IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

unAT DAR ES SALAAM

REVISION APPLICATION NO. 83 OF 2023

(Arising from an Award issued on 27/02/2023 by Hon. Mahindi, P.P, Arbitrator in Labour dispute No. CMA /PWN/KBH /23/2022 at Kibaha)

ALIKO REUBEN MWANGOSI..... 1ST APPLICANT
GASTOR ALEX MKUDE..... 2ND APPLICANT

VERSUS

MAGARE COMPANY LIMITED..... RESPONDENT

JUDGMENT

Date of last order: 19/07/2023
Date of Judgment: 15/08/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 26th June 2021 and 4th June 2012, respondent employed Aliko Reuben Mwangosi and Gasto Alex Mkunde, the above mentioned 1st and 2nd applicants respectively. It is undisputed that, on 28th March 2022, respondent terminated employment contracts of the applicants. Being dissatisfied with termination, applicants filed Labour dispute No. CMA/PWN/KBH/23/2022 before the Commission for Mediation and Arbitration henceforth CMA complaining that they were unfairly terminated. In the Referral Form

(CMA F1) applicants indicated that they were claiming to be paid TZS 36,450,000/= as compensation.

On 27th February 2022, Hon. P.P. Mahindi, Arbitrator, having heard evidence of the parties issued an award that applicants were employed for specific task contracts and that, the said contracts came to an end after completion of the task they were employed to perform. The arbitrator found that, Reuben Mwangosi, the 1st applicant was paid his entitlement and that Gastor Alex Mkude, the 2nd applicant was not paid. With those findings, the arbitrator awarded the 2nd applicant to be paid TZS 2,526,923/= being one month salary in lieu of notice, 21 days he worked for the month of March 2022 and leave pay.

Applicants were dissatisfied with the said award hence this application for revision. Applicants filed their joint affidavit to support the Notice of Application. In their joint affidavit, applicants raised two grounds namely: -

(i) *That the arbitrator erred to hold that respondent had valid reason for termination.*

(ii) *The arbitrator erred to hold that respondent was not bound to adhere to procedures of termination of employment rather was only supposed to serve applicants with 28 days' notice*.

In opposing the application, respondent filed both the Notice of Opposition and the counter affidavit sworn by Mabula Magangila, her Principal Officer.

When the application was called on for hearing, Mr. Edward Simkoko, Personal representative, appeared and argued for and on behalf of the applicants while Mr. Kelvin Mutatina, Advocate, appeared and argued for and on behalf of the respondent.

Arguing the 1st on behalf of the applicants, Mr. Simkoko, personal representative of the applicants submitted that, applicants were terminated due to operational requirement (retrenchment). He submitted further that; respondent did not prove reasons for termination because no documents were tendered to prove that the contract of the respondent in construction of the railway came to an end, but the Arbitrator merely accepted that the project of the respondent with Yapi Merkezi came to an end. Mr. Simkoko submitted further that, in termination letters, respondent indicated that applicants were terminated because the project came to an end. Mr. Simkoko further argued that, the project was going on. In his submissions, Mr. Simkoko, conceded that respondent was subcontracted by Yapi Merkezi. He submitted further that, in terms of Section 37(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], respondent was duty bound

to prove validity of the reason for termination. He cited the case of ***Mohamed Said Mawela & 11 Others V. Chang You Recycling Plastic Co. Ltd,*** Revision No. 35 of 2021, HC (unreported) to support his submissions that respondent had a duty to prove validity of reasons for termination and concluded that respondent did not discharge that duty.

Arguing the 2nd ground, Mr. Simkoko submitted that, respondent did not follow procedure for termination because she only served applicants with termination letter without complying with the provisions of Section 38 of Cap. 366 R.E. 2019(supra). He submitted further that, applicants were not consulted, no notice was issued to the applicants and no criteria for selection. He went on that, respondent was supposed to follow procedures for termination for operational requirement and cited case of ***Sharaf Shipping Agency (T) Ltd V. Bacilia Constantine & 5 Others,*** Civil Appeal No. 56 of 2019, CAT (unreported) to support his submissions.

