IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION NO. 82 OF 2020

BETWEEN

VICTORIA PERCH LTD ..... APPLICANT

VERSUS

SEBA JOHN ..... RESPONDENT

JUDGMENT

Date of last Order: 25/10/2021

Date of Judgment: 05/11/2021

M.MNYUKWA J,

The applicant VICTORIA PERCH LTD filed the present application seeking to revise and set aside the award delivered on 25th September, 2020 issued by the Commission for Mediation and Arbitration (herein to be referred to as CMA) in labour dispute No. CMA/MZA/ILEM/293/2019/115/2019. The application is made under the provisions of Section 91 (1), (2)(a)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, Section 51 of the Labour Institutions Act, No 7 of 004, Rule 24(1), 24(2),(a),(b),(c),(d),(e) and (f) and Rule 24(3)(a),(b),(c),(d) and 28(1)(a)(b)(c)(d)&(e) of the Labour Court Rules, 2007 GN No. 106 of 2007.

The application was supported by the affidavit of EDWIN KABAGO while the respondent one SEBA JOHN challenged the application through his counter affidavit.

The background of the dispute may be summarized as hereunder, the respondent was employed on one-year term written contract by the applicant in a filter unit from 1st June 2019 and expected to end his contact on 30th May 2020. That on 9th July 2019 the respondent received a letter from the applicant terminated him from employment. The said termination was reported to TUICO for the purpose of resolving the dispute as the respondent believed to be unfairly terminated. The dispute was resolved and the Deed of Settlement was signed on 15th July 2019 of which the parties agreed that from the date of signing the deed there shall be no any dispute and the respondent shall be considered as an employee of the applicant. The respondent resumed at his duty station from 16th July 2019 and work for the applicant up to 24th July 2019. The respondent alleged that the applicant breached the contract of employment as he was underpaid contrary to their agreement and he was terminated from the employment by the applicant. The respondent referred the dispute to CMA on the ground of the breach of the contract. The arbitration was conducted to both parties and on 25th

September 2020, an arbitral award was issued in favor of the respondent on the reason that there was breach of the contract of employment on the part of the applicant. Being aggrieved with the CMA's Award, the applicant filed the present application to revise and set aside the award dated 25th September 2020. By order of the Court dated 22nd September 2021, hearing of the Revision was done by way of written submissions. The applicant was represented by the learned counsel, Mr. Edwin Kabago, while Ms. Angela Francis Kindimba, a representative from TUICO represented the respondent.

At the CMA four issues were agreed by the parties for determination

(i) Whether there was breach of contract

(ii) Whether there were sufficient reasons for breach of the contract of employment

(iii) Whether the procedure for breach of the contract was followed as per the parties' agreement

(iv) What reliefs are entitled to both parties

The arbitrator in determining the issues raised he adjudged that the applicant breached the contract of employment. Being dissatisfied with the decision of the CMA, he filed revision application on the following legal issues

(i) *That the honourable arbitrator erred in law and in fact by basing on assumptions to decide that the applicant breached the contract while there was no any clear evidence to prove the said allegations.*

(ii) *That the honourable arbitrator erred in law and in fact by refusing to give the applicant an opportunity to tender the attendance and salary register to disprove the respondent's allegations.*

(iii) *That the honourable arbitrator erred in law and in fact by wrongly awarding Tsh 1,704,400/= as terminal benefits while the respondent worked on a daily basis*

(iv) *That the honourable arbitrator erred in law and in fact to decide that the applicant breached the contract while the respondent terminated employment by absenteeism/abscondment without any official notice to the applicant*

(v) *That the honourable arbitrator erred in law and in fact by shifting the burden of proof to the applicant while the onus of proof lies to the respondent who had failed to discharge it.*

During the hearing, the learned counsel for the applicant submitted that he contested the respondent's allegation that the applicant breached the contract of employment. He avers that it was the respondent who breached the contract of employment by abscondment. He added that initially the respondent's employment was terminated on 09/07/2019 as evidenced in

Exhibit AB-1, after parties signed a deed of settlement, the respondent was re-instated as it is shown in Exhibit AB-2.

