THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LABOUR REVISION NO. 29 OF 2019

(Arising from Labour Dispute No. CMA/MBY/115/2018)

BETWEEN

CHINA CHONGQUING INTERNATIONAL CONSTRUCTION CORPORATION (CICO).....APPLICANT

AND

KELVIN MWASUMBI.....RESPONDENT

RULING

14/05 & 11/08/2020.

UTAMWA, J.

This is an application for revision by CHINA CHONGQUING INTERNATIONAL CONSTRUCTION CORPORATION (CICO), hereinafter called the applicant. The applicant filed the instant application in this court pleading the court to revise and set aside an award (impugned award) of the Commission for Mediation and Arbitration at Mbeya (the CMA), issued in Labour Dispute No. CMA/MBY/115/2018 dated 30/09/2019. The application was preferred under sections 91 (1) (a), (2) (b) and (c), 94 (1)

(b) (i) of the Employment and Labour Relations Act No. 6 of 2004, read together with rules 24 (1) (a) – (f), (3) (a) – (c), 28 (1) (c), (d) and (e) of the Labour Courts Rules, 2007 (GN No. 106 of 2007).

The back ground of this matter according to the record of the CMA is to the effect that, the applicant was an employer of KELVIN MWASUMBI (the respondent). The respondent was employed as a driver of the applicant on 8/9/2016, to serve the project manager one Mr. Wang in the road construction project of Bujesi – Lupaso (busokelo) in Mbeya region. The contract of employment ended on 15/1/2018, when the project was completed. The respondent, together with other employees (not parties in this matter) were given all their terminal benefits. However, it was alleged that, in January 2018 the applicant renewed the contract of the respondent according to the previous terms and for unknown period. In September, 2018 the applicant changed the contract of the respondent from being a driver to a gateman. His salary was also reduced from Tanzania shillings (Tshs.) 450,000/= to 270,000/=. The respondent was not ready for that new engagement. He thus, referred the matter to the CMA for arbitration on the ground of forced resignation (constructive termination).

After hearing both sides, the CMA found that, the applicant dismissed the respondent constructively. It thus, awarded the respondent a total of Tshs. 6,300,000/= (Six Million and Three Hundred Thousand) as a one month salary in lieu of notice, leave, and twelve months' compensation for unfair termination. The award was based on the reasons that, the applicant caused the working relationship unbearable to the respondent, on intolerable the situation. The applicant was dissatisfied by the award, hence this application for revision.

The grounds for the application according to paragraph 8 (a – d) of the affidavit sworn by Mr. Jackson Ngonyani, learned counsel for the applicant, were to the effect that:

a) The Honourable Arbitrator erred in law and facts in finding that there was constructive termination, hence payment of one month salary in lieu of notice, leave and 12 months' compensation for unfair termination to the respondent.
b) The Honourable Arbitrator erred in law and facts by not analyzing clearly the evidence adduced before delivery of the award.
c) The Honourable Arbitrator erred in law and facts by finding that the applicant threatened the respondent and makes his working environment intolerable without any proof on that.
d) The Arbitrator erred in law and facts by considering the end of the contract after completion of the project as constructive termination.

The applicant's counsel suggested for this court to determine two issues as follows:

i) Whether the Arbitrator's award is justifiable in law.
ii) Whether it was proper for the Arbitrator to term the end of the contract as constructive termination.

The applicant's counsel urged this court to revise and set aside the award, to declare that there was no constructive termination and make any other order(s) or reliefs as it may find just to grant.

The respondent objected the application through a counter affidavit sworn by Mr. Luka Ngogo, learned advocate for the respondent. In essence, the counter affidavit states that, the CMA rightly made the

impugned award. The application was heard by way of written submissions.

The major issue according to the circumstances of this matter is *whether or not the Arbitrator's award/holding was legally justified.* In his written submissions supporting the application, the learned counsel for the applicant adopted the contents of the affidavit. He further contended that, the arbitrator's award was not legally justifiable since the respondent did not prove that there was renewal of contract after the first contract had came to an end upon the road project being completed. According to the applicant's counsel, the respondent bore the burden of proof for that material fact. On that issue, the respondent's counsel submitted that, after the completion of the previous contract, the same contract was renewed on the same terms. This was because, the manager of the road project whom the respondent was serving as driver, was still involved in other projects.

