IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT MUSOMA

LABOUR REVISION NO. 2 OF 2020

(Arising from the decision of the Commission for Mediation and Arbitration for Musoma in Labour Dispute No. CMA/MUS/07/2019)

NYANZA ROAD WORKS LIMITED .....APPLICANT

VERSUS

FESTO ADAMU .....RESPONDENT

JUDGEMENT

Date of Last Order: 3rd April, 2020
Date of Judgement: 8th May, 2020

KISANYA, J.:

This Court is moved to set aside the award of the Commission for Mediation and Arbitration (CMA) at Musoma in *Labour Dispute No. CMA/MUS/07/2019.* The application is made by way of Chambers Summons which is supported by affidavit sworn by Ramso Juma, Principal Officer of the Applicant.

Briefly, the respondent, Festo Adamu was employed by the Respondent, Nyanza Road Works Limited as a driver. On 8th December, 2018, he was transferred to Musoma from Mwanza head office. Upon arriving to Musoma, he could not work as the Musoma site had no vehicle for the respondent to drive. The applicant stated that, the respondent was transferred back to Mwanza. The transfer allowance or entitlement was not paid to the applicant. He was informed that his entitlement would be paid upon arriving in Mwanza. The applicant

averred that, the appellant refused to go back to Mwanza and decided to refer the matter to the CMA.

On the other hand, the respondent denied to have been transferred to Mwanza. He testified that, he was terminated verbally by the site manager of Musoma after reporting him to police on allegation of assault. This gave rise to the labour dispute before the CMA, where claimed to have been terminated unfairly, and prayed for reinstatement.

Upon full hearing, the labour dispute was decided in favour of the appellant on 7/8/2019. The applicant was ordered to reinstate the Respondent and pay him Tshs. 5,145,000/=, being salary arrears from December 2018 to 7th August, 2019,

The applicant is aggrieved by the said decision. He has chosen to lodge the present application for revision. Paragraph 7 of the affidavit in support of the application provides for the following grounds:

(a) That the Respondent was never terminated by the Applicant and that the Hon. Arbitrator erred to rule that the Respondent was terminated.

(b) That the Arbitrator erred in holding that non-payment of bus fare from Musoma to Mwanza amounted to termination which termination he considered to be unfair.

(c) That the Honourable Arbitrator erred in holding that the Respondent was barred from stepping on Musoma without proof.

(d) That it was wrong on the side of the Arbitrator to find that stopping an already transferred employee from the previous site amounted to termination.

(e) That the findings by the Hon. Arbitrator that the Respondent was terminated are ambiguous as to whether the termination was actual or constructive.

(f) That the Arbitrator erred by failing to consider Respondents' employer evidence which was supported by the Applicant's employee that he was transferred and not terminated.

(g) That the Arbitrator erred in relying upon uncorroborated hearsay evidence that the employee was terminated verbally at the police station.

(h) That he further erred in finding that he was terminated by the Musoma Site Manager verbally while the said Manager was neither the Respondent's employer nor his disciplinary authority.

(i) That the Arbitrator erred by holding that non-payment of salary amounted to termination while ignoring the fact that the employee never reported to work after the transfer.

(j) That the Arbitrator erred in holding that termination was procedurally unfair upon failure to report to work while no disciplinary measure could have been conducted in his absence.

(k) That the Honourable Arbitrator misdirected himself by ordering reinstatement in the verge evidence that there was no car for the respondent to drive at Musoma.

(l) That the Arbitrator erred in calculating salary arrears for 7 months by finding to be Tshs 5,145,000 instead of Tshs 2,625,000/.

(m) That the Arbitrator grossly misdirected himself in computing Respondent's salary arrears using the Musoma rate, which includes an out of station allowance, instead of that of Mwanza where he was supposed to report which is aslo his place of recruitment and domicile.

(n) That, the decision of the Hon. Mediator was badly reached as the proceedings of the commission was not signed and dated.

(o) That the arbitrator acted with material irregularity in the admission of exhibits.

(p) That decision by Hon. Katto (Arbitrator) was composed based on unsworn evidence making the proceedings and the Award irregular and illegal.

At the hearing of this application, the applicant was represented by Ms Milembe Lameck, learned advocate while the Respondent appeared in person, legally unrepresented.

In his submission in chief, Ms. Milembe contended that the respondent was not terminated. She submitted that, the respondent was transferred from Musoma to Mwanza because Musoma site had no vehicle for him to drive. The learned counsel submitted further that, the respondent refused to receive the termination letter and go to Mwanza.

