

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 52 OF 2018

(Arising from CMA/ARS/ARB/175/2016)

CHARTYON WILLIAM MUSHIAPPLICANT

VERSUS

TANZANITEONE MINING LIMITEDRESPONDENT

JUDGMENT

Hearing Concluded 08/06/2019
Judgment delivered 31/08/2020

GWAE, J

Dissatisfied with an award procured by the Commission for Mediation and Arbitration ("CMA") on the 25th May 2018 which was to the effect that the applicant, **Charton William Mushi** is still an employee of the respondent, **Tanzaniteone Limited** and that the applicant went to the Kilimanjaro Christian Medical Centre (KCMC) without any referral from the Respondent's dispensary, the applicant filed this application for revision on 27th June 2018 alleging impropriety and illegality of the award on the following grounds;

1. That, the CMA erred in holding that the applicant has capacity to continue with his employment despite his critical health condition.
2. That, the CMA erred in holding that the applicant has absconded from work and that he had not exhausted local medical remedies.
3. That, the CMA erred in ordering the respondent to re-engage the applicant.
4. That, the CMA erred in law and fact for not awarding the applicant reliefs of salary areas, special damages, specific damages and statutory terminal benefits of the employment.

Perhaps it is apposite if facts of the case are briefly appreciated, that the applicant was employed by the respondent since 1st March 2005 in the respondent's mining area at Simanjoro District in Manyara Region as a **lasher** however on March 2015 while in his course of employment he sustained injuries (fracture of posterior arch of thoracic vertebra and multiple level disc disease in the lumbar vertebra). That following the applicant's regular clinic attendance for his illness.

The respondent stopped paying the applicant his monthly salary effectively from August 2015 and on the 1st September 2015, the respondent purport to issue the applicant with termination letter on the ground of the applicant's absenteeism from work, the termination which obviously culminated the labour dispute between the parties.

When the application was called on for hearing, the applicant and respondent were duly represented by **Miss Magdalena Sylister** and **Mr. Alex Yunga** respectively. The parties' advocates sought and obtained leave to argue this application by way of written submissions.

Arguing the 1st and 3rd grounds of this application above in support of this application, the applicant's advocate stated that the respondent should be ordered to terminate the applicant on the medical ground as the applicant is incapable of continuing with his employment in lieu of re-engagement wrongly ordered. According to the learned counsel for the applicant, the CMA's arbitrator ought to have ordered the respondent to terminate the employment by virtue of section 14 (1) (a) of the Labour Institution Act, Cap 11. R. E, 2002.

As to the 2nd ground of revision on the relied abscondment by the CMA, the applicant's advocate seriously argued that the applicant did not abscond except that he was attending medication as established by the applicant's testimony as well as CW2 and CW3 as opposed to the respondent's evidence on record which according to her is weak and not reliable. The advocate for the applicant went on arguing that the applicant was permitted to go to KCMC by the respondent's dispensary nurse (CE3) more so he was on critical health conditions and KCMC was the closest Hospital than Manyara Referral Hospital.

In the last ground for the revision sought, the applicant's advocate submitted that the applicant was entitled to salary arrears from August to date since he is still a valid employee alternatively, if some of arrears will be time barred, this court should award him salary arrears at the tune of Tshs. 400,000/=from April 2016 to the date of full satisfaction of the award.

The counsel stated further that the applicant is entitled to general damages following the sustained injuries and incapacity. She cemented her submission as far as grant of general damages is concerned by citing a



judicial decision in **Abubakary Haji Yakub v. Air Tanzania Co. Ltd**, Labour Revision No. 162 of 2011 where this court (Rweyemamu, J-rtd) held that;

"Before proceeding, I wish to emphasize that the purpose of awarding damage..... is to act a solatium for other personal injury..... In order the damages to be granted, they must be certain generally, general damages are awardable for injury which the law will presume to be direct, natural and probable or foreseeable consequences of an act complained of ..."

In his response, the respondent through his advocate argued that the CMA award was properly procured in respect of the order of re-engagement since his incapacitation was medically diagnosed to be 60 %, hence partial incapacity and therefore capable of performing light duties.

The respondent's advocate went on arguing that, the CMA was entitled to hold that the applicant was liable for absconding from his work since he did not turn back to work after he had recovered even partially he ought to have reported back at the work.

Responding to the reliefs claimed by the applicant, the respondent argued that the applicant is not entitled to salary arrears from April 2016 to date since he absconded from duty and since he did not comply with the award of re-engagement as a result he preferred this application and that the applicant had failed to establish that he exhausted all the local medical remedies as he was supposed to go to KCMC by way of referral.

In her rejoinder, the learned counsel for the applicant mainly reiterated her submission in chief however she slightly added that, compelling the applicant to continue working with the respondent is

tantamount to another grave jeopardy on his part given fragile health condition.

It is now the duty of the court to determine the applicant's grounds for revision. As to the 1st and 3rd grounds, looking at the evidence of the applicant and that of a medical practitioner (CW2) as well as the medical report (CE3 and CE7), I think this evidence deserves to be considered as credible one to establish that the applicant was incapacitated in the rate of 60%, hence unable to perform bending works and lifting of heavy objects. More so the evidence of the respondent on record is so contradictory to the extent that it is not reliable to be acted upon for instance;

RW1 Q: Since he attended medication he never reported in the office?

