THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

APPLICATION FOR REVISION NO. 15 OF 2019

(Arising from Labour Dispute No CMA/MTW/LD/02/2019 of Mtwara)

CASHSON RISK MANAGEMENT..... APPLICANT

VERSUS

RAJABU MLAPONI..... RESPONDENT

JUDGMENT

Hearing date on: 27/8/2020

Judgment date on: 10/11/2020

NGWEMBE, J:

The applicant herein was aggrieved with the decision of the Commission for Mediation and Arbitration for Mtwara (CMA) in dispute No. CMA/MTW/LD/02/2019. Thus, knocked the doors of this fountain of justice seeking revision of the whole proceedings and judgement of CMA. In support, the applicant, raised a good number of grounds calling for this court's consideration.

On the hearing date, both parties unanimously agreed to proceed with the application by way of written submissions, which prayer was granted and they complied with scheduling dates of filing their written submissions.

Briefly the applicant argued that, the respondent did not prove that he was terminated by the applicant, the duty of proofing if the respondent was terminated or not lies on the employee. He was of the view that, failure to prove if there was termination of employment makes the dispute to be incompetent and premature. Therefore, CMA had no jurisdiction to entertain the prematurely instituted dispute. He referred this court to the case of **C.R.J Construction Co. (T) LTD Vs. Maneno Ndalije & Another, Labour Revision No. 205 of 2015** (unreported).

He added further that, the respondent did not prove if he was terminated, rather merely raised an allegation of termination without any proof therein. For instance, the respondent alleged to have been remanded in police custody and thereafter, he came back to the employer, but failed to adduce any evidence to support his statement contrary to section 112 of the law of Evidence Act, Cap 6 R.E 2019.

That, since there was no termination it means fairness of termination substantively or procedurally cannot arise. He insisted that the decision of CMA should be quashed and set aside because it was instituted and determined by CMA prematurely.

The applicant submitted that, the respondent sued an entity called Cashson Risk Management, the non existing entity, which means he sued a wrong person. The applicant is registered and incorporated as Cashson Risk Management Limited. Omitting the word "Limited" makes another entity and not the former employer of the respondent. It means even its execution of the CMA award cannot succeed. He rested his arguments by referring this court to the cases of **Christina Mrimi Vs. Coca Cola Kwanza Bottlers Ltd, Civil Appeal No.112 of 2008**, and the case of **Kanisa La Anglikana Ujiji Vs. Abel s/o Samsoni Heguye, Labour Revision No. 5 of 2019**.

Replying on the applicant's submission, the respondent argued quit strongly, by referring to section 39 of the Employment and Labour Relation Act R. E 2019, whereby the employer had a duty to prove fair termination. Thus, in this case at hand, the employer was supposed to prove if he had never terminated the respondent herein or if he terminated him, whether such termination was faire. Further argued that, the respondent was absent from work place, but has did not show which procedure was taken against him, due to his absence from work as stipulated by the Labour laws.

On the third issue, that the respondent sued a wrong party, he argued forcefully that, the applicant never raised this issue at the commission, instead the case was heard to its finality and never denied that the

respondent is not his employer. Since the contract of employment was oral one, he had no means to know the correct name of the employer.

Further argued that, the error made on the year of whether 26/7/2018 or 26/7/2019, such error may be rectified by any way without affecting the contents of the decision. He referred this court to the case of **R Vs. Nuru Masudi Mgawe [1984] TLR 218.**

In his very brief rejoinder, the applicant reiterated on what he submitted in chief, but he also stated that the respondent introduced a new issue of constructive termination, which was not the issue at CMA and never discussed anywhere.

This court is called upon to review on what was adduced during trial, the law applicable and determine if at all the Arbitrator rightly the required legal procedures, as required by Labour laws and its rules before arriving into conclusion.

Certain facts in this case are not disputable, including the fact that Rajabu Yusuph Mlaponi jointly with two others were arraigned in the District Court of Mtwara charged for conspiracy to commit an offence contrary to section 384 of the Penal Code. Thus, criminal case No. 208 of 2018 was preferred against them. However, it is also on record that Senior Resident Magistrate E.S. Mwambapa on 17th October, 2019 found them innocent, consequently acquitted them. Likewise, it is not in dispute that Rajabu Yusuph Mlaponi was an employee of the applicant Cachson Risk Management. Both agrees

that there was an oral employment contract. That is to say the employer did not issue the respondent with written employment contract as required by Labour Laws. Briefly these are not disputable issues among the disputants.

