IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 220 & 228 OF 2023

TANZANIA REVENUE AUTHORITY ..... APPLICANT/RESPONDENT

VERSUS

KHADIJA LUMBI..... RESPONDENT/APPLICANT

JUDGMENT

Date of last Order: 28/11/2023
Date of Judgment: 29/11/2023

B . E. K. Mganga, J.

Brief facts of this application are that, on 24th June 1996, the Tanzania Revenue Authority(hereinafter referred as the employer), the applicant in revision No. 220 of 2023 and respondent in revision application No. 228 of 2023 employed Khadija Lumbi (hereinafter referred to as the employee), the respondent in revision application No. 220 of 2023 and applicant in revision No. 228 of 2023. It is undisputed by the parties that the employer employed the employee as customs guard. It is further undisputed that one of the duties of the employee was inspection of imported vehicles together with documentations thereof at Dar es Salaam port. It is further undisputed by the parties that, on 19th December 2007, the employer terminated employment of

the employees based on misconducts and that on 3rd January 2008, the employee filed labour dispute No. CMA/DSM/KIN-ILA/106/09. It is also undisputed by the parties that on 7th January 2010, Hon. E. Mwidunda, arbitrator, as he then was, issued an award in favour of the employee that termination was unfair and ordered the employer to reinstate the employee without loss of remuneration. It is further undisputed by that the employee filed execution No. 362 of 2013 before this court for enforcement of the said CMA award. It is also undisputed that, during hearing of the said execution application, the employer, stated *inter-alia* that she was unwilling to reinstate the employee rather, was ready to pay her twelve(12) months salaries in lieu of reinstatement but the employee stated *inter-alia* that she was entitled to be reinstated without loss of remuneration. On 11th April 2014, Hon. S.S. Sarwatt, the executing officer, the Deputy Registrar, as she then was, agreed with the employer in compensating the employee 12 months salaries in lieu of reinstatement.

On 13th April 2017, Mr. G.S. Ukwong'a advocate for the employee filed at CMA the Notice of application for clarification of the award issued in dispute No. CMA/DSM/KIN-ILA/106/09 as a result, the said application

was assigned ref. No. CMA/DSM/KN/R.151/17. The said notice was supported by an affidavit affirmed by the employee.

On the other hand, the employer filed the counter affidavit sworn by Moses Mabamba wherein he stated *inter-alia* that, the award was issued on 7th January 2010 and that the same have been executed through cheque No. 00058676 by payment of salaries from the date of termination to the date of the award and 12 months compensation in lieu of reinstatement. It was further deponed on behalf of the employer that the award is clear and has been interpreted by the Honourable Registrar Sarwatt on 11th April 2014 in execution No. 362 of 2013.

On 17th August 2023, Hon. Mbena, M.S, Arbitrator, having heard the parties issued a ruling with Ref. No. CMA/DSM/MISC/65/2021 in which she indicated that she clarified the award and ordered the employer to pay the employee TZS 35,315,020/= being 12 months' salary compensation and 25 months salaries from December 2007 to January 2010.

The employer was aggrieved with the said ruling hence filed Revision No. 220 of 2023. In the affidavit of Jacqueline Chunga, the employer raised two grounds namely:-

1. *The Hon. Arbitrator erred in law and fact in holding that the respondent (employee) is entitled to TZS 35,315,020/= being the total cost for compensation of twelve (12) months salaries and twenty-five(25) month's salary due from the date of termination i.e., December 2007 to September 2009.*
2. *The Hon. Arbitrator erred in ignoring the facts that the Respondent (employee) remained in the payment system (payroll) continued to receive salary from TRA from December 2007 to September 2009 despite the evidence tendered justifying the same."*

On the other hand, the employee was also aggrieved with the said ruling as a result she filed Revision Application No. 228 of 2023. In the affidavit in support of the Notice of Revision, the employee raised four issues namely:-

1. *Whether the respondent(employer) have legally implemented the award that was issued on 7th January 2010.*
2. *Whether implementation of an award by the Commission for Mediation and Arbitration can be implemented at the leisure of the respondent(the employer) in disregard of the time frame.*
3. *Whether or not the award issued on 7th January 2010 revived employment of the applicant (employee) and*
4. *To what reliefs are the applicant (employee) entitled to.*

By consent of the parties, this consolidated revision was argued by way of written submissions. In the said written submissions, the employer enjoyed the service of Jacqueline Chunga from legal service department while the employee enjoyed the service of G.S. Ukwong'a advocate.

