THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA SUB-REGISTRY)

AT MTWARA

LABOUR REVISION APPLICATION NO. 12 OF 2021

(Originating from Labour Dispute No.CMA/MTW/46/2020)

BENEDICT BUTOBHE & 10 OTHERS .....APPLICANTS

VERSUS

AQUINAS SECONDARY SCHOOL ..... RESPONDENT

JUDGMENT

14/12/2023 & 27/2/2024

LALTAIKA, J.

Three out of the 11 original Applicants in the matter at hand namely **BENEDICT BUTHOBHE, JOSHUA JOEL PALLANGYO** and **MOSES AIDAN CHEMBELE,** have not given up (yet). They are desirous of challenging the decision of the Commission for Mediation and Arbitration (the CMA) of Mtwara in Labour Dispute No. CMA/MTW/46/2020.

Apparently, for reasons that are irrelevant here, the other seven Applicants chose to abandon their claims. As will be explained at some considerable length later in this judgement, all references to the "applicants" as far as orders are concerned, should be construed to refer to the above named three. The use of the term in the rest of this decision may be liberally construed, albeit for factual and contextual reasons.

When the matter was called for mention, the parties suggested proceeding in disposing of the same by way of written submissions. A schedule to that effect was jointly agreed and the same has been spotlessly adhered to. It appears that the Applicants were assisted by an anonymous legal aid provider while the Respondent enjoyed the skillful services of Mr. Alex Msalenge, learned Advocate. I take this opportunity to register my appreciation for their invaluable services.

At this juncture, I consider it imperative to provide a brief factual and contextual backdrop to the matter. Prior to 2020 the applicants, save for Mr. Pallangyo who doubled as a librarian, were employed by the respondent, a private school located in the outskirts of Mtwara as teachers. Records indicate that the employer-employee relationship was uneventful until the respondent decided not to extend the relationship. Aggrieved the applicants knocked the doors of the CMA on 27/04/2020 filed the CMA Form No. 1 which outlined specific reliefs sought.

For ease of reference and avoidance of confusion with another application by the same parties decided by this court, their seven claims as can be gleaned from court records are as follows:

1. *That the Applicants were working above the statutory time and the Respondent never paid the overtime.*
2. *That in the whole material time the Respondent was underpaying the Applicant's payment of gratuity.*
3. *That the Respondent made unlawful deduction upon some Applicant's salaries.*
4. *That the Respondent never paid the win-win agreement payment to the Applicants herein entered with the Respondent.*
5. *That, the Respondent failed to pay Academic Allowance to some Applicants herein and*
6. *That, the Respondent never paid Annual Leave to the Applicants herein.*

Needless to say, that the CMA decided in favour of the Respondent as it found no merit to any of the above claims. The applicants have faulted the CMA in the following terms:

(i) *That the Arbitrator erred in law and in fact in failing to properly analyze the evidence and decide the case on a balance of probabilities after weighing the strength of the evidence adduced by the parties.*

(ii) *That, the Arbitrator erred in law and in fact in failing to take into consideration the contents of the contract of employment which specifically provides for the rights of the parties.*

(iii) *That the Arbitrator erred in law and in fact in disregarding the exhibits which were tendered by the Applicants and*

(iv) *That the Arbitrator erred in law and in fact in finding that the Applicants are not entitled to anything against the Respondent notwithstanding the fact that the Respondent did not dispute (admitted) some of the claims of the Applicants.*

Arguing in support of **the first ground of appeal**, the applicants emphasized that in labor practices, the burden of proving allegations for unfair termination rests squarely on the employer, who is obligated to demonstrate that the employee's termination was fair. They asserted that this burden does not shift to the employee.

The applicants alleged further that in the present case, the honorable arbitrator erroneously shifted the burden of proof to the applicants, failing to recognize the clear grievances of the applicant who was initially terminated unfairly and had outstanding arrears for salary, annual leave, gratuity for different years, overtime, teacher allowance, and academic allowance.

According to the applicants, they had substantiated their claim of unpaid salary arrears by submitting bank statements to the Commission for Mediation and Arbitration, demonstrating that they never received the full salaries as per the agreed terms.

Specifically, applicants cited **Section 28(1)(a), (b), and 7 of the Employment and Labour Relations Act (Supra)** which prohibit employers from making deductions from remuneration unless legally required, such as by law, collective agreement, wage determination, court order, or arbitral award.

The applicants argued that the arbitrator disregarded this compelling evidence and legal provisions, unjustly demanding additional documentary evidence that was in the possession of the respondent but not provided to the applicant or the Commission for Mediation and Arbitration in Mtwara.

Submitting on the second ground, the applicants argued that in accordance with Article 17.1 of the **Employment Contract** issued by the Respondent, it was stated that:

> *"...on the successful completion of the contract, the employee would be entitled to the golden handshake, amounting to ten to fifteen percent of his/her annual basic salary, depending on the performance of the employee."*

Prior to signing the contract on 20/02/2019, the Appellants asserted, they **had a verbal agreement with the Respondent**, stipulating that they would be paid gratuity at the rate of 15% of the annual basic salary upon the successful completion of 12 months of service. However, for reasons known to the Respondent, the Applicants asserted, their entitlement of gratuity was underpaid from 15% to 10% or even less without justification.