Having summarized on those undisputable issues, let me now consider the applicant's grounds of this application. It is the applicant's assertion that, the respondent did not prove that he was terminated by the applicant at all. Therefore, the duty of proving if the respondent was terminated or not lies on the employee. Rightly so stated, the respondent had a duty before CMA to prove that he has been terminated from employment. I think, this point has two traffic ways, while the employee had a duty to prove termination of his employment, the employer likewise, had a duty to prove that he employed the respondent and that the employment contract is still subsisting in terms of providing him with appropriate jobs and entitlements as agreed in the contract.

As I have noted hereinabove, the respondent was arrested by law enforcers and taken to police custody and later was arraigned in court charged on criminal case No. 208 of 2018 which ended in his favour. This point was emphasized by the Arbitrator in CMA at page 6 of paragraph 3 of the award as quoted hereunder:-

> *"Katika kujibu hoja ya kwanza endapo mlalamikaji aliachishwa kazi na mlalamikiwa, hapa mlalamikaji alieleza tukio la kupelekwa polisi na kuwekwa rumande kwa tuhuma za wizi na kufikishwa mahakamani na kwamba mwajiri alijua kuwa*

amepelekwa polisi, alieleza baada ya kuachiwa kwa dhamana alienda ofisini kuonana na meneja ili kupangiwa kazi na akajibiwa hawezi kupangiwa kazi hadi mahakama itakapomwachia huru"

Understanding the contents of the above quotation, clearly indicates that the respondent was not terminated by the applicant, rather the applicant accused him for theft, taken to police custody and charged on criminal accusations. When he was bailed out, yet the employer demanded to wait until the criminal case is finally determined by a competent court of law.

Such undertaking was, I think, in line with section 37 (5) of the Employment and Labour Relations Act of 2004 which states:-

"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto"

This provision of law is clear which does not require expert of legal interpretation to understand it. Once an employee is facing criminal accusations before police and before the court of law, any subsequent disciplinary action must be stayed pending final determination of that criminality.

According to the evidence on record, the respondent was rightly suspended from employment due to the reasons that he is facing a criminal allegation. Notably, suspension is not dismissal and suspension does not affect the

employee's basic rights including his salaries. Above all, suspension to an employee facing criminal accusations are correct, but always do not affect his rights of employment including his salaries.

In respect to this application, at page 2 of the CMA award stated categorically that:-

> *"Kwamba baada ya kutoka mahabusu 18/12/2018 alikwenda kuripoti ofisini 19/12/2018 ili aweze kuendelea na majukumu yake na kulipwa mshahara wake, meneja alimwambia arudi kesho yake 20/12/208. Alirudi 20/12/2018 akakutana na meneja wake na kumkumbusha kuhusu kumpangia kazi na kulipwa mshahara, alijibiwa hawezi kupangiwa kazi wala kulipwa mshahara kwa kuwa anatuhuma za wizi."*

So the reason of the applicant not paying the respondent's salary was the pendence of criminal accusations. If that was the understanding of the applicant, then it was contrary to Rule 27 (5) of Employment and Labour Relations (Code of Good Practice) GN No.42 of 2007, which provides:-

> *"Notwithstanding the provision of section 35 of the Act, an employee charged with a criminal offence may be suspended on full remuneration pending a final determination by a court and any appeal thereof, on that charge"*

Further that, it was on record that the employment agreement was of one year. From 11/5/2018 to 14/5/2019 and the agreed salary was Tshs 200,000/= per month. Therefore, I'm in agreement with the findings of the CMA that the applicant did not terminate the respondent from

employment. Rather was technically suspended due to criminal accusations pending in court. But legally, the employment relationship still existed and he was entitled to receive his actual salaries from the date he was taken to police to the date of final verdict of his case.

Failure to pay the respondent his entitlements, including salaries all the period when he was facing criminal accusations was fatal and amounted into unfair termination.

The applicant has raised and argued quite forcefully, that the applicant is not Cachson Risk management, rather is Cachson Risk management Limited. This point should not tie me up for obvious reasons, that the term Limited does not change the true name of Cachson Risk Management. This court cannot build mountain on minor errors which may easily be corrected without affecting the substantive issues in dispute. I therefore, answer this point in negative.

