IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LABOUR REVISION NO. 33 OF 2021

(Arising from Labour Dispute No. CMA/MZ/GEIT/412/2015)

KILIMANI DOTTO RICHARD..... APPLICANT

VERSUS

GEITA GOLD MINING LIMITED.....RESPONDENT

JUDGMENT

22/8/2022 & 16/9/2022

ROBERT, J:-

The applicant's effort to move the Commission for Mediation and Arbitration (CMA) for Geita to grant condonation of time proved futile when the said application was dismissed on 3rd February, 2016. He had referred a Labour Dispute No. CMA/MZA/GEIT/412/2015 in which he prayed for condonation of time to refer the dispute to the Commission. The CMA was not convinced by his reasons for the delay and eventually dismissed the dispute.

Aggrieved, the applicant has preferred this Revision under the provisions of Section 94(I)(a) & (b) and (2)(a) (b) (i) of the Employment and Labour Relations Act No.6 of 2004 and Rules 24(1),(2)(a),(b),(c),(d) and (f) and 3(a)(b)(c) and (d) and 28(1)(c)(d) and (e) of the Labour Court Rules GN No. 106 of 2007 and pursuant to the order of this Court, Hon.

Ismail, J dated 25th May, 2021. Through the Chamber Summons as well as the notice of application, the applicant is moving the court for the following orders;

1. *That this Hon. Court be pleased to revise the proceedings in Labour Dispute No. CMA/MZ/GEIT/412/2015, Hon. Kimaro-Mediator, between Kilimani Dotto Richard and Geita Gold Mining Limited and make an order quashing the decision and orders made therein on 03/02/2016 and allow the applicant to refer the Labour Dispute to CMA and out of time.*
2. *Costs of the application to be provided for and*
3. *The other orders and reliefs the court deems fit to grant.*

The application has been supported by an affidavit of the applicant which sets out the grounds upon which the application is made as follows;

1. *Whether the Hon. Mediator was legally correct to hold that the applicant did not prove the reasons for delay while the respondent admitted to have supplied the applicant with the letter of termination on 04th November, 2015.*
2. *Whether the Hon. Mediator was legally correct to hold that the act of the applicant not to receive payment of salary was a justification and formal communication that his employment was terminated.*
3. *Whether the act of not making follow-up of the payment made by the employer on 17th September, 2015 amounted to the knowledge that the employment of applicant is terminated.*

The application was argued orally whereby the applicant was represented by Mr. Acram Adam, learned counsel whereas Ms. Neema Josephat, learned counsel represented the respondent.

Mr. Adam kicked-off first with a prayer that the applicant's notice of application and affidavit be adopted by this Court to form part of his submission. While submitting in support of the application, he made reference to the three legal issues in paragraph 7 of the applicant's affidavit as they have been reproduced herein above and argued them in sequence.

Arguing in respect of the first issue, Mr. Adam told this Court that there was no dispute before the CMA that the applicant received the termination letter on 04/11/2015 and referred the matter before the CMA on 13/11/2015. The applicant pleaded before the CMA that he was not aware of the outcome of his appeal until 04/11/2015 when he was supplied with the termination letter dated 08/09/2015.

He submitted that according to the schedule to the Employment and Labour Relations (Code of Good Conduct and Practice) Rules, 2007 on the segment of Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedures whereby item 14 provides that *"the Manager considering the appeal must record the outcome of the appeal in*

appropriate part of the original disciplinary form and return the copy to the employee"

Therefore, it was his opinion that the respondent had a duty to return the outcome of the appeal to the applicant. The fact that the outcome of the said appeal was received on 04/11/2015 while the same was issued on 08/09/2015 was enough to have the period from 08/09/2015 to 04/11/2015 condoned.

With regards to the second issue, it was the counsel's argument that the inference drawn by the Hon. Mediator that since the applicant did not receive salary, then that was deemed as communication that the employment was terminated was not correct. He stated that the only formal communication is by way of a letter as required by the law cited, also the demand by the employer to have the office equipment which were in the hands of the employee returned, which in this case, the said equipment was returned on 03/11/2015 and the applicant underwent medical check-up as an exit procedure. He cited the case of **Said Seleman and 13 Others vs A-One Product and Butlers Ltd,** Revision Application No. 890 of 2018, HC-DSM at page 8 to bolster his argument and stated that based on the authority, the applicant was still the employee of the respondent until 03/11/2015 when he handed over the

respondent's equipment and collected the outcome of the appeal on 04/11/2015.