The Appellants explained that the parties were bound by their contract, as evidenced in the Commission for Mediation and Arbitration for Mtwara. Referring to Article 17.3, Appellants pointed out that the employee would not be entitled to the golden handshake if his/her performance had not been

to the satisfaction of the employer or performed to the standards of the stated indicators. In this case, Applicants lamented, the respondent did not pay gratuity according to the agreed-upon terms, as the applicant received amounts below 10% without any reasons or justification. Appellants also asserted that according to the contract, especially the right to annual leave under Article 8, the applicants were not paid annual leave.

Regarding overtime covered under Article 7 of the contract, the Appellants argued that, as per Section 19 (2) and 5 of the act, it was mandatory for the employer to pay overtime. They pointed out that the learned Arbitrator failed to acknowledge that the applicants worked overtime, and the respondent did not pay them. They concluded that the contract itself spoke volumes, and the arbitrator failed to grant the applicant's prayer as required by the law and the contract.

The applicants maintained that, based on the strength of the evidence presented during the proceedings, their case was more substantial than the respondent's. They emphasized that they had provided the court with documents supporting their claims, and the commission's failure to recognize these rights was said to contradict **principles of evidence analysis in decision-making.**

Submitting in support of the third and fourth grounds of appeal conjointly, applicants argued that during the proceedings, they presented both oral and documentary evidence. However, they asserted that the arbitrator disregarded the documentary evidence, which, in turn, would have supplemented the oral testimony of the applicant.

In concluding their submission, applicants lamented that the arbitrator focused solely on ensuring that they were not paid their statutory claims

against the respondent therein. Although there were instances where the respondent admitted to not paying them, the applicants asserted, the arbitrator ultimately failed to award them as per claims. Regarding the Win-Win Agreement, applicants claimed that the respondent admitted to its existence, and the payment was supposed to be Tsh. 50,000/=. However, the evidence submitted by the respondent showed that, in some years, the applicant received only 25,000/=, and the remaining balance was not paid by the respondent.

As the turn for the Respondent came, her Counsel Mr. Msalenge started by pointing out that the submission filed by the applicants suggested that BENEDICT BUTHOBHE signed on behalf of the other ten applicants. He questioned the identity of the ten applicants and when BENEDICT BUTHOBHE acquired the legal basis to sign on their behalf, considering that only three applicants remained actively involved.

He emphasized that the present matter originated from dispute number CMA/MTW/LD/46/2020, where the applicants initiated two separate cases at the commission for mediation and arbitration (CMA/MTW/46/2020 and CMA/MTW/LD/25/2020), both referred to this court for revision. The distinction between the cases lies in the nature of the claims, one involving unfair termination (CMA/MTW/LD/25/2020) and the other terminal benefits (CMA/MTW/LD/46/2020).

Mr. Msalenge highlighted that the court has already determined the nature of the employment contract in the case **of BENEDICT BUTHOBHE and 10 others vs AQUINAS SECONDARY SCHOOL (Labor Revision number 10 of 2021),** concluding that the applicants had fixed-term contracts, not oral permanent contracts as claimed.

Regarding the ruling delivered by Hon. Mediator I. ADAM on June 25, 2020, granting condonation to file a complaint before the commission out of time (pertaining to application number CMA/MTW/46/2020), Mr. Msalenge asserted that the ruling covered only claims from the year 2019, according to the written contract, and claims beyond that duration should not be entertained, as explicitly stated in the ruling, despite the commission entertaining all claims of the applicant.

Mr. Msalenge opposed the grounds of appeal by asserting that the applicants claimed a cardinal principle of labor practices, emphasizing that the burden of proving allegations for unfair termination rests on the employer. However, he pointed out that the dispute at hand pertained to terminal benefits, not unfair termination.

He noted that two applications for revision involving the same parties were before the court. One, revision application **number 10 of 2021, concluded that the applicants were terminated fairly (related to unfair termination)**, while the other, revision application **number 12 of 2021 (the current matter), focused on terminal benefits.**

Mr. Msalenge explained the burden of proof as the duty placed upon a party to prove or disprove a disputed fact. He cited examples where employees need to establish certain facts before the burden shifts to the employer. He also highlighted that the burden of proof in labor disputes depends on the issue being proved.

Referring to **sections 60(2)(a) of the Labour Institutions Act No. 7 of 2019**, he stressed that the person alleging a contravention of labor law must prove the facts constituting the contravention. Mr. Msalenge argued

that all claims by the complainants are rights provided by labor law, and it was their duty to prove the alleged violations.

He emphasized that the standard of proof in labor disputes is the balance of probabilities **and critiqued the applicants' claims of gratuity arrears, overtime, and annual leave, asserting that they failed to provide evidence.** He contended that the respondent's evidence was strong, proving the payment of all legal claims, while the applicants' evidence was contradictory and lacked substance.

