

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

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 75 OF 2023**

*(Arising from an Award issued on 07/10/2022 by Hon. Lucia C.C, Arbitrator, in Labour dispute No. CMA/DSM/ILA/R.532/2016 at Ilala)*

**RAHIM M. MUSSA & 14 OTHERS ..... APPLICANTS**

**VERSUS**

**ZTRONG SECURITY CO. LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 10/07/2023  
Date of Judgment: 15/08/2023*

**B. E. K. Mganga, J.**

Brief facts of this application are that, on unknown date, respondent entered a contract with Southern Beach Hotel so that she can supply security service to the said Southern Beach Hotel. It is said that, on 4<sup>th</sup> April 2015, respondent employed the applicants as security men to guard at the said Southern Beach Hotel. Applicants worked with the respondent until on 30<sup>th</sup> May 2016 when they alleged that respondent terminated their employment contract. On 20<sup>th</sup> June 2016,

applicants filed Labour labour dispute No. CMA/DSM/ILA/R.532/2016 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that respondent unfairly terminated their employment.

In the Referral Form (CMA F1), applicants indicated that respondent had no valid reason and that procedures for termination were not followed. In the said CMA F1, applicants were claiming to be paid TZS. 33,486,917/= being salary compensations for unfair termination, notice pay, unpaid annual leave and severance pay. At CMA, it was alleged by the respondent that applicants were not unfairly terminated ,rather, the employment contract was mutually terminated.

On 07<sup>th</sup> October 2022, Lucia C.C, arbitrator, having heard evidence and submissions from both sides, issued an award in favour of the respondent that termination was fair both substantively and procedurally and dismissed the dispute.

Applicants were dissatisfied with the said award hence this application for revision. In this application, applicants have filed the Notice of Application supported by an affidavit affirmed by Rahim. M. Mussa, applicants' representative. In the said affidavit, applicants have raised four (4) issues namely:

1. *Whether applicants were fairly terminated.*
2. *Whether it was proper for the learned arbitrator to hold that applicants were terminated by agreement.*
3. *Whether the act of the learned arbitrator to rely on a document which was not tendered and admitted as exhibit denied the applicants right to be heard and vitiated proceedings.*
4. *Whether it was proper for the learned arbitrator to rely on petty cash voucher which was admitted only for verification.*

In opposing the application, respondent filled both the notice of opposition and the counter affidavit. The counter affidavit opposing this application was affirmed by Farhia Abdullahi Noor, her Principal Officer.

When the application was called on for hearing, Mr. Joseph Basheka, Personal Representative, appeared and argued for and on behalf of the applicants while Mr. Michael Mhina, advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Joseph Basheka, personal representative of the applicants, submitted on the first issue that, there was no reason for termination and that procedures were not followed. He argued further that, applicants were employed for unspecified period and were terminated on 30<sup>th</sup> May 2016 without affording them reasons for termination.

On the second issue, Mr. Basheka submitted that, in order for termination by agreement to be fair, employer must give reason and follow procedures for termination including consultation as part of the procedure. To support his submissions, he cited Section 36 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. He submitted further that, at CMA, respondent tendered an agreement to terminate employment(exhibit D1) but the same did not disclose reasons for termination. He added that, respondent did not adduce evidence to show that there was discussion between the parties prior to termination. Mr. Basheka referred this court to the case of **YARA Tanzania Ltd V. Athuman Mtangi & Others**, Revision No. 49 of 2019, HC (unreported) and submitted that, due to absence of discussions, termination cannot be fair. He further cited the case of **St. Joseph Kolping Secondary School V. Alvera Kashushura**, Civil Appeal No. 377 of 2021, CAT (unreported) to support his submissions that in termination by agreement, reason must be disclosed, and procedure must be followed.

Regarding the third issue, Mr. Basheka submitted that, arbitrator erred to rely on the affidavit of the applicants that was in the file but not tendered as exhibit. Mr. Basheka cited the case of **Zanzibar Telecommunication Ltd v. Ali Hamadi Ali & 105 Others**, Civil

Appeal No. 295 of 2019 CAT (unreported), **Mhubiri Rogega Mong'ateko V. Mak Medics Ltd**, Civil Appeal No. 106 of 2019, CAT (unreported), **Heri Gidion Kuyenga v. The Registered Trustees of the Seventh-day Adventist Church of Tanzania & Another**, Consolidated Revision Application No. 405 & 427 of 2022, HC (unreported) to support his submissions. He argued further that, reliance on a document that was not admitted in evidence deprived applicants' right to be heard and referred this court to the case of **Charles Christopher Humphrey Kombe V. Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017 CAT (unreported). He strongly submitted that, based on the foregoing, the award becomes a nullity.

Arguing the fourth issue, Mr. Basheka submitted that, DW1 tendered petty cash vouchers that were admitted for identification, but the arbitrator considered the said petty cash vouchers in the award. Mr. Basheka argued further that, those petty cash vouchers had no evidential value and cited the case of **Nitak Limited v. Onesmo Claud Njuka**, Civil Appeal No. 239 of 2018, HC (unreported) and **Alex Mwalupulage @ Mamba V. The Republic**, Criminal Appeal No. 25 of 2020, CAT (unreported) to support his submissions.

