

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
LABOUR REVISION NO. 5 OF 2021**

(Original CMA/ARS/ARS/685/19/20)

SINOHYDRO CORPORATIONS LIMITED APPLICANT

VERSUS

SHELEMBI BIJUNGES PETRO 1ST RESPONDENT

SAMWEL SHABANI MAKIYA 2ND RESPONDENT

JUDGMENT

4/10/2022 & 17/01/2022

GWAE, J

In the Commission for Mediation and Arbitration for Arusha at Arusha (CMA), the respondents named above jointly lodged complaints against their employer, applicant herein on the 10th December 2019 alleging that, they were unfairly terminated on the 29th November 2019.

The record envisages that, the 1st respondent was employed on the 24th March 2019 and 2nd respondent was employed on the 2nd April 2019 and that they were being paid Tshs. 375,000/= as monthly salary

On its analysis of the parties' evidence, the CMA finally procured its award in favour of the respondents on the basis that, there was no clear evidence if the respondents were transferred to another working station but they did not report. The Commission consequently awarded each respondent the following reliefs; one-month salary in lieu of the requisite termination notice as per section 41 (5) of the Employment and Labour Relations Act, Cap 366 Revised Edition, 2019 (ELRA), 12 Months' salary compensation as per 40 (1) (c) of ELRA and certificate of service. The CMA's arbitral award aggrieved the applicant, she is now before this court seeking orders of the court revising and setting aside the CMA's award dated 31st December 2020.

During opening statements by the parties as well as at the hearing of the parties' dispute before CMA equally before this court, the respondents maintained to have been terminated after they had made follow ups of their unpaid overtime allowance to Legal and Human Rights Centre (LHRC) whereas the applicant, the employer strongly contended that, she did not terminate the respondent's employment save the transfer from one station to another.

During hearing of this application before me, the applicant was duly represented by Mr. Marandu, the learned advocate whereas both respondents appeared in person. The parties reiterated their stand as earlier explained. Now, therefore I am asked to diligently analyze the testimonies adduced by the parties before the Commission in order to ascertain, whether the respondents were terminated by the applicant as complained of by the respondents and if answered in affirmative whether they were unfairly terminated.

Carefully looking at the CMA proceedings, arbitral award, parties' statement on revisional stage and oral submissions of the parties herein above, it is observed that, the duty of this court is therefore to closely ascertain whether the respondents were evidently terminated from their employment.

The CMA's records plainly reveal that, none of the parties was able to produce any documentary evidence to prove to the effect that, the respondents were incontestably terminated from their employment. I am saying so simply because I have certainly detected that, neither the applicant nor the respondents who tendered any termination letter. Hence, the complained termination was contentious issue before CMA was rightly

framed. The issue as whether the respondents were terminated or not was in my considered opinion, ought to be seriously proved by the respondents. Termination of a contract of employment, to my simple understanding, may be expressly that is orally or in writing or impliedly (constructive termination through the conducts).

If one carefully examines the CMA records, particularly the applicant's letter dated 29th November 2019 addressed to the Human Resource Officer exhibiting that the respondents were transferred to another site but they requested time for reporting to the new allocated site (work place). Equally, the applicant's letter dated 30th November 2019 addressed to Legal Affairs Department which directed the respondents to report to their new site on the 4th December 2019. This court at Arusha **Sinyati Ltd-Tarangire Safari Lodge vs. Sokoine Gerald**, Revision no. 184 of 2017 (unreported) where the complained termination was contentious and the applicant's maintained that the respondent absconded, he was thus not terminated while on the other hand the respondent was accused of misconducts and was orally terminated from work, the court held and I quote;

"According to the questions and answers quoted it is clear that if respondent was not paid his salaries from

July 2016 to date while the contention by the applicant that he was sick and was issued with sick sheet on 3rd July 2016 and 3rd September 2016 (DE), this envisages that, the applicant had terminated that respondent, if not why had he stopped paying him his salaries from July 2016 while he was sick and out of work place following his permit?"

In our instant dispute, it is my observation that, there is no scintilla of evidence establishing that, the respondents were terminated by the applicant except that, they were evidently transferred to a new working station (Site). Had there any evidence such as failure or refusal to pay the respondents their salaries or any words spoken by the applicant as to termination, this court would be of the view as was in the case of **Sinyati Ltd-Tarangire Safari Lodge vs. Sokoine Gerald** (supra).

Despite the fact that, it is crystal clear that the burden of proof in labour disputes, particularly in proving whether termination of employment was substantively and procedurally fair, is generally on the part of an employer (See Rule **9 (3)** of the Employment and Labour Relations (Code of Good Practice) GN. 42 /2007) however in a situation where an employer asserts that he or she has not terminated the employee, the burden of

proof shifts to an employee who alleges existence of such termination of employment. That is why in our case the respondents commenced the hearing.

In the present dispute, the respondents had never been able to prove that, they were actually terminated by the applicant except mere their assertions which, in my decided opinion, do not constitute sufficient grounds to convince any court or quasi-judicial body to justly and fairly hold that the applicant did terminate them. Whenever a termination of a contract of employment is alleged by an employee and contested by an employer, there must be proof to the satisfaction of the court that there was termination otherwise there will be confusion to our employers particularly when employees secure other contracts of employment or when the employees unilateral decide to terminate their contracts of employments for their own reasons.

Basing on the court's finding herein above on the first issue, I think I am not supposed to be curtailed by the 2nd issue since there is no proof as to the alleged termination.

Consequently, it is prudent and equitable if the respondents resume to their work at the new site without any entitlement as to their previous salaries (December 2019 to January 2022) or should the applicant be **not** willing to continue working with the respondents, he shall follow the right procedure in terminating their contracts of employment. The CMA's award is hereby revised and set aside. In view of the nature of the dispute between the parties, each party shall bear its own costs of this application and those incurred in the Commission.

It is so ordered.



M. R. GWAE
JUDGE
17/1/2022

Court: Right of appeal fully explained



M. R. GWAE
JUDGE
17/1/2022