In support of his arguments, Mr. Msalenge cited the case of **CRJ CONSTRUCTION CO (T) LTD VS MANENO NDALIJE & ANOTHER** (Labour Revision No.205 of 2015 (unreported)) and Section 112 of the Evidence Act [CAP 6 R.E 2002]. He also referenced the cases **MAELEZA SECURITY SERVICE LTD VS SAMSON ANDREW** (Labour Revision No.20 of 2011 (Unreported)), **EDDY MARTIN NYINYOO VS REAL SECURITY GROUP & MARINE** (Labour Revision No. 114 of 2011 (Unreported)), and **Emmanuel Saguda and another v Republic** (Criminal Appeal Number 422 B of 2013, Court of Appeal of Tanzania), particularly highlighting the statement that:

> *"a decision to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony."*

Concluding his submission in style, Mr. Msalenge pleaded with this court to dismiss the entire application for revision for lacking merit.

I have dispassionately considered the rival submissions and carefully scrutinized the court records. As alluded earlier, only three out of the 11 original applicants have chosen to travel this far on their journey to fault the

CMA's decision. I must emphasize that I found rather strange that the learned Counsel for the Respondents chose to spend unjustifiably many paragraphs on this issue. Although I totally agree with him that Mr. Butobhe's act of signing the documents on behalf of 10 others violated procedural laws **Rule 43 and 44 of GN number 106, Labor Court Rules, 2007** to be exact as he correctly cited, he should have regarded it as a mere slip of the pen.

I say so because, as an officer of the court, he is aware that the three named applicants prayed to proceed on their own and he indicated no objection. I therefore found intriguing to read Mr. Msalenge's submission where he argued that BENEDICT BUTHOBHE's submission on behalf of the other ten applicants is incompetent and should be expunged from the records for not complying with the mandatory notice of representation. That would have led to striking out or outright dismissal of the application without considering it on merit hence more knocks in court for revisions or appeals as the case may be. I think, going forward, it is vital for counsel to assist the court not to lose the forest for the tree. Only then can litigation such as the present matter that has backlogged this court for more than 15 months can come to an end.

Coming back to the crux of the matter, the starting point of my analysis is the recollection of the records conducted with impressive clarity by Mr. Msalenge. The learned Advocate pointed out that there were two applications for revision involving the same parties: **One**, Revision Application number 10 of 2021 which concluded that the applicants were terminated fairly Muruke J. as she then was (related to unfair termination) and Two, Revision Application number 12 of 2021 (the current matter), focused on terminal benefits.

Reading the Applicants' submission between the lines, one can easily see a great deal of a mix-up. Applicants have brought forth arguments on unfair termination that were decided by this court in an earlier application. I cannot agree more with Mr. Msalenge that this Court is ***functus officio*** with regards to issued raised in revision application **number 10 of 2021.** I henceforth refrain from any further reference to the same.

Having narrowed down the scope of the application, I am left with only one issue to determine, and it is whether the CMA failed to accord proper analysis to the evidence fronted by the applicants. It is the applicant's submission that they had substantiated their claim of unpaid salary arrears by submitting bank statements demonstrating that they never received the full salaries as per the agreed terms. They went further and argued that the arbitrator disregarded this compelling evidence and legal provisions, unjustly demanding additional documentary evidence that was in the possession of the respondent.

I have carefully considered how the CMA analyzed the evidence presented before it and the reasons advanced for rejecting the same. As correctly stated by the learned Arbitrator, the burden of proof rested with Applicants to prove that they indeed worked overtime, never went for leave and more importantly, received no payment as per the cited sections of the contract. It appears that Applicants left the blanks to be filled by the Arbitrator.

I cannot help but endorse the following reasoned opinion of the learned Arbitrator arrived at after considering a wealth of oral and documentary evidence sometimes with enviable flexibility typical of Labour Courts:

> *"Walalamikaji katika shauri hili hawajathibitisha madai yao kwani hawajato authibitisho wa kufanya kazi masaa ya ziada na kutolipwa, kutokwenda likizo miaka yote waliokuwa kazini, kupunjwa gratuity*

na kutolipwa malipo ya makubaliano ya win win, wala kuthibitisha kuwa mwalimu wa darasa kustahili posho hiyo. ***Pia walalamikaji hawajakana malipo mlalamikiwa aliyothibitisha kuwalipa ikiwa ni posho ya muda wa ziada, kazi za ziada na malipo ya gratuity kama alivyothibitisha kwa KW6 na KW8.***"

The complaint that the learned Arbitrator erroneously shifted the burden of proof from the Respondent (employer) to the Applicants (employees) against the dictates of Labour Laws is equally unfounded. When an employee alleges to have been unfairly terminated in the employer must prove that termination was fair. However, as correctly argued by Mr. Msalenge, where an employee claims overtime, constructive termination, breach of contract of employment as per **DANIEL S/O SHOTOLI VS GPH INDUSTRIES** (Labour Revision No.72 of 2017(unreported) and discrimination it is her duty to establish the evidential facts substantiating the existence of liability to the employer the relevant case of **STEPHANO CHAMBO VS J.D. INTERNATIONAL LTD** (Labour Revision No.2 of 20 (unreported).

Premised on the above, I see no merit to the application and the same is hereby dismissed. I make no order as to costs.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.02.2024