

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 33 OF 2018

YAAQUB ISMAIL ENZRON APPLICANT

VERSUS

MBARAKA BAWAZIRI FILLING STATION RESPONDENT

JUDGMENT OF THE COURT

I. Arufani, J

The applicant filed the instant application in this court beseeching the court to revise and set aside the award of the Commission for Mediation and Arbitration at Dar es Salaam [herein after referred to as the CMA], issued in Labour Dispute No. CMA/DSM/TEM/167/2017/86/2017 dated 22nd December, 2017. The application is made under Sections 91 (1) (a), and 2 (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rule 24 (1), 2 (a), (b), (c), (d), (e) and (f), 3 (a), (b), (c) and (d) and 28 (1) (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 and section 51 of the Labour Institutions Act No. 7 of 2004.

The background of this matter as can be found in the proceedings of the CMA and documents filed in this court by the parties is to the effect that, the applicant was employed by the respondent on 1st January, 2011 and posted to work at the respondent's Ikwiriri filling station as a manager from December, 2012. Later on he was transferred to Dumila filling station and in 2014 he was transferred to Mafinga filling station. The applicant said in October, 2015 he received a phone call from Halidi who was an assistant manager in the business of the respondent and he notified him he had been transferred to their headquarter at Dar es Salaam.

He said after going to Dar es Salaam he was assigned to work at the office and garage where his work was to buy vehicles' spare parts. He said he was not paid his salaries but allowance only. When he requested to be paid his salaries as he had a family problem he was told by his boss to wait until the next day. When he made a follow up of his salaries on the next day his boss became angry and told him he is not a good employee and told him to depart. The applicant told his boss he can depart but he wanted to be paid his salaries. Thereafter the applicant filed the complaint before the CMA.

Mustapha Bawaziri who testified as DW1 told the CMA that, the applicant was not transferred to Dar es Salaam but he absconded from his work while at Mafinga. The witness said to have gone to Mafinga to look for the applicant but he didn't find him there and he decided to report the event to the Gangilonga Street Chairman where he was given a letter which was admitted in the matter as exhibit D1. Thereafter he went to report the event at Mafinga police station and he was given RB which was admitted in the case as exhibit D2. The witness said they didn't see the applicant until when he met him before the CMA is when he discovered he was at Dar es Salaam.

After hearing the evidence from both sides the CMA found the applicant had absconded from his employment and dismissed his complaint. The applicant is now beseeching the court to revise the award of the CMA on the following grounds:-

1. The Commission for Mediation and Arbitration did not evaluate the evidence properly.
2. The Commission for Mediation and Arbitration erred to say that the applicant was not terminated.

During hearing of the application the applicant was represented by Mr. Nickson Ludovick, learned advocate and the

respondent was represented by Mr. Abdul Maliki Simbamgeni, personal representative. The counsel for the applicant told the court that, the CMA did not evaluate properly the evidence adduced before it by both sides. He said if you look at page 7 and 8 of the award of the CMA you will find the only evidence relied upon by the CMA to determine the matter is exhibits D1 and D2. He said that evidence was not enough to establish the applicant absconded from his employment and said the CMA erred to use the evidence of DW1 to find the applicant absconded from his employment.

He said the Arbitrator did not consider that, exhibit D1 contain hearsay story of what the author was told by DW1. He argued that, exhibit D1 states the applicant was not at his home and not at his place of work and the author of the letter was not called to testify before the CMA. He argued further that, if it is true that the applicant had absconded from his work and DW1 was looking for him and had RB from police station why he didn't take any action against him when they met at the CMA. He also argued that, the Arbitrator failed to see the applicant had no any reason to abscond from his employment as there was no any allegation of stealing anything from his employer and he owed nobody anything.

It is his further argument that, the Arbitrator did not consider that the applicant was transferred from Ikwiriri to Dumila and from Dumila to Mafinga without any letter to find he was also transferred from Mafinga to Dar es Salaam without any letter. He stated that, the Arbitrator erred in believing DW1 went to find the applicant at Mafinga instead of finding him through his guarantors. He submitted that, the allegations raised by the respondent were not sufficient to meet the conditions provided under sections 110, 111 and 112 of the Evidence Act, Cap 6 R.E 2002.

