IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 26 OF 2022

[*From CMA/MZA/NYAM/71/2023/29/2023 of Mwanza Commission for Mediation and Arbitration*]

MANJULABEN KARAVANDA ----------APPLICANT

VERSUS

AUTO KILIMO SPARE LIMITED----------RESPONDENT

JUDGEMENT

Sept. 27th & Oct. 13th, 2023

Morris, J

Ms. Manjulaben Karavanda, on 11th July 2023, filed this application. She is moving the Court to, on the one hand, call for and examine the records in Labour Dispute number CMA/MZA/NYAM/71/2023/29/2023 of Mwanza Commission for Mediation and Arbitration (elsewhere, *CMA or Commission*). The objective is for the Court to satisfy correctness, legality, and propriety of the CMA Award dated 26th June 2023 (Hon. D. A. Wandiba, Arbitrator). On the other hand, the Court receives an invitation to revise, quash and set aside the CMA Award; and substitute it with an order that the

applicant should be given salary of the alleged remaining period of the contract together with other statutory reliefs.

Briefly accounted, the record reveals that the applicant filed the labour complaint before the CMA on breach of employment contract. She claimed for payment of Tshs. 18,761,538.46/- being alleged salary for remaining five months of her unlawfully terminated employment and allied benefits. The total figure comprised of monthly salary (Tshs. 9,000,000/=); two month's leave (Tshs. 3,600,000/=); severance pay (Tshs. 4,361,538.46); and payment of one month's salary in lieu of notice (Tshs. 1,800,000/=).

The Arbitrator found that parties herein had no employment relationship between them. Consequently, the dispute was dismissed. Disgruntled, the applicant has this application in pursuit. Paragraph 8 of the affidavit raises 4 issues for determination. For a coherent flow, they have been merged into two. That is, *whether the CMA correctly analyzed the evidence on record* and *whether it correctly applied the law* respectively.

When the matter was scheduled for hearing, the applicant and respondent respectively enjoyed services of Messrs. Innocent Bernard and Kelvin Mtatina, learned Advocates. The parties' submissions are analyzed in

the course of determining the grounds above. For the application, it was submitted that at pages 7 and 8 of the Award, CMA held that there was no contractual relationship between the parties because the applicant already had resigned from work. To the contrary, at page 4 of the proceedings, three contracts of employment were admitted as exhibits SM1, SM2 and SM3 respectively.

It was submitted further that the relationship of parties was on fixed term the last one of which was valid up to 30/6/2023. The applicant argued that the defense's assertion (at page 7 and 8 of the proceedings) that the applicant resigned on 01/01/2022 was unfounded. To her, the respondent did not prove the applicant's resignation according to law given the nature of the current employment contract. I was referred to Rule 6(1) ***of the Employment and Labour Relations (Code of Good Practice)*** GN No. 42 of 2007 (hereinafter, *the Code*). It was argued further that, pursuant to ***the Code***, the employee may resign subject to the employer's approval.

The applicant also stated that at CMA, she testified to the effect that she had attempted to resign on 10/01/2022 due to medical challenges and financial constraints. However, the employer declined her move and offered

to raise her salary instead. On basis of such stimulus, the applicant claimed that she continued working for the respondent as the salary slip (exhibit SM5) indicated. It was her advocate's further argument that the slip was issued in accordance with section 27(2) of ***the Employment and Labour Relations Act***, Cap 366 R.E. 2019. To her, if it applied the law correctly, CMA would have arrived at a different verdict by confirming that there still existed employment relationship between parties herein.

Her counsel fronted a four-fold base on which to mount the foregoing conclusion. **One**, the exhibits were admitted without objection. **Two**, oral testimony cannot be admitted to outweigh documentary evidence (exhibit SM5 and SM6) per section 106 of ***the Tanzania Evidence Act***, Cap 6 R.E. 2022. **Three**, the onus of proving proper resignation rests upon the respondent. In absence of evidence showing that she was absent from her work, the safe presumption should be that she continued working. **Four**, the Human Resources Officer (HRO) who was the most relevant witness in this regard did not testify. Therefore, to the applicant's counsel, CMA was required to draw adverse inference against the respondent.

