

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 323 OF 2013**

**(ORIGINAL/ CMA/ DSM/KIN/ 1010/2010)**

**OTHMAN R. NTARRU..... APPLICANT**

**VERSUS.**

**BARAZA KUU LA WAISLAMU TANZANIA**

**(BAKWATA)..... RESPONDENT**

**JUDGEMENT**

*23/04/2014 & 30/05/2014*

**Aboud,J**

The application is made under Section 91 (1) (a) and (b) of the Employment and Labour Relation Act, No. 6 of 2004, and Rule 24 (1) (2) and 28 (1) (d) of the Labour Court Rules G.N No. 106 of 2007. The applicant calls upon this court to call for the record,

examine, revise the proceeding and set aside the Award issued by the Hon. Chengula, Arbitrator, for Commission for Mediation and Arbitration (CMA) in the CMA/DSM/KIN/1010/2010, dated 15/06/2012.

The brief facts are back on 29<sup>th</sup> July 2003 the applicant who was a complainant at the CMA was appointed to hold a post of Secretary General of National Muslim Council of Tanzania (BAKWATA). Apart from his monthly salaries the applicant enjoyed several allowances to wit, house, transport, and 25% bonus at the end of every two years. On 2<sup>nd</sup> of May 2005 the applicant was demoted from the post, and remained as just a mere employee of the respondent awaiting for the new duties to be assigned to him. From 2<sup>nd</sup> May, 2005 the applicant was not assigned any duty till 20/08/2010 when he wrote a letter to the respondent claiming among other things the remuneration for five years. On 25/10/2010 the respondent responded to the applicant letter and informed him that his service as a General Secretary ended on 2<sup>nd</sup> May 2005. Respondent letter further said since the applicant did not attend to work as he was required to do so, the management has considered it as abscondment from work; hence he was not entitled to any payment from the respondent. That

decision aggrieved the applicant and he then referred his complaint to the CMA where the Arbitrator decided infavour of the respondent. Dissatisfied by the CMA award the applicant prefers revision to the court.

At the hearing the applicant enjoyed the service of Mr. Godfrey Taisamo, learned counsel, while the respondent was represented by Mr. Abdulkarim Majaliwa, Director of Human Resources of Bakwata.

Arguing this application Mr. Taisamo, learned counsel submitted that the basis of this application is dissatisfaction by the applicant on the way the Arbitrator evaluated the evidence and subsequent decision at the CMA. The applicant was employed by the respondent as a Secretary General from 29/07/ 2003 to 25/8/2010 when he was informed by the respondent that his service was terminated from 02/05/2005. He submitted further that on 02/05/2005 the applicant was officially informed by the respondent that he had been removed from his position as Secretary General and the applicant will remained to be respondent employee in different post as it is in exhibit D3 of the CMA proceedings. He said since 2005 the applicant was not given

any post until 25/10/2010 when he was informed that his service of employment ended way back in 2005.

Mr. Taisamo said that in CMA award from page 6 to 7 the arbitrator while evaluating the evidence he agreed that the applicant remained as the employee of the respondent even after he was demoted in 02/05/2005 because he was promised by the respondent that will remain to be the respondent employee until further notification about his new position. He quoted the arbitrator's words at page 6 that;

**"Hoja nyingine ni iwapo mlalamikaji aliendelea kuwa chini ya ajira ya mlalamikiwa baada ya kuondolewa kwenye nafasi yake ya awali. Ushahidi uliotolewa na mlalamikiwa ni barua ya tarehe 2/05/2005 ikitoka kwa BAKWATA kwenda kwa mlalamikaji iliyosainiwa na Sheikh mkuu, ikisema utaendelea kuwa mtumishi wa baraza mpaka utakapotaarifiwa nafasi mpya ya utumish wako katika baraza."**

The above quotation means another issue was whether the complainant contract of employment was terminated after been removed from his former position. The evidence adduced by the respondent was a letter dated 02/05/2005 from BAKWATA to the complainant signed by "Sheihk Mkuu" which said the applicant

will remain to be an employee of BAKWATA until when he will be further notified of his new post in BAKWATA.