On the last issue, it was submitted by learned counsel for the applicant that it was wrong for the CMA to conclude that failure by the applicant to make follow-up of the payment made by the respondent on 17/09/2015 indicated that he knew that he was terminated; because payment by the respondent was not proof of termination as the applicant was not informed of the said payment. He concluded his submission by praying that the CMA decision be set aside and he be condoned so that the labour dispute before the CMA can proceed.

In the reply submissions, the learned counsel for the respondent began by making a prayer to adopt the respondent's affidavit to form part of her submissions.

She submitted with regard to the first issue that it is undisputed that the applicant knew that there was a labour dispute before the disciplinary committee that led to his suspension from 17/07/2015 which proposed that his employment be terminated; and that he submitted an appeal before the higher management thus the applicant knew that his employment could be terminated or allowed to proceed.

She told this court that the CMA was right to decide that the applicant did not bring sufficient evidence to substantiate that his delay in filing the complaint before the CMA was caused by his lack of knowledge that his employment was terminated. As regards to the cited law, he argued that, the respondent complied with the law as he prepared the results of the applicant's appeal through a letter dated 08/09/2015 titled "reply to your appeal". She admitted however that the said reply was not served to the applicant for the reason that they tried to locate the applicant but did not succeed as the applicant was not ready to receive the outcome of the appeal.

With respect to the second issue, the learned counsel for the respondent submitted that the Arbitrator was legally correct because the employment relationship between the employer and employee is governed by the employer paying salary and the employee working. Hence, since the applicant stopped working from 08/07/2015 and was not paid any salary except his terminal benefits which were paid on 17/09/2015, non-payment of salary was an indication that there was no any employment relationship between the applicant and respondent.

He submitted further that the cited case of **Said Selemani** (supra) is distinguishable as in this case, the respondent having terminated the

applicant could not locate him so as to give him the termination letter and other procedures to take place.

Coming to the third issue, it was submitted that as a reasonable person the applicant was aware of the labour dispute hence having received payment on 17/09/2015 which was not salary but failed to ask why the said payment was effected indicates that he was aware that his employment had come to an end. He stated that the CMA rightly considered the case of **Tanzania One Mining Ltd vs Andre Venter**, Labour Revision No. 279 of 2009 which decided that the dispute arose when the employer decided to pay the terminal benefits.

To strengthen on that point, he made reference to the case of **Nyanza Road Works Ltd vs Giovanni Guidon**, Civil Appeal No. 75 of 2020 CAT-Dodoma (unreported) in which the Court held that the law assists the vigilant and not those who sleep. She then concluded her submission by praying that the CMA decision be upheld and this application be dismissed with costs.

In the rejoinder submissions, submitting with regards to the issue of notice of termination, Mr. Adam argued that the respondent did not follow proper procedure of giving notice to the applicant. Also, that no evidence was given to prove that the respondent tried to locate the applicant and

failed. The evidence indicate that the applicant was served with the termination letter on 04/11/2015 and that is when he became aware of the termination.

On the second issue, he reiterated what he had submitted earlier that failure to receive salary was not proof of termination. The applicant was suspended since 16/07/2015 and such suspension could only come to an end through the official letter from the respondent either terminating him or sending him back to work.

Lastly, on the third issue, he submitted that failure to make follow-up of the payment made by the respondent is not proof that the applicant knew that he had been terminated as the said payment was made without informing the applicant that it was for final benefits.

With regards to the cited case of **Tanzania One Mining Ltd** (supra), he distinguished the same from the matter at hand by arguing that, unlike in this case, in the cited case there was formal communication prior to the payment of terminal benefits. He also distinguished the cited case of Nyanza Road (supra) stating that the circumstances in that case are different from this matter as in that case the court was discussing illness as a ground for extension of time.

As for the principle cited by the respondent that the law helps those who are vigilant, he stated that the same does not apply in this matter as the applicant became aware of the termination on 04/11/2015 and filed for condonation by 13/11/2015, a difference of only 9 days which cannot be said that the applicant slept on his own right.

He submitted in the end that this application be allowed and that he be condoned to proceed at the CMA. Also, any other relief this court may deem appropriate.

From the submissions and records of this matter, one important question arises which calls for this court's determination, that is, whether there is merit in this application.