He went on that, it is a well-established principle in labour matters that the employee is charged with duty to prove breach of contract as it was held in the case of **James Renatus vs CATA Mining Company Limited,** HC Labour Revision No 1 of 2021. He also referred section 110(1) and (2) of the Tanzania Evidence Act, Cap 6 R.E 2019 and the decision of the Court of Appeal of Tanzania in the case of **Antony M Masanga vs Penina Mama Mgesi and Lucia,** Civil Appeal No 118 of 2014.

The counsel for the applicant submitted that the respondent alleged that the applicant breached the contract as he was paid Tsh 4450/= instead of Tsh 6000/= per day contrary to their agreement and that he was stopped working and his contract of employment was terminated. The counsel of the applicant in his submission stated that the respondent failed to prove before the CMA that he was underpaid and he was terminated from the employment. He added that the respondent brought no evidence except the oral testimony which was not corroborated and that the respondent failed to tender the termination letter.

The counsel of the applicant submitted that the arbitrator misdirected himself by deciding the matter in favour of the respondent by assumptions as it was reflected on page 10 to 12 of the Award. He insisted that the respondent failed to prove his allegation before the CMA. He supported his argument by referring this Court to the case of **Regina Gaudence vs Sadock James,** HC Civil Appeal No 11 of 2019.

The counsel of the applicant went on that the arbitrator misdirected himself to use the termination letter dated 9th July 2019 while the parties agreed that the said letter should not be used by either of the party to initiate legal proceedings. He added that reference by the arbitrator to Exhibit AB-1 and AB-2 as the basis of the decision was a total misconception occasioning injustice to the applicant.

On the other ground of revision, the applicant avers that the arbitrator misdirected himself by shifting the duty to prove breach of contract to the employer. He went on to state that, the principle stated in the above cited cases, placed the duty to the respondent, therefore the arbitrator erred in law and fact to shift the burden of proof to the employer.

On the other ground of revision, the applicant alleged that the arbitrator erred in law and fact by refusing to give the applicant an

opportunity to tender the attendance and salary register to disproof the respondent's allegations. The counsel for the applicant stated that, during the hearing of the applicant's case, DWI tendered the attendance register and payment records to prove that the respondent was paid Tsh 6000/-He refers to page 3 of the typed proceedings. He went on that, to his surprise and for the reasons best known to the arbitrator in paragraph 3 of page 11 of the Award, it is on record that the attendance registers and payment records were rejected and not admitted. However, the same is not reflected in the proceedings. The counsel of the applicant further argued that what is stated in the Award contradicts with the typed proceedings and he believed that, That is the highest standard of biasness to arbitrator.

The counsel of the applicant finally submitted that the respondent was paid on a daily basis for the work done, the contract ends at the end of the day and that such contract is renewed on daily basis. He avers that the arbitrator was wrong to award the respondent payment of Tsh 1,500,000 as a total salary from 25th July 2019 to 30th May 2020 because the nature of the contract of the respondent creates no expectation of pay for the days not worked for. He added that, the arbitrator erred in awarded Tsh 1,704.400 as terminal benefits because the applicant did not breach the contract nor

terminate the respondent employment contract as the respondent was the one who terminated the contract by absenteeism/ abscondment. He buttresses his argument by referring to Regulation 9 of the GN No 42 of 2007.

He went on that the arbitrator awarded the reliefs to the respondent *suo moto* and without afforded the other party right to be heard as the same was not prayed for in the CMA Form No 1 and not featured during the hearing. He went on that since the said reliefs were raised *suo motto* and does not give the other party right to be heard on the same, that award is nullity. He refers to the case of **Revina Kidagali vs Rozia Vyishinzo**, HC Land Appeal Case No 7 of 2020, The applicants pray the revision to be allowed and the CMA's Award to be revised and set aside.

Responding to the applicant's submissions, the respondent's representative submitted that it is the established principle in labour law that the burden of proof lies to the employer to prove the reason on the balance of probabilities. She went on that, when the employee alleges the breach of contract of employment in absence of the clear evidence and if the employer deny to have breached the contract, the employee is duty bound to establish the existence of the breach before the burden of proof shift to

the employer to prove that there was no breach of contract of employment. She supported her argument with the case of **CRJ Construction Co. Ltd vs Maneno Ndalije & Another,** Labour Revision No 205 of 2015.