It is his further submission that, the Arbitrator failed to see the respondent failed to comply with section 37 (2) (a) and (b) of the ELRA which deals with unfair termination and supported his submission by the case of **Association of Tanzania Tobacco Traders V. Ahmed Ally** [2013] LCCD 42. He stated that, as the claim of the applicant of Tshs. 26,982,307/= was not contested by the respondent, the claim be awarded and the respondent be ordered to pay the applicant the claimed amount. He supported his prayer by citing the case of **NBC & Another V. Ahmed Abderhaman**, [1997] TLR 259 and prayed the application to be granted.

In reply the personal representative of the respondent told the court that, exhibit D1 and D2 shows the respondent made a lot of effort to trace the applicant without success. He said the mentioned exhibits and the evidence of DW1 were enough to establish the applicant absconded from his employment. He argued that, as provided under Rule 9 of GN No. 64 of 2007 absence from work is a fair reason which may warrant termination of employment of an employee. He argued further that, the respondent used his wisdom and energy to trace the applicant up to the extent of going to the Police station where he was given exhibit D2.

He argued that, the Arbitrator evaluated properly the evidence adduced before the CMA and applicant failed to convince the Arbitrator that he didn't abscond. He said it is true that there was no letter issued to their employees who were transferred from one station to another but the transferred employees used to do handing over of the properties of their work to the employees whom they exchanged the office.

He stated further that, there was no evidence to show why the applicant would have been terminated from his employment. He submitted that, the applicant is not entitled to be awarded any relief because as provided under section 40 and 44 of the ELRA

terminal benefits are paid to an employee who has been terminated from his employment and not the employee who has absconded from his employment as done by the applicant. Finally he prayed the application to be dismissed.

In his rejoinder the counsel for the applicant reiterated most of what he argued in his submission in chief. He stated that, exhibit D2 is not showing any relationship with the claim of the applicant and said if it had any relationship the police officer who issued the same was required to be summoned to testify before the CMA about the same. He argued in relation to exhibit D1 that the same contain the words of DW1 and said that shows it is as good as the testimony of DW1 himself.

He argued further that, exhibit D1 is not showing the applicant absconded from his employment and said is full of hearsay. He stated that, as labour laws casts duty to employers to keep record of his employees, the respondent was supposed to establish by record how the applicant was being transferred from one station to another. He said it is not true that the claim of the applicant has no basis as is claimed in accordance with the law and prayed the application to be granted.

After considering the submission from both sides and going through the proceedings and award of the CMA the court has found proper to start with the first ground which states the Arbitrator failed to evaluate properly the evidence adduced before the CMA. The court has found in order to be able to determine this ground properly it is proper to start by looking if the evidence adduced before the CMA managed to establish the applicant absconded from his employment or he terminated his employment with the respondent after failing to tolerate the action of the respondent.

The court has found that, despite the fact that DW1 supported his evidence that the applicant absconded from his employment by tendering before the CMA exhibits D1 and D2 to show he went to find the applicant at Mafinga without success but there are some circumstances which makes the court to disbelieve his evidence that the applicant absconded from his work and not that he terminated his employment after the respondent failed to pay him his salaries. The court has arrived to the above finding after seeing that, DW1 stated in his testimony that there were changes of their managers in their filling stations and said the applicant absconded after handing over the Mafinga filling station where he

was working to another manager. For clarity purposes DW1 stated at page 10 of the proceeding of the CMA that:-

"Kulikuwa na mabadiliko ya kubadilisha mameneja toka kituo Fulani kwenda kituo Fulani. Tulipeleka meneja wakafanye makabidhlano ya kubadilisha na baada ya yeye kufanya makabidhiano ya kituo hatua aliyofanya yeye ni kutoweka kituoni bila taarifa ya kampuni na ndipo alipoulizwa meneja aliyepeleka pale kuwa huyu mtu hayuko kituoni na barua ya makabidhiano ipo."

The court has considered the above quoted part of the evidence of DW1 and find that, despite the fact that DW1 said there was changes of their managers at their working stations and the applicant was required to hand over his working station to another manager but he did not say if the applicant was required to remain at his working station or he was transferred to another station. Since DW1 did not say if the applicant was required to remain at his working station after handing over and he did not say the applicant was transferred to which station of work there was no justifiable reason for the Arbitrator to fail to find the applicant was transferred to Dar es Salaam as he stated in his evidence.

