IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 72 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 2nd day of February 2023 in Labour Dispute No. CMA/DSM/ILAL/928/19/177/21 by (Johnson, Arbitrator)

KHADIJA ABDALLAH..... APPLICANT

VERSUS

MACAU ENTERTAINMENT LIMITED..... RESPONDENT

JUDGEMENT

Date of last Order: *03/07/2023*
Date of Judgement: *19/07/2023*

MLYAMBINA, J.

In the present application, the Applicant is challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (herein CMA) (Hon. Johnson F, Arbitrator) which was decided in favour of the Respondent. The Applicant is praying for this Court to call for the records of the CMA and revise the proceedings and the Award with *Reference No. CMA/DSM/ILA/928/19/177/21* and satisfy on the correctness, propriety, and legality of the Award. She further prays for the incidental costs to the application.

The brief facts are that the Applicant was employed by the Respondent orally from 1st September 2018 until on 26th November

2019 when it was alleged by the employer that the Applicant terminated her employment contract for abscondment, and on the same date she received a summons for appearance before CMA.

Being not satisfied with the way the employment ended, the Applicant filed a complaint in the CMA, *vide Labour Dispute No. CMA/DSM/ILA/928/19/177/21* complaining against unfair termination on both aspects of reason and procedure. She further claimed that her termination was not fair as she was terminated after being discovered by the Respondent to have a pregnancy.

Before the CMA, the Arbitrator found that the Applicant had fixed term contract and her termination was fair as the Applicant absconded herself from the work for more than five days.

Being aggrieved by the CMA's Award, the Applicant filed the present application challenging the CMA Award basing on three issues as hereunder:

i. Whether the Applicant was employed under fixed term contract or permanent basis.
ii. Whether the Applicant' employment termination was substantively and procedurally fair.
iii. To what reliefs are the parties entitled.

The Applicant was represented by Mr. Isihaka Yusuph Counsel whereas Mr. Manyama Peter, Advocate represented the Respondent. Parties argued the application by way of written submissions.

As regards to the type of agreement, Mr. Isihaka submitted that it was testified by the Applicant that she was employed on permanent basis but the same was disputed by the Respondent. The later submitted that the Applicant was employed under yearly fixed term contract but there was no any supporting evidence contrary to *Section 15 of the Employment and Labour Relation Act [Cap 366 Revised Edition 2019] (herein ELRA).* He further added that the Respondent failed to honour her legal obligation of keeping record as per *Section 15(C) and Section 96(2) of ELRA.*

On whether the Applicant was terminated or not, Mr. Isihaka submitted that *Section 39 of ELRA,* imposed the duty upon employer to prove the fairness of the termination. According to Mr. Manyama, the Arbitrator was neither right by shifting the burden of proof to the Applicant nor for believing the testimony of the Respondent without any collaborative evidence and disregarding the Applicant's testimony contrary to *Section 143 of the Evidence Act [Cap 6 Revised Edition 2019]* which directs the Court to consider the credibility of witness and not number of witness.

It was submitted by Mr. Isihaka that the issue of pregnancy was not a new issue, as it was testified at the trial CMA, however the same was never disputed by the Respondent. According to him, failure to challenge it implies acceptance of the truth. Bolstering the position, he cited the case of **Jaspin s/o Daniel @ Sikwaze v. The DPP,** Criminal Appeal No.519 of 2019, Court of Appeal of Tanzania (unreported).

Mr. Isihaka added that the law is very clear that no employee shall be terminated on ground of pregnancy as per *Section 37(3)(b)(i) of ELRA.* On that basis, he was of the view that the Respondent had no valid reason of terminating the Applicant's employment.

As regards to the defectiveness of the of the affidavit, the Applicant's Counsel submitted that defectiveness on verification clause was just a minor slip of the pen which is cured by including properly numbering the item which were left. He supported his argument by citing the case of **Sanyou Services Station Ltd v. BP Tanzania Ltd (now Puma Energy (T) Ltd,** Civil Application No. 185/17 of 2018, Court of Appeal of Tanzania (unreported).

It was further added by the Applicant's Counsel that the trial Arbitrator did not consider the testimony and evidence of the Applicant which has resulted to serious of justice. They thus prayed for this Court to revise, quash and set aside the CMA Award.

Opposing the application, Mr. Manyama submitted that since the Respondent is the custodian of particulars and information of her employees as per *Section 60(2) of the Labour Institution Act [Cap 300 Revised Edition 2019] (herein LIA)* and it was testified by DW1 that the Applicant was employed orally under fixed term contract of one year.

On the agreed issues, including the disputed question as to; *whether the Applicant was terminated or absconded herself from the work,* Mr. Manyama submitted that; basing on *Section 60 (2) of the LIA,* the Applicant owe a legal duty of proving as to whether she was terminated and the reason for termination. Further, the Applicant had nothing to prove her case, apart from the word she alleged *"We toto ipo tayari".* Mr. Manyama was of strong position that the alleged words does not amount to termination.

