IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(AT DAR ES SALAAM)

REVISION APPLICATION NO. 219 OF 2023

BETWEEN

MOSES GILBERT KITIIME ..... 1ST APPLICANT

KADAWI LUCAS LIMBU..... 2ND APPLICANT

MUUMIN CHAULEMA ..... 3RD APPLICANT

AZIZI SALUM MWESHA ..... 4TH APPLICANT

FATUMA AKILI MTONGWELE ..... 5TH APPLICANT

AND

THE REGISTERED TRUSTEES OF EAGT ..... RESPONDENT

JUDGEMENT

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

MLYAMBINA, J.

The Applicants filed the present application challenging the decision of the Commission for Mediation and Arbitration (herein CMA) on the following grounds:

1. That, Trial Arbitrator erred in law and fact by not considering the relationship between the 2nd Applicant and the Respondent was purely of employer and employee.
2. That, the Trial Arbitrator erred in law and fact by not considering the evidence adduced by the 2nd Applicant that proves the fact that on November 2003 the 2nd Applicant was firstly employed as a

normal church servant and later on December 2003 employed as the secretary of the construction board.

3. That, the Trial Arbitrator erred in law and fact by determining 1st, 3rd, 4th and 5th Applicant's employment was procedural and substantive fair terminated hence the Respondent was right to deny the 1st, 3rd, 4th and 5th Applicants their lawful salaries.
4. That, the Trial Arbitrator erred in law and fact by not considering the fact that the 1st, 3rd, 4th and 5th Applicants were still performing their duties and obligations as the employees of the Respondent despite the termination letter.
5. That, the Trial Arbitrator erred in law and fact by not considering that all witness did not dispute the fact that the 2nd Applicant was been paid monthly since November, 2003, been giving day to day instructions to his fellow employees, received instruction from the Respondent, also been given the office at the Respondent premises which is enough to justify the employment relationship.
6. That, the Trial Arbitrator erred in fact and law by relying on uncorroborated hearsay evidence in determining the matter.
7. That, the Trial Arbitrator erred in fact and law by not considering the evidence adduced by both side in reaching to his decision.
8. That, the Trial Arbitrator erred in fact and law by not considering the evidence shown and proved that it was the tendency of the Respondent to not provide her employees with written employment contracts as for 1st, 3rd, 4th and 5th Applicants. The Respondent herself admit that they were her employees but without written contracts to establish such relationship. The

Respondent merely denied the 2nd Applicant as an employe because there was no directly existing written contract.

9. That, the Trial Arbitrator erred in law and fact by failure to properly analyze the evidence hence reached unfair conclusion.

10. That, the Trial Arbitrator erred in law and fact by assuming facts which were not stated by parties during hearing and not considered the facts which were stated by the parties during hearing.

The application proceeded by way of written submissions. Before the Court, the Applicants appeared in person, unrepresented. On the other hand, Mr. Andrew Miraa, learned Counsel appeared for the Respondent.

In a nutshell, the Applicants alleged to have been employees of the Respondent. The 1st, 3rd, 4th, and 5th Applicants were employed in the position of security guards while the 2nd Applicant was employed as a secretary of construction board since December 2003. On 07/05/2021, the 2nd Respondent received a letter from CETHA & SONS ATTORNEYS terminating him from employment. The 2nd Applicant did not accept his termination, therefore, a confrontation between him and the Respondent began.

The Respondent further ordered the 2nd Applicant not to appear in his offices. The 2nd Respondent ignored the order and forced entrance to

the Respondent's office. On the other hand, the 1st, 3rd, 4th, and 5th Applicants were ordered not to allow the 2nd Applicant to enter into the Respondent's buildings. They also disobeyed the order. Thus, they were all charged and found guilty for insubordination. Thereafter, they were terminated from their employment.

Aggrieved by the termination, all Applicants referred the matter at the CMA. After considering the evidence of both parties, the CMA found that the 1st, 3rd, 4th, and 5th Applicants were fairly terminated from their employment. It was also found that the 2nd Applicant had a contract of specific task, hence, his contract expired upon completion of the specific task. Thereafter, the Arbitrator awarded the 2nd Applicant unpaid salary of 7 days for the month of May 2021 as well as one month salary in lieu of notice. The 1st, 3rd, 4th, and 5th Applicants were awarded one month salary in lieu of notice, one month salary as leave allowance and severance payment.

