IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 59 OF 2023

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Temeke) A, MIKIDADI: Arbitrator) Dated 02nd January 2023 Labour Dispute No. CMA/DSM/TEM/330/2020/151/2020)

SELEMANI OMARY SHABANI...APPLICANT

VERSUS

SWIFT MOTORS LIMITED..RESPONDENT

JUDGEMENT

17th Aug. & 8th Sept. 2023

OPIYO, J.

Aggrieved with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application under Sections 91(l)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019] and Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007 praying for the Orders in the following terms:-

i. This Honourable Court be pleased to revise and set aside the the award and an order issued by Hon. Mikidadi, A. Arbitrator in

Commission for Mediation and Arbitration on 2nd Day of January 2023 in dispute No. CMA/DSM/TEM/330/2020/151/2020.

ii. The Honorable Court may set aside the award, order therein and be pleased to determine the dispute in the manner it considers appropriate.

iii. Any other reliefs that the Court may deem fit to grant.

The historical background of this application as extracted from CMA records, affidavit and counter affidavit filed by the parties. The applicant was employed by the respondent on 01st August 2013 as a Driver, on permanent basis [see Exhibit P-1(employment contract)]. Their relationship turned sour on 04th May 2020 after being charged for the offence of misconduct (use of abusive language at working place), the disciplinary action was initiated by the Disciplinary Committee against the applicant. The committee found the applicant guilty and recommended that he be terminated. Aggrieved with the decision of Disciplinary Committee, the applicant challenged the same by way of appeal, at appellate level his claim was dismissed for failure to convince the management to exercise its power of varying the decision issued by Disciplinary Committee. On 24th July 2020 the applicant, after being served with results of appellate body, he preferred the dispute to CMA

on 5th August 2020. At CMA the matter was decided in his favour by dismissing his claim, for the reason that the matter was premature filed as the respondent had never terminated applicant's employment. The applicant was not happy with the verdict, the fact which triggered this application for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by himself, in which after expounding the chronological events leading to this application, the applicant challenged the decision of the arbitrator on the ground that in exercising his jurisdiction he acted illegally, with material irregularity on the ground that he failed to evaluate evidence tendered and had a misconceiving of issues that was brought before him. He further added that the arbitrator failed to observe the principles regulating burden of proof, as it was honoured not in accordance with the law.

The applicant's affidavit at paragraph 7 contains five legal grounds, are as follows: -

i) That the arbitrator erred in law and facts for failure to evaluate the evidence tendered by the applicant before the trial.

ii) That the erred in law and facts for misconceiving issues brought by CMA Form No. 1 and considering issues not discussed during the mediation session.

iii) That the arbitrator erred in law and facts for being grossly misdirected on question of burden of proof, as regards to termination of employment.

iv) That the arbitrator erred in law and facts for twisting burden of proof at the time of composing judgement as opposed to what were agreed before trial when issues were formed.

The application was challenged through a counter affidavit affirmed by Mr. Mohamed Dewji, respondent's Principal Officer. The deponent in the counter affidavit vehemently and strongly disputed applicant's allegations contending that the award was issued under the jurisdiction legally vested to the arbitrator.

The application was disposed of by a way of written submissions. The Applicant was represented by Mr. Themistocles Rwegasira, Advocate, from EA Attorneys whereas the Respondent was represented by Mr. Isaack Zake, Advocate, from a firm styled as Zake Advocates. I

appreciate their long rival submissions which will be considered in due course of drafting this judgement.

Having gone through the parties' submissions and their affirmed statements together with the record of the CMA, I am stirred to address two issues. The first issue is whether the applicant has adduced sufficient grounds for this Court to exercise its powers of revising the CMA award issued in Labour Dispute No. CMA/DSM/TEM/330/2020/151/2020 given the legal issues enumerated in his affidavit.

In resolving first the above all grounds of revision will be considered, when they fall relevant. Starting with the first ground as to whether the evidence was properly analyzed in relation to arbitration findings, that the matter was filed premature as the applicant was not terminated. The applicant's Counsel contended that the arbitrator failed to evaluate the evidence proving that the applicant was terminated. He argued that, after the applicant appealing against the disciplinary committee's decision, and the appellate body upholding the disciplinary committee decision justifies that the applicant was terminated contrary to the finding of the CMA that he was not terminated.

On other hand the respondent's Counsel maintained that since the termination letter was not issued to the applicant, then he is of the view that the applicant's employment after initiating disciplinary action was not terminated, rather the applicant rushed to CMA to institute a dispute against the respondent.

From the above rivals argument, I am of the view that the center of debate between the parties is the as to what constitutes "termination of employment." In my understanding, the plain meaning of termination of employment refer to an act that brings employer-employee relationship to an end. Under **Rule 10(1) of GN No. 64 of 2007** provides that; -

> *"Any dispute about fairness of 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 supplied)*

As pointed out herein above, the above provision relating to termination of employment draws demarcation at which point one could assert, he has been terminated or not. In relation to the application at hand it is

undisputed that applicant was subjected to disciplinary action and the disciplinary committee recommended his termination after being found guilty of misconduct. On appeal, the employer's appellate body did not vary the decision of the Committee nor its recommendation by upholding the decision. Apart from that the record available reveals that on 12th June 2020 appellate decision was issued as per Exhibit D-7 the respondent remained reluctant to issue termination letter till 5th August 2020 when the applicant decided to file the matter at CMA after being served on 24th July 2020 with the outcome of his appeal. That means the respondent remained silent for almost 2 months, this justifies employer's intention to terminate applicant's employment.

It is an established principle that, for the alleged premature filing of dispute to stand, one must file the application without first exhausting the internal remedies as was held in the case of **Joshua Nassary vs. Speaker of the National Assembly of the United Republic of Tanzania and Another,** Miscellaneous Civil Cause No. 22 of 2019, High Court of Tanzania at Dodoma, (unreported). However, this differs with the circumstances in this application. This is because in our case the applicant exhausted all the internal remedies available to his employer and the respondent seemed to be reluctant to issue a

termination letter. In the circumstances no one could claim that the applicant was wrong to file the matter before CMA or filed the matter prematurely. In my considered view, the respondent's decision of remaining mute after the appellate body confirmed recommendation for applicant's termination falls under the ambit of Rule 10 of G.N No. 64 of 2007. Thus, the finding by the arbitrator that the matter was pre matured filed before CMA is unfounded.

Having found that there was a termination, then, the next question is, was it fair in both aspects substantively and procedurally. The record available including the CMA award reveals that, after the arbitrator found that the matter was filed prematurely, he opted not to reason on this issues framed as reflected at page 3 of the CMA award. In the case of **Truck Freight (T) Ltd Vs CRDB Ltd,** Civil Application No. 157 of 2007 (unreported) cited in **The Board of Trustees ELCT North Central Diocese & Others v. Agness Mrefu Lucumay,** Revision Application No. 25 of 2022, High Court of Tanzania, at Arusha, (unreported), the Court of Appeal held that:-

"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We

cannot step into its shoes. We therefore allow the appeal and quash the decision..."

Based on the above authority, this court being a revision Court and not trial Court, cannot act as CMA by determining the issues that were not addressed by the trial court, the CMA in this matter. The issues are to be determined by CMA as a trial body before being dealt with the revisional court. For the reasons the application is found to be meritorious. It is therefore allowed. The decision that the matter was preferred prematurely is quashed and set aside. The file is remitted back to the CMA for the matter to be heard on merits before a different arbitrator.

No orders as to costs.

M. P. OPIYO,

JUDGE

8/9/2023