Moreover, the applicant submitted that the Commission did not analyze the evidence before; it rather entertained extraneous matters. Her counsel prayed that this being the first appellate court, it may be pleased to re-evaluate the evidence. The applicant referred to ***Good Samaritan v Joseph Robert Savarimuthu***, Labour Revision No. 165 of 2011; and ***Morogoro International School v Hongo Manyanya***, Civil Appeal No. 278 of 2021 (both unreported). Finally, the applicant's counsel prayed further that the application may be found to have merits.

In reply, it was submitted by the respondent that the applicant resigned before the matter was lodged at CMA. The respondent's advocate cited page 5 of the proceedings and argued that the applicant testified to had resigned on 10/01/2022. And that upon her resignation, she informed and claimed her terminal benefits package from the National Social Security Fund (NSSF). The respondent also argued that the applicant tendered no document to prove that she continued working up to 2/2/2023. It was also argued by him that both the letter to embassy and salary slips (exhibits SM6 and SM5 respectively) were tendered at the Canadian Embassy to process the VISA (per the applicant's testimony recorded at page 6 of the

proceedings). To the respondent, no salary slip was tendered to prove her employment status before February 2021. Further, the respondent argued that in CMA Form No.1, the applicant claimed Tshs. 9,000,000/= as 5 months' salaries in appreciation that her monthly salary was not Tshs 4,500,000/= as claimed now and/or through exhibit SM6 which was only for VISA processes.

Moreover, it was submitted by the respondent that at page 5 of the proceedings, the applicant testified that she was claiming for Tshs. 22,500,000/=. But on being cross examined, she stated her monthly salary to be Tshs. 4,500,000/= which was quite different with the amount stated in CMA Form No.1. The applicant was, thus, not justified to claim smaller amount of salary in the complaint form only to adopt a higher figure during Trial. The defence counsel submitted that admission of a document in trial is one thing and considering such exhibit in making the decision is a different this altogether. The subject counsel added that, because the dispute related to breach of contract, the applicant bore a burden of proof. He further argued that the remedies available for breach of contract are subject of proof. Therefore, to him, the authority cited by the applicant in this

connection are distinguishable. I was referred to the case of ***Zuberi Augustino v Anicent Mugabe*** [1992] TLR 137. The respondent accordingly prayed for the application to be dismissed.

In rejoinder it was submitted that, the need to prove specific damages does not apply in labour disputes. Therefore, to the applicant, the case of ***Zuberi Augustino*** (*supra*) does not apply in circumstances of the present case. It was also argued that remedies awarded to employee naturally depend on the nature of dispute.

I have dispassionately considered the submissions of both parties. This being the second court to determine the dispute between parties, I will adopt the re-hearing approach. It is legitimate for this Court to re-appraise, re-assess and re-analyze the evidence on record for it to arrive at its own reasoned conclusions. See, for instance, ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited vs. K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

In making use of the afore-stated approach, I undertake to answer one major question: whether the applicant had contractual relationship with the respondent up to 2/2/2023. By so doing, two issues will be determined, namely, *whether the evidence was correctly evaluated* and *whether law applied by CMA was appropriate*. The applicant contends that she was an employee until 2/2/2023. The respondent, contends that the former resigned on 10/1/2022. According to exhibit SM3, the applicant's employment as **Sales Consultant** was renewed from 1/7/2021 to 30/6/2023. Her gross salary then was Tshs. 300,000/=. By a letter dated 2/12/2021 (exhibit SM4), her salary was increased to Tshs. 1,000,000/= effective from 1/12/2021 the rest of terms and conditions remained unchanged.

