IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 273 OF 2023

(Arising from Labour Dispute No. CMA/PWN/KBH/22/2022/13/2022 and the Award of Hon. P.P MAHINDI Arbitrator dated 25th September 2023)

BETWEEN

HERITAGE SECONDARY SCHOOL ..... APPLICANT

VERSUS

JOYCE FRED ..... 1ST RESPONDENT

ELIKADO COSMAS ..... 2ND RESPONDENT

JUDGEMENT

Date of last Order: *05/02/2024*
Date of Judgement: *16/02/2024*

MLYAMBINA, J.

The matter at hand originates from the decision of the Commission for Mediation and Arbitration (herein CMA). The 1st Respondent refereed a dispute before the CMA claiming for unfair termination both substantively and procedurally. After considering the evidence of the parties the Arbitrator awarded the 1st Respondent the sum of TZS. 7,071,692 being compensation for unfair termination and severance payment. The Arbitrator awarded the said amount based on two grounds: **One**, the 1st Respondent had a written permanent contract of employment and that it

was wrong for the Applicant to require the 1st Respondent to sign another contract. **Two,** the 1st Respondent was offered a contract that offended labour laws. Aggrieved by the said decision, the Applicant filed the present application and invited the Court to determine the following legal issues as indicated at paragraph 4 of the Applicant's supporting affidavit:

i. Whether there was a permanent written contract of employment between the Respondent and the Applicant.

ii. If issue (i) is answered in the affirmative, then what was the terms and conditions of the above said agreement.

iii. If issue (i) and (ii) above are answered in affirmative, then whether termination of employment of the Respondent was unfair.

The matter proceeded by way of written submissions. Before the Court, the Applicant was represented by Mr. Nickson Ludovick, legal Counsel from a firm styled as White Law Chambers Advocates, whereas Nancy J. Mosha, legal Counsel from a firm known as N & L Attorneys appeared for the Respondent.

Arguing in support of the application, Mr. Ludovick submitted that; it was wrong for the Arbitrator to conclude that the 1st Respondent had a written permanent contract of employment. They challenged the

Arbitrator's findings based on the following reasons: *First*, the said agreement was not tendered at the CMA as evidence. *Second*, the confirmation letter that was admitted in Court as R1 and annexed to the counter affidavit and Affidavit supporting the present Application expressly required the 1st Respondent to sign the contract of employment. Thus, the 1st Respondent is quite aware that she was supposed and bound to sign the contract of employment which she did not sign. *Third*, the Arbitrator did not state the terms of the purported permanent contract. *Fourth*, the Arbitrator ignoring the principle of law which says that where there is written agreement or documents, oral evidence ceases to have strong weight. *Fifth*, the Arbitrator erred in law and fact for assuming that the Respondent was required to sign the second Agreement while there was no previous agreement.

It was argued by Mr. Rudovick that one who alleges must prove existence of the alleged facts. Failure to prove the alleged facts, then the claim dies a natural death as it is stipulated under *Section 110(1) and (2) and section 111 of the Evidence Act*. He also supported his submission with

the case of **Attorney General and 2 Others v. Eligi Edward Massawe and 104 Others,** Civil Appeal No. 86 of 2002.

Mr. Rudovick went on to refer to *Section 61 of the Evidence Act* as well as the case of **Daniel Apael Urio v. Exim (T) Bank,** Civil Appeal 185 of 2019 (Court of Appeal) and argued that oral evidence cannot be used to prove the contents of a document. Mr. Ludovick added that; since the 1st Respondent alleged to have a permanent contract, the CMA was not supposed to believe and entertain oral evidence to prove that the 1st Respondent and the Applicant had a contract of employment.

It was further argued that the 1st Respondent was offered a contract that offended labor laws. In support of his submission, Mr. Ludovick cited *Section 2(e) and (h) and 10 of the Law of Contract Act [Cap 345 RE 2019];* the case of **Lilian Sifael v. Mbeya Sanitation Authority,** Labour Revision No. 11 of 2020 (unreported), and the case of **Agreko International Project Limited v. Triumphat Trade and Consultancy Services Limited,** Civil Appeal No. 83 of 2020, where it was held that fundamental elements to a contract are offer, acceptance, intention to create legal relationship and consideration. He added that for a contract to be valid and enforceable all elements have to co- exist.

Mr. Ludovick went on to submit that what was given to the 1st Respondent was a proposed contract or a proposal. It would have been a contact if it was signed by both parties. Since the said proposal was not accepted by the 1st Respondent as seen in CMA records, then no one can say that the 1st Respondent was given a contract that contradicted the labour laws. Since the contract was not singed the claim that it offended labour laws was for that matter prematurely raised and accepted. In the upshot, Mr. Ludovick urged the Court to revise and set aside the CMA's decision.

In response to the application, Ms. Mosha submitted that the confirmation letter and salary slips (exhibit P1 and P2) proves the fact that there was a contract, the fact which was neither disputed by the employer nor his witnesses before the CMA. Ms. Mosha stated that the confirmation letter clearly stated that the Respondent was confirmed as a School Matron with effect from 10th April 2019 but the same did not describe the end of the employment thus, conforming that he had permanent contract. The Counsel maintained that after confirmation the Respondent signed a contract which was retained by the Applicant and never returned to her. Regarding the terms of the purported contract, Ms. Mosha submitted that

the Arbitrator was not in the position to state the same because the parties did not dispute the same.

Responding to the principle as who alleges must prove, Ms. Mosha strongly disputed such argument and added that the argument is baseless since the issue for determination was unfair termination as presented in the CMA Form No. 1. He maintained that the Applicant offended labour laws. In conclusion, Ms. Mosha submitted that the application at hand is devoid of merit and the same be dismissed.

