

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION APPLICATION NO. 91 OF 2021

(Originating from Employment Dispute No. CMA/ ARS/715/2018/29/2019)

SG NOTHERN ADVENTURE LTD.....APPLICANT

Versus

OMARY HAMISI.....RESPONDENT

JUDGMENT

Date of last Order:2-9-2022

Date of Ruling:1-11-2022

B.K.PHILLIP,J

Aggrieved by the Award made by the Commission for Mediation and Arbitration ("CMA") at Arusha, delivered on 13th day of August, 2021 in Employment Dispute No. CMA /ARS/715/2018/29/2019, the applicant herein lodged this application under sections 91 (1) (a) (2) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, (CAP 366 R.E 2019), ("ELRA") read together with Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007 praying for the following order:

- i) That, this Honourable Court be pleased call for and examine the records of Award delivered on 13th August, 2021 by Honourable Arbitrator O. Mwebuga for the purposes of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein, revise and set aside the Award.

ii) Any other relief this Court may deem fit and just to grant.

The application is supported by an affidavit sworn by the Mr. Mbazi Steven Mrita, the applicant's assistant managing director. The respondent swore a counter affidavit in opposition to the application.

The applicant was represented by Mr. Shilinde Ngalula, learned advocate whereas respondent was represented by Ms. Farida Juma, personal representative. The application was heard viva voce. Before delving into the merits of this application, it is worth stating the background to this matter, albeit briefly.

Before the CMA, it was the respondent's case that he was employed by the applicant as a finance and administrative manager from 2005 to 1st June 2018 when his employment was terminated following the decision of the Disciplinary Committee which found him guilty of the offence of insubordination, substantial negligence in accounting department and causing serious damage to property of the applicant's managing director. Aggrieved by the applicant's decision aforesaid, the respondent lodged his complaint on unfair termination at the CMA against applicant. He prayed for payment of thirty six months (36) months' salary as compensation for unfair termination among other things.

After receiving evidence from both sides the Arbitrator ruled out that the respondent was unfairly terminated because there were no valid reasons for his termination and ordered the applicant to reinstate him without loss of remuneration for the period he was absent from work due to unfair termination. Aggrieved by the Arbitrator's decision

aforesaid , the applicant lodged this application on the following grounds:

- i) That, application before CMA was filed out of time.
- ii) That, the Honourable Arbitrator erred in law and fact for making a finding that no lawful or valid reasons were proved before the disciplinary committee for the termination of the respondent's employment.
- iii) That, the Honourable Arbitrator erred in law for failure to evaluate and properly analyse the evidence of DW-1, DW-2 and exhibits D2, D3, D5, D6, D8 and D9 which by and large proved reasons for termination of respondent's employment.
- iv) That, Honourable Arbitrator erred in law and fact by relying on exhibit P2 as a proof of the respondent's salary without due consideration of DW1 evidence that the respondent was not in the list of the applicant's employee. Exhibit P2 was not reliable document to prove respondent's salary.
- v) That, the Arbitrator erred in law and fact by making a finding that the difference in the names of respondent was a technical issue.
- vi) That, the Honourable Arbitrator erred in law for issuing the award beyond thirty days after the conclusion of the proceedings without assigning reasons for the delay.

Submitting for 1st ground , Mr. Ngalula argued that on the 6th December 2018 the respondent prayed before the CMA to amend his complaint in the CMA Form No.1. Earlier on, he had prayed to

withdraw his complaint with leave to refile it. He was granted the leave to refile his complaint within 14 days. He refiled his complaints on 18th December 2018. Mr. Ngalula went on arguing that the Arbitrator's order was not an automatic extension of time. The respondent was supposed to refile his complaint within 14 days together with an application for condonation because the matter was withdrawn. He contended that in Labour Laws there is no any provision regulating withdrawal and adjustment of suit. So in this situation the Civil Procedure Code ("CPC") is applicable. To support his argument he cited Order 23 Rule 2 of the CPC. He maintained that the respondent's complaint was filed at the out of time for 4 months and 17 days.