In her written submissions on behalf of the employer, Ms. Chunga submitted that, the award of TZS 35,315,020/= being 12 months compensation and 25 months from December 2009 to January 2010 to the employee is unjust because the employee continued to receive salary from December 2007 to September 2009. She submitted further that TZS 11,594,468/= that was calculated by the employer includes salary from October 2009 to January 2010 and 12 months' salary compensation. It was further submitted on behalf of the employer that payment of TZS 35,315,020/= that includes salaries from December 2007 to September 2009 will amount to double payment and cited the case of ***Ronald Ufoo Muro vs. AIM Steel Ltd***, Labour Revision No. 73 of 2018, HC, Arusha(unreported) to support her submissions. She concluded that the employer proved that the employee continued to be paid salary from December 2007 to September 2009 and that she is only entitled to be paid TZS 11,594,468/= in lieu of reinstatement.

Responding to submissions by the employer, Mr. Ukwong'a counsel for the employee submitted that payment of the employee's salaries and other benefits were supposed to be made within 14 days from the date of the award. He further submitted that the arbitrator did not consider the provisions of section 40(3) of the Employment and

Labour Relations Act[Cap. 366 R.E 2019] in ordering the employer to pay 25 months salaries when she made interpretation of 12 months payable to the employee. He added that letter by the employer dated 5th February 2010 showing that she will only pay the employee 12 months' salary compensation in lieu of reinstatement is of no impact because it was written outside the 14 days within which the employer was required to satisfy the award. He went on that the cheque dated 1st day of March 2010 was also not served to the employee as a result the later remain unpaid as a result the amount unpaid is 156 months and not 25 months ordered by the arbitrator in her ruling.

I should point out that the employer did not file rejoinder.

On the other hand, it was submissions of the employee in revision No. 228 of 2023 that, the award that was issued on 7th January 2010, was definite, certain, and concise as a result, no appeal or revision was preferred by the employer. He went on that, the action that remained was implementation or execution of the said award. It was further submissions by counsel for the employee that, employer implemented the award by writing a letter and issuing a cheque well out of time hence the said implementation was void. Counsel submitted further that, in the award, the employee was reinstated hence her employment was revived. To support his submissions, counsel cited the case of ***Tanzania***

Harbours Authority vs. Wendeline Ledger, Civil Appeal No. 8 of 1986, CAT(unreported) because the employer failed to implement the award within 14 days from the date of the award. He further cited the case of ***Paul Solomon Mwaipyana vs NBC Holding Corporation***, civil Appeal No. 68 of 2001 in which the Court of Appeal discussed the provisions of section 24(1)(b) of the Security of Employment Act and held that the employer had no choice where reinstatement is ordered. Counsel for the employee further cited the provisions of section 40(3) of Cap. 366 R.E. 2019(supra) and strongly submitted that the arbitrator erred because the employee was not served with a letter denying her reinstatement. He added that the said letter was written after the 14 days has expired. He went on that the employer did not notify CMA her decision of not reinstating the employee. Counsel for the employee also submitted that the award revived employment of the employee and that reinstatement was confirmed after expiry of 14 days set out as time frame in the award. He submitted further that, to date, the employer has not terminated the employee hence the later remains as an employee of the former. He also submitted that the employee is entitled to accrued salaries including increments, pension, leave and all benefits due to her employment contract. Counsel for the employee concluded

by praying the court to quash the decision by the arbitrator and the award issued to the employee be given the right and just interpretation.

Resisting revision No. 228 of 2023 filed by the employee, counsel for the employer reiterated what she submitted in relation to revision No. 220 of 2023 that was filed by the employer. Counsel for the employer added that, the employee filed execution No. 99 of 2010 before the High court and that a cheque valued TZS 11,594,468/= was issued in favour of the employee in presence of Mr. Chaburuma, advocate for the employee, as a result, on 7th June 2010, Hon. Karua, Registrar marked the matter as settled. She submitted further that, thereafter the employee filed civil application No. 44 of 2010 challenging constitutionality of section 40(3) of Cap. 366 R.E. 2019 on payment of 12 months' salary compensation in lieu of reinstatement but the same was dismissed on 11th November 2011. She added that the employee filed Civil Appeal No. 92 of 2012 before the Court of Appeal but she withdrew it. Counsel for the employer submitted further that after withdrawal of the said appeal, the employee filed execution No. 262 of 2013 in which Hon. Sarwatt, Deputy Registrar as she then was, agreed with the decision of the employer of paying the employee 12 months' salary compensation in lieu of reinstatement. She went on that the employee filed Revision No. 410 of 2015 challenging legality and

correctness of the decision in Execution No. 362 of 2013 but the said revision was dismissed on 18th November 2016. She added that, thereafter the employee filed execution No. 40 of 2017 that is pending in court but later on she filed an application for clarification of the award at CMA. Counsel for the employer prayed the application by the employee be dismissed on ground that she acted negligently as she did not collect the cheque and payment of TZS 11,594,468/= as 12 months' salary in lieu of reinstatement. She cited the case of ***ONGC Ltd vs. M/s. Modern Construction and Co.***, Civil Appeal Nos. 8957-8958 of 2013 in the supreme Court of India and concluded that the employee is only entitled to be paid TZS 11,594,468/=.