Records reveal further that on 16/6/2022, the respondent wrote a letter to the Canadian Embassy introducing the applicant as her employee in the capacity of **Floor Manageress and Personal Assistant to the Director** effective from 1/8/2014 to the date of introduction (exhibit SM6). However, through that letter, the applicant's gross salary was stated to be Tshs. 4,500,000/=. The latter salary was further stated in salary slips of

February, March, April, and June 2022 (collectively, exhibit SM4). Nonetheless, in CMA Form No. 1 the applicant filed her complaint as **Shop Manager** and claimed for, *inter alia*, Tshs. 9,000,000/= for remaining period of 5 months.

It was the applicant's further testimony (at pages 4-6 of the proceedings) that she was employed from July 2013 in the capacity of **Sales Manager** for salary of Tshs. 300,000/= which pay was increased in December 2021 to Tshs. 1,000,000/=. She was still unsatisfied with the salary and due to health challenges, she wrote a letter for resignation. The respondent pleaded her to continue working and increased her salary to Tshs. 4,500,000/=. It is alleged further that she was terminated on 2/2/2023. And that she claimed for 5 months' salary at Tshs. 1,800,000/= each. Moreover, it was argued that she took her NSSF benefits in February 2022.

On his part, the respondent – Ayaz Khanji (DW1) testified that the applicant resigned on 10/1/2022. That she, in February 2022, requested him to fill/authorize her NSSF form (Exhibit SU1). In June she 2022, she requested for being introduced to the Canadian Embassy for her to go to

Canada where her child was studding. Out of their mutual good relationship, he gave her the letter and pay slips addressed to Canadian Embassy. To him, the objective was to assist her get the requisite assistance.

From that evidence on record seven facts are undisputed. **First**, the applicant was employed by the respondent as sales/shop manageress or consultant. **Second**, her monthly salary was Tshs. 300,000/=. This figure was adjusted upwards to Tshs. 1,000,000/= in December 2021. **Third**, the applicant once wrote a letter of resignation from her employment. **Fourth**, the respondent filled the NSSF form for her. **Fifth**, she was paid her NSSF terminal benefits in February 2022. **Sixth**, the respondent wrote a letter to the Canadian Embassy to introduce the applicant; and **seventh**, the applicant was issued with 4 months' salary slips along the introduction letter.

Discernable from the rival submissions of parties, are the contentions on whether the resignation was formally accepted by the respondent; and whether the applicant's salary was raised to Tshs. 4,500,000/= per month in order to retain her services. The applicant testified nothing as to when her resignation was refused. She, however, acknowledged writing a letter for resignation on 10/1/2022. The NSSF form was signed by DW1 specifying

the date of resignation (*kuacha kazi*) as 10/2/2021. Therefore, the said form was filled a month after the alleged letter of resignation.

The absence of evidence to prove what transpired from 10/1/2022 to 10/2/2022, leaves the applicant with no proof of her continuation of active work. According to clause 13 (c) of the employment renewal contract (exhibit SM3), termination by the employee was subject to serving the employer with one month's notice. In this connection therefore, counting from the date of resignation, the effectual resignation took course on 10/2/2022. The latter date is also reflected in NSSF claim form as the date of actual resignation after expiry of the due month's notice.

It is on record that the applicant alleges that she continued working upon being requested by DW1 and upon increment of her salary. The applicant also argued that the respondent was enjoined to prove that she affirmed the resignation in line with Rule 6(1) of ***the Code***. I disagree with such line of submissions. As it is the applicant who alleges to had resigned but continued working upon being pleaded by her employer; she carries the burden of proving such asseverations. This position is in line with section 110 (1) of ***the Evidence Act***, (*supra*); ***Obed Mtei v Rakia Omari*** [1989]

TLR 111; and ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported).

The foregoing onus aside, for one to appreciate whether or not the applicant's resignation was accepted by the employer as per the law, it would be imperative for him to consider the conduct of parties hereof. It is undisputed that she conceded having tendered her resignation. Further, she pocketed her terminal dues from NSSF. According to operations of any conventional social security fund, NSSF inclusive, the terminal package is payable to the member-employee upon proving that his/her employment has already come to an end.

