IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 169 OF 2023

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Ilala issued by Hon. L, CHACHA: Arbitrator) Dated 16th June 2022 Labour Dispute No. CMA/DSM/ILA/127/2022/96/22)

DAUDI LEFI LAZARO.....1st APPLICANT

SILVESTER NGALYA.....2nd APPLICANT

JAPHETI LEFI LAZARO.....3rd APPLICANT

VERSUS

ST. SCHOLASTICA NURSERY AND PRIMARY

SCHOOL.....RESPONDENT

JUDGEMENT

Date of last order: 24th Oct. 2023
Date of judgment: 31 Oct. 2023

OPIYO, J.

Dissatisfied 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(a)(b), (2) (b)(c), and 94(1)(2) 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 following orders:-

i. That, this Honorable Court to call for the whole CMA records with registration number CMA/DSM/127/96/22 to revise and set them aside.

ii. Any relief deemed just and fit to grant to the applicant.

The brief facts of this matter as wrested from CMA records, affidavit and counter affidavit filed by the parties are that, the applicants were employed by the respondent as Security Guards. Their relationship turned sour on 30th December 2021 when the applicants decided to engage another company for rendering security service. Upon such a decision, the misunderstanding arose between the parties. On 08th March 2022 the applicants lodged the labour dispute before CMA claiming to be unfairly terminated both substantively and procedurally. Before the Commission, mediation failed, hence the matter went to arbitration. At an arbitral stage the matter was dismissed for being time barred. Aggrieved with the decision of the arbitrator, they preferred this application.

Along with the Chamber summons, the applicants filed jointly affidavit in supporting the application, clarifying the sequential events leading to this application. The applicants are challenging the decision of the arbitrator that she erred in law and facts for holding that the matter was time barred and they were employed under fixed term contract that ended on 30th December 2022. Also that, the Hon. Arbitrator was biased in recording, evaluating and analysing the evidence of the applicants which resulted into irrational and illogical award.

The application was challenged through a counter affidavit sworn by Sr. Polycap Nchimbi, respondent's principal office (Head Teacher). The deponent in the counter affidavit vehemently and strongly disputed applicant's allegations.

The application was disposed of by way of written Submissions. The Applicant was represented by Prosper Mrema, Advocate, whereas the Respondent was represented by Loy Sehemba, Advocate. I appreciate their long rival submissions which will be dully considered in drafting this judgement.

From the parties' submissions and their sworn statements together with the record of the CMA, I am obliged deal with two first grounds jointly for interrelation between them. This involves two issues; whether the matter was time barred before CMA and whether applicants had a fixed term contract that ended on 30th December 2021. The applicant's Counsel contended that the final decision to terminate applicants' employment was made on 15th February 2022 when applicants were called to sign their final terminal benefits, which was prepared on 11th February 2022 as per Exhibit D5 (Requisition Form). On such a stand, Mr. Mrema is of the view that, the applicants acted within a time by filing a Labour Dispute on 08th March 2022 by computing time from the date final payment was made.

Regarding the allegation of fixed term contracts and when its ended, it was argued by Mr. Mrema that the same lacks legal stance, on the reason that applicants were employed under unspecified period, and nothing was tendered by the employer, respondent herein, to justify that applicants were employed under fixed term contract.

On other hand the respondent's Counsel maintained that the issue before CMA was not when the applicants were paid their terminal benefits rather it was whether the matter was filed within time calculated from the day they

were terminated. He further challenged applicants' argument that they were terminated on 15th February 2022, on the reason that exhibit D5 (Requisition Form) in which the applicants pretend to rely on shows that they were paid and signed for their terminal benefits on 11th February 2022.

On the allegation that applicants were not employed under fixed term contracts, Sehemba contended that they were employed under yearly fixed term contracts that ended on 30th December 2021. In justifying his argument, he referred to exhibit D3 collectively (letters for re-employment by applicants) and exhibit D7 (Services Contract between the respondent and private security service company engaged after termination of applicants contract) and exhibit D6 (attendance book) which shows when the applicants last worked with the respondent. She then submitted that the remedy of dismissal that was held by CMA was correct as that is the proper remedy for the matter filed out of time as discussed in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni,** Civil Appeal No. 19 of 2016, CAT, at Dar es salaam, (unreported). From the above rival's argument, I am of the view that the center of debate between the parties revolves around the question as to when did

the contract of employment of the applicants end/terminate? Termination of refers to an act that brings the employer-employee relationship to an end. If the party terminating the contract is the employer, he must show that he or she has reasons that justify the termination, and that the procedure was complied with, short of which the claim for unfair termination arises. Under rule 10(1) of G. N No. 64 of 2007, a dispute about fairness of an 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.

Therefore in determining whether one was within time in filing a dispute, it is important to know when his contract terminated. In our application, the record available including exhibit D3 (letters for re-employment) shows that applicants made requests for re-employment for the year of 2022. Also exhibit D7 (Services Contract between the respondent and private security service company) shows engagement of another service provider upon expiry of the former contracts. Since its undisputed that, exhibits D3, letters for request to be re-employed were issued by the applicants, this is enough to show that they were aware that their contract lapse on

30th December 2021 as supported by exhibit D7 which shows that soon after applicants employment contracts ended, the respondent engaged a new service provider on 30th December 2021, a Company namely Air Security Services Limited. no proof by the applicants continued working for the respondent after 30th December 2021.

The standard of proof in civil cases was well addressed in the case of **Miller v Minister of Pensions [1947] 2** All ER 372 where the legal test was expressed in the following words:-

> *'...the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determined conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.'*

The above analysis and authority has relevance to our matter at hand. In this matter, the evidence of the respondent carries more weight, than of the applicants who alleged existence of employment relationship till 15th February 2022 without any supporting evidence. Again, existence of exhibit D2 (employment contract of the 2nd applicant) which under item 2 of the contract states that the contract is of one year, shows the contract was for a fixed term and not for an unspecified period as argued by applicants. In my view, this justify respondent's allegation that the contract of 1st and 3rd respondent which were approved to have been misplaced were also of a fixed term. All my doubts are put to rest by proof of knowledge of the applicants about the ending that made them write requests for re-employment letters for the year 2022, exhibit D3 herein. Thus, the claim for an unspecified period contract of employment by the applicants lacks evidential support. From the above legal finding I have no hesitation to say that applicants were employed under yearly fixed term contracts that lapse on 30th December 2021.

In such circumstances, by filing the matter 08th March 2022 before CMA, the arbitrator was right in dismissing the application before him for being time barred. I therefore find no reason to fault it as the applicant failed to

adduce sufficient grounds for this Court to exercise its powers of revising the CMA award. The application is therefore dismissed for lack of merits.

M. P. OPIYO,

JUDGE

31/10/2023