It is clear that the Applicant alleged to be terminated by the Respondent while on other side the Respondent disputed the fact by

alleging that the Applicant absconded himself from the work. However, Mr. Manyama was of the view that the Applicant owes duty of proving her allegation. In strengthening his stand, he cited the case of **Anastazius Mtahya v. Steven Academy Co. Ltd,** Labour Revision No. 3 of 2022. On that stand, the Respondent was of the view that the Applicant ought to exhaust internal remedies before referring the matter to the CMA.

Mr. Manyama submitted that the Applicant failed to prove that he was restrained, restricted, or chased from her place of work. He stated that the Arbitrator was right in his findings as the Applicant failed to tender any evidence to prove the fact she was terminated, contrary to the principle of burden to proof as was held in the case of **Geita Gold Mining Ltd & Another v. Ignas Athanas,** (Civil Appeal No.227 of 2015) (unreported) which quoted with approval the case of **Antony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014(unreported). Thus, he prayed for the application to be dismissed.

In rejoinder the Applicant reiterated his submission in chief but urged on the issue of absenteeism that the Respondent failed to prove the alleged abscondment.

Before I embark to the main application, I find worth to address two concerns raised by the Respondent. *One*, is that, the Applicant did not attach the copy of ruling in her application. *Two*, the allegation regarding verification clause.

Having gone through the record of this application, I noted the Award to be revised has been attached as per *Rule 24(1) (f) of the G.N No. 106 of 2007*. Further to that, the Applicant failed to mention which rule was violated in order for the alleged defectiveness on verification to have a legal stand. The principle regarding the point of law raised to dispose of the matter has been developed in different cases including the case of **Thabit Ramadhan Maziku and Another v. Amina Khamis Tyela and Another,** Civil Appeal No. 98 of 2021 at page 4 as cited in **Bank of Tanzania Ltd v. Devran P. Valambia,** Civil Application No 15 of 2002, Court of Appeal of Tanzania (unreported) where the Court held:

> *The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily.*

From the above case of **Thabit Ramadhan Maziku and Another**, since all concerns raised by the Respondent did not

dispose of the matter, then the same lacks legal stance. That being the case, I will proceed with the main application.

Being guided by parties' submissions, pleadings, and the CMA record, I noted two issues for determination. The **first** issue *is whether the Applicant adduced good grounds for this Court to exercise its revisionai power to set aside the CMA Award* with **Reference No. CMA/DSM/ILA/928/19/177/21;** and the **second** issue is; *what reliefs are the parties entitled to.*

In resolving the first issue, all the issues and grounds of revision listed in the affidavit will be considered, as pointed out herein above.

The starting point is the type of employment contract the Applicant had. In short, the Applicant contended that she was employed orally on permanent basis, enjoying the remuneration to the tune of TZS 600,000/=.

On other hand, the Respondent's Counsel maintained that the Applicant was employed orally under yearly fixed term contract. In resolving the disputed question, I find worth to give the meaning of fixed term contract. According to Collin Dictionary ***"Fixed term contract"*** means a contract for a particular and fixed period.

The plain meaning of fixed term contract validates that for the contract to be termed as a fixed term contract it must specify the time of its existence. Again, the relevant provision regarding the form of employment contract is well stipulated under *Section 14(2) of ELRA* which provides that:

> A contract with an employee *shall be in writing if the contract provides that the employee is to work within* or outside *the United Republic of Tanzania. (Emphasis added)*

The above highlighted clause directs that the contract of employment must be in writing and the word used is "shall" which under *Section 53 (2) of the Interpretation of Laws Act [Cap 1 Revised Edition 2019]* means mandatory. In this matter, it is undisputed that parties had oral contract. Also, the record reveals that the Applicant's contract commenced on 1st September 2018 and ended on 26th November 2019 when the Applicant came with summons for the Respondent to appear before the CMA. That means, the Applicant was still employee for more than two months, contrary to what is alleged by the Respondent.

Since it is undisputed that Applicant was employed by the Respondent, then the alleged fixed term contract ought to be proved

by the Respondent herself. It is well known under the law that the one who alleges must prove. Such legal position has been addressed in different cases including the case of **Abdu Karim Haji v. Raymond Nchimbi Alois & Another,** Civil Appeal No. 99 of 2004, Court of Appeal of Tanzania at Zanzibar(unreported) at page 14 where it was held that:

> *It is an elementary principle that he who alleges is the one responsible to prove his allegations.*

The above case of **Abdu Karim Haji** directs that the one who allege must prove his assertion. In this matter, the Respondent vide her key witness failed to act upon on such legal duty as reflected at page 2, last paragraph and page 3 paragraph 3 of the impugned Award where it was testified that the Applicant was employed under yearly fixed term contract, while on other hand, he testified that the Applicant contract commenced on 1st September 2018 and ended on 26th November 2019 which is more than a year. On that basis, I am of the view that one could not claim the evidence of the Applicant while the Respondent evidence was contradictory itself. Such benefit of doubt triggered the Court to hold that the Applicant had permanent employment contract and not fixed term contract as founded by the Arbitrator.