In deciding the major issue posed above, I considered the submissions by the parties, the record and the law. Upon perusing the record of the CMA, I am of the view that, no documentary evidence was tendered either by the respondent or by the applicant. It can thus, be found that, the original contract between the applicant and the respondent was unwritten. It follow, thus that, even the second contract cannot be discarded only for the reason that no documentary evidence was tendered. The Arbitrator thus, rightly found that, in the absence of documentary evidence and reasonable explanations that the witness for the applicant was not engaged in the employment of the applicant, the testimony of the respondent is appealing and believable.

It is also my view that, the applicant was supposed to call a witness who was in position to explain clearly what transpired. The failure to do so justified the arbitrator to believe what the respondent testified. The law also guides that, the standard of proof in civil justice is on balance of probabilities.

The applicant's counsel also complained that, *there was no proper analysis of evidence by the CMA.* He submitted that, the arbitrator did not correctly analyse the evidence since she mixed up the testimony of the respondent on the contract which ended on January 2018 with the new contract which the applicant never entered. The respondent's counsel did not address himself to this aspect. He focused his submissions to the issue of termination which will be discussed soon. Indeed, this complaint should not detain me because the issue regarding the second contract has already been resolved above.

The pertinent question here is *whether or not there was any constructive termination.* The applicant's counsel argued that, there was no such termination since the contract between the parties had already been discharged after the completion of the road project and the applicant never renewed it. On his part, the respondent's counsel submitted that, all the requirements for constructive termination existed in the matter at hand. This was in connection to the provisions of Rule 7 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007, (the Code). Therefore, he argued that, the Arbitrator was correct in deciding that, there was constructive termination, hence unfair termination which resulted to the impugned award.

In answering the question posed above I consulted Rule 7 (1) of the Code. It states as follows:

> "Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amounts to forced resignation or constructive termination."

Another situation that amounts to constructive termination is when the employee was unfairly dealt with and has utilized the available mechanisms to deal with such grievances; see Rule 7 (2) (b) of the Code.

Case law has also elaborated the stance of the law just highlighted above; see decisions in the case of **Girango Security Group v. Rajabu Masudi Nzige, [2014] LCCD 40** as cited in the case of **National Bank of Commerce v. Francis Cecil Ramadhani (Labour Revision No. 23 of 2013) HCLD at Dar es Salaam (LCCD 2015 PART II, P. 124)** and in **Yaaqub Ismail Enzron v. Mbaraka Bawaziri Filling Station,** (Revision No. 33 of 2018) [2019] TZHCLD 73; (19 September 2019) www.TanzLii.org. They set some questions to be asked in determining whether there was constructive termination. The questions are as follows:

i) "*Did the employee intend to bring the employment relationship to an end?*
ii) *Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his obligation to work?*
iii) *Did the employer create the intolerable situation?*
iv) *Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*
v) *Was the termination of the employment contract the only reasonable option open to the employee?*"

In the matter at hand, the Arbitrator considered the above testing questions before reaching her conclusion. I quote the necessary paragraphs verbatim for a readymade reference.

> "In the case at hand, I find the complainant did not intend to bring employment to an end had his position not been changed from a driver to a security guard. Also by subjecting him to threats of terminating him if he refuses to be a security guard, I find the complainant's working relationship had become so unbearable, and he could not fulfil his obligation to work as he stated that he could not work as a security guard as he had no skills in the said work. Also his salary was to be 270,000/= as a security guard per month while as a driver, he was being paid 450,000/=
> I find the employer created the intolerable situation which was likely to continue for a period that justified termination of the relationship by the complainant. In such circumstances, I also find the complainant was put in a situation which he could not put up with and termination of employment contract was the only reasonable option open to the complainant."

From the above reasoning of the Arbitrator I see no reason for faulting the CMA. I consequently, answer the pertinent question posed above affirmatively that, in fact there was a constructive termination in the matter at hand.

Owing to the above reasons, I answer the major issue affirmatively that, the Arbitrator's holding mentioned previously was legally justified. I consequently dismiss the application on its entirety. Since this is a labour matter, I make no order as to costs. It is so ordered.

J.H.K. Utamwa

JUDGE

11/08/2020.

11/08/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: Mr. Denis Lazaro, advocate, holding briefs for Mr. Ngonyani, advocate.
Respondent: Mr. Abineli Zephania, advocate holding briefs for Mr. Ngogo, advocate.
BC; Mr. Patrick, RMA.

Court: Ruling delivered in the presence of Mr. Denis Lazaro, learned advocate holding briefs for Mr. Ngonyani, advocate for the applicant and Mr. Abineli Zephania, advocate holding briefs for Mr. Ngogo advocate, for respondent in court this 11th August, 2020.

JHK. UTAMWA.
JUDGE

11/08/2020.