The representative of the respondent submitted that, the burden of proof is not always static on the complainant in some issue such as proof of fair termination including breach of contract of employment, the burden of proof shifts to an employer who is the applicant. She refers section 39 of the Employment and Labour Relations Act, Rule 24(3) of the GN No 67 of 2007, the case of **Maelezo Security Services Ltd vs Samson Andrew, Labour** Revision no 20 of 2011 and the case of **Eddy Martin Nyonyoo vs Real Security Group & Marine,** Labour Revision No 114 of 2011 (both unreported)

She went on to submit that, it is not for an employee to prove the breach of contract by producing evidence sufficient to raise the issue and once this evidentiary burden is discharged, the onus shift to the employer to prove that there was no breach of contract and not otherwise. She added that the arbitrator did not shift the burden of proof of the breach of the contract to the employer rather than it was the applicant duty to submit the

evidence to the CMA that the respondent was not underpaid, and that is not the shifting of burden of proof as stipulated by the applicant.

On the other ground of revision the representative of the respondent averred that the arbitrator had the discretion to elect among others, an inquisitorial or adversarial approach in conducting arbitration proceedings and even admitting hearsay evidence as the key evidence depending on the circumstance of each and every case in order to achieve the goal of dealing with the substantial merits of the dispute fairly, quickly and with minimum legal formalities. She further submitted that; both parties were given equal chances to establish their cases. The respondent was the legal employee of the applicant and it was the duty of the applicant to give evidence that the respondent was not his employee and not otherwise.

On the issue of the award that was alleged to be done by the arbitrator *suo moto* without afforded the parties the opportunity to be heard, she claims that *suo moto* is an action taken by the court without any request by the parties, therefore the court will make its own decision without involving any party to the case. She concludes by praying the Court to dismiss the Revision application on the reason that the same is devoid of merit.

I have carefully and duly considered the grounds of revision advanced by the applicant, submissions of both parties and carefully considered the evidence on record with eye of caution, I will now consider as to whether the Revision is meritous.

In the present Revision it is uncontested that there was employment relationship between the applicant and the respondent. The nature of the employment contract between the two was the fixed term contract for a period of one year on a daily payment. This can be reflected in the CMA's proceedings through the evidence of PW1, DWI and Exhibit AB-3.

Upon going through the court record, I find the application before the CMA was properly initiated with CMA Form No 1 in which the respondent claimed that there was breach of contract by the applicant and claims to be paid the salaries for the remaining period of the contract of employment entered with the applicant. The available record specifically Exhibit AB-3 shows that the respondent was to be paid Tsh 6000/- being the daily payment for the work done. It is the complaint of the respondent that the applicant paid the respondent Tsh 4450/- which is less of the amount agreed in the contract.

In his submission, the applicant denied to have paid the respondent less of the agreed amount and he avers that the respondent was paid the agreed amount as per their contract and surprisingly the respondent abscond from work without giving any notice to the applicant as per the terms of contract.

On the other hand, the respondent avers that the applicant breached the contract of employment for being paid less than what they have agreed in the contract. He averred that, after the respondent was reinstated from work after he was unlawfully terminated, for a period of five days he was paid Tsh 4.450/- instead of Tsh 6.000/- per day contrary to the agreement and that the applicant terminated him from employment. He therefore claims the breach of the contract by the applicant of which he is entitled to be paid as it was rightly awarded by the arbitrator.

Upon further perusal of the records, I find the arbitrator ruled out that there was breach of the contract by the applicant as he believed that the applicant paid the respondent less amount from what the parties agreed and the applicant failed to prove that he was paying the respondent the agreed amount as per the terms of contract. The arbitrator added that the applicant terminated the employment contract after he was questioned by the

respondent as to why he was paid contrary to the agreement. Therefore, the applicant was ordered to pay the respondent salaries for the remained period of the contract, accrued leave pay, payment of notice and certificate of service.

In the present case, the question of breach of contract is a pivotal issue that need to be considered by this Revision. Before I embark into a merit of revision it is better to appreciate how the breach of the contract of employment may happen. The breach of the employment contract may happen when one of the terms of the contract is breached. It may includes but not limited to for example, failure to pay wages, failure to work on agreed hours and failure to work diligently and competently. Both the employer and the employee can bring a claim for breach of contract in relation to binding contractual terms. It is therefore expected that, the claimant needs to show that he had suffered loss by the breach that has been occasioned by the other party.

