IN THE HIGH COURT UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 87 OF 2023

(Arising from the Decision of the Commission for Mediation & Arbitration of DSM at Kainondoni in Labour Dispute No. CMA/DSM/KIN/005/21, Abdallah M, Arbitrator, dated 03rd March 2023

SAID HASSAN BITALI.....APPLICANT

VERSUS

SGA SECURITY TZ LTD.....RESPONDENT

JUDGEMENT

Date of last order:-1/8/2023
Date of Judgement:- 11/8/2023

OPIYO, J.

This decision emanates from Revision Application No. 87 of 2023 which was filed by the applicant against the CMA award in a Labour Dispute No. CMA/DSM/KIN/005/21 praying for this Court to call for in order to examine, revise set aside the Arbitral Award of the Commission issued in Labour Dispute No. CMA/DSM/KIN/005/21 dated 03rd March 2023 and any other reliefs as this Honourable Court may deem fit and just be granted.

The background of the dispute leading to this application is grasped from CMA record, affidavit and counter affidavit filed by the parties as stated hereunder. The applicant was employed by the Respondent on 5th October 2019 as a security Guard. On 26th October 2020 he was terminated for the alleged misconduct (absenteeism). Being aggrieved with termination the applicant filed the matter to the Commission, claiming for unfair termination plus other terminal benefits. At CMA the applicant was awarded 6 months' salary compensation plus one 1 month salary in lieu notice, to the total tune of TSZ 1,090,384.61/= on the reason that the termination was substantively fair, but procedurally unfair. Not satisfied with the award the applicant filed the present application.

The application is supported by the applicant's affidavit. The respondent failed to oppose the application by not filing the counter. In his affidavit, the Application has three legal issues which are: -

i. Whether the arbitrator gave weight the Applicant's it deserves.

ii. Whether the employee benefits were legally determined.

iii. Whether the arbitrator was legally presided and the matter was determined on merits.

The record of this application reveals that the respondent had a tendency of non-appearance three times despite of being aware of the matter. Lastly it was scheduled for hearing on 1st August 2023 to afford the parties with a chance to appear. However, the respondent failed to appear leading to the order for ex-parte hearing to be issued. On 2nd August 2023 the respondent, through advocate Asha Nganogera prayed for this Court to set aside *ex-parte* award the same was rejected as the applicant failed to fortify his reason for nonappearance. Henceforth the hearing proceeded ex-parte.

The hearing of the application proceeded orally, whereby applicant appeared in person. Starting with the first the applicant submitted that he stated being sick on 5th October 2020, but the arbitrator did not consider the evidence, including the medical certificates he had submitted before the commission, leading to the wrong finding on absenteeism.

On second issue as to whether the payment was rightly awarded, the applicant submitted that the calculation was not right, as the arbitrator ordered payment of 6 months' salary payment instead of twelve months salary compensation provided by the law. He stated that, the medical insurance payments was collected for 6 months without the respondent

submitting to the same to the insurer, which made him to use his own expenses when he got sick as he was not insured. It was further submitted that the premium was deducted from his account monthly as per salary slips he also submitted for proof, but the same was not ordered to be refunded by the employer whose mistake resulted to him not being covered.

Lastly it was submitted by the applicant that night allowance was not paid properly for longer duration of 8 normal working hours he had worked as shown in his salary slips. The applicant averred that he was just paid salary arrears of two months, in October 2019 he was paid 117,000/= instead of 285,000/= and during termination he was paid for 5 days instead of 26 working days he worked with the employer before termination. According to the applicant, on 5th he left the working premises due to sickness and while continuing with treatment he received a call a call from his employer to attend hearing on 26th. After reporting he was given termination letter. On that decision he is of the view that, his employment was terminated without being heard. He further added that, since the medical chit was tendered before CMA, the arbitrator was wrong in his findings by awarding 6 months' salary instead of 12 months as compensation that is statutorily provided.

The applicant further contended that, in unfair termination the employer owes a legal duty to prove if she had a reason for termination and procedures were followed. He stated that the arbitrator doubted testimony of DW1 Othman Kenyata, Branch Commander and Benjamin Soki (Surgent) that they were not informed about applicant's sickness which started when he was at work. Further to that they did not deny that he was at work on that date and went to the hospital upon their permission. He thus prayed for the application to be granted.

Being guided by the applicant's submissions and his sworn statements together with the record of the CMA, this Court is called upon to address two issues. The first issue is whether the applicant's evidence was properly considered and whether the award was correctly calculated.

It is well established principle that the first Appellate Court has power to re-evaluate evidence and comes with own findings, this Court is standing in the position first appellate Court by exercising its power by way of revision of the CMA awards, it has the same power of re-evaluating evidence of the CMA. In the case of **Venaranda Maro & Another v. Arusha International Conference Centre,** Civil Appeal

No. 322 of 2020, Court of Appeal of Tanzania, at Arusha, (unreported) at page 13. It was held:-

> *"The circumstances upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal are: one, if the inferior Court misdirected itself; or two, it has acted on matters it should not have acted; or three, it has failed to take into consideration matters which it should have taken into consideration and four, in so doing, arrived at wrong conclusion. See: CREDO SIWALE VS THE REPUBLIC, Criminal Appeal No. 417 of 2013 and MBOGO AND ANOTHER VS SHAH [1968] EA 93."*

In answering the first issue all three grounds of revision stated in applicant's affidavit will be considered separately. Starting with the first ground regarding consideration of applicant's evidence, in resolving this question I found it worth to go through the CMA records and noted that exhibit no exhibits of the applicant were ever admitted and named as they were reflected in CMA proceeding. Consequently, they were also not referred to by the arbitrator in his findings, including the medical reports the applicant claimed to have submitted in court. It is true that a trial court or body owes the parties a legal duty of admitting and handling evidence in accordance with the law and subsequently consider all the admitted exhibits (see **Ismail Rashid v. Mariam Msati,** Civil Appeal No. 75 of 2015, CAT, (unreported). However that is only

maintainable upon the same being tendered by the party during hearing not left in the annextures.