Mr. Simkoko submitted further that, the arbitrator erred to hold that once 28 days' notice is issued, the employer is not required to comply with the provisions of Section 38 Cap. 366 R.E. 2019(supra). He therefore strongly submitted that, termination was unfair and prayed the application be allowed. He concluded by inviting the court to apply the

provisions of Section 40 of Cap. 366 R.E. 2019(supra) and award applicants a total of TZS 36,450,000/= for unfair termination.

Resisting the application, Mr. Mutatina, learned counsel for the respondent, submitted that applicants were employed for specific task and referred the court to the contracts of employment of the applicants (exhibits R1 and R2). Counsel for the respondent submitted further that, applicants did not tender exhibits to show that they were employed for unspecified period. He submitted added that, applicants admitted that they were working in a project and that after completion of each task, their contracts of employment came to an end. Counsel for the respondent added that, applicants tendered exhibit P1 and P2 showing that their contracts came to an end.

Mr. Mutatina learned counsel for the respondent strongly submitted that, there was no retrenchment and that, retrenchment was not an issue at CMA. He went on that; retrenchment is a new issue that applicants have just raised before this court at the revision stage. He added that, ***Sharaf's case*** (supra) cited on behalf of the applicants is distinguishable because in the application at hand, there was no retrenchment. Mr. Mutatina submitted further that, applicants were paid their terminal benefits after termination, including one month salary in lieu of notice hence they are not entitled for any payment. Counsel

concluded his submissions praying that this application be dismissed for want of merits.

In rejoinder, Mr. Simkoko, the personal representative of the applicants reiterated his submissions in chief and added that, in the CMA F1 applicants indicated that they were retrenched. He concluded that the issue of retrenchment is not new.

I have examined evidence of the parties in the CMA record and considered submissions made on behalf of the parties in this application. In disposing this application, I will start with the issue relating to the nature of termination of the contracts of the applicants.

It was submitted by Mr. Simkoko, the personal representative of the applicants that, applicants were retrenched and that, they indicated in the CMA F1 that they were retrenched by the respondent. On the other hand, counsel for the respondent submitted that applicants have raised retrenchment as a new issue before this court because it was not a subject of the dispute at CMA. I have examined the Referral Form (CMA F1) that was signed by Aliko Reuben Mwangosi, the 1st applicant on 27th April 2022 and find that he merely indicated that the dispute was relating to termination. In other words, the said CMA F1 does not show that termination of employment of the applicants was by retrenchment.

Therefore, submissions by Simkoko that applicants indicated in the CMA F1 that they were retrenched by the respondent is not valid.

The CMA record shows that, on 11th October 2022 four issues namely, (i) whether applicants were employed for unspecified period, (ii) whether there were valid reasons for termination, (iii) whether procedures for termination were adhered to, and (iv) to what relief(s) are the parties entitled to. I have read evidence that was adduced by the parties and find that neither applicants nor the respondent adduced evidence relating to retrenchment. Evidence that was adduced by the parties centered to answer the above four mentioned issues only. It is my considered opinion therefore, that, the issue of retrenchment raised by Mr. Simkoko in his submissions is new because it was not discussed at CMA. I, therefore, entirely agree with counsel for the respondent. Since the issue of fairness of termination based on retrenchment was not discussed at CMA but was only raised at the revision stage, this court cannot entertain it. There is a litany of case laws that matters not raised at trial, cannot be raised at appellate stage. See the case of ***Haruna Mtasiwa vs Republic*** (Criminal Appeal 206 of 2018) [2020] TZCA 230, ***Sunshine Furniture Co. Ltd vs Maersk China Shipping Co. Ltd & Another*** (Civil Appeal 98 of 2016) [2020] TZCA 1934, ***Richard Majenga vs Specioza Sylivester*** (Civil Appeal 208 of 2018)