In our case at hand, the applicant claimed that it is the respondent who alleged that the applicant had breached the contract of employment, thus, he had a duty to prove his allegation. It is my view that thus, the respondent had that duty because he claimed the contravention of a

fundamental right that goes to the very root of the contract as he is alleged to have been paid less contrary to the agreed amount. (See section 60 (2) of the Labour Intuition Act, Cap 300 R.E 2019). But also on the other hand, the applicant had a duty to keep records of employment in case of any legal proceedings an employer has a burden to prove or disprove an allegation of employment. (See section 15 of the Employment and Labour Relations Act, Cap 366 R.E 2019)

The above laid foundation is with a purpose. The objective is to address the issue of the evidence to prove or disprove the allegation claimed by both parties.

In the determination of this Revision, I will start with the second ground of revision which alleged that the honourable arbitrator erred in law and fact by refusing to give the applicant an opportunity to tender the attendance and salary register to disprove the respondent's allegations.

On my perusal of the record cover to cover, it indicates that, neither party submitted the documentary evidence to prove the allegation put forward by the other party. The applicant alleged that he was not given that opportunity by the honourable arbitrator presiding on that matter at the CMA. In other words, his allegations suggests that he was denied the right

to be heard because he was denied a right to tender the documentary evidence to disprove the respondent's allegation.

When looking at the CMA's proceedings at page 3 of 7, when the evidence of DW1 was taken, the witness seems to have documentary evidence tends to prove that the respondent was paid Tsh 6.000/ but the proceedings shows that the same was not tendered nor rejected by the arbitrator. I say so because the records of the proceedings read as hereunder

> *"S. Baada ya settelement kusainiwa nini kiliendelea*
>
> *J. Alirudi kazini tangu tarehe 17/07/2019 aliendelea na kazi hadi 24/07/2019*
>
> *S. Nyaraka hizi ni nini*
>
> *J. Ni karatasi zinazoonyesha mfanyakazi ameingia kazini na amelipwa kiasi gani*
>
> *S. Hizo karatasi zimetokea wapi*
>
> *J. Victoria Perch Ltd*
>
> *S. Ni za lini hadi lini*
>
> *J. Kuanzia tarehe 17/07/2019 hadi tarehe 24/07/2019 kasoro tarehe 21/07/2019 na 22/07/2019 hatukufanya kazi siku hizo mbili".*

S. Baada ya mlalamikaji kurudi kazini alikuwa analipwa kiasi gani

J. Tsh 6000/-

S. Tangu 17/7/2019 – 24/07/2019 Bwana Seba alitoa malalamiko yoyote juu ya mshahara wake

J. Sijawahi kusikia malalamiko yoyote ya mlalamikaji

The conversations on cross examination of DWI as it is reflected in the CMA's proceedings were as follows:

S. Ulijuaje Seba analipwa 6000

J. Mimi ndio naandaa karatasi na malipo na nahakikisha kuwa wamelipwa. Analipa ni mtu mwingine mimi ila ndio mwandaaji"

On the other hand, when the evidence of PW1 was taken, the CMA's proceedings revealed that the respondent claimed to be paid Tsh 4,450/- instead of Tsh 6,000/- as per agreement. The part of the proceedings at page 6 reads as here under:

" S. Nini kiliendelea

J. Nilipokea 4.450, niliendelea kupokea hela hiyo kwa muda wa siku 5 ila siku ya kwanza nilipoipokea kesho yake nilienda kumwambia kwa nini analipa kinyume na mkataba wangu, alisema kwani siwezi au siridhiki na mshahara huo..."