The applicant's application is rooted in three legal issues as reflected in his affidavit which can be lowered down into one major, that is, whether the applicant adduced good and sufficient reasons for the delay.

I have gone through the records and noted that at the CMA as well as here in this revision, the applicant attributes his delay to what he termed as the failure by the respondent to issue him with the termination letter in time. He alleged that he received the termination letter on 04/11/2015 which was dated 08/09/2015 and that was when he realised that he had been terminated since 08/09/2015. It was his argument that

since there is no dispute that he received the outcome of his appeal on 04/11/2015, then the period from 08/09/2015 to 04/11/2015 should have been condoned.

The respondent did not dispute the fact that the letter for termination was served to the applicant on 04/11/2015. He stated that the delay to serve the applicant was caused by failure to locate him. He also argued that since the applicant was paid his terminal benefits on 17/09/2015, he knew that his employment had ended but did not want to collect the termination letter.

The limitation of time for referring employment disputes to the CMA is governed by the provisions of rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, (GN No. 64 of 2007) which necessitates an applicant to refer a dispute about the fairness of termination to the CMA within 30 days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.

The applicant's termination letter shows that the applicant's employment contract was terminated since 08/09/2015. When the applicant became aware of the said termination on 04/11/2015, the period of 30 days had lapsed thus he could not approach the CMA to challenge

the fairness of the termination unless he first applied for and obtained condonation.

An application for condonation is governed by the provisions of Rule 31 of GN No. 64/2007 (supra) which requires that for condonation of time to be granted, what the applicant needs to adduce is good cause for the delay. Also rule 11(3) which provides that an application for condonation shall set out the grounds for seeking condonation and shall include the referring party's submissions on the following: -

> *(a) the degree of lateness; (b) the reasons for the lateness; (c) its prospects of succeeding with the dispute and obtaining the relief sought against the other party; (d) any prejudice to the other party; and (e) any other relevant factors.*

As already stated above, this Court is required at this point to see, while guided by the authority cited above, if the applicant had sufficient reasons for the delay. It is clear from the records that the applicant having been dissatisfied with the decision of the disciplinary committee, presented his appeal before the higher authority. It is also clear that the appeal was not successful as, according to the termination letter, the applicant was formally terminated on 08/09/2015. However, the said

letter did not reach the applicant until 04/11/2015, the fact which has not been disputed by the respondent.

From those facts, I am constrained to hold that the applicant had a good reason for the delay as there was no way he could have known or become aware that he had been terminated except through formal communication of the results of his appeal. Since he was served and became aware of the termination on 04/11/2015, then he was eligible for condonation as it only took him eight days after being notified of the termination to lodge his application before the CMA.

In its decision, the CMA, in refusing to grant condonation, did consider factors first, that the respondent paid the applicant terminal benefits on 17/09/2015, thus the applicant was aware that his employment had ended. With due respect, I do not think the payment of terminal benefits amounted to termination of employment especially in this case where the applicant was not made aware that the said payment was actually his terminal benefits. Termination was supposed to be communicated to the applicant.

The second factor considered by the CMA was that the applicant did not bring proof that he was served with the termination letter on 04/11/2015. Again, I do not buy this view by the CMA because the fact

that he was served with the termination letter on that date has not been disputed by the respondent whose defence is that the applicant could not be served in time owing to the failure to locate him. As an employer, the respondent is deemed to have all the information regarding its employees including addresses thus the claim that the applicant could not be located is unfounded.

As regards the issue of non-payment of salary, I think the same cannot be used against the applicant as during those two months that the respondent claims that he did not pay the applicant his salaries, the applicant was suspended and out of work but that in itself cannot be termed as formal communication to the applicant that his employment contract had been terminated. The respondent was duty bound to communicate the results of the appeal to the applicant as soon as the same were out.

Apart from that, the records further reveal that there was evidence that on 15/10/2015 the applicant was paid allowance to take his son to the hospital. He was also called in and required to return the office properties on 03/11/2015. Therefore, this Court finds that, the CMA ought to have considered this evidence when determining whether or not to

condone the applicant's application based on the exact time at which the applicant became aware that his employment had ended.

On the foregoing, I find merit in this application and allow it accordingly. As a consequence, I grant condonation, revise the ruling which dismissed application for condonation and set it aside. I further direct parties to go back to the CMA where their dispute will be determined on merit.

It is so ordered.

K.N.ROBERT
JUDGE
16/9/2022