In line with this position, the employer must certify about such discharge of the employment contract and execute the claim form in the appropriate spaces. As the applicant herein conceded to had accessed her contributions from NSSF, unless she proves otherwise, the employer is taken to had not held any reservation against her resignation. For clarity, I render the excerpt from page 6 of the Commission's proceedings to support the court's reasoning hereof. The relevant cross-examination and re-examination sessions of the applicant hereof run as: -

(Being cross-examined)

"S: Baada ya kuresign uliwaambia nn NSSF?

J: Kuwa nimeacha kazi mwenyewe na nikachukua pesa yangu"

(Upon re-examination)

S: Ulichukua lini pesa ya NSSF lini (sic)?

J: Februari 2022". [S stands for swali/question; and J for jibu/answer].

In literal translation, the above witness-questioning stages reveal that the applicant affirms having informed NSSF that she had resigned from employment before being paid her money in February 2022.

Further, in a bid to prove that she was still employed, the applicant tendered the letter to the Canadian Embassy and salary slips. I am alive to the principle that when a person of capacity (especially who can read and write) executes a document; he cannot later on be allowed to disown it. See, for instance, the case of ***Sluis Brothers (E.A) Ltd v Mathias & Tawari*** [1980] TLR 294. Further, the respondent is not denying to have had issued

the said documents to the applicant. However, to the former, the subject credentials were given in consideration of their good relationship at that time in order to assist her secure the VISA only.

The illegitimacy of the motive thereof notwithstanding, I am inclined to agree with the reason given by the respondent herein. The Court is set to justify this inclination. **One**, the applicant affirms that the purpose for the letter was to process the VISA at the Canadian Embassy. This is aptly revealed when she cross examined. (At page 6 of the proceedings, she was asked: "*Lengo la barua lilikuwa ni nini*?" to which she replied: "*Ni kwa ajili nipate VISA*").

Two, the said correspondence contained inconsistent matters from the other conclusive record. Such matters include, the employment designation of the applicant; the tenure of her employment; and her monthly salary plus allied employment benefits; to mention but a few. **Three**, the subject letter was inconclusive in the absence of the corresponding employment contract between parties.

The counsel for the applicant is of the view that oral testimony cannot be admitted to contradict the written document. I totally agree with him. In

this regard, one may also read the case of ***AMICO Ltd v Salu Limited***, Civil Appeal No. 91 of 2015 (unreported). However, in my view, the document on its face, must prove the matter at issue without requiring other evidence. In other words, it must be self-explanatory to prove one's case. I have read exhibits SM4 and SM5. The same fall short of proving the contractual relationship between parties herein. I have reasons. I render them below.

Firstly, the letter introduced the applicant to be the **Floor Manageress and Personal Assistant to the Director**. I find no evidence as to whether at some point the applicant worked under such capacity. The record is as silent as the gravesite in this connection. Moreover, throughout the trial, she testified as being the **Sales Manager** (sic). The record bears nothing to indicate otherwise. Further, in the CMA Form No.1, she referred to her title as **Shop Manager**. Hence, up to the time of lodging the complaint at CMA, she was appreciative of the fact that her purported title in the letter to the Embassy was fictitious. In addition, exhibit SM4 only increased the salary to Tshs. 1,000,000/= and other terms and conditions of employment remained to be as per exhibit SM3 which specifies her

position as **Sales Consultant**. Logically, the increment in wage corresponds with the titles reflected in the two exhibits.

Secondly, the subject letter to embassy introduced the applicant to have been working with the respondent under above stated capacity from 1/8/2014. There is a serious inconsistency hereof. The applicant did not testify, not-even in passing, that she ever worked under that designation on or from the stated date. That is, her unequivocal evidence on record is to the effect that she started working from July 2013. See, for instance, page 4 of the Commission's typed proceedings.