Counsel Mirembe conceded that the respodent was not paid the transfer allowance. However, she stated that the same could have been paid upon his arrival at the head office in Mwanza as the Musoma site had no authority of authorizing any payment. The learned counsel was of the view that failure to pay the transfer allowance or entitlement does not amount to termination and that, there is no evidence to show that the appellant was prevented from going to the office.

It was argued further that, the arbitrator failed to consider the employer's evidence and that the termination of the respondent was based on un-

corroborated hearsay evidence. The learned counsel contended that, the site Manager had no authority of terminating the employer.

As to unpaid salary, Ms. Mirembe argued that the respondent was not entitled to salary because he was not at work. Upon being probed by the Court as to whether the respondent was served with notice to appear before the any disciplinary Committee, the learned counsel replied that the employer had no means of serving the respondent with notice.

Counsel Milembe went on to argue that, the arbitrator erred to calculate the salary arrears as Tshs 5,145,000 in lieu of 2, 625,000 and that, he misdirected himself by using the rate of Musoma while the respondent had been transferred to Mwanza. She was of the view that, the Arbitrator was required to use Mwanza rate which does not include out of station allowance.

The last ground addressed by counsel Milembe is on the order of reinstatement. She argued that the respondent was not supposed be reinstated at Musoma where there is no vehicle for him to drive. The learned concluded her submission by requesting to adopt the affidavit in support of the application. That said, Ms. Milembe advised me to revise and set aside the award of the CMA.

In reply, the respondent submitted that, he was terminated by the project/site manager for Musoma after reporting him to the police on allegation of assault. The respondent stated that, he went to head office in Mwanza and he was not welcomed as he had no letter from Musoma. Therefore, he opted to refer the matter to CMA. The respondent maintained that, he was not transferred to Mwanza and that, there is no evidence to prove the transfer.

As to the salary arrears, the respondent conceded that his salary was Tshs. 375,000 per month. However, he argued that the arbitrator considered other

benefits before awarding him the said amount of Tshs. 5, 145,000. Therefore, he urged me dismiss the application want of merit.

I have considered the evidence on record, the affidavit in support of the application, the respondent counter affidavit. It is not in dispute that that the respondent was employed by the applicant. Further, parties do not dispute that the respondent was transferred to Musoma in December, 2018. I find that this application can be disposed of by considering the following issues which are in dispute:

1. Whether the respondent was terminated;
2. If the answer to (a) is in affirmative, whether the termination was fair substantively and procedurally; and
3. Whether the CMA's reliefs are justifiable.

Before addressing the above issue, I wish to consider the irregularities pointed out by the applicant in paragraphs 7(n), and (p) of the affidavit that: the proceedings of the commission were not signed and dated; and that the evidence was unsworn. I have gone through the record and noted that the handwritten proceedings are duly signed and dated. Further, evidence of both parties was taken on oath as required under rule 25 of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007. Therefore, these grounds have no merit.

Now, as to the first issue herein, section 36 of the Employment and Labour Relation Act, 2004 (as amended) defines the term termination of employment as follows:

"For purposes of this Sub-Part-

(a) termination of employment" includes-

(i) a lawful termination of employment under the common law;

(ii) *a termination by an employee because the employer made continued employment intolerable for the employee;*

(iii) *a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;*

(iv) *a failure to allow an employee to resume work after taking maternity*

(v) *leave granted under this Act or any agreed maternity leave; and*

(vi) *a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to reemploy one or more of them"*

Similar definition is provided for under rule 3(1) of the Employment and Labour Relation (Code of Good Practice) Rules, 2007.

In the case at hand, the Hon. Arbitrator was satisfied that the respondent was terminated from employment. His decision was based on the evidence that: (i) the respondent was assaulted by the Musoma Site Manager and reported the matter to the police station; (ii) the Musoma Site Manager verbally declared to the applicant that he was terminated and barred him from stepping the site; and (iii) the appellant had not been paid any salary since his transfer to Musoma.

As shown herein, the applicant maintains the position that, the respondent was not terminated but transferred to Mwanza. This fact was also stated before the CMA by the Ramson Juma, the only witness for the applicant. However, it was not proved on the required standard as the transfer letter was not tendered. Transfer of employee is a serious issue which cannot be effected orally. For better understating of the discussion herein, I find it pertinent to reproduce evidence of the said Ramson Juma.

"The employer do not have a problem with the Applicant. He was employed as a driver. He was brought at Musoma site, but found no vehicle. He has to go back to Mwanza to be assigned other duties. We could not pay him as per the Company procedures, the Site Manager has no power to make payments. Payments are made in the Head Office at Mwanza. That's all.

