IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. 120 OF 2023

(Originating from award by CMA in Labour Dispute. No. CMA/DSM/UBG/48/2022/25/2022 dated 5/5/2023, Mbena, M.S. Arbitrator)

BETWEEN

CHAMA CHA USHIRIKA WA AKIBA NA MIKOPO (MLIMANI SACCOS LTD).....APPLICANT

AND

MWINYI CHANDE ALIY DYANDUMBO.....RESPONDENT

JUDGEMENT

OPIYO, J.

This application is premised on the prayer that this honourable court be pleased to call for records of the Commission for Mediation and Arbitration (Commission) in dispute No. **CMA/DSM/UBG/48/2022/25/2022** by Hon. Mbena M. S dated 5th May, 2023 in order to satisfy itself on appropriateness of the said award and consequently the Court be pleased to quash and set aside the award and orders therein.

Brief facts are that, the Respondent was employed of the Respondent in the position of Loan Officer on fixed term contracts of four years basis. His last contract was renewed by default to run from 1st June, 2020 to 31st May, 2024. However, the Employer later on varied the contract, *inter alia* to be of two years as from 1st June, 2020 to 31st May, 2022 upon the Respondent's request to be issued with a written contract after the lapse of his last contract which ended on 31st May, 2020. This aggrieved that respondent who successfully preferred the matter to the CMA. The CMA held the respondent liable to pay the respondent the total amount of 59,000,000/= Aggrieved, the applicant preferred this application based on the following legal issues.

(i) That, the honourable Arbitrator erred in facts and at law by unlawfully invoking and misconstruing the end of contractual tenure of the Respondent with retrenchment/operational requirement;

(ii) That, the honourable Arbitrator erred in facts and in law by disregarding the Applicant's testimonies on the circumstances that led to variation of the Respondent's contract:

(iii) That, the honourable Arbitrator erred in facts and in law by constituting the Award and orders therein which are unlawful, null and void, illogical, irrational and improperly procured for failure to record and analyze the clear evidence on record;

(iv) That, the honourable Arbitrator erred in facts and at law by reaching into unlawful conclusion for failure to take into account the Respondent's admission paying himself gratuity contrary to the employment contracts; and

(v) That, the honourable Arbitrator erred in facts and at law by wrongly awarding the Respondent Tanzanian Shillings Nineteen Million Eight Hundred Thousand [TZS. 19,800,000/=] without legal and contractual base and proof thereof;

The matter was heard by way of written submissions. In support of the first issue that the Arbitrator erred in facts and in law by unlawfully invoking and misconstruing the end of contractual tenure of the Respondent with retrenchment/operational requirement, Ms Otilia Nyamwiza Rutashobya, representing the applicant submitted that at page 10 of the Award the Arbitrator insinuated that applicant ought to have

retrenched the employees on grounds of financial difficulties. She argued that, this was the Arbitrator's speculation because no evidence was given on retrenchment and the Applicant did not in fact undergo any operational changes when the business was denied license in June 2021. She further stated that, the Arbitrator regarded the announcement to SACCOS Members in exhibit D6' dated 8th July, 2021 as part of retrenchment process while the document did not state anywhere that there would be retrenchment. She continued that, DW1's testimony at page 9 of the Award explains the measures taken to revamp the capital of the SACCOS after license denial as per Exhibit D7 and D8 which did not involve any retrenchment. She therefore stated that, since the parties did not plead retrenchment, the Arbitrator Award is in error hence liable to be quashed and set aside as held in the case of **Zebra Hotels (T) Limited v Marr P. Kachinga, Labour Revison No. 1 of 2020, High Court of Tanzania Moshi District Registy at page 10** where it was held that since the claims regarding WCF policy were neither pleaded nor substantiated, the Arbitrator erred in giving orders *suo motu* regarding them.

On the second ground that the arbitrator erred in law and facts by disregarding the Applicant's testimonies on the circumstances that led to variation of the Respondent's contract, her submission is that, the applicant's testimonies were based on the background that the Applicant's business was affected by denial of license as per Exhibit D4 which affected contractual employees where some employees contracts could not be renewed upon expiry. Thus, the Respondent's four years contract which ended on 31/5/2020 and was renewed by default, he had agreed for it to end on 31/5/2022 by signing the notice of variation issued on 16/2/2022. That, the variation of contract ('Exhibit D3) removed the provisions of gratuity, since gratuity was a generous gift by applicants to her employees while and when all was well economically and that principally the Applicant's has a social security scheme cover to her employees including the Respondent for which no variations were made. She contended that, the arbitrator also failed to consider measures taken by the Applicant to revamp the Company to be given permission to operate as per exhibits D5, D7 and D8 leading to award to be procured illegally and based on unlawful grounds and on facts not pleaded and testified by the parties. That, if the

Arbitrator had considered the Applicant's testimony, it would have found that there was no breach of any contract as it held.