[2020] TZCA 227 and ***Godfrey Wilson vs Republic*** (Criminal Appeal No. 168 of 2018) [2019] TZCA 109 to mention a few. In ***Godfrey's case*** (supra) the Court of Appeal held *inter-alia*: -

> *"…we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, we refrain ourselves from considering them."*

It is my opinion therefore, that, submission by Mr. Simkoko in relation to section 38 of Cap. 366 R.E.2019 (supra) is a misconception. In fact, in their evidence, Aliko Reuben Mwangosi (PW1) and Gasto Alex Mkude (PW2), the 1st and 2nd applicants respectively said nothing in relation to retrenchment. I therefore find that ***Sharaf's case***(supra) cited by Mr. Simkoko on behalf of the applicants is not applicable in the circumstances of the application at hand.

It was submitted by Mr. Simkoko, the personal representative of the applicants that applicants were employed for unspecified period and that their employment were terminated unfairly. On the other hand, it was submitted by Mr. Mutatina, learned counsel for the respondent that applicants were employed for specific task and that their contracts were terminated after completion of the specific task they were employed to

perform. I have examined evidence of the parties in the CMA record and find that, applicants were employed for specific task and not for unspecified period. In his evidence, Anthony David Ikongo (DW1) testifying on behalf of the respondent stated that, applicants were employed for specific task at Kwala project and that they were terminated after completion of the task they were employed to perform. DW1 tendered contracts of employments of the 1st and 2nd applicants as exhibit R1 and R2 respectively without objection. On the other hand, Aliko Reuben Mwangosi (PW1), 1st applicant stated that his employment with the respondent started on 26th June 2021 and that it was oral contract. In his evidence, 1st applicant((PW1) did not state that the said oral contract was for unspecified period. In fact, in his evidence, 1st applicant did not challenge evidence of DW1 in relation to the contract of employment (exhibit R1) that shows that 1st applicant's contract was for specific task. More so, he did not adduce evidence to contradict reasons advanced by DW1 for failure of the said contract (exhibit R1) to be signed by 1st applicant. In my view, since evidence of DW1 was not shaken and PW1 did not counter that evidence, I hold as the arbitrator did, that the contract of the 1st applicant was for specific task and not for unspecified period contrary to what Simkoko submitted.

On his part, Gasto Alex Mkude (PW2), the 2nd applicant, testified that his employment with the respondent commenced on 4th June 2021 and that it was oral contract. The 2nd applicant (PW2) testified further that; the said contract was for unspecified contract. When testifying under cross examination, 2nd applicant (PW2) testified that he does not recognize exhibit R2 though he admitted that the signature appearing in the said contract belongs to him. He further testified that; he signed the said exhibit without knowing the contents of the document he was signing. When he was further cross examined, he stated that it is true he signed the said contract. It is my view that, evidence of the 2nd applicant (PW2) that at the time of signing exhibit R2 he was not aware of what is signing cannot help him in this application. In my view, what was signed by the parties is what they intended to execute. It is my view further that, the *non est factum* doctrine cannot apply in favour of the 2nd applicant. This court had an advantage of discussing the said doctrine in the case of ***Meriment Nangasu Mseli vs Felister Robert Sekidio*** (Land Case 213 of 2022) [2023] TZHCLandD 15734, and ***Tanganyika Bus Service Co. Ltd vs National Bus Service Ltd (Kamata) [1987]*** TZHC 11. In the ***Tanganyika's case*** (supra) this court held :-

"Non est factum is the name given to the argument raised when the defendant in a contract suit alleges that a document that he has signed should not be binding upon him because he was ***induced to sign it on the understanding that it was of completely different nature from what it is in fac****t…That is very difficult point to establish because the mistake must be one relating not to the content but to the character of the subject matter. The document signed should be radically different in character from that which the plaintiff believed he was signing."* (Emphasis is mine)

In ***Tanganyika's case*** (supra) this court further quoted the decision of Lord Reid pointed out in the decision of the House of Lords in ***Saunders v Anglia Building Society*** [1970] 3 All E.R. 961 that: -

"There must, I think, be a radical difference between what he signed and what he thought he was signing or one could use the words fundamental or serious or very substantial. But what amounts to a radical difference will depend on all the circumstances. So, the essence of the plea non est factum is that the person signing, believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different."