On the 2nd ground Mr. Ngalula submitted that the Arbitrator's finding that there was no valid reason for the respondent's termination from employment was wrong because the mandate to decide whether or not there is a valid reason for the termination of employment is within the powers of disciplinary committee. Furthermore, he argued that the evidence adduced at the disciplinary hearing proved the reason for termination. All exhibits for justification of the respondent's termination were tendered before disciplinary Committee. So, the Arbitrator had no power to step into the shoes of the disciplinary Committee because the complaint before CMA was not an appeal against the decision of the disciplinary committee. The Arbitrator was supposed to evaluate the evidence before him, contended, Mr. Ngalula.

On the 3rd ground Mr. Ngalula submitted that the Arbitrator failed to evaluate and analyse evidence tendered including exhibits D2, D3, D5, D8 and D9 as well as the testimony of DW1 and DW2. He added that

the above-mentioned exhibits were sufficient proof for the termination of the respondent's employment.

On the 4th ground Mr. Ngalula submitted that Arbitrator erred to rely on exhibit P2 without taking into consideration the testimony of DW1 that the respondent was not in the list of applicant's employees. Exhibit P2 was not a reliable document to prove the respondent's salary.

On the 5th ground Mr. Ngalula submitted that the issue on the difference in the names of the respondent it is not technical issue since it goes to the substance of the respondent's claims. Furthermore, he argued that in his testimony the respondent said that his name is Omary Hamisi Mfangavo but the complaints before CMA was filed by Omary Hamisi.

On the 6th ground Mr. Ngalula submitted that award was issued out of time contrary to section 88 (a) of ELRA. In conclusion of his submission, Mr. Ngalula prayed this application to be allowed and the award issue by the CMA be set aside.

In opposing the application Ms. Farida's response was as follows;

That respondent's application was filed within the time prescribed by the law because the respondent was granted leave to amend his complaint in CMA Form No 1 within 14 days and amended the same within that time as ordered by the Mediator. She referred this Court to page 6 of the Arbitrator's award. She further alleged that section 86 (5) of ELRA gives power to Arbitrator to order amendment of the complaints.

With regard to the 2nd ground she submitted that exhibit D5 (Disciplinary hearing form) was not signed by the respondent. She contended that Exhibit D5 was signed by chairman of the disciplinary committee only. She maintained that there was no proof of the valid reasons for termination of the respondent's employment. The Award mad by the Arbitrator is proper. To fortify her arguments, she cited section 37 (2) of ELRA and Rule 8 (1) (c) (d) of Employment and Labour Relations (Code of Good Practice Rules) GN. No. 42 of 2007.

With regard to the 3rd ground, she submitted that the testimonies of DW1 and DW2 did not proof and justify the reasons for the termination of the respondent's employment. The evaluation report that was tendered in Court, indicated clearly that was not supposed to be used as evidence in Court. Thus, the same cannot be used to justify the applicant's decision to terminate the respondent from employment.

With regard to the 4th ground, she was of a strong view that there was sufficient evidence to prove the respondent's salary. She referred this Court to exhibit P2 collectively. She pointed out that the applicant did not provide any document regarding the respondent's salary. Furthermore, she argued that there was an affidavit filed to prove the names of the respondent. She was emphatic that the issue of names is a matter of technicality and cited the provisions of section 88 (4) of ELRA, to cement her argument.

On the 5th ground she submitted that CMA heard the matter on merit and made proper analysis of the evidence adduced.

On the 6th ground she submitted that Award was almost made in time. That the hearing of the complaints was on 17th July 2021 and Award

was delivered on 13th August 2021. She prayed this application to be dismissed the ground that the decision of CMA is well reasoned. She cited the case of **Tourism Promotion Services (T) Ltd vs Ally Mkumuzi, Revision Application No. 139 of 2017** (unreported) to cement her argument.

In rejoinder, Mr. Ngalula reiterated his submission in chief and went on arguing that the CMA's order was for withdrawal of the respondent's complaint and there is ruling to that effect. He maintained that the issue on the difference of the respondent's names is not a issue of technicality since it is on record that the respondent testified before the Arbitrator that his name is Omary Hamisi Mfangavo and not Omary Hamisi.