It follows therefore that, looking at the proceedings of the CMA no medical chits were admitted as exhibits. They remained as attachments to the application. In law the annextures that were not admitted as exhibits does not form part of the records in the trial court proceedings. This fact was well kept in the case of **Ismail Rashid (supra).** Therefore for the documents including those medical chits claimed by the applicant to have not been considered were not admitted as exhibits. The CMA had no justification of considering documents that were never part of the records. It cannot then be successfully challenged for not looking on those documents. This ground thus fails. The arbitrator gave the necessary weight to whole evidence before it.

On the issue of whether the applicant's terminal benefits were property Determined/calculated, my observation is as follows. The applicants complaint is that calculation of his terminal benefits was not correct. The first blame goes to the fact that the arbitrator ordered payment of 6 months' salary in lieu of notice instead of 12 months' salary. According to Section 40(1) (c) of Cap 366 in case of finding that the termination was unfair the compensation need not be less than 12 months' salary.

Termination referred to here can be both substantively and procedurally unfair. In substantive unfairness it is when there was no reason for termination and procedural unfairness is when the necessary procedure depending on the way of termination was not followed.

There are some circumstances where termination is substantively fair but procedurally unfair fair, like what was decided by the arbitrator in this award. The award stated that as there was unjustified absenteeism, the reason for termination was there and it was a fair reason as per the law. However, it also provided that procedurally the applicants termination was unfair, as the required procedural was not followed for proceeding with disciplinary meeting in absence of the applicant.

In the circumstances, when there is only unfair termination due to procedural lapses compensation is allowed to go below the statutory prescribed minimum of 12 month's salary. This was set clear in the case of **Felician Rutwaza Vs. World Vision, Tanzania Civil Appeal No. 213 of 2019, CAT at Bukoba**, where Court of Appeal in upholding High Courts decision awarding less than twelve month's compensation had this to say:-

"In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect we agree with her entirely... under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation that awarded was by the CMA. We sustain that award.

It follows therefore that, awarding six months' salary, which was less than 12 months' salary statutory minimum as compensation on part of arbitrator was not an error. I find no reason to fault him on that. My decision is backed by the reason that the issue of absenteeism was proved against the applicant. As noted above his alleged medical chits were merely annexed but not admitted as exhibits. And, in my considered view, even if the same could have been received as exhibit, still it could have not helped much as the applicant failed to comply with item 10.3 of his employment contract (exhibit D1) requiring initiative to notify the employer of employee's sickness. The employer could not have known the applicant was given ED when he supposedly went to the hospital. Therefore, irrespective of the claim that he got sick while on duty to the knowledge of his supervisor, still he had a duty of

notifying the employer of what went on afterwards as required by their contract, be it by himself or through a third party.

I now move to ground on the terminal benefits not being properly calculated. The first line of argument by the applicant is that he was entitled to the unpaid overtime that he claimed was not paid to him. Perusal of the records reveals that, in cross examination the applicant agreed that he was getting payment of 285,000/= monthly while his salary was 150,000/= monthly. He came to admit in cross examination that the additional payment was an overtime. upon such admission the same claim could not stand. It is surprising that the applicant is coming before this court claiming over the same entitlement which CMA validity denied him over his own admission of being already paid. This ground also falls.

The applicant also claimed that he was entitled to payment for 26 days in the months he was terminated as the letter was issued to him on 27th day of the month, but the employer had paid him for only 5 days. It is on record that the applicant left work form 5th October claiming to be sick. That means, he had worked only for 5 days in the month of October. The reason for termination which the CMA and this court has

already agreed was valid for his termination is absenteeism from work for more than 5 consecutive days without permission. In the circumstances, the days are calculated up to the day one turned up for work not the day termination letter was issued to him as in reality he had not worked for those days, from 6th to 26th as he was absconded from work. The applicant was therefore not entitled to 26 days' pay he was and still claiming. It was right to pay him for only those 5 days he had actually worked. This ground is therefore dismissed.

The last claim is that, he was not compensated for the amount of medical expenses he had incurred in treating himself while he had been paying monthly premium for medical insurance. In his testimony the applicant insinuated this without specifying any amount he had spent in medical expenses out of medical insurance. He provided no physical evidence in form of a receipt proving any kind of such payments. Further perusal of the records shows that he himself continued to testify that, on the first day of attending treatment he was faced with problems regarding medical insurance because the respondent was not paying the premium to the insurers, but the next time he went to the same hospital he was treated under the medical insurance cover. The respondent denied having not paying for insurance, rather it was just a minor issue

that could have been solved instantly had the applicant communicated any challenge he faced. It is therefore my view that, the applicant did not convince the CMA enough to entitle him to such refund.

From the above observations that indeed there was a valid reason for applicant's termination, but only some procedurally lapses ruined the process, I find no need to depart from arbitrator's findings. I therefore dismiss the application for lack of merits. No order as to costs, this being a labour matter.

M. P. OPIYO,

JUDGE

11/8/2023