

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 93 OF 2020

BETWEEN

TASNIM M. ESAJEE AND MUFADDAL.....APPLICANT

AND

HARUNA A. MOHAMED.....RESPONDENT

JUDGMENT

Date of the last order: 03/03/2021

Date of the Judgment: 30/04/2021

A. E. MWIPOPO, J.

This application for revision is against the ruling and *ex parte* award of Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/580/19. The Applicant herein namely Tasnim M. Essajee and Mufaddal applies to the Court to be heard in the following terms:-

1. That the Court be pleased to set aside and revise the CMA ruling/award issued by the hand of Hon. M. Chengula, Mediator, on 25th February, 2020.
2. That the Court be pleased to order that the award that was issued was improperly procured.

3. That the Court may make any other order(s) that may deem just and equitable to grant.

The facts of the case in brief shows that the Respondent namely Haruna A. Mohamed was employed by the Applicant in 2010 as the driver for the monthly salary of shillings 280,000/=. However, the working relationship between the Applicant and Respondent deteriorated as he was assigned another post and the Respondent's salary was reduced. The condition forced the Respondent to resign from employment on 10th January, 2019. Thereafter the Respondent filed the dispute before the Commission for Mediation and Arbitration which heard the dispute in *ex parte* following the failure of the Applicant to appear before the Commission on several occasions. The Applicant applied for the *ex parte* hearing order to be set aside but the Commission dismissed it on 22nd November, 2019. Then, the Commission heard the Respondent in *ex parte* and the Commission *ex parte* award was delivered on 25th February, 2020, by Hon. M. Chengula, Arbitrator, in favour of Respondent. The Applicant was aggrieved by both the ruling and *ex parte* award of the Commission and he filed the present application.

When the matter came for hearing, the Applicant was represented by Mr. Sammy Katerega, Personal Representative, whereas the Respondent

was represented by Mr. Cosmas Maige, Personal Representative. Hearing of the matter proceeded orally.

Submitting in support of the revision application the Personal Representative for the Applicant averred that the Applicant was employed in 2015 and during his employment he bought a car from the Applicant by loan. The car was sold to the Respondent for Tshs. 4,500,000/= and the Respondent paid a total of 600,000/= out of the loan. In 2018 the Respondent resigned from employment orally. The employer orally granted the resignation starting from 01st November, 2018. Thus, the Respondent was not employee from 01st November, 2018. On 05th January, 2019 the Respondent filed resignation letter stating that the working condition is intolerable. The employee was absent from employment starting from 01st November, 2018 but in the dispute before the CMA the Respondent stated that he resigned from 10th January, 2020. The Respondent filed dispute at the CMA on 19th July, 2020 which is 7 months later from the date of resignation. The CMA heard and determined the dispute which was referred out of time. The Respondent did not file application for condonation hence the CMA had no jurisdiction to entertain the Application.

The Personal Representative submitted further that the CMA Form No. 1 shows that the complaint name is Ally Mohamed Haruna. But the signature

in the CMA form No. 1 was of the person known as Haruna Mohamed Ally. The CMA Form No. 2 shows the name of the complaint as Ally Haruna Mohamed and the signature therein was signed by a person known as Ally Mohamed Haruna. The CMA Award shows the complaint name as Haruna A. Mohamed, thus there is inconsistency in the name of the complaint before the CMA. This goes to the root of the case as it is not known if the person who filed the dispute before the commission and the one in the title of the Award are one and the same person.

It was further submitted by the Applicant that there is no evidence at all to prove that the working condition was intolerable to force the Respondent to resign. Thus the Arbitrator erred to hold that the Respondent was forced by the intolerable working condition to resign. Also, the Arbitrator erred to proceed with hearing in *ex parte* without proof that the Applicant herein was served with summons or was aware that the matter was going for hearing on the respective date. The Ruling on the application to set aside *ex parte* hearing order shows that the CMA Form No. 1 was served to the Applicant which is not true. The Arbitrator erred for failure to inform the Applicant herein to appear and receive the commission Award on the date it was delivered. Thus, the Applicant prayed for the CMA Award be revised.

