

TANZANIA / JUDGMENT

JOINT VENTURE OF ARAB CONSTRUCTORS ELSEWEDY ELECTRIC V

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1 January 2024

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 17926 OF 2024 (Arising from Award issued on 16/4/2024 by Hon. Ngalika, E.,
Arbitrator, in Labour Dispute No. CMA/PWN/MKR/46/2022/23/2022 at Mkuranga) JOINT
VENTURE OF ARAB CONSTRUCTORS & ELSEWEDY ELECTRIC..... APPLICANT
VERSUS DORIS RUEBEN MWASIFIGA RESPONDENT

JUDGMENT

Date of Last Order: 10/10/2024 Date of Judgment: 31/10/2024 B. E. K. Mganga, J. Applicant and respondent had employment relationship that commenced on 13th April 2022. Their beautiful, if not, handsome relationship, lasted for only five months and nine days and turned into sour taste. That happened after the allegation was levelled by the applicant against the respondent that the latter committed a misconduct as a result, she terminated respondent's employment contract. Aggrieved with termination of her employment, respondent filed Labour Dispute No. CMA/PWN/MKR/46/2022/23/2022 before the Commission for Mediation and Arbitration (CMA) claiming that applicant breached the contract of her employment. 1 On 16th April 2024, Hon. Ngalika, E, Arbitrator, having heard evidence of the parties issued an award in favour of the respondent and awarded her to be paid 12 month's salary compensation for both substantive and procedural unfair termination. Applicant was dissatisfied with the said award hence this application for revision. In support of the Notice of Application, applicant filed the affidavit sworn by Joseph Mrimi, her Principal Officer. In the said affidavit, applicant raised four grounds namely:-

1. That, the trial arbitrator erred in law and in fact in holding that termination of respondent's contract of employment was substantively unfair contrary to the evidence tendered and testimonies of the witnesses.
2. That, the trial arbitrator misconducted himself in law and fact by awarding the respondent a colossal amount of compensation to wit; salary for 12 months equal to TZS 8,680,521/= the amount which was not prayed for in the CMA Form No. 1.

3. That, the trial arbitrator erred in law in holding that the respondent had a permanent contract instead of a specific task contract contrary to the evidence tendered and testimonies of the witness as well as the CMA F.1 ticked by the respondent herself.
4. That, the trial arbitrator erred in law in awarding the respondent benefits under unfair termination while the respondent filed the dispute claiming breach of contract and not unfair termination. In resisting the application, respondent filled both the Notice of Opposition and the Counter affidavit sworn by herself. 2 During hearing of the application Ms. Joycelinda Mdeme, learned Advocate, appeared and argued for and on behalf of the applicant while Mr. Ambakishye Kipamila, from TAMICO, a trade union, appeared and argued for and on behalf of the respondent. Arguing jointly the aforementioned grounds in support of the application, Ms. Mdeme submitted that, the arbitrator held that respondent was employed for unspecified period and proceeded to award 12 months salary as compensation while she was employed for specific task and not for unspecified period. Counsel referred to the contract of employment (Exhibit A1) to support her submissions that respondent was employed for specific task contract. She further cited the case of Leonarda Benedicto Kapele v. Leonard Alfred Mwananzumi and Another, Land case No. 34 of 2022, HC(Unreported) to the position that, courts are supposed to confine themselves on evidence adduced by the parties. Ms. Mdeme further submitted that, since respondent had a specific task employment, she cannot benefit from the relief of unfair termination. She cited the case of Mamba Shamte and 64 Others v. Care Sanitation and Suppliers, Revision No. 154 of 2024, HC(unreported), Hamidu Abdallah Mbekae and 11 Others v. Be Forward Tanzania Co. Ltd, Civil Appeal No. 380 of 2019, 3 CAT(unreported) and Asanterabi Mkonyi v. TANESCO, Civil Appeal No. 53 of 2019, CAT(unreported) to support her submissions that, principles of unfair termination does not apply to employees with specific task contract. She also submitted that, respondent was terminated prior to completion of the specific task she was employed for. She added that, in CMA F1, respondent indicated that the dispute was relating to breach of contract. With those submissions, counsel prayed the court to all this application by revising and setting aside the CMA award. Resisting the application on behalf of the respondent, Mr. Kipamila submitted that, exhibit A1 at paragraph 1, shows that the contract was for unspecified contract depending on completion of the project. He further submitted that, the arbitrator was justified to hold that respondent was employed for unspecified period contract of employment. He also submitted that, the arbitrator was justified to award respondent to be paid 12 months salary compensation for unfair termination because, that is based on evidence adduced by the parties. He added that, applicant had no valid reason to terminate respondent and did not follow fair procedures of termination. He went on that, respondent was terminated allegedly due to violence at work that is a misconduct which was not proved. With those submissions, Mr. Kipamila prayed the court to dismiss this application for want of merit. 4 Counsel for the applicant had no rejoinder submissions. At the time of composing the judgment, I carefully read the CMA record and find that, Doris Rueben Mwasifiga(AW1) the herein respondent and Rashid Ramadhan Kitupwa, for the applicant, at the time of adducing their evidence, the arbitrator admitted inter-alia contract