Again, the employee did not file rejoinder submissions.

When I was composing my judgment, I noted that the notice of application for Notice of application for clarification of the award issued in dispute No. CMA/DSM/KIN-ILA/106/09 was signed by G.S. Ukwong'a advocate and not Khadija Lumbi, the employee. I further noted that, in her ruling, the arbitrator considered matters that were neither part of the employee's affidavit nor employers counter affidavit rather, were in submissions of the parties. With those observations, I resummoned the parties to address whether there was a competent application for clarification before the Hon. Arbitrator and whether it was proper for the

arbitrator consider matters that were not either in the affidavit of the employee or the counter affidavit of the employer. I decided to resummon the parties because these issues were not covered in their written submissions.

Responding to the issues raised by the court, Mr. Urso Luoga, State Attorney for the employer and the Attorney General submitted that, the application was incompetent because, Rule 29(3) of Labour Institutions(Mediation and Arbitration)Rules, GN. 64 of 2007 requires the notice of application be signed by the party bringing the application. He went on that, the notice was signed by the advocate who is not the applicant.

On the 2nd issue, Mr. Luoga submitted that, it was wrong for the arbitrator to consider matters not either in the affidavit or the counter affidavit. He added that, the arbitrator issued a ruling that has an effect of revising the award that was issued by Mwidunda, arbitrator. He concluded that, the arbitrator has no power to revise the award of the fellow arbitrator because revisional powers are reserved to the Labour Court only.

Responding to the issues raised by the court, Mr. Geoffrey Ukong'a, Advocate for the employee submitted that, it is true that the notice of application for clarification was signed by an advocate. Counsel

submitted that, the advocate had power to sign the said notice because he was instructed by the respondent/employee to file an application on her behalf. In his submissions, counsel conceded that in the CMA record there is no notice of representation showing that respondent appointed the advocate who signed the said notice of application for clarification.

Responding to the 2nd issue raised by the court, counsel for the employee submitted that, in the ruling for clarification, the arbitrator considered all documents that were annexed to both the affidavit and the counter affidavit. Counsel submitted further that, matters that were raised by the parties in their submissions are not evidence. In his submissions, Mr. Ukong'a, learned counsel for the employee conceded that in the impugned ruling, the arbitrator did not give clarification, rather, gave a ruling that departed from what was awarded by her fellow arbitrator.

I have considered submissions of the parties on the issues raised in their respective revision application and those raised by this court. In disposing this consolidated revision, I wish to start with issues that were raised by the court.

There is no dispute, as it was observed by the court and correctly submitted by the parties that the Notice of application for clarification of

the award issued in dispute No. CMA/DSM/KIN-ILA/106/09 was signed and filed by Mr. G.S. Ukwong'a, advocate for the employee. It is clear from the CMA record that, on 13th April 2017, Mr. GS Ukwong'a advocate for the employee filed at CMA the Notice of application for clarification of the award issued in dispute No. CMA/DSM/KIN-ILA/106/09 as a result, the said application was assigned ref. No. CMA/DSM/KN/R.151/17. The said notice was supported by an affidavit affirmed by the employee. In the said notice of application for clarification, the learned counsel for the employee indicated that applicant intends to apply for orders that:-

> *"1. This Honorable Comission be pleased to make an order for clarification of the award in Dispute No. CMA/DSM/KIN ILA/106/09 and determine the rights of the applicant who to date has not been reinstated and not paid salaries hence award remaining unsatisfied.*
>
> *2. The grounds upon which the reliefs above have been sought are more so set in the affidavit of **KHADIJA LUMBI** the applicant herein".*

In support of the said notice, Khadija Lumbi, the employee, filed an affidavit with 7 paragraphs wherein she stated:-

> *"1. …*
>
> *2. That on the 7th day of January 2012 the Commission for Mediation and Arbitration in Labour Dispute No. CMA-DSM-KIN_ILA-106-09 entered an award in my favour and the same to date has not been executed…*

3. *That an attempt to execute the award in the High Court proved futile because the taxing master imposed his own award hence failure of the process. Annexed marked "B" is the copy of the ruling and a copy of a cheque of the respondent unilaterally issued purporting to settle the award forming part thereof.*
4. *That I have filed further application for execution of the award in the High Court of Tanzania Labour Division and the matter is pending…*
5. *That upon letting my advocate learn about this I was advised which advice I believe to be true is that the duty to determine and interpret the award is that of the Commission hence this application.*
6. *That in the interest of justice let the Commission arrange for necessary interpretation of the award so as to determine the quantum of the claim and to enable me execute the award.*
7. *That this Commission has the power under the relevant provisions of the law cited to grant the orders sought."*

Counsel for the employee indicated that the said Notice was made under Rule 29 of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007 and Rule 8 of the Labour Institutions(Ethics and Code of Conduct for Mediators and Arbitrators)Rules, GN. No. 66 of 2007.