Again the applicant raised an issue of whether there was illegality at CMA. In justifying on this issue, the applicant argued quite well that CMA miss-spelled the date of award as 26th July, 2018 instead of 26th July, 2019. This is purely a sleep of a pen, which does not affect the contents of the award of CMA. In fact, the applicant ought to have applied before the same CMA to correct such error instead of appealing to this court. As such, I hereby invoke powers of this court to correct the error appearing in the CMA award to read 26th July, 2019 instead of 26th July, 2018.

Another illegality which the applicant pointed out is on payment of TZS 400,000/= as transport costs from Mtwara to Songea in Ruvuma region. The applicant argued that such order was contrary to labour laws without citing specific section to that effect. The place of recruitment is not disputed that the respondent was recruited at Ruvuma and worked in Mtwara.

It is settled, in our Labour Laws, that indeed (Section 43 (1) of the ELRA), where a contract of employment is terminated at a place other than where the employee was recruited, the employer shall provide transport to the place of recruitment. In this case the respondent was recruited at Ruvuma, worked at Mtwara and terminated at Mtwara, therefore, according to law, the employer/Applicant is duty bound and compelled by law to transport the respondent to a place where he was recruited. The section is quoted hereunder for ease of reference:-

> **Section 43** *(1) where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either:*
>
> *a) transport of the employee and his personal effects to the place of recruitment,*
> *b) pay for the transportation of the employee to the place of recruitment, or*
> *c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transferring the employee and his family to the place of recruitment.*

The question remains whether the order of CMA to pay the respondent TZS 400,000/= as transport costs was illegal? I think, the section quoted above is self-speaking, I need not to amplify it further. Suffice to say that CMA made no illegality in its order.

May be it is important to point out here, the Overriding Objective of labour laws in our jurisdiction. Judge Mipawa in his ruling of **Reli Assets Holdings Co. Ltd Vs. Japhet Casmil & 1500 others, Revision No. 10 of 2014,** rightly ventured to discuss the overriding objective of Labour Laws in page 12:-

> *"The Labour Court as a specialized court and Division of the High Court has its Labour Laws and Rules enacted and passed by the Legislature with the aim of guiding the Labour Court to achieve its ends,* ***purpose and specific objectives which is social justice, hence labour Legislation are enacted to achieve that goal of social justice which is intended to achieve industrial harmony'*****.**

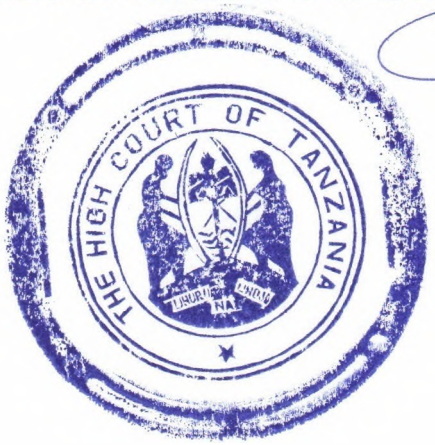
To achieve this goal and purpose demand both parties to the labour dispute to be truthful, honest, integrity, pointing out legal defects from the earliest point in time and ready to speak nothing but only truth. Failure of which, such overriding objective may remain on papers and fail to build the intended social justice and industrial harmony. In this application the applicant is challenging the decision of CMA by pointing out minor correctable errors as grounds capable of dismissing the whole decision of CMA.

It must also be borne in mind of employers that the duty to prove that, termination of employment was fair substantively and procedurally lies on the shoulders of the employer as opposed to the employee. Also a fair termination must be accompanied with valid reasons and fair procedures. In other words, there must be substantive fairness and procedural fairness as per section 37 (2) of the ELRA. The whole purpose of the legislature was to require employers to terminate employees only on valid reasons and not their own whims.

In totality and for the reasons so stated, save only on the corrections on the effective date of the CMA decision, which is 26th July, 2019, this revision lacks merits same is dismissed and consequently, I proceed to uphold the award entered by the CMA.

I accordingly order.

Dated at Mtwara in chambers this 10 day of November, 2020.



P.J. NGWEMBE

JUDGE

10/11/2020

Court: Ruling delivered at Mtwara in Chambers on this 10th day of November, 2020 in the presence of Shadrack Rweikiza for Kusakala, Advocate for the applicant and in the presence of the Respondent.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

10/11/2020