It is my view therefore, that the doctrine of *non est factum* cannot help the 2nd applicant. It is my further view that, the contract of the 2nd applicant was not for unspecified period, rather, it was for six months. I have noted that the contract between 2nd applicant and the respondent was for six months from 4th June 2021. It is my further opinion that, after expiry of the first six months, the said contract was renewed automatically for another six months expiring in June 2022. In his evidence, 2nd respondent (PW2) did not adduce evidence to suggest that

after expiry of exhibit R2, the parties signed a contract for unspecified period. I therefore conclude that 2nd applicant was not employed for unspecified period.

It was submitted by Mr. Simkoko on behalf of the applicants that respondent had no valid reason for termination of employment of the applicants because no documents were tendered to prove that the contract of the respondent in construction of the railway came to an end. With due respect to Mr. Simkoko, it is not a requirement of law that facts must be proved by documentary evidence. It is my opinion that evidence of DW1 proved that contracts of the applicants ended after the tasks they were employed to perform came to an end. That evidence was not contradicted by evidence of the applicants. More so, documentary evidence namely termination letters (exhibit P1 and P2) that were tendered by the 1st and 2nd applicants respectively, corroborated evidence of the respondent. I have examined exhibit P1 and P2 and find that the reason for termination of employment of the applicants is not retrenchment opposed to what Mr. Simkoko submitted. The said exhibits reads in part: -

"YAH: TAARIFA YA KUTOENDELEA NA MKATABA WAKO.

Tafadhali husika na kichwa cha Habari hapo juu.

Kutokana na upungufu wa kazi katika eneo la kazi kwenye mradi wa Reli ya SGR YAPI MERKEZ-KWALA Kampuni inasitisha mktaba wako kama

ambavyo unasema kuhitajika au kutohitajika kwa mafanyakazi kunategemea na uhitaji wa mteja wa wafanyakazi, kukosekana kwa kazi/kuisha kwa kazi husika. Kwa barua hii nakufahamisha rasmi kuwa kuanzia tarehe 21/03/2022 hutakuwa mfanyakazi wa Magare Company Ltd..."

The above quoted part of exhibits P1 and P2 that were tendered by the applicants does not show that applicants were retrenched, rather, that there was no more task to be performed by the applicants. It is my view that, exhibits P1 and P2 supports evidence of the respondent that applicants were terminated because there was no longer work to be performed by them. I therefore find that termination of the applicants was fair.

It was submitted by Mr. Simkoko, personal representative of the applicant that the arbitrator held that once 28 days' notice is issued, the employer is not required to comply with the provisions of Section 38 Cap. 366 R.E. 2019(supra). With due respect, I have read the whole award and find that there is no even a single sentence in the award to support what was submitted by Mr. Simkoko. In fact, Mr. Simkoko was trying to insert new words in the award because, the arbitrator did not hold that once a 28 days' notice is issued, the employer is exempted to comply with the provisions of section 38 of Cap. 366 R.E. 2019(supra). What the arbitrator held is that, respondent did not serve applicants with a 28 days' notice hence violated the provisions of section

41(1)(b)(ii) of the Employment and Labour Relations [Cap. 366 R.E. 2019]. In addition to that, in the entire award, the arbitrator did not discuss or refer to the provisions of section 38 of Cap. 366 R.E. 2019 (supra). Based on those findings, the arbitrator, ordered the respondent to pay applicants one month salary in lieu of notice. It is my view that, complaints by Mr. Simkoko against the arbitrator in this application are unfounded.

For all what I have discussed hereinabove, I find that the application is devoid of merit and dismiss it.

Dated at Dar es Salaam on this 15th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 15th August 2023 in chambers in the presence of Edward Simkoko, Personal representative of the Applicants and Kevin Mutatina, Advocate for the Respondent.

B. E. K. Mganga
JUDGE