

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 37 OF 2018

(Originating from CMA/ARS/ARB/201/2017)

LUKAS ELIA PALLANGYO.....APPLICANT

VERSUS

SHIDOLYA TOURS SAFARIS LTD.....RESPONDENT

JUDGMENT

24/09/2020 & 16/11/2020

GWAE, J

This is an application for revision which was brought by the applicant Lukas Elia Pallangyo against his former employer one Shidolya Tours Safaris Ltd. The applicant is seeking revision of the Commission for Mediation and Arbitration (CMA) decision which was delivered in favour of the applicant. The CMA decision was basically that the applicant to be reinstated and further to that, the respondent to pay the applicant six months salaries Tshs. 1,500,000/= for the time the applicant was absent from work.

The application is supported by the applicant's affidavit which is to the effect that the applicant is partly dissatisfied with the award of the CMA in particular on

the reinstatement. The applicant further stated that after all that has transpired between him and the respondent the applicant is not ready to go back to work with the respondent. He was of the view that instead of being reinstated by the respondent all he wants is to be paid twelve months compensation for unfair termination. The application is opposed through a counter affidavit of the respondent which partly noted and partly denied some facts.

On the date fixed for hearing, parties appeared in person unrepresented, and had little to add to their pleadings. The applicant when submitting pleaded for the payment of his unpaid leave for seven years together with severance allowance.

In response the respondent submitted that the applicant's claims of unpaid salaries, unpaid annual leave and overtime are all time barred. More so the respondent is ready to reinstate the applicant as per the CMA award, and if at all the applicant does not want to work with the respondent let him terminate his employment.

In his short rejoinder the applicant maintained that he is not ready and willingly to be reinstated by the respondent

The law under section 37 (2) of the Employment and Labour Relations Act No. 06 of 2004 provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. In our instant case the applicant before the

CMA claimed that the respondent had terminated his employment after he demanded for his salary, a termination letter was not tendered as the applicant claimed that he was terminated orally and was not given a termination letter. The respondent on the other hand had a different story where he stated that the applicant absconded from work and he never terminated his employment, actually, the respondent is willingly to reinstate the applicant back to his work and pay him the salaries for the time he was absent from work.

The controversial issue in the matter at hand is basically on the order of reinstatement by the CMA, where the applicant strongly refutes to be reinstated back to his working station for the reasons better known to himself and his former employer. The position of the law as envisaged under section 40 (3) of the Act gives an option to an employer to refuse to reinstate and in lieu therefore he shall pay compensation of twelve months' compensation addition to the wages due and other benefits as opposed to an employee.

If the applicant did not wish to be reinstated he ought to state before the Commission as provided for under R. 32 (2) of the Labour Institutions (Mediations and Arbitrations) Guide Lines, Gn. 67 of 2007. By doing so the arbitrator would have made a proper ought of compensation instead of reinstatement

In absence of assertion that the employee