The court has found another question left unanswered by DW1 is that, if the applicant was transferred to another working station why didn't DW1 go to find him in his new station and decided to go to find him in the working station which he had already handed over to another manager. The court has also considered what is stated in exhibit D1 and D2 and find as rightly argued by the counsel for the applicant what is stated in exhibit D1 is just what was said by DW1 to the author and exhibit D2 is just a police RB number with no any particulars which can be said it would have proved the applicant absconded from his work.

In addition to that the court has found as rightly argued by the counsel for the applicant there is no any reason or scintilla evidence given by the respondent to show why the applicant should have absconded from his employment. The court has found as the applicant said he was transferred from Mafinga to Dar es Salaam by phone call made to him by Halidi and as it was not stated when he was transferred from Ikwiriri to Dumila and Dumila to Mafinga the mode used to transfer him was different from the mode he alleged was used to transfer him to Dar es Salaam there was no reason which would have made the Hon. Arbitrator to fail to find what was said by the applicant was more plausible compared to what was said by DW1. In the premises

the court has found the Hon. Arbitrator failed to evaluate properly the evidence adduced before the CMA to find the applicant was transferred to Dar es Salaam and he didn't abscond from his employment.

Having found there is sufficient evidence to establish the applicant did not abscond from his employment but he was transferred to Dar es Salaam the next question to determine is whether the Arbitrator erred in failing to find the applicant was terminated from his employment. The court has found the counsel for the applicant said the act of the respondent to refuse to pay the applicant his salaries and told him to depart amounted to constructive termination of his employment as he was compelled to terminate his employment. The term constructive termination of employment is provided under Rule 7 (1) of the GN No. 42 of 2007 which states as follows:-

"Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination."

The court has found that, in order to be able to determine if termination of employment of the applicant was constructive

termination as argued by his learned counsel it is proper to have a look on the guidelines laid in the case of **Girango Security Group v. Rajabu Masudi Nzige**, [2014] LCCD 40 which laid down some questions which an arbitrator or court is required to take into consideration when determining the issue of constructive termination. The questions laid in the above case are as follows:-

- i) "Did the employee intend to bring the employment relationship to an end?"*
- ii) Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfill his obligation to work?"*
- iii) Did the employer create the intolerable situation?"*
- iv) Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?"*
- v) Was the termination of the employment contract the only reasonable option open to the employee?"*

Another essential condition which the court is required to take into consideration when determining the issue of constructive termination can be found in South African Supreme Court decision

made in the case of **Murray V. Minister of Defense** (383/2006) [2008] ZASCA 44 where it was held that:-

"... the onus rest on employee to prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship."

The court has found in proving he was constructively terminated from his employment the applicant stated in his testimony that, after being transferred to Dar es Salaam he was told to work at the garage and in the office of his employer. He also said he was not paid his salaries from when he was transferred to Dar es Salaam and he was only being paid allowance. The court has found the applicant said when he demanded to be paid his salaries the respondent told him the condition was not good and told him to come on the next day. When he came on the next day he was told he was not a good worker and told he can depart. The applicant said after being told so he decided to follow the legal procedures and went to institute the complaint before the CMA.

The court has found the evidence of the applicant that he was not being paid his salaries from when he was transferred to Dar es Salaam was never countered by the respondent. To the

contrary when DW1 was cross examined by the counsel for the applicant he stated at page 10 of the proceeding of the CMA that, their managers used to pay themselves their salaries and pay other employees their salaries and NSSF contributions. The court has found that, if managers were paying themselves their salaries and the applicant said after being transferred to Dar es Salaam he was working at the garage and the office of his employer where he used to be sent to buy spare parts and do other office works it is crystal clear that he was not in a position which he could have paid himself his salaries as stated by DW1. If he was not in a position which he could have paid himself his salaries it was the duty of DW1 to prove how the applicant would have paid himself his salaries or how he was being paid his salaries.

That being the position the court has found that, there is no evidence adduced before the CMA to prove the applicant was being paid his salaries from when he handed over the filing station of Mafinga to another manager and transferred to Dar es Salaam. The court has found that, the testimony of the applicant shows that, although he was not been paid his salaries and he was being paid only allowance but he was continuing with work and this shows he had no intention of terminating his employment. The court has found the applicant said the dispute

arose when he had a family problem and demanded to be paid his salaries as instead of being paid his salaries he was told to depart from his employment.

The court has found that, although the applicant did not say the allowance he was being paid was for what purposes and how much he was being paid and within which period of time but the act of working without being paid salaries and without being proved what he was being paid was proportional to the work he was doing is an intolerable condition which would have made the applicant to fail to continue with his employment. In the premises the court has found the applicant was put in an intolerable condition which would have justified the Hon. Arbitrator to find his employment was brought to an end by his employer by way of constructive termination.