In response to the application, Mr. Miraa raised an issue worth to be considered by the Court before determining the merit of the application. He questioned the legality of the impugned award. Mr. Miraa called upon the Court for dismissing the application on the reason that it arises from an award which was made contrary to law. Mr. Miraa argued

that labour matters are referred at the CMA by way of prescribed form, CMA F1 pursuant to *Section 86(1) of the ELRA*. The position is also *in pari materia* with *Rule 12(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2004 (herein GN. No. 64 of 2007)*.

Mr. Miraa submitted that apart from CMA F1, opening statement is also the document used in CMA proceedings. The two mentioned documents are used to help the CMA to draw issues for determination during trial. Thus, the opening statement should be in reflection of what is pleaded in CMA F1. According to the Applicants' CMA F1, the Applicants' nature of dispute is claim for unpaid salaries, whereas in the opening statements they claimed for unfair termination.

It was strongly argued by Mr. Miraa that Courts of law cannot decide on issues which were not raised in the pleadings. In support of his submission, Mr. Miraa referred the Court to the case of **Pasinetti Adriano v. Giro Gest Limited and Another** [2001] TLR 89. He added that; in this application, the CMA F1 did not contain issues concerning unfair termination nor breach of contract. Thus, it was improper and contrary to law for the opening statement to contain issues with regard to unfair termination and breach of contract. He also cited the case of

Uranex (T) Ltd v. Godwin M. Nyelo, High Court, Labour Division at Dar es Salaam, Revision No. 159 of 2020 (unreported). In the upshot, Mr. Miraa urged the Court to quash and set aside the award since it emanates from an illegal award.

In rejoinder, the Applicants strongly disputed Mr. Miraa's claim and stated that he is misleading the Court. That he raised new issue which was not pleaded in the counter affidavit. They further submitted that the issues were properly framed and determined in accordance with the CMA F1 and the opening statements.

I have dully considered the submissions of the parties. As rightly submitted by Mr. Miraa, the dispute indicated in the Applicants CMA F1 is the claim of unpaid salaries. The 1st, 3rd, 4th and 5th Applicants claimed for unpaid salaries from July, 2021, whilst the 2nd Applicant claimed for unpaid salaries from May, 2021. All Applicants in their CMA F1 did not state if they claimed for breach of contract or unfair termination. However, the issues framed were in respect of a dispute of unfair termination. The same are as follows as reflected in the CMA proceedings:

i. Iwapo kulikuwa na na mahusiano ya kiajira kati ya Kadawi Lucas Limbu na Mlalamikiwa

ii. Iwapo Walalamikaji waliachishwa kazi na Mlalamikiwa

iii. Iwapo kuachishwa kazi kwa Walalamikaji kulikuwa halali

iv. Iwapo wanastahili madai walivyoomba.

The above quoted issues can be loosely translated as follows:

i. Whether there was employer employee relationship between Kadawi Lucas Limbu and the Respondent.

ii. Whether the Applicants were terminated from their employment by the Respondent.

iii. Whether the Applicants were fairly terminated from their employment

iv. Whether the Applicants were entitled to the reliefs claimed.

The mentioned above issues clearly shows that the Arbitrator misdirected herself and framed issues which were not the subject matter of the dispute referred before her contrary to *Rule 24(4) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007* which is to the effect that:

> At the conclusion of the opening statements, the Arbitrator shall attempt to narrow down issues in dispute as much as possible and explain to the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes.

The wording of the above provision is clear that the purpose of narrowing down issues is to eliminate production of unnecessary evidence. As properly argued by Mr. Miraa, framing of issues before the CMA must consider CMA F1 and opening statement. The two mentioned documents are used to help the CMA to draw issues for determination during trial. Thus, the opening statement should be in reflection of what is pleaded in CMA F1.

Therefore, if the issues are not properly framed in light of the dispute presented at the CMA, the Arbitrator will end up determining a different dispute from the one brought by the parties. Likewise, in the matter at hand, the issues framed were contrary to the dispute presented by the parties through CMA F1.

In the result, since the Arbitrator determined a distinct dispute from the one presented by the Applicants through CMA F1, I hereby quash and set aside the CMA proceedings and the subsequent award. The matter is remitted back to the CMA to be heard afresh expeditiously by another Arbitrator by considering the nature of dispute initiated by the Applicants through CMA F1.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

16/02/2024

Judgement pronounced and dated 16th day of February, 2024 in the presence of the Applicants in person and Counsel Mr. Andrew Miraa for the Respondent.

Y.J. MLYAMBINA

JUDGE

16/02/2024