The Personal Representative for the Respondent replied to all of the Applicant submissions. He submitted that the Respondent served the Applicant with Notice of Application and the summons to appear on 23rd July, 2019. The Applicant rejected to receive the Notice of Application and the Local Government Officer of the Applicant's street endorsed that the Applicant has rejected to receive the Notice of Application and summons. The matter was adjourned to 13th August, 2019 and the summons was served to the Applicant on 13th August, 2019 which he rejected to receive it. Then the matter was adjourned to 10th September, 2019. The Applicant was served with summons on 02nd September, 2019 but they did not appear in Court on the respective date of mention which was 10th September, 2019. The Respondent prayed to proceed with hearing in *exparte* and the commission granted the prayer. Thus, the Commission rightly rejected to set aside its *exparte* order. The hearing of the Application proceeded in *exparte* and the Award was delivered. According to section 37(1), (2) (a) and (b) of the Employment and Labour relations Act, 2004, the Applicant as employee had duty to prove that the termination or resignation of the Respondent was fair but he failed to do so.

Regarding the Applicant's submission that the CMA had no jurisdiction to entertain the dispute as it was filed out of time, he submitted that the

commission has jurisdiction to entertain the matter. The Respondent filed application for condonation which was granted by the CMA before the matter proceeded with the hearing. Thus, the ground have no merits as the application was condoned.

Further, the Respondent Personal Representative averred that the evidence tendered and the testimony of the Respondent was sufficient to prove that the Respondent was forced to resign due to the intolerable condition of work. Thus, the commission rightly awarded the Respondent with remedies for unfair termination. The Representative prayed for the application be dismissed and the CMA Award be upheld.

In rejoinder, the Applicant's Personal Representative retaliated his submission in chief and emphasized that there is nothing in record to prove that the application before the Commission was condoned.

From the submissions, I find that there are three issues in dispute for determination. The respective issues are as follows:-

- i. Whether the Commission had jurisdiction to entertain the matter.
- ii. Whether the Commission had sufficient reason to dismiss Applicant's application to set aside *ex parte* hearing order.

- iii. Whether the evidence available in Commission arbitral exparte award proved that the termination of Respondent's employment was not fair.

In determination of the first issue whether the Commission had jurisdiction to entertain the matter, I find it relevant to look at the provisions of law relating to the time limitation for referring the dispute to the Commission. Rule 10 of Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 64 of 2007, provides for time limitation for referring a labour dispute to the CMA. The rule provides that, I quote;

"10. (1) Dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a decision to terminate or uphold the decision to terminate.

(2) All Other disputes must be referred to the Commission within sixty days from the date when the dispute aroused."

However, the Commission for Mediation and Arbitration have discretion to condone any failure to comply with time limitation which is provided by the Rules. The law provides in Rule 31 of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. 64 of 2007 that, I quote:-

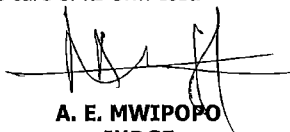
"The Commission may condone any failure to comply with the time frame in these rules on good cause."

In the present application, the Applicant submitted that the Commission determined the dispute before it without jurisdiction since the CMA Form No. 1 shows that the Respondent resigned on 10th January, 2019 but the dispute was referred to the Commission on 19th July, 2020 which is 7 months later. However, the Respondent opposed the Applicant's submission and argued that the Commission has jurisdiction to entertain the matter since it granted the application for condonation before the hearing of the matter proceeded.

I have read the CMA record which shows that when the Respondent filed CMA Form No. 1 he attached the application to be condoned for filing the dispute out of time. However, there is nothing in the CMA records which indicates that the Commission granted the Respondent's application for condonation. The Respondent argued that his application to be condoned was granted by the Commission but there is nothing in the CMA record to prove it. In absence of the decision of the Commission granting Respondent's application to be condoned means that the Commission determined the dispute before it without jurisdiction. Thus, I find that the Commission acted without jurisdiction to determine the dispute which was filed out of time.

Since it was the Commission which was in fault for failure to determine the Respondent's application to be condoned for filing the dispute out of time, I hereby quash the Commission proceedings and set aside the Commission ex parte award. The file is reverted back to the Commission for Mediation and Arbitration where the hearing of the dispute has to start afresh with determination of the application for condonation before another Mediator. As the first issue dispose of the matter, I'm not going to determine the remaining issues.

Therefore, the revision application has merits and is allowed. Each party to the suit to take care of its own cost.

A handwritten signature in black ink, appearing to be 'A. E. Mwiopo', written over a horizontal line.

A. E. MWIPOPO
JUDGE
30/04/2021