I have read the above cited provisions of the law specifically Rule 29 of GN. No. 64 of 2007 (supra) and I agree with submissions by the learned State Attorney on behalf of the employer and the Attorney General that, the Notice of application was not properly signed. I am of that view because, the notice was signed by the advocate and not the person filing the application. Rule 29(2) and (3) of GN. No. 64 of 2007

(supra) provides clearly as who should sign the Notice of Application. The said Rule provides:-

> *"29(2) An application shall be brought by notice to all persons who have an interest in the application.*
>
> 3. **The party bringing the application shall sign the notice of application** *in accordance with Rule 5 and shall contain-…"* (Emphasis is mine)

It was argued by Mr. Ukong'a, learned counsel for the employee that, he signed the said notice to seek clarification because, he was instructed by the employee. That submission cannot be correct because it is not supported by evidence on record as it was correctly conceded by counsel for the employee. In his submissions, counsel for the employee conceded that, there is no notice of representation that was signed by the employee appointing him to be her advocate. Since that evidence is wanting in the CMA record, I find that the Notice to seek clarification was improperly signed. Technically there was no proper notice or application that was filed at CMA seeking clarification of the award that was issued on 7th January 2010, by Hon. E. Mwidunda, arbitrator. For the foregoing I find that all proceedings that were conducted by Hon. Mbena, M.S, arbitrator, is a nullity and the ruling arising from those proceedings cannot stand.

Apart from that, on 7th January 2010, Hon. E. Mwidunda, arbitrator, issued an award in favour of the employee that termination was unfair and ordered the employer to reinstate the employee without loss of remuneration. The said award was not challenged by the employer, instead, the employer opted to pay the employee 12 months' salary compensation in lieu of reinstatement. The employee did not accept payment of the said 12 months' salary as compensation in lieu of reinstatement. That is the source of the application for clarification that was filed by the employee at CMA and led to issuance of the impugned ruling hence this application.

I have read the impugned ruling and find, as it was correctly submitted by both counsel, that the arbitrator altered totally what was awarded to the employee on 7th January 2010 by Hon. E. Mwidunda, arbitrator. In the impugned ruling, the Hon. arbitrator ordered the employer to pay the employee TZS 35,315,020/= being 12 months compensation and 25 months from December 2009 to January 2010. It was correctly in my view, submitted by the parties, that the said ruling revised the award that was issued by her fellow arbitrator. That was an error on part of the arbitrator because revision of CMA award is the domain of the Labour Court. In short, the arbitrator had no jurisdiction to revise the award that was issued by her fellow arbitrator.

Again, the application that was before the arbitrator was for clarification as indicated in the hereinabove quoted notice of clarification. The said application was not for calculation. It is my view that, in calculating and awarding the employee TZS 35,315,020/= to be paid 12 months compensation and 25 months from December 2009 to January 2010, the arbitrator went beyond what was prayed by the employee in her application. I am of that view because in both the above quoted notice of clarification and the above quoted affidavit in support of the said notice of clarification, there was no prayer for calculation of the amount payable to the employee. It is my considered opinion that, synonyms of clarification is not calculation. Therefore, the arbitrator did not confine herself within the ambit of the Notice of clarification and affidavit of the employee in support thereof, instead, she overshot and went ahead to calculate the amount that was payable to the employee. Worse, in the said calculation, she included the period after the award was issued by Mwindunda, arbitrator and the period the employer alleges issued the cheque for payment of 12 months' salary in lieu of reinstatement but allegedly the employee refused to accept it. At any rate, that was not an issue of clarification. If anything, it was a matter of argument by the parties during execution stage before the Deputy Registrar, who, in terms of section 87(4) and 89(2) of the

Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rules 48(3) and (4) and 49(1) of the Labour Court Rules GN. No. 106 of 2007, is the executing officer. In making calculations as to the amount payable to the employee, the arbitrator assumed and performed the duties of the executing officer while she was not.

For all what I have discussed hereinabove, I find that the issues that were raised by the court has disposed the whole application. I therefore find unnecessary to discuss issues raised by the parties in this consolidated revision.

For the foregoing, I hereby nullify CMA Proceedings, quash, and set aside the ruling arising therefrom.

Dated at Dar es Salaam on this 29th November, 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 29thNovember 2023 in chambers in the presence of Urso Luoga, State Attorney for the Applicants/ Respondents and Khadija Lumbi, the Respondent /Applicant.

B. E. K. Mganga
JUDGE