She continued to state that, previously the Respondent's contract as per 'Exhibit P1' was varied in 2012 as per (Exhibit P2) increasing the salary while the Respondent had not completed the two years contractual tenure after probation as was required and on that he never claimed for breach of contract. That, likewise, the applicant basing on Clause 12 (c) of Exhibit D1 exercised her contractual right and varied the Respondent's fourth contract by reducing the tenure from four to two years and removed gratuity provision. Therefore to her, having signed the variation of contract on 16/2/2022 the Respondent was bound by it and cannot depart from the agreement at his own convenience. He stated that, that is forbidden as held in the case of **Hawa Siwa Abu Hussein v Mfi Document Solutions Ltd Labour Revision No. 273 of 2022** which held that it is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue. Therefore, as the Respondent signed the variation of contract he agreed to exit the employment by 31/5/2022.

On the third ground that award and orders therein were unlawful, null and void, illogical, and irrational and improperly procured for failure to record and analyze the clear evidence on records, her contention was that, the arbitrator erred by raising new issue at page 16 of the Award that was not framed as to whether the board acted properly after seeing the difficult situation the SACCOS was in? The issues as per page 2 of the award were only two, namely, whether the contract of the respondent was breached and reliefs each side was entitled to. He cited the case of **Scan-Tan Tours v Registered Trustees of Catholic of Mbulu Civil Appeal No. 78 OF 2012** as cited in the case of **Kassim Selemani Lukwele v Zaidan Halifa Mwinyishehe Land Appeal No. 41 oF 2021**. CAT at page 12 for the authority that, when an issue being introduced is so fundamental to the whole case and would form a basis for the decision of the trial court, it is pertinent that parties be given a chance to address the court on the new issue. She thus, argued that, the arbitrator was wrong to draft a new issue on retrenchment which the parties did not testify on. She submitted that, the Respondent's claim was based on breach of contract out of applicant's act of variation of contract, the fact that was testified on by both sides. But, the arbitrator continued to create yet another issue regarding

Respondent's contractual tenure which was not an issue and was not pleaded anywhere. He stated that parties are bound by their own pleadings and Court would be acting contrary to its own character and nature if it were to pronounce any claim or defense not made by the parties making reference to the case of **Barclays Bank (T) Limited Versus Jacob Muro Civil Appeal No. 357 Of 2019, Court, CAT.**

She continued to state that, it was indeed an error by the making statements that were not pleaded or attested by the parties while ignoring the parties' testimonies that the Respondent conceded to the variation of contract. That at page 13 paragraph 3 of the Award, the Arbitrator stated that there was no dispute that the applicants contract was revived for a tenure of four years while the records including the CMA form No 1 filled by the Respondent, he seeks outstanding salaries ending May, 2022 when his contract expired according to Rule 4(2) of G.N No. 42 of 2007. Therefore, the Respondent clearly testified that the contract ended on 31/5/2022 as shown in the CMA Form No. 1. The Arbitrator cannot change what is stated in the referral form. He fortified his argument by also referring to the case of **Zebra Hotels (T) Limited** (*supra)* where it was held that an Arbitrator cannot alter the CMA F1 *suo motu.*

Submitting further, the counsel stated that the award was null and void because the dispute was not condoned. He argued that the Arbitrator at pages 15-16 of the Award made statement as to why and when the dispute arose by writing that after the applicant received objection letter by the respondent (exhibit P5) the respondent never received any reply and therefore the parties continued to execute the variation contract is when the dispute arose by respondent claiming breach of contract. Therefore, she argued that as the letter for leave without pay and variation of contract that were issued on 16/2/2022 'exhibit P4' and the Respondent referred the dispute to the Commission on 30/6/2022, the dispute arose when the letters were issued on 16/2/2022. It means the Respondent ought to sought for condonation as held in the case of **University of Dar Es Salaam v Benedict Ambrose Labour Revison No. 302 Of 2021.**

The counsel also argued that, the above facts was supported by the Respondent's testimony at page 6 paragraph 3 when he stated that when he was served with the notice of variation of contract on 16/2/2022, he replied within 28 days and when he failed to get reply he filed the dispute.

To her that shows that the dispute arose when the notice was served on the respondent.

Her further argument is that, to show that the matter was time barred, it is also on record that the arbitrator denied the respondent's claims of salaries from July 2021 – May, 2022 amounting to Tshs. 17,600,000/=; instead the Arbitrator at page 19 guided the respondent that he ought to have sought for condonation before the Commission to be able to claim for the said salaries. But, at the same time the Arbitrator granted two months salaries amounting to Tsh. 3,300,000/= without stating they are payable for which months that were within the contractual period while the Respondent contract ended on 31/5/2022 and the dispute was filed on 30/6/2022 at the Commission. She submitted that the claim for two month's salary also must fail for being legally untenable on the same grounds.

In reply to these grounds, Kelvin Mundu, personal representative stated generally that the application is unfounded, baseless and lacks merits, hence deserves to be dismissed. He then continued to submit that, in all the applicant has failed to satisfy the court on the allegation that the arbitrator unlawful invoked and misconstrued the end of contractual tenure

of the respondent with retrenchment/operational requirement because in the respondents testimonies especially of DW1 And DW6 it was narrated that taking the employees to leave without pay was a result of the respondent facing economic hardship. To him because the cause for all these was economic hardship, the applicant was supposed to follow the procedure for retrenchment in terms of section 38 (a)-(c) (i)-(iii), (d)(i)-(iii), 3(2) instead of subjecting employees to the leave without pay, respondent inclusive as evidenced by exhibit D6.