After perusing the Court's record and analysing the competing arguments made by the parties, let me embark on the determination of the merit so of this application. I will start with the issue on whether the application was filed out of time. It is not in dispute that on 24th April 2018 the applicant terminated the respondent's employment. It is on the record that respondent lodged his complaint before CMA on 8th May 2018 perfectly within time .On 6th December 2018 he prayed to withdraw his complaint with leave to refile after conceding to the points of preliminary objection which were raised by the applicant's advocate. His prayer was granted . He was ordered to refile his complaint within 14 days from the date of the Order. He refiled his complaint on 18th December 2018 in compliance with the Arbitrator's Order. Thus, Mr.Ngalula's argument that the respondent was required to apply for condonation is misconceived since the Mediator

gave the respondent specific time to refile his complaint and that is the time which has to be considered in determination on whether or not the complaint was filed in time. In short, the mediator gave the respondent time to rectify the defects in his complaint which were pointed out by the applicant's advocate. It is the finding of this Court that this ground has no merit. I hereby dismiss it.

With regard to the reasons for termination, Mr. Ngalula's contention that the Arbitrator had no powers to decide whether or not there was a valid reason for termination of the respondent and that the same is vested on the disciplinary committee, is misconceived. It is noteworthy that the major role of an Arbitrator is to examine the reasons for the employees' termination and determine whether the same were valid or not. I agree with Mr. Ngalula that the complaint lodged at the CMA is not an appeal. However, in the course of hearing the employee's complaint, the Arbitrator cannot avoid to evaluate the analysis of the evidence made by the Disciplinary Committee since the same is the foundation of the case on which all parties rely on in proving their respective stance.

Upon perusing the Court's records, I have noted that the Arbitrator's analyses and evaluation of evidence was properly done. The Arbitrator's findings that the termination of respondent's employment was procedurally fair but substantially unfair is correct because the charge on insubordination and causing serious damage to property of the managing director were mainly based on the allegations that the respondent locked the house of the applicant's managing director and caused damages to the said house. In my considered opinion those

allegations have nothing to do with the respondent's duties /responsibilities in the applicant's Company.

The charge on negligence in accounting department, in which the applicant alleged that the respondent neglected to advise the applicant on annual and statutory payments of taxes was not proved because no sufficient evidence was adduced to prove that the respondent was the only person accountable for the allegedly flaw in payment of the taxes in question(bed night levy).

With regard to Mr. Ngalula's concern on exhibit P2 that the same cannot be relied upon to determine the respondent's salary, my observation is that since the applicant did not tender any document to prove the salary of the Omary Hamisi Mfangavo who by the evidence adduced is the respondent herein, I do not see any plausible reasons to fault the Arbitrator's findings on the salary.It is noteworthy that the Arbitrator had no any other document to rely on apart from Exhibit P2. After all, section 15 (6) of ELRA provides that if in any legal proceedings , the employer fails to produce the particular pertaining to the terms of employment ,then the burden of proving or disapproving the terms of employment alleged by an employee shifts to him. In this case the applicant failed to disapprove the contents of Exhibit P2 as far as the respondent's salary is concern.

On the issue pertaining to the respondent's names, I entirely agree with the Arbitrator's findings that entertaining the difference in the names of the respondent pointed out by Mr. Ngalula will amount to embracing uncalled for technicalities because it is on record that Omary Hamisi and Omary H. Mfangavo is the same person. It is also on

record that Omary Hamisi (the respondent herein) is the one who was summoned to attend at the Disciplinary Committee. In his testimony chief , DW2 (The chairman of Disciplinary Committee) testified that he did not know the respondent prior to the disciplinary hearing . However, he told the Arbitrator that the respondent was present in room where hearing before the Arbitrator was going on. This means that he was able to identify the respondent because he had seen him at disciplinary hearing. So, it goes without saying that the person who attended the Disciplinary Committee is the one who filed the complaint at the CMA. In indeed, this ground is purely based on technicality and has nothing to do with the substance of the dispute between the parties.

From the foregoing, It is the founding of this Court that this ground lacks merit too .The same is hereby dismiss .

With regard to Mr. Ngalula's concern that the Award was delivered out of time, as long as applicant did not show how he has been prejudiced by the delay in the delivery of the said award, the alleged delay is not fatal. Thus, it cannot vitiate the proceedings of the CMA and the Award made thereto.

In the upshot, this application has no merit. It is hereby dismissed in its entirety.



Dated this 1st day November 2022


B.K.PHILLIP

JUDGE