Since the applicant was put in a condition which made him to find difficult to continue with his employment it is crystal clear that, as provided under Rule 7 (3) of the GN No. 42 of 2007, the employment of the applicant was terminated at the instance of the respondent. Therefore the court has found the Arbitrator erred to find the applicant was not terminated from his employment. Having found termination of employment of the applicant was by way of constructive termination which under

section 37 (1) of the ELRA is unlawful the next question to determine is whether the applicant is entitled to the claims contained in appendix "YB" to the CMA F1.

The counsel for the applicant argued that, the applicant is entitled to all what is claimed as were not contested by the respondent. The court has gone through the case of **Association of Tanzania Tobacco Traders** cited by the counsel for the applicant to support his argument and find it is stated therein that, where an employer terminates his employee unlawfully or unfairly is required to pay him compensation of not less than twelve months remuneration together with all terminal benefits which the employee is entitled to in terms of any other law or agreement as provided for under section 40 (2) of ELRA.

The court has also gone through the case of **NBC & Another** cited by the counsel for the applicant to support his submission that as the claim of the applicant was not contested by the respondent then it was supposed to be awarded as presented but find that, the said case is distinguishable from the case at hand. The court has found in the cited case the claim which was granted as claimed was admitted by the counsel for the defendant while in the case at hand despite the fact that the respondent did not say anything to dispute the claims of the

applicant but there is nowhere indicated the respondent admitted the claims of the applicant. Therefore an omission to state the respondent contested the claims of the applicant does not always mean he admitted the claims of the applicant.

With the above position in mind the court has gone through the claims of the applicant annexed to the CMA F1 and find it is not only that the said list was not admitted in the dispute as an exhibit so that it can be acted upon by the court but it includes some claims which its entitlement was supposed to be proved by evidence to enable the tribunal or the court to award it. After considering what is listed therein the court has found as the applicant said he was not paid his salaries from when he was transferred to Dar es Salaam and he said he was transferred to Dar es Salaam on October, 2015 and termination of his employment occurred on 27th February, 2017 he was not paid his salaries for 16 months and not 17 months.

If his salary per month was Tshs. 500,000/= he deserve to be paid arrears of salaries for 16 months which is Tshs. 8,000,000/=. He is also entitled to get compensation of twelve months' remuneration for unfair termination as provided under section 40 (1) (c) of ELRA which is Tshs. 6,000,000/=. In addition to that he is entitled to be paid severance payment of Tshs. 807,692.31 as

he worked for six years and as provided under section 42 (1) and (4) of the ELRA and is entitled to be paid one month salary in lieu of notice which is Tshs. 500,000/=.

The court has considered the claim for payment of annual leave and finds that, despite the fact that the applicant said he didn't take his leave from when he was employed but he didn't say why he didn't take his leave for all that period and he didn't say if he applied to take it and denied by his employer. The court has found that being the position to claim for annual leave which was not established was applied for and denied is contrary to section 31 (9) of the ELRA. Therefore the applicant is entitled to get payment of only one month salary in lieu of annual leave for the year when his employment was terminated which is Tshs. 500,000/=.

The court has considered the claims of overtime and housing allowance and find there is no proof if he was entitled to the said claims. In addition to that the applicant said in his testimony that he was being paid allowance which he didn't say how much allowance he was being paid and it was for what purposes. To the view of this court the allowances paid to him can be taken it covered the said claims of overtime and housing allowances. The court has also found there is no justification to grant the applicant

repatriation costs as he didn't say where he was recruited and he was required to be repatriated to which place.

All being said the court has found the application deserve to be granted and the award of the same is hereby revised as prayed and is quashed and set aside accordingly. In lieu thereof the applicant is awarded unpaid salaries which its sum is Tshs. 8,000,000/=, twelve months salaries as a compensation for unfair termination which its sum is Tshs. 6,000,000/=, severance allowance at the sum of Tshs. 807,692.31, payment for annual leave at the sum of Tshs. 500,000/= and notice for termination of his employment at the sum of Tshs. 500,000/=. This makes the total sum to be paid to the applicant by the respondent to be Tshs. 15,807,692.31. It is so ordered.

Dated at Dar es Salaam this 19th day of September, 2019



I. ARUFANI

JUDGE

19/09/2019