court to sustain the CMA award.

In rejoinder, the Applicant representatives reiterated his submission in chief but insisted it is not true that the Respondent was in the Police hands for three months. He added that; it is not fair to benefit from the typo errors.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. *First; whether the Applicant has adduced sufficient grounds for this Court to revise the CMA Award issued in Labour Dispute No. CMA/DSM/KIN/145/21. Second, to what reliefs are the parties entitled?*

In addressing the first issue; whether the Applicant has adduced sufficient grounds for this Court to revise the CMA Award, I find prudent to address the five legal issues raised in the Applicant's affidavit which fall under one question as to; *whether the Award was properly procured by the Arbitrator.*

To start with the first issue; whether it was proper for the Arbitrator to create non-existing witness, the Applicant contended that DW2 was not her witness. For that reason, the Applicant was of the view that the evidence was not properly analysed. On the other hand, the Respondent maintained that it was just a typal error.

I have had time to go through the record. I found page 1 of the CMA proceedings reveal that the Applicant had only one witness namely Levina Alpohonce Uisso (DW1) who testified before the CMA. There were no two witness as contested by the Applicant. However, in Award the

Arbitrator findings relied on testimony/evidence of DW1 and DW2 as indicated at page 7 paragraph 2 and Page 8 paragraph 2.

Again, the record reveals that the impugned Award was composed by the same Arbitrator namely *Muhanika* who heard the matter. However, the substance of the evidence of DW1 and the alleged DW2 is the same evidence testified by DW1. Indeed, all the exhibits were tendered by DW1 and not the dummy DW2. It therefore follows that it was a typal error to write DW2.

The Applicant's contention could have legal stand if DW1 was not mentioned in the Award. I am of the view that the evidence was properly analysed by the Arbitrator in accordance with *Rule 25(1)(b) of G.N No.67 of 2007* save for the said typal error. Hence, the parties right to be heard was not violated. They were both afforded with the right of cross examining the alleged witness (DW1).

From the above analysis, I am of the view that the evidence of the parties were well evaluated by the CMA. I understand that the effect of not evaluating the evidence has been addressed in the numerous cases, including the case of **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 cited in **Amran Hussein v. Republic,** Criminal Case No. 13 of 2019 in which it was observed that:

It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain... Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at ail in the evaluation or analysis.

Again, in the case of **Anurali Ismail v. Regina** TLR 370 cited in **Seifu Mohamed Seifu v. Zena Mohame Jaribu,** Misc. Land Application No. 84 of 2021, High Court of Tanzania, at Dar es salaam, at page 8 and 9 it was stated that:

A good judgment is clear, systematic, and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported, and if should give sufficiently and plainly the reasons which justify the finding. If should state sufficient particulars to enable a Court of appeal to know what facts are found and how.

Turning back to this application in relation with the above authority, I find that the Arbitrator never created non-existing witness. He even not mentioned the name of such DW2. If there was a mention of DW2 with a creation of new evidence, that could be fatal and contrary the principles of law under *Rule 25(1)(b) of G.N No.67 of 2007.*

In circumstance of the above, it is the findings of this Court that the Award was well composed save for the typal error of writing DW2 while the entire defence evidence was adduced by DW1. Given that the Award was reached with reasons, it follows, therefore, that the Award was rational and logical as it complied with *Rule 22(1) (c) and 25(1)(c) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007.*

Regarding the allegation of changing the dispute from breach of contract to constructive termination, this also holds no water. As indicated at page 21 paragraph 2, the issue of constructive was stated by the Arbitrator at the time of determining reason for termination. The same was justified by Exhibit D-1 (letter of handling his office). Apart from that, the Applicant failed to take any legal action against the Respondent after handling the office all this, fortifying constructive termination. It is well established principle in determining; whether there was constructive termination, five test must be put into consideration. This shortfall has been addressed by the Court of Appeal in the case of **Kobil Tanzania Limited v. Fabrice Ezaov,** Civil Appeal No. 134 of 2017, Court of Appeal of Tanzania, at Dar es Salaam (unreported) citing the case of **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161 and the case of **Solid Doors (Pty) Ltd v.**

Commissioner Theron and Others, (2004) 25 ID 2337 (LAC) at para 28, and the Court come with a view that five things must be considered:

i. *Did the employee intend to bring the employment relationship to an end?*

ii. *Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?*

iii. *Did the employer create an intolerable situation?*

iv. *Was the intolerable situation likely to continue for a period that justified termination o f the relationship by the employee?*

v. *Was the termination of the employment contract the only reasonable option open to the employee?*

From the above authorities, the alleged reasons advanced by the Applicant must be tested to those factors for constructive termination to stand. The same applies in this application, the Applicant intended to end employment relation by not taking any legal action after the Applicant handled the office. That's means, there was a breach of employment contract. On that basis, ground (iii), (iv) and (v) of revision are merged with ground (ii) on the reason that all have the same legal findings.

In the premises, I hereby sustain the CMA Award and dismiss this application for lack of merits. Being a labour matter, I award no costs. It is so ordered.

Y. J. MLYAMBINA

JUDGE

28/07/2023

Judgement pronounced and dated 28th July 2023 in the presence of Salum Lugwiza (Administrator) of the Applicant and Nehemia Munga, Personal Representative of the Respondent. Right of Appeal explained.

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

Y. J. MLYAMBINA

JUDGE

28/07/2023