Cross Examination.

Qn: How should I go back to Mwanza without a letter?

Answe: He can come at the site so that we can give a letter to introduce him to Mwana office.

Qn. Will I be entitled to my salaries if I report to Mwanza?

Answer: Salaries are paid on hours worked.

Qn: Will you pay me case costs and disturbance costs if I report back?

Answer: No.

No Re-examination

Juma: *I pray to close Respondents evidence.*

In the present application, the applicant states that, the respondent refused to receive the transfer letter. However, as shown herein, this is new evidence which was not averred by Ramson Juma before CMA. When he was asked about the letter he replied that the respondent can collect the introductory letter and not the transfer letter. Also, it was not stated that the respondent had refused to receive the said letter as averred in the affidavit and argued by the counsel for the applicant.

The applicant admits that, the transfer allowance was not paid to the respondent. The reason advanced is to the effect that, the site manager had no authority to make payment and that the same is approved at the headquarters. Even if the payment is approved at the head office, there were other means of paying the

respondent. This include depositing the transfer allowance in his bank account or other electronic means. Hence, I find no evidence to prove that the respondent was transferred to Mwanza.

On the other hand, the respondent testified how he was terminated verbally by the site Manager after reporting him to the police station. His evidence was as follows:

> *"While at Musoma, on 15/12/2018 the Site Manager assaulted me, I report (sic) to the police station. After reporting him to the police station, he declared me I am terminated and that I should not be seen in the premises. He refused to give me any writing. I pray for unpaid salaries from December and reinstatement. That is all"*

The said evidence was not challenged by the applicant during cross-examination. The questions put to the respondents were as follows:

> *Qn: Why did you (sic) after the problem with the site manager?*
>
> *An: I came to CMA.*
>
> *Qn: Do you claim for your salaries or costs of the case?*
>
> *An: Both*
>
> *Qn: Why didn't you report your salary claims to Mwanza?*
>
> *An: I was terminated while here.*

As shown, the applicant did not state at all whether the Site Manager had no authority of terminating any employee. The company disciplinary procedures and/ rules were not stated or tendered before the CMA. Likewise, in the affidavit in support of the application and the submission before this Court, the disciplinary authority of the respondent was not stated.

The applicant argues further that the evidence of terminating the respondent verbally was hearsay. This is reflected in paragraph 7(h) of the affidavit. It is trite

law that fact may be proved by oral evidence. Pursuant to section 62(1) of the Evidence Act (Cap 6. R.E. 2002), oral evidence referring to a fact which was heard is admitted as direct evidence if it is given by the witness who heard it. In the matter at hand, the fact that the respondent was terminated verbally by the Site Manager was testified on oath by the respondent whom the declaration was made. In my opinion, this evidence was direct and not hearsay as argued by the applicant.

Further, refusal to pay wages is one of the conducts which amount to a material breach of a contract of employment thereby justifying summary termination of the employee as provided for under rule 6 (4) of the Employment and Labour Relation (Code of Good Practice) Rules, 2007. In the instant application, there is evidence that, the respondent was not paid his salary for 7 months. The applicant argues that he was not entitled to be paid because he was not at work. However, the measures taken against the respondent were not stated. Absent from work without permission or without acceptable reason for more than five working days is an offence which may constitute serious misconduct leading to termination of any employee. If the respondent was absent from work, the applicant was required to take the necessary measure including terminating employee or refuse to pay his salary after giving him the right to be heard under rule 13 of the Employment and Labour Relation (Code of Good Practice) Rules, 2007. The Rules provides that, the employer may proceed *exparte* with the hearing if the employee refuses to attend the hearing. This was not done. Evidence to such effect is wanting.

Furthermore, an employer can make an employment intolerable thereby resulting the employee from resignation and that amount to constructive termination under 7 (1) of the Employment and Labour Relation (Code of Good

Practice) Rules, 2007. Circumstances which can lead to constructive termination is where an employee is unfairly dealt with. However, rule 7(2) provides that the employee must have utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so. The respondent testified to have been assaulted by the site manager, verbally terminated; and told not be seen in the site premises. As stated herein, this evidence was not challenged during cross-examination and there is no evidence to show that the appellant was transferred to Mwanza and paid his transfer allowance. In such a case, I am of the opinion, that he was dealt with unfairly and hence constructive termination. It is these factors which prompted the respondent to refer the matter to CMA. The applicant did not state as to whether there were available mechanism to be dealt with by the respondent.

In view of the above, I find the first issue answered in affirmative. The respondent was terminated.