In rejoinder Mr. Ludovick reiterated his submissions in chief.

I have dully considered the submissions of the parties. I will start with the first issue on *whether there was a permanent written contract of employment between the Respondent and the Applicant.* The 1st Respondent through the CMA F1, which initiates disputes at the CMA, clearly stated that the employment between her and the Applicant commenced on October, 2018. Both parties agree that the contract proceeded with the probation period of six months. After the end of the probation period, the Respondent was served with the confirmation letter (exhibit P1). For easy of reference, I hereunder reproduce terms of the confirmation letter:

Reference is made to a letter written to you on 10th October 2018, titled "**Recruitment on Probation**"

Kindly, this letter serves to inform you that the school Administration and the Management have honour to notify you that you have exemplified reasonable degree of commitment as expected, thus, contended and convicted to confirm your employment as **School matron** with effect from **10th April 2019**.

However, you are yet and very emphatically urged to work hard in fulfilling your duties as per the job descriptions as well as maintaining the spirit of **cooperation, diligence, trustfulness, integrity, tolerance, humility, maturity, competence, ethics and principles** in the daily execution of your responsibilities.

Apparently, you are supposed to respond in writing within one week declaring your position in regard to the matter then check with the headmaster for the next procedure.

On the basis of the content of the letter reproduced above, the Arbitrator was of the view that the Respondent had a permanent contract because the confirmation letter did not state the end of the employment contract. After going through the said letter as well as other documents available in record, I find the Arbitrator's findings is not correct based on the following reasons:

First, the confirmation letter cannot stand as a contract. The last paragraph as quoted above informed the Respondent that she had to respond to the offer then after response, next procedure could be followed. Though the next procedure was not directly stated but the evidence indicate that it was the procedure of signing a formal contract. The Respondent maintained that he followed the next procedure and signed a permanent contract which was retained by the Applicant. On his part, the Applicant strongly submitted that there was no such alleged contract. Since the Applicant did not recognize the alleged contract, he served the Respondent with a written contract (exhibit P3), requiring him to sign the said contract.

With a letter dated 4/9/2021, the Respondent refused to sign the said contract and responded thereto. She stated her reasons why she is not

pleased to accept to sign the employment contract. One among the reasons stated was that she previously signed a permanent contract. Her letter was responded by the employer with a letter dated 18/11/2021 where the Applicant *inter alia* demanded proof of the alleged permanent contract. Having gone through the records, I found there is no such proof tendered neither before the employer nor at the CMA proving the allegation of a permanent contract. In absence of such proof, the Respondent's allegation cannot stand.

Second, as rightly submitted by Mr. Ludovick, oral evidence cannot supersede written evidence. This is the law's position stated under *Section 61 of the Evidence Act (supra)* which is to the effect that:

> All facts, except the contents of documents, may be proved by oral evidence.

The above position was well elaborated in the case of **Daniel Apael Urio** (supra). In the instant matter, the written documents available proves that the alleged permanent contract never existed. Thus, the Respondent's oral evidence is baseless.

Again, in the case of **Lulu Victor Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited**, Consolidated Civil Appeals No. 22 and 155 of 2020 (unreported) it was held that:

> Documentary evidence reflects repositories and memorial of truth as agreed between the parties and retained the sanctity of their understanding.

Third, the terms of the purported contract are uncertain. The Respondent would have a stand to allege the new contract differs with the previous one if the terms of the alleged contract were known to both parties. As revealed from the records, they are not known as rightly submitted by the Applicant's Counsel. Therefore, on the basis of the foregoing analysis, it is my view that the Respondent had no permanent contract as found by the Arbitrator.

The determination of the first issue covers the second issue too. Coming to the last issue, the Arbitrator was of the view that the Applicant wrongly terminated the Respondent because she had legal justification to refuse to sign employment contract. On this issue, it is my view that the employment relationship between the employer and employee begins once parties are in agreement whether oral or written. In the matter at hand,

the Applicant offered the Respondent employment with the terms stipulated in the contract (exhibit P3). The Respondent was at liberty to agree or refuse the offer given. The records in this case clearly indicate that the Respondent refused the offered terms. Thus, she refused to enter into employment relationship with the Applicant. Under such circumstance, the Applicant had no other means than to terminate the Respondent from the employment because she refused the offer given to her.

Taking into account that the parties had previous employment relationship, the Applicant followed procedures in terminating the Respondent by summoning her before the disciplinary hearing to answer the allegation of insubordination, as to why she refused to sign the offered contract. The disciplinary committee found her guilty, and the Applicant proceeded to terminate her from employment. In the premises, all the stipulated procedures were followed in this case.

I have noted the Applicant's submission that the Arbitrator erred to conclude that the Respondent was offered a contract which offended labour laws. Indeed, I join hands with Mr. ludovick's submission that the questioned contract was just a proposal which was not accepted by the Respondent. Therefore, she was not in the position to challenge the

employment contract which she was not part of it. Furthermore, the Arbitrator did not clearly state the contravened provisions and point out the terms in the said contract which contravenes the labour laws.

In the result, I find the present application has merit. The payment of TZS 6,768,000/= as compensation for the alleged unfair termination is hereby quashed and set aside. The award of severance pay is not disturbed. Thus, the application has succeeded to the extend explained above. It is so ordered.

Y.J. MLYAMBINA

JUDGE

16/02/2024

Judgement pronounced and dated 16th day of February, 2024 in the presence of Counsel Victoria Hiza holding brief of Mr. Nickson Ludovick for the Applicant and Victoria Hiza for the Respondent.

Y.J. MLYAMBINA

JUDGE

16/02/2024