Mr. Taisama submitted further that from 2005 to 2010, the applicant was not given any assignment, work or salary by the respondent despite the fact that the applicant continued to attend at work place without fail. It is from the record that sometimes the respondent did send the applicant to Singida to attend cases but arbitrator in his award at page 8 to 9 concluded that, he quote;

**"Hiyo haitoshelezi kuwa ni kielelezo kuwa alikuwa mfanyakazi kwani aliongea na mlalamikiwa na wakaelewana nayeye akatoa usafiri na posho ya kuwasaidia watakapokuwa safarini. Hivyo pekee havitoshi kuwa ni uhusiano wa kiajira ulikuwa bado unaendelea. Inawezekana ni shughuli maalum mliyokubaliana na mlalamikiwa nje ya utaratibu wa ajira".**

The above quotation means that it is not enough evidence to justify that he was still the employee as they discussed with the respondent and agreed that he offered the applicant transportation and travel allowance. That alone does not prove that there was employment relationship between the parties at that particular time and it is possible was a specific task agreed by the parties.

It was Mr. Taisamo's submission that it was wrong for the arbitrator to direct himself that way as he was already decided on the second issue as reflected at page 6 of the award that the applicant remained to be the respondent employee after 2005. He said the arbitrator was wrong also to decide that the applicant absconded from employment which was not true as the applicant continued to attend to work and thus the reason why he was assigned to travel to Singida for official duty. He therefore prayed the court to find that applicant had genuine case against the respondent, and hence genuine claims which are salary arrears from May 2005 to October 2010, bonus of 25% of his annual salary which is 906,438/=, transport allowance tsh 210,000/= per month, housing allowance Tsh 2,500,000/= per annum, repatriation allowance and 12 month compensation.

Mr. Majaliwa in response, submitted that the arbitrator correctly evaluated and determined the complaint filed by the applicant as the main issue at the CMA was whether the applicant was still an employee after May 2005. He said, he testified at the CMA that the applicant was not the respondent's employee from May 2005, therefore the respondent had no duty to pay the applicant anything as he claimed. He submitted further that

regarding the letter that the applicant was given by the respondent was not a termination letter but was a letter to inform him that he was not the employee of the respondent from May 2005. Therefore he prayed the application be dismissed for lack of merit.

Mr. Taisamo had no rejoinder and prayed the application be allowed.

I went through the submission by both parties, and court record page to page cover to cover with caution eyes and I found that there is no dispute that the applicant was the respondent's employee. However this brings me to the question as to when did the cause of action arise in this case? Therefore the issue to be determined by this court is whether the applicant was still the respondent's employee after he received BAKWATA's letter dated 2<sup>nd</sup> May, 2005. If the 1<sup>st</sup> issue is answered in affirmative then whether the termination of the applicant was procedurally and substantively fair.

As to the first issue that whether the applicant was still the respondent's employee after May, 2005, it is crystal clear from the court record that the applicant was still the employee of BAKWATA after May 2005, this according due to the testimony of

DW1 (Administrative Director of BAKWATA) as quoted by the Arbitrator at page 3 of the CMA award I quote for easy of reference;

**"Mlalamikaji aliendelea na wadhifa wake mpaka 2005, Mamlaka iliyomteua ikamvua Ukatibu Mkuu lakini haikumfukuza na akataarifiwa kuwa bado ni mtumishi wa BAKWATA na atapangiwa kazi nyingine."**

The above quotation means the complainant maintained his post as General Secretary until 2005, when his appointing authority demoted him but his employment was not terminated and he was informed that he will remain to be BAKWATA's employee until when he was assigned other duties.

