

TANZANIA / JUDGMENT

RULING CHINA HENAN INTERNATIONAL VS YOHANA CHILEMILE Final

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LABOUR REVISION NO. 25539 OF 2024 CASE REFERENCE NO.
202410111000025539 (Originating in Labour Dispute No. CMA/MBY/Mby/63/2023) M/S CHINA
HENAN INTERNATIONAL COOPERATION GROUP CO.
LTD..... APPLICANT VERSUS YOHANA
CHILEMILE RESPONDENT

JUDGMENT

11th December 2024 & 5th March 2025 NONGWA, J. The respondent filed a claim for breach of contract against the applicant in the Commission for Mediation and Arbitration Mbeya (the CMA), it was registered as Labour Dispute No. CMA/MBY/Mby/63/2023. He alleged was employed by the applicant since 2021 on the three years contract. That key of the car he was driving was taken away and orally told had been terminated from employment. In his opening statement the respondent stated he started work with the applicant in April 2021 to August 2023. That initially was stationed in Dodoma and transferred to Mbeya in March 2023 for a special task work mainly construction of four-way road from Nsalaga to Ifisi. Further that his salary was Tsh 432,000/= per month which was 1 supported by bank statement and that any out-station travel would be paid Tsh 1500/= per kilometre. He stated they travelled with site manager to Arusha, Sirari and Kibondo for 14,591Km and was claiming Tsh 21,886,500/=. That car key was taken from him by the site manager and told he was too stubborn is demanding his payment. When he went to human resources manager Adili Mwasomola was told orally that was terminated. On her part, the applicant did not dispute that the respondent was her employee but disputed that had contract from 2021 rather said the applicant was employed in Mbeya in March 2023. Further that there was accusation against the respondent for receiving money from people on promise to secure them job in the company. That after that accusation, they prepared an explanation letter and when it was served to the respondent rushed to the CMA and instituted the present dispute. The matter being on breach of contract the respondent started to bring evidence which was essentially what was stated in his opening statement and produced three documentary exhibits, contracts with the applicant dated 21/4/2021 and 21/8/2022 and bank slips as exhibit D1 and D2 respectively. On the other hand, the applicant called one witness and intimidated to call other

witness, however absconded hearing, the CMA closed the applicant's case and composed its award based on the 2 presented evidence. In the award, the CMA found there was breach of contract by the applicant and awarded the respondent Tsh. 8,170,000/=. Aggrieved the applicant has filed this application for revision made under sections 91(1)(a)(2)(b)(c)(4)((a)(b), 94(1)(b)(i) of the Employment and Labour Relation Act [Cap. 366 R: E 2019] (the ELRA) and Rule 24(1)(2)(a)(b) (c)(d)(e)(f)(3)(a)(b)(c)(d) and rule 28(1)(B)(c)(d)(e) of the Labour Court Rules, G.N. No. 106 of 2007. Grounds for the application are eight in total as narrated in paragraph 4 of the affidavit, I will not reproduce them here. The respondent, oppose the application. On the date scheduled for hearing the applicant was represented by Mr. Essau Abraham Sengo, learned counsel whereas the respondent appeared through the service of Mr. Seiph M. Wembe, also learned counsel. Parties agreed to file written submissions. In his submission Mr. Essau combined the first and second, third and fifth, fourth, six and seven grounds while ground eight argued separately. Submitting in the first two grounds, the arbitrator is faulted for deciding in favour of the respondent while the case was not proved on balance of probabilities by inferring and assuming terms of contract which was not tendered in evidence. He contended as there was no written contract tendered it was an error to assume terms of the contract, arguing it was a misdirection to act on previous contract 3 (exhibit D1). Counsel said, as the respondent testified to have written contract was bound to produce it under section 100(1) of the Evidence Act from which terms of the contract would be known. This, he said was due to evidence of PW1 that the project would last for three years and that of DW1 that was for two years. That it was a misdirection by the arbitration to hold that the respondent had a remaining period of 19 months and award compensation. Further submission was that exhibit D1 was not read to parties after its admission, he supported the argument with the case of Bulungu Nzungu vs Republic, Criminal Appeal No. 39 of 2018 [2022] TZCA 454 (21 July 2022; TanzLII). He argued after expunging exhibit D1 which was the basis of the arbitrator award, no evidence remains to prove the case. In ground three and five, it was based reason that exhibit D1, D2 and D3 were not read after its admission. On analysis of evidence which cover grounds four, six and seven, after referring to evidence of DW1 found at page 18 and that of PW1 at page 7, Mr. Essau submitted that respondent was never terminated from employment. To him it was not known who terminated the respondent from employment 4 In ground eight that the CMA closed her case, it was submitted that the applicant was denied right of hearing as he was not served with summons under section 88(8)(b) of the ELRA of intention to close her case and there was no proper service by a service server. Counsel argued the applicant was denied right to call other witnesses from the RPC office. He stated the CMA has no right to close party's case. Finally, prayed the application be granted. In rebuttal, Mr. Seiph started his submission with section 15 of the ELRA on the requirement of supplying the employee with written contract. He stated the arbitrator rightly inferred terms of the contract from the previous contracts. On the period of the project, it was submitted that both sides were at once that it started in March 2023 until April 2025 thus, Mr. Seiph did not find any contradiction on the period of employment of the respondent. On argument that exhibit D1 was not read, it was submitted that the respondent said the contracts were in English language he did not know to read. Referring to the case of Stanley Murithi Mwaura vs Republic, Criminal Appeal No. 144 of 2019 [2021] TZCA 688 (22 November 2021; TanzLII), Mr. Seiph submitted the applicant was not