of employment (exhibit A1), show cause letter (exhibit A2), interdiction letter (exhibit A3), minutes of the disciplinary hearing (exhibit A4), termination letter (exhibit A5) as evidence of the respondent and investigation report (exhibit R1), response of the respondent to the show cause (exhibit R2), notice to attend the disciplinary hearing (exhibit R3), appeal by the respondent (exhibit R5), dismissal of the appeal (exhibit R6), terminal benefits (exhibit R7) as evidence of the respondent. In my perusal, I noted that, the CMA record does not show that witnesses prayed to tender these exhibits. More so, the record does not show that the other party was asked to comment, whether there is objection or not, prior to admission of the said exhibit. These exhibits were considered by the arbitrator in the award and exhibit A1 is one of the center of argument of the parties in this application. With those findings, I resumoned the parties and asked them to address the court as whether, those exhibits were properly admitted as evidence and the effect thereof. 5 Responding to issues raised by the court, Ms. Mdeme for the applicant conceded that, according to the CMA record, exhibits were not tendered by the parties and admitted as evidence. She further submitted that, this court cannot rely on exhibits that were not tendered and not admitted properly. On the effect thereof, counsel submitted that, the irregularity has rendered the whole CMA proceedings a nullity. With those submissions counsel for the applicant prayed the court to nullify CMA proceedings, quash and set aside the award arising therefrom and order trial de novo before another arbitrator. On his party, Mr. Kipamila responding to the issues raised by the court, concurred with submissions made on behalf of the applicant and the prayer to nullify CMA proceeding, quash the award and order trial de novo before a different arbitrator. In disposing this application, I will start with the issue raised by the Court suo motu. It was correctly conceded by the parties that, all exhibits were not properly tendered because, there was no prayer by the witnesses to tender exhibits. More so, the other party was not afforded a chance to comment before admitting the said exhibits. The requirement of the witness to pray to tender an exhibit was emphasized by the Court of Appeal in the case of Total Tanzania Ltd vs Samwel Mgonja (Civil 6 Appeal No.70 of 2018) [2021] TZCA 265 (25 June 2021), wherein it held that:- "...if the witness wants to tender a particular document, ...he ought to make a prayer for tendering it as exhibit. And the adverse party should be given a chance to object or concede to its admission...If it is admitted, the trial court ought to comply with the endorsement of such document...In case it is rejected, the reason for its rejection ought to be given..." In the application at hand, there was no prayer to tender exhibits by the witnesses and the other party was not asked to comment prior admission of the said exhibits into evidence. In the award, the arbitrator considered the said wrongly admitted exhibits. It is my view that, legally speaking, there was no exhibit that was tendered and admitted as evidence. It was not proper for the arbitrator to consider documents that were not properly admitted as evidence. This court cannot consider those improperly admitted exhibits. In my view, it was correctly submitted on behalf of the parties that, the procedure adopted by the arbitrator is fatal and vitiated the whole CMA proceedings. The Court of Appeal had an advantage of discussing a similar issue in the case of Ismail Rashid vs Mariam Msati (Civil Appeal 75 of 2015) [2016] TZCA 786 (29 March 2016, Mhubiri Rogega Mong'ateko vs Mak Medics Ltd (Civil Appeal 106 of 2019) [2022] TZCA 452 (20

July 2022), Shemsa Khalifa and two Others vs Suleman Hamed, Civil Appeal 7 No. 82 of 2012 and Mohamed A. Issa vs John Machela (Civil Appeal No. 55 of 2013) [2013] TZCA 490 (27 September 2013) to mention but a few. In Machela's case (supra), the Court of Appeal held inter-alia that:- "...we are of the firm view that determining the rights of the parties on the basis of documents which were not admitted in evidence during the course of the trial was fatal to the trial and occasioned a failure of justice. We think we need not overemphasize what we take to be trite law that the judgment of any Court or quasi-judicial tribunal must be grounded on evidence properly adduced during the trial, otherwise it is not a decision at all. The purported decision becomes a nullity. Therefore, the appellate Tribunal and/or the High Court on appeal could not uphold what was a nullity from the beginning...We have seriously considered what course of action we should take under the circumstances...we quash and set aside the proceedings and judgment of the trial Tribunal. Consequently, the proceedings and the judgments of the appellate Land and Housing Tribunal and those of the High Court based on a null decision are nullified, quashed and set aside." In Mhubiri's case (supra), a Labour case similar to the application at hand, the Court of Appeal held inter-alia that:- "...It is our considered view that, the purported exhibit D4 which is the alleged admission by the appellant that he occasioned loss to the respondent, was not admitted in evidence for it to be acted upon to decide the case. It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record...Therefore, it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence 8 which was not properly admitted in evidence...In the event, we allow the appeal, quash and set aside the whole revision proceedings in the High Court and that of the CMA .. for the interest of justice, we remit the case to the CMA for a trial de novo before another arbitrator." Guided by the above cited Court of Appeal decisions, I hereby nullify CMA proceedings, quash and set aside the award arising therefrom and remit the CMA record to CMA so that the dispute can be heard de novo before a different arbitrator without delay. Since the issue that I raised has disposed of the whole application, I will not discuss the issues raised by the applicant. Dated at Dar es Salaam on this 31st October 2024 B. E. K. Mganga JUDGE Judgment delivered on this 31st October 2024 in Chambers in the presence of Jackson Mgonja, Advocate and Ambakisye Kipamaila, from TAMICO, a Trade Union, for the. Respondent. B. E. K. Mganga JUDGE 9

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Prepared on 13 October 2026 · Esheria