Thirdly, the said letter specifies the applicant's placement as being permanent. To the contrary, the rest of the evidence on record shows that her employment was a fixed and renewable contract every 2 years. Exhibits SM1, SM2 and SM3 serve to buttress this argument. In addition, the applicant is recorded as testifying, at page 4 of the proceedings, to conclusions that hers were contracts of two consecutive years' engagement; and renewable upon exhaustion of the tenure therein.

Fourth, more so, paragraph 3 of exhibit SM6 was categorical that the applicant's employment status was "in accordance with the terms and

conditions as stipulated in our contract of employment". Thus, for the applicant to rely on such document to prove her alleged employment status, she was expected to tender the employment contract which contained such terms and conditions (the most relevant of which hereof are wages and tenure).

Fifthly, in the complaint form filed at CMA (Form No.1), the applicant claimed salaries for the remaining duration of employment (5 months) at Tshs. 9,000,000/=. Arithmetically, the total figure is a product of Tshs. 1,800,000/= per month. It would sound weird, for the employee to forget her salary at the commencement of the alleged dispute and recollect about it a couple of months later. Further, even the alleged monthly salary of Tshs 1,800,000 is also not reflected on record. The applicant did not prove from when and on what basis her wage rose from Tshs 1m/- (exhibit SM4) to Tshs 1.8m/-; let alone Tshs 4.5m/-. To condone such kind of serious oblivion on her part, would likely promote courts working on the basis of afterthoughts.

It is now settled that the CMA form No. 1 is equivalent or synonymous to the plaint. Therefore, it bears binding attributes against the author-

applicant. See the case of ***Magnus K. Laurean v Tanzania Breweries Limited***, Civil Appeal No. 25 of 2018; ***Security Group (T) Ltd. v Samson Yakobo & Ten Others***, Civil Appeal No. 76 of 2016; and ***Dew Drop Co. Ltd v. Ibrahim Simwanza***, Civil Appeal No. 244 of 2020 (all unreported).

It is opportune here that I state the rationale of the initial disputes-lodging documents to bind the makers thereof. **One**, the principle works to prevent parties to formulate and concoct frivolous claims with the motive of perfecting them in due course. **Two**, it guarantees certainty of the trial. That is, the court is seized with the opportunity to ascertain the real issue between the parties from the outset. Therefrom, it frames the determinable issues. Subsequently, it resolves parties' dispute. **Three**, it is one of the determinant factors of the court's jurisdiction. It would, thus, turn out to be ironic for one to file and commence a land dispute but end up prosecuting a matrimonial cause. **Four**, the principle compliments the need to maintain credibility, sanctity and reliability of court proceedings.

Furthermore, it was the submission of the applicant's counsel that the Commission was enjoined by law to draw an adverse inference against the respondent for failing to call its HRO to testify on the applicant's absence

from work after resignation. I join no issue with the learned counsel hereof. It is a law that when a party fails to call a material witness to the case, the court may draw adverse inference that if he was called, he would have testified in favour of the adverse party. ***CRDB Bank PLC v Africhick Hatchers Ltd and 2 Others***, Commercial Case No. 97 of 2014; and ***Ahiya Eliau Lukumay v the Registrar of Titles and 2 Others***, Land Case No. 97 of 2011 (both unreported) guide me hereof.

In the case at hand, however, circumstances are not in squares with holdings in the foregoing cases. Herein, as demonstrated above, the major difference is that the applicant resigned from her employment. Further, DW1 testified to had received the resignation letter from the applicant; to had filled the appropriate blanks in her NSSF claim form; and to had written the letter to Embassy stated above. In principle, such were the key aspects to be considered by CMA in order to resolve the dispute herein. Therefore, I firmly observe that, basing on both respondent's defense theory and theme; the said witness (DW1) sufficed as the material witness. That is, another witness, material or otherwise, would be (and he indeed was) dispensed with but without occasioning injustice to the rivalry party.

In the upshot, I find the present application deficient of merit. The Commission properly evaluated evidence before it and applied the law correctly. Its Award is, henceforth, not revised in the applicant's favour as prayed. Consequently, this application stands dismissed. I make no order as to costs. It is so ordered and the right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

October 13th, 2023