prejudiced. Alternatively, counsel said even if exhibit D1 is expunged it was not the basis of the dispute between the parties. He added evidence available reveals there was not contract signed between the parties. Regarding ground four, six and seven, Mr. Seiph said there was no submission in ground six and seven, thus impliedly abandoned. On the remain ground it was submitted that the arbitrator properly analysed evidence and came to the conclusion that the respondent was terminated from employment. Further that it was DW1 who terminated the contract. On evidence that the respondent ran away after being told to explain on accusation of taking money from people, it was submitted the same was not proved. In ground eight that arbitrator had no power to close party's case, Mr. Seiph submitted that the applicant was served with summons of hearing on 3/7/2024 but defied to attend as directed in the summons. He added a party has duty to follow up his case at the court premises to know its status. On this he supported with the case of Elias Masija Nyang'oro & Others vs Mwanachi Insurance Company Limited, Civil Appeal No. 278 of 2019 [2022] TZCA 648 (24 October 2022; TanzLII). On complaint that the CMA has no power to close one's case, counsel for the respondent referred the court in the case of Mansoor Industries Limited vs United Bank of Africa (Tanzania) Limited, 6 Civil Appeal No. 314 of 2021 [2024] TZCA 1038 (5 November 2024; TanzLII) in which the court held the record informs that at the time of dismissal, the appellant had led PW1 to testify in support of its case. This meant that steps towards prosecution had been taken and that the worst that the appellant would suffer for its failure to lead in evidence on 10th June, 2021, was to have its case closed to allow the respondent to open up its case and let the court make a decision based on the testimony adduced in court. During rejoinder, Mr. Essau Maintained that the arbitrator had no power to close case of a party and that summons was not served to them. Further that the respondent failed to produce written contract and restated his submission in chief that exhibit tendered by expunged for not being read after admission. I have considered the rival submissions, application documents and record of the CMA, the issues for the determination are one, whether it was proper for the arbitrator to close the applicant's case; two, whether exhibits were read after admission and what is its effect; and three, whether the respondent proved breach of contract. Starting with first issue which cover ground eight that the CMA closed the case while it had no such powers. Attendance of parties in the CMA is regulated by rule 28 of the Labour Institution (Mediation and 7 Arbitration Guideline) Rule, G.N. 67 of 2007 that is dismissal in case the complainant fails to attend or proceed ex-parte if the respondent. Records of the CMA is clear that the applicant after had called one witness (DW1) promised to bring other witness, however defaulted appearance which necessitated summons to be issued. After further default, her case was closed to pave way to compose award based on evidence adduced. As rightly submitted by the respondent's counsel, the court has power to close one's case when has taken party by adducing evidence in support. As the respondent had closed his case and the applicant adduced evidence in support and promised to bring more witness but disappeared, it was proper for the arbitrator to close the case. On this, in the case of Mansoor Industries Limited vs United Bank of Africa (Tanzania) Limited (supra) the court stated; 'The record informs that at the time of dismissal, the appellant had led PW1 to testify in support of its case. This meant that steps towards prosecution had been taken and that the worst that the appellant would suffer for its failure to lead in evidence on 10th June, 2021, was to have its case closed to allow the respondent

to open up its case and let the court make a decision based on the testimony adduced in court....’