After considering parties submission on these three grounds, I think it is prudent to pause to determine them first as their determination may finally dispose the application doing away with the need to dwell on the rest of the grounds. I will start with the first third ground which insinuates the dispute being null and void for being preferred out of time. The gist of argument in this ground by the applicant's counsel is that as the respondent was served with the variation contract and leave without pay on 16th February 2022, brought the dispute on 30/6/2022, which is beyond the 30 days within which the dispute should be brought from the date of termination. In objective examination of facts and evidence on records, it is indisputable that the notice of variation and leave without pay were issued

on 16 February/ 2022. Under clause 12.0 of the employment contract, the respondent was free to reply to the notice of variation within the time prescribed which was not any way prescribed in the notice itself. However the respondent used the duration of the notice which was 28 days to file his objection within. The objection was never replied to, until the time for variation ended which was just a month ahead from the date he filed his objection. In my view, treating the date of being served with the notice of variation as the date for counting limitation period is unrealistic as the respondent was still having chance to file objection and expect the applicants reaction before expiry of the variation which never came. For the reason, the date the dispute arose should be the date when the variation contract expired which is 31 May 2022. Therefore, filing the dispute on 30th June was within the time, in my view. That means the dispute was not time barred as argued by the counsel for the applicant. This ground is therefore dismissed.

The above determination, gives us a chance to proceed with determination of the first two grounds jointly. The matter for determination in these grounds is whether the CMA misconstruing the end of contractual tenure of the Respondent with retrenchment/operational requirement. As submitted

by Otilia, the CMA in its award found out that the CMA failed to follow the procedure in terminating the respondent. This finding was premised on the argument that, as the termination was due to financial difficulties, the termination was actually retrenchment; hence, the applicant ought to have followed the procedure for retrenchment under the law. This is what has aggrieved the applicant who argues that, this was a mere speculation by arbitrator because no evidence was given regarding retrenchment and the Applicant did not in fact undergo any operational changes as a result of the alleged financial difficult to warrant arbitrators finding. I am in agreement with the counsel because, in my view, CMA indeed erred when it decided that the applicant was terminated through retrenchment. This is because, in essence it is not disputed by both that the employment of the respondent was terminated automatically after variation of the fixed term contract as reflected in applicants claim. Retrenchment is not reflected anywhere in the CMA form No 1 and opening statement of both parties. According to CMA Form No. 1, the claim is breach of contract not claim for terminal benefits after retrenchment.

I have gone through the evidence on record and found that clause 12.0 of the employment contract in question allowed the applicant to make

variations in the contract. They acted on this term of contract to effect the variation complained about. The CMA was therefore supposed, to determine the validity and fairness of the effect of exercising applicant's right of variation under the contract instead of looking on the reasons for variation with the twisted eye of speculating the would be outcome of such reasons. The arbitrator thought that, every change in employment as a result of financial difficult is retrenchment. This thinking is not correct and was unfounded in the circumstances of this matter where the respondent did not even plead the same. This is equal to fitting the facts in a misconceived legal perspective by the arbitrator that brought his wrong finding that termination was unfair. Had he analysed the evidence broadly and objectively, I believe he would have reached the correct finding. Therefore, as argued by Otilia, he erred by creating the new issue that was neither pleaded nor testified on by the parties. The arbitrator indeed disregarded the Applicant's testimonies on the circumstances that led to variation of the Respondent's contract as resulting from denial of license (per Exhibit D4) which affected contractual employees including the respondent, but that did not lead to any retrenchment, but engaging in various measure to revamp the company.

From the foregoing, the Applicant had reasons to vary the Respondent's contract according to the employment contract clause 12.0. The CMA award is therefore accordingly quashed and set aside.

What still tasks this court is the fact that both notice for variation and notice for leave without pay was served on the same day to the respondent. That entails immediate loss of income to the respondent and so much reduction in his contract period as a result of the variation the contract that was to expire in more than 28 months was made to expire in less than 4 months from the date of variation. At the same time the salary was immediately stopped for engaging in leave without pay. In employment arena, this is unlikely to be seen as fair treatment, because of the devastating effect it has to the employee. Engaging employee in leave without pay still maintains his hopes of coming back to work. But doing that and at the same time significantly reducing her contract duration shutters all those hopes. For the reason, as the contract duration was made to be too short to save the same purpose of relieving the employer of the same obligation of salary payment, it is my considered view that, it

was not fair for the employer to engage the same employee in both leave without pay and significant reducing the contract period. I agree, both are employer rights under the contract of employment, but both should not be exercised concurrently. For that reason, it is my considered view that, the respondent is entitled to payment of the salaries form the date of notice to the date the variation contract expired. That is from 16th February 2022 to 30th may 2022 which comes to Tshs 5,650,000/=. The CMA award is therefore revised to the extent explained.

M. P. OPIYO,

JUDGE

31/10/2023