Mr. Basheka concluded his submissions by praying the CMA award to be quashed and respondent be paid TZS 33,486,917/= being 12 months compensation, Notice pay, leave pay and severance pay.

Resisting the application, Mr. Michael Mhina, learned advocate for the respondent, submitted on the first issue that, applicants and respondent terminated employment by agreement(exhibit D1) which was entered on 15<sup>th</sup> September 2016. Counsel for the respondent submitted further that, exhibit D1 shows that employment of the applicants was terminated due to expiry of the contract between respondent and South Beach Hotel where applicants were working.

On the second issue, counsel for the respondent submitted that, it was proper for the arbitrator to rely on the agreement to terminate employment (exhibit D1) because the said exhibit D1 was admitted without objection. Counsel argued further that, there were discussions between the parties and at the end, applicants agreed to sign exhibit D1. Counsel for the respondent referred the court to the case of ***Muhimbili National Hospital v. Linus Leonce, Civil Appeal No. 190 of 2018***, CAT (unreported) and argued that, applicants are estopped to deny the truth of what they signed in exhibit D1. Counsel added that, all cases cited on behalf of the applicants are distinguishable

and not applicable to this application. He added that, in *Yara's case*, it was held that reasons for termination must be disclosed and in the application at hand, reasons were given.

On the third issue, counsel for the respondent submitted that, the arbitrator did not rely on the affidavit that was not tendered. He conceded that in the award, the arbitrator referred to the affidavit that was not admitted as evidence but did not rely on it. He added that, it was proper for the arbitrator to refer to that affidavit and that cases cited on behalf of the applicants are not applicable in the application at hand.

On the 4<sup>th</sup> issue, counsel for the respondent submitted that, arbitrator did not rely on petty cash vouchers that were admitted for identification only. Counsel concluded that, this application has no merit and prayed the same be dismissed.

In rejoinder, Mr. Basheka, submitted that **Leonce's case(supra)** is not applicable and maintained that respondent did not disclose reasons in exhibit D1. Mr. Basheka reiterated his submission in chief on the third and fourth grounds and prayed that the application be allowed.

I have examined the CMA record and considered submissions by the parties in this application. At CMA, only two witnesses testified namely, Said Isale Mmanywa (DW1) for the respondent and Rahim Mohamed Mussa (PW1) on behalf of the applicants. The CMA record shows that, DW1 tendered an agreement between applicants and the respondent (exhibit D1) dated 15<sup>th</sup> December 2016 showing that the parties settled the matter and an affidavit sworn by Magreth Mpoli (exhibit D2) who witnessed both the said agreement and payment that was done by the respondent to the applicants based on exhibit D1. There is no any other exhibit that was tendered either by the applicants or the respondent.

It was submitted by Mr. Basheka, the personal representative of the applicants that, arbitrator considered the affidavit that was not tendered in evidence. I have read the impugned award and find that; it is true that the arbitrator considered the affidavit that was filed by the applicants in one of the applications before CMA. The said affidavit was not tendered to form part of evidence of either the applicants or respondent in the application at hand, though it is one of the documents in the CMA record. It was correctly submitted by Mr. Basheka that, arbitrator was not supposed to consider that affidavit. The cases of



**Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others** (Civil Appeal 295 of 2019) [2020] TZCA 1919, **Mhubiri Rogega Mong'ateko vs Mak Medics Ltd** (Civil Appeal 106 of 2019) [2022] TZCA 452 and **Heri Gidion Kuyenga vs The Registered Trustees of The Seventh Day Adventist Church of Tanzania and Another** (Consolidated Rev. Appl. 405 of 2022) [2023] TZHCLD 1223 cited by Mr. Basheka clearly shows that, documents not tendered in evidence, cannot form part of evidence and should not be considered. In my view, it was an error for the arbitrator to consider the affidavit that was not tendered.

It was submitted by Mr. Basheka on behalf of the applicants that, due to the error of the arbitrator to consider untendered document, the application be allowed and that, respondent be ordered to pay TZS 33,486,917/= being 12 months compensation, Notice pay, leave pay and severance pay. With due respect to Mr. Basheka, in the above cited cases, proceedings were nullified and a trial *de novo* was ordered. Therefore, the prayer that this court should order respondent to pay applicants 33,486,917/= cannot be accepted because CMA proceedings must be nullified.

What I have discussed hereinabove have disposed the whole application hence no need to labour on other issues raised by the applicants.

For the foregoing, I hereby nullify CMA proceedings and order trial de novo before a different arbitrator.

Dated at Dar es Salaam on this 15<sup>th</sup> August 2023.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on 15<sup>th</sup> August 2023 in chambers in the presence of Joseph Basheka, Personal representative of the Applicants and Mhina Michael, Advocate for the Respondent.



B. E. K. Mganga  
**JUDGE**