8 From the above, the arbitrator was right to close the applicant’s case and proceed to compose the award. I therefore dismiss ground eight. Coming to the second issue that exhibits were not read after its admission. From the contending argument, it is now a well-established principle in the Law of Evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance it must be read in court. See *Bulungu Nzungu vs Republic*, Criminal Appeal No. 39 of 2018 [2022] TZCA 454 (21 July 2022; TanzLII). However, the rule is relaxed in civil proceedings in which parties are bound by their pleadings and documentary exhibits are known to parties in advance as opposed to criminal trial. In the CMA parties are given chance to file opening statements, in which one’s case is stated and are given room to exchange documents to be relied upon. In that circumstance failure to read documentary exhibit is not fatal unless the party alleging establishes was prejudiced. Faced with akin situation in *Robert Mhando & Another vs The Registered Trustees of ST. Augustine University of Tanzania*, Civil Appeal No. 44 of 2020 [2023] TZCA 65 (24 February 2023; TanzLII) the court held; ‘Whereas Mr. Nasimire is on record as having strongly objected to the admissibility of the two exhibits saying, inter alia that 9 they were not genuine for not having been issued by the respondents, DWI’s evidence is remarkable of her discordant but conclusive statement that, there was no doubt that all the disputed receipts were issued by the respondents. Given this state of affairs, one thing becomes clear. That is, throughout the trial, the material contents of the disputed documentary exhibits were well known to the respondents as to render inconsequential the complaint by Mr. Nasimire that, they were not read out in court after being admitted in evidence.’ Emphasize supplied. The above applies to this case exhibit D1 which are contracts of employments were issued by the applicant. Further it was among the documents listed by the respondent to be relied upon, there is no complaint that it was not served to her before its tendering in evidence. Moreover, it was not objected during its clearance stages, on those circumstance, the complaint that exhibits were not read to parties after its admission becomes redundancy. Last is whether the respondent proved that the applicant breached the contract. The dispute in the CMA as per CMA form No. 1 was for breach of contract, unlike in dispute of unfair termination where under section 39 of the ELRA burden of proof is upon the employer, in breach of contract it is upon the claimant. Thus, in terms of section 110 of the Evidence Act burden of proof was upon the respondent as a party who 10 alleged breach of contract to establish such claim against the other party. Expounding the rule of burden of proof in *Paulina Samson Ndawanya vs Theresia Thomas Madaha*, Civil Appeal No. 45 of 2017 [2018] TZCA 218 (12 October 2018; TanzLII) the court quoted a passage passage from Sarkar’s Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis in which the author explains; ‘... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....’ Emphasize added. At hand there is no dispute that

the respondent was employed by the applicant on the special task work. Further that there was no any written contract signed between the parties, thus what were terms of the contract is mysterious. This disposes the argument that the 11 respondent was supposed to tender written contract. Connected to this per exhibit R1 title declaration/tamko, the contract of the respondent and applicant at Mbeya started in March 2023. The question is whether the applicant breached the contract. From the respondent's evidence two reasons has been advanced one, after the site manager taking the motor vehicle key and orally being told by Adili Mwasomola that was terminated and two, frequent follow up out-station travel payment for 14,591km at the tune of Tsh 21,886,500/=. I have taken keen of respondent's evidence on breach of contract, on allegation that keys were taken by the site manager, apart from his words of mouth this allegation was not substantiated. There is no evidence that he went at his work place and denied access or not given work to do or another person was given to drive the site manager. This is more complicated due to evidence of the applicant which had another story that the applicant absconded from work after being served with letter of explanation on the accusation which was reported to them. Another reason advanced by the respondent was that was due to his follow up on travel payment as they had agreed. Although the respondent said, he travelled to Arusha, Sirari and Kibondo, no travel documents were tendered to prove the allegations. Thus, even if it is 12 assumed there was such terms that the respondent was to be paid 1500/= for a kilometre for out-station travel, there was no evidence showing that they travelled to such places and was entitled to such payment. Further there is no any scintilla of evidence supporting that he had any claim and tried to make follow up. This could be by filling claim forms or writing letter of claim to the applicant and tendering it in the CMA. From the above discussion, I agree with Mr. Essau that the respondent failed to prove that there was breach of contract as there was no any circumstances from which it could be gauged that the applicant breached the contract. In the premises, I allow the application and set aside the order awarding the respondent Tsh. 8,170,000/= for breach of contract and substitute it with an order dismissing the complaint. Being labour matter, I make no order to costs. V.M. NONGWA JUDGE 5/3/2025 13 Dated and Delivered at Mbeya this 5th March 2025 in presence of Mr. Bosco Mdoe learned counsel for the Respondent also holding brief of Mr. Peter Kiranga for the Applicant. V.M. NONGWA JUDGE 14

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