Also the letter dated 02/05/2005 (Exhibit D3) shows that the applicant was removed from being General Secretary of the respondent but still he remained to be the respondent employee for another post. That means there was no termination of employment on 02/05/2005 but the applicant only changed the applicant position or post of. I totally disagree with the respondent that from 02/05/2005 the applicant ceased to be his employee. Therefore this answers the first issue positively that the applicant was still an employee of the respondent after 02/05/2005.



The second issue as to when the cause of action arose, it is my view that the cause of action arose on 25/10/2010 when the applicant received a letter from the respondent indicated that the service of his employment ended since 02/05/2005. That letter was a result of the applicant letter dated 09/08/2010 which claimed for his salaries and wanted to know his fate at work. So it is apparent from court record that the applicant's knowledge of his termination was revealed on 25/10/2010.

Having discussed above I move to the 2<sup>nd</sup> issue whether the termination was substantively or procedurally fair. It is crystal clear from the court record that after the applicant's removal from the post as General Secretary he was not assigned to any other post or position by his employer or given any new terms of employment as he was promised by his employer (respondent). However, the respondent alleged that the applicant since 02/05/2009 he did not attend to work so as he can be assigned other duties and that is the reason they decided to terminate his service for absconding from work as per DW1 testimony. The applicant testified at the CMA that on 05/05/2005 he was in the office, handing over the office to a deputy General Secretary, and on August 2008 he was assigned other duties, he attended cases at

Singida. All that no doubt shows the applicant was at work in such period the respondent alleged to have absconded from work.

I asked myself even if the applicant absconded from work did the respondent follow the right procedures in terminating the applicant? "The answer is negative" the law is very clear under Section 37(2) of the Employment and Labour Relation Act, No. 6 of 2004, which will be referred as Act. It provides that:

**"37(2) A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) That the reasons for termination is valid;**

**(b) That the reason is a fair reason-**

**(i) Related to the employee's conduct, capacity or compatibility; or**

**(ii) Based on the operational requirements of the employer, and**

**(c) That the employment was terminated in accordance with a fair procedure."**

The law put the burden of proof to the employer to prove that he had sufficient reasons, and followed the required

procedure in terminating the service of the applicant. Even if I took abscondment as the sufficient reason for termination, or I consider that the BAKWATA Constitution empowers "Sheikh Mkuu" to terminate service of his employee at his own will or pleasure, then BAKWATA being a registered entity in Tanzania is required under Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN. No.42 of 2007 to follow clearly the procedure for terminating an employee. Then if the applicant absconded from work, the respondent ought to have charged the him for such offence according to the relevant labour laws and proceed to conduct disciplinary hearing against him accordingly. Even if the applicant absconded from work as alleged, the respondent was at liberty under Rule 13 (6) of GN. 42 of 2007 to proceed with the hearing. This rule provide that;

**"13 (6) Where an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee."**

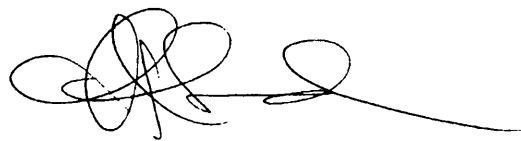
Basing on the above discussion I have no doubt that the respondent failed to discharge his duty to prove that the termination was fair both substantively and procedurally because he had opportunity under the above provision to prove that

termination of the respondent's employment was fair as he claimed.

In the circumstance I found that the applicant was unfairly terminated substantively and procedural. It is my view that the employer (respondent) did not have valid reasons to terminate the applicant as he failed to prove the alleged offence against the applicant. I also found the respondent did not comply with procedures in terminating the applicant hence the termination was not fair.

In the result the CMA proceeding and award are quashed and set aside. The respondent is hereby ordered to pay the applicant his salaries and other benefits which were due from 02/05/2005 to 25/10/2010 without loss, one month salary in lieu of notice, leave, severance pay, and 12 month salaries be compensation for unfair termination.

It is so ordered.



**I.D.ABOUD**

**JUDGE**

**30/05/2014**