The other issue is; *whether the Applicant was terminated substantively and procedurally fair*. In approaching this issue, it has to be noted that fairness in termination is evaluated in two aspects which are reasons and procedures.

On the point of the reason, the Applicant alluded that she was terminated from the employment after being discovered that she had a pregnancy. The Respondent disputed the same by alleging that she had never terminated the Applicant but her employment came to end after absconded from workplace for more than five days. The centre of parties' debate is *whether the Applicant was terminated or not*, if the answer is positive, *was it substantively fair?*

On whether the Applicant was terminated, it was alleged by the Respondent that there was abscondment from the work. The relevant provision in resolving this disputed issue is *Item 1 of the Guidelines of Disciplinarily Incompatibility Policy and Procedure G.N No. 42 of 2007* which directs that abscondment from work for more than five days without a justifiable reason may constitutes a serious offence that warrantee termination. Basing on such legal stand, in relation with disputed fact, the question placed before this Court is: *Did the Respondent take any legal action against the alleged abscondment to be justifiable reason?* if the answer is affirmatively

then the question of validity regarding reason for termination will be merged. In determining this question, I find wise to consider the available record which reveals that the Applicant absconded from 31st October 2019 to 26th November 2019 as alleged by the Respondent.

However, the evidence justifies nothing about any legal action taken by the Respondent against such alleged misconduct. Failure to do so justify the Applicant's allegation that she was terminated for the reason of pregnancy as justified by the Arbitrator at page 10 of the CMA Award.

Section 7(1) of ELRA requires every employer to ensure that he promotes an equal opportunity in employment and strives to eliminate discrimination in any employment policy or practice.

Internationally, Article 1 of the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)* provides that:

> *1.* For the purpose of this Convention the term *discrimination* includes.
>
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (Emphasis added)

From the above authorities, I have no hesitation to say that any employer's act which violates the right of the employee basing on Sex, as applied in this application whereby the Applicant was terminated for the reason of pregnancy then such kind of reason will be invalid. Basing on these findings Iam of the view that Respondent's allegation that the issue of pregnancy was a new issue lacks merits on the reason that the same was challenged by the Applicant at the trial CMA. Having observed so, I have no hesitation to hold that there was no valid and fair reason for termination.

Regarding procedure since Applicant's termination was based on misconduct (absenteeism) the relevant provision is *Rule 13 of GN 42 of 2007* which directs that the investigation should be conducted. *Rule 13 (1) (supra)* provides:

> *The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

Rule 13 (supra) speaks loudly. It is mandatory to investigate prior to holding of the disciplinary hearing. The records available reveals that the Applicant was never being notified for the offence charged with and the investigation was not conducted. On such basis, it is my observation that the right to be heard was not afforded. As

such, the only fair conclusion to draw is that the termination was procedurally unfair.

Having founding that the termination was unfair in both aspects, it follows therefore that the Applicant managed to adduce good grounds for this Court to exercise its revisional power to set aside the CMA Award.

The last issue is on reliefs. It is well known that then in exercising its discretion power of awarding compensation, once the Court finds termination was unfair in both aspects, the discretion must be exercised judicially, contrary to other form of unfair termination when it is founded to be violated in one of its aspects, its compensation is limited as developed by different cases. [See the case of **Felician Rutwaza v. World Vision Tanzania** Civil Appeal No. 213 of 2019 Court of Appeal of Tanzania at Bukoba (unreported).

As found herein above, the Applicant was terminated for the reason of pregnancy contrary to the law. With much consideration of *Section 3 of ELRA (supra)*, I depart from *Section 40 of ELRA (supra)* in awarding 12months compensation or ordering reengagement or reinstatement on the reason that from 2019 when the Applicant was terminated till today it is not certain if the position would be vacant. I

henceforth award the Applicant 20 months as a compensation for unfair termination basing on her salary as the same was never disputed by the Respondent at the trial.

The above legal analysis necessitates this Court to vary with the Arbitrator in his findings and I concur with Applicant's Counsel that the Arbitrator failed to analyze the evidence on record, hence reached to the wrong Award.

Conclusively, the application is allowed to the extent discussed herein above. Each party to take care of its own cost.

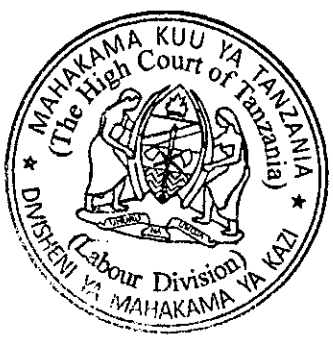
It is so ordered.

Y.J. MLYAMBINA

JUDGE

19/07/2023

Judgement pronounced and dated 19th July, 2023 in the presence of Counsel Colletha Fortunatus Mashigila holding brief of Isihaka Yusuph for the Applicant and in the absence of the Respondent.



Y.J. MLYAMBINA

JUDGE

19/07/2023