Ans: Yes

RW2 Q: But after the accident he reported at the work

Ans: Yes

Q: How did you know that he did go to the dispensary?

Ans: Record from the sick sheet, log book

The respondent's witnesses told the commission different versions as if he reported at work after partial recover as depicted herein above and whether the applicant reported to dispensary. The evidence of the applicant and his witnesses is certainly heavier than that of the respondent. Credibility of a witness to my firm is vitally important when assessing the evidence adduced by the parties and their respective witnesses. In this aspect, I wholly subscribe the judicial decision in **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2000 (unreported) where the Court of Appeal of Tanzania had these to say;

"The credibility of a witness can also be determined in two ways; when assessing the coherence of the testimony of that witness, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused"

In our instant labour dispute it is clear that, the applicant's health condition was for the works that he used to perform prior to the accident except light duties. The respondent, is found trying to persuade the court that they gave the applicant light duties but when looking at their evidence it is quite contradictory as on one hand the respondent is found asserting that the applicant did not report at work while other witnesses had testified that he reported. Hence a decree of improbability that the same never happened except as rightly alleged by the applicant that his employer terminated his employment due to the fact that he was serious sick. To my considered view, the evidence adduced by the applicant suggests that it is more probable that the applicant was incapable of performing heavy duties and that he never absconded from work. My holding is founded in a persuasive judicial authority in **Miller vs. Monister of Pensions** (1937) ALL ER 372 at page 374 where it was stated;

"If evidence evenly balanced, that the tribunal is unable to come to a determination conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the case against him reaches decree of cogency as is required to discharge the burden in a civil case. That decree is settled. It must carry a reasonable decree of probability but not so high as required in a criminal case, if the tribunal can say that it is

more probable than not, the burden of proof is discharged. If the probabilities are equal, it is not. "

Having discussed as herein the 1st and 3rd grounds are determined in favour of the applicant.

In the 2nd ground above, it is from the evidence of WE3 that the applicant sustained serious injuries which need medical attention and that the ill health was work related illness which required the respondent to go to the greatest length to accommodate the applicant by being guided by the opinion of the medical practitioner (See Rule 19 (2) and (3) of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007. Looking at the evidence adduced by the respondent's witnesses nothing was adduced to the satisfaction of the provisions envisaged under sub rule (2), (3) (4) (5) and (6) of Rule 19 of the Code.

The respondent's contention that the applicant would be given or was given an alternative job is unfounded unless he was able to prove that the applicant was being paid his salary. Moreover the assertion that the applicant absconded from his work does not arise since even the respondent's witnesses testified that he reported at work after attending medication. I also find that the re-engagement ordered by the Commission is not fair and just since the applicant was terminated summarily without considering the fact that, he sustained injuries and permanent health/incapacity in the course of the employment, in that view there would be no further harmonious labour relations between the parties.

I also find not justifiable to hold that, the applicant was to exhaust all medical remedies available before going to KCMC since the requirement to exhaust all local medical remedies, that treatment within, respondent's

dispensary and or in a hospital within Manyara Region to have not been supported by any reliable evidence such as respondent's Policy stipulating to the effect that, every respondent's employee must first be treated in her dispensary and be given referral form where so necessary.

In the last and final grounds for the sought revision on remedies, the applicant was evidently earning Tshs 400, 000/= being his monthly salary which is said not paid since August 2015. Since the applicant filed this application in 2016, June it follows therefore claims of salaries arrears from March 2016 to August 2015 are time barred (See section 91 of the Act). Hence the applicant is entitled to his salaries from April 2016 to the date of CMA award on May 2018. The applicant is further entitled to general damages in the tune of Tshs. **10,000,000/=** since by virtue of section 88 (1) (b) (ii) of the Act No. 6 of 2004 as amended by Written Laws (Miscellaneous Amendments) Act No.6 of 2006 an employee be entitled to damages arising for matters under common law, a refund of medical expenses Tshs. **2,000,000/ =** He is also entitled to his terminal benefits such as severance allowance, one month salary in lieu of notice and certificate of service.

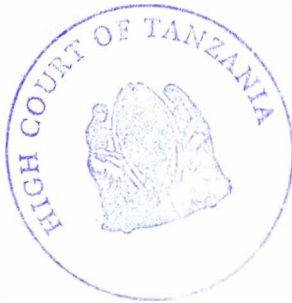
In the foregoing reasons, the applicants' application is granted, the CMA's award is quashed and set aside. The applicant is now entitled to his salary arrears from April 2015 to May 2018 at the rate of Tshs. **400,000/=** being his month's salary (37 months x 400,000/= 14,800,000/=), general damages in the tune of Tshs. **10,000,000/ =** severance pay, one month salary in lieu of requisite notice and certificate of service. No order as to costs of this application is made due to the reason that, the matter is a labour dispute.

It is so ordered.



M. R. Gwae
Judge
31/08/2020

Court: Right of appeal to the Court of Appeal of Tanzania is open for any aggrieved party.



M. R. Gwae
Judge
31/08/2020