When cross examined by the counsel of the applicant, the respondent, PWI admitted that he had no evidence to tender before the CMA to show that he was paid Tsh 4450. The part of the proceedings as reflected at page 8 and 9 of the CMA's proceedings reads as follows:

> *"S.Una Ushahidi wowote umeutoa kuthibitisha mshahara ulikuwa 4450*
>
> *J. Hapana*
>
> *S. Unataka Tume iamini maneno matupu bila Ushahidi*
>
> *J. Ndio*
>
> *S. Una ushahidi kuthibitisha mwajiri ulipo mhoji kuhusu punguzo la mshahara alisema umerudi kazini kwa sababu ya misamaha ya wakili Angelo*
>
> *J. Hapana*
>
> *S. Kwa nini ulifanya kazi ndani ya muda wa siku 5 kama mshahara haukuwa 6000*
>
> *J. Kutokana na hali ya uchumi niliyokuwa nayo na mwajiri alisema niendelee hivyohivyo kufanya kazi."*

The conversations compel me to go through the CMA Award. At page 11 of the Award the arbitrator remarked that:

" .... Baada ya uamizu mdogo kutolewa na mlalamikiwa kuamuriwa kuleta mashahidi wake alikuwa na nafasi ya kuomba kuwasilisha vielelezo vya Ushahidi, kabla ya usikilizaji, jambo ambalo mlalamiiwa hakulifanya na badala yake alileta vielezo siku ya usikilizaji wa Ushahidi na ***Tume haikupokea baada ya mlalaimkaji kutoa hoja kuwa vimetolewa kwa kushtukizwa na wakili wa mwajiri kuamua kuendelea na mashahidi wake bila uwepo wa vielezo."***
(emphasis is mine on bolded words)

As it was rightly submitted by the applicant, the above statement contradicts with the CMA's proceedings as they are reflected above and in the CMA's file. The proceedings are silent as to whether there was tendering of the exhibit by the applicant and if there was objection from the respondent when the purported exhibit was tendered.

It is a settled principle that courts proceedings are to be trusted. In the case of **Alex Ndendya v R,** Criminal Appeal No 207 of 2018 CAT at Iringa held that:

"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what is actually transpired in court. This is what referred to in legal practice as the sanctity of court record."

Since the proceedings of the CMA are silent, the averment of the arbitrator on its Award cannot be trusted and therefore the second ground of revision of the applicant need to be addressed.

It is a trite law that a party to the case should be given a right to be heard. In this country a right to be heard is a fundamental principle which has been guaranteed in our Constitution of 1977 (as amended) under Article 13 (6) (a). The right to be heard is not confined only on the right to give oral testimony before the court of law, it also includes the right to tender the documentary evidence and the due procedure should be followed on its admissibility or otherwise. The admission and the denial of the exhibit should be clearly seen in the proceedings. The applicant in the present revision need to be given adequate opportunity to be heard in order to achieve the substantive justice which guarantee a fair trial.

In the case of **Antony M. Masanga vs Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No 118 of 2014, CAT at Mwanza, the court observed that:

> *"...In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an*

adequate opportunity to be heard as to achieve the quest of a fair trial."

In the circumstances, I am of the considered opinion that, that the fact that the applicant claimed to have denied the right to tender the documentary evidence to disprove the allegation of the respondent, and the fact that the Award shows the applicant was given that opportunity and the respondent objected which contradicts with the proceedings, for the purpose of attaining the substantive justice, it was necessary for the applicant to tender the documentary evidence. This will not only ensure adequate opportunity to be heard to the applicant but will also enable the arbitrator to reach the just decision based on the evidence presented before him taking into consideration that in our revision at hand, neither of the party adduce documentary evidence which may in fact prove or disprove the allegation on the breach of contract. It was therefore incorrect for the CMA to order the way it did without according the applicant an opportunity to tender evidence as to the allegation put forward by the respondent.

In the event, the instant revision had merit, and the same is therefore allowed. The decision of the CMA is hereby revised, quashed and set aside. For the interest of justice, I remit the file to the CMA and order the applicant

to be given right to tender documentary evidence, then the CMA should make its own findings. Since the second ground has an effect of disposing the application, I find no need to labour much on the remaining grounds of revision. The matter being a labour dispute, I make no order as to costs.

It is so ordered.

M. MNYUKWA
JUDGE
05/11/2021

Right of appeal explained to the parties.

M. MNYUKWA
JUDGE
05/11/2021

Judgement delivered on 05th day of November, 2021 in the presence of the parties via audio teleconference.

M. MNYUKWA
JUDGE
05/11/2021