The next issues is whether the termination was fair substantively and procedurally. According to 37(1) of the Employment and Labour Relation Act, 2004, it is unlawful to terminate the employee unfairly. The duty to prove that the employee was terminated fairly lies on the employer. He is required to prove that; the reason for the termination is valid; the reason is a fair reason, and that the employment was terminated in accordance with a fair procedure. This is pursuant to section 37(2) of the Employment and Labour Relation Act, 2004.

In the instant case, the applicant denies to have terminated the respondent. However, as shown when addressing the first issue, there is no evidence that the respondent was transferred to Mwanza and paid the transfer allowance. Further, it is on record that, the applicant was terminated verbally by the site manager when he reported him to the police. He was not given the grounds for

termination and the right to be heard. Considering further that the established procedure for terminating him were not stated to have been complied with, I find that the respondent was unfairly terminated substantively and procedurally.

The last issue is whether the CMA's reliefs are justifiable. The remedies available to a person who is terminated unfairly as in the case at hand are specified under section 40 of the Employment and Labour Relations Act, 2004 as reinstatement, re-engagement or compensation. The section provides that:

> *"40.-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
> *(c) to pay compensation to the employee of not less than twelve months remuneration.*
> *(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.*
> *(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."*

Having considered that the respondent had prayed for reinstatement and that the said prayer was not contested by the applicant, the Hon. Arbitrator ordered the respondent to be reinstated under section 40(1) (a) of the Act. Consequently, the Respondent was ordered:

(i) *Under section 40(1) (a) of the Act to reinstate the applicant with immediate effect from 1st day of September, 2019.*

(ii) *In tandem with the reinstatement order in (i) above, the applicant be paid Tsh. 5, 145, 000 as salary arrears created from December 2018 to date.*

(iii) *In default of orders (i) and (ii) above by the respondent, the amount stated therein shall keep accumulating for the duration delayed on applicant's monthly remuneration basis until when is completely executed.*

The applicant has raised three grounds to challenge the said order. The first ground is to the effect that the Arbitrator "misdirected himself by ordering reinstatement in the verge evidence that there was no vehicle for the respondent to drive at Musoma." I find this ground devoid of merit. This is because the Hon. Arbitrator did not order the respondent to be stationed at Musoma. It is for the applicant to decide on where to post the respondent. However, since his last post was Musoma site, it is expected that, the applicant would give him the transfer letter to the new station/ site and pay him the required transfer allowance.

The second ground raised by the applicant is that, the Hon. Arbitrator grossly misdirected himself in computing Respondent's salary arrears using the Musoma rate in lieu of Mwanza rate where he was supposed to report and which is his place of recruitment and domicile. I think this ground should not detain us. This is because there is no evidence to show that the respondent was transferred to Mwanza. Further, even if he was transferred, the applicant did not testify and state the rate applicable to Mwanza in the pleadings and the affidavit in support of the application. Therefore, this ground has no merit as well.

The third ground is to the effect that, the Arbitrator erred in calculating salary arrears for 7 months as Tshs. 5,145,000 instead of Tshs 2,625,000/. The respondent does not dispute that his salary is Tshs. 375,000/ per month. Therefore, I find that from December, 2018 to 7thAugust, 2019 (date of award), the respondent was entitled to eight (8) months' salary arrears equal to Tshs.

3,000,000. However, the said amount of money should be subject to tax and other deduction(s) required to be paid under the law.

Having considered the provision of section 40(3) of the Labour and Employment Relations Act, 2004, cited herein, I revise order (iii) issued by the Arbitrator to the effect that, in the event the applicant decides not to reinstate the respondent, they should pay him compensation of twelve months wages/salary in addition to salary due and other benefits from the date of unfair termination to the date of final payment.

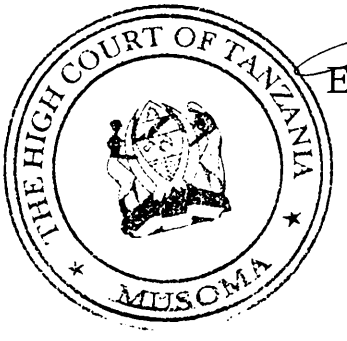
In the end result, the application partly succeed to the extent the award is revised as shown above. Any party aggrieved by this decision may appeal to the Court of Appeal in accordance with the law.

It is so ordered.

Dated at MUSOMA this 8th day of May, 2020.

E. S. Kisanya
JUDGE
8/05/2020

COURT: Judgement delivered this 8th day of May, 2020 in the absence of the applicant and in the presence of the respondent.



E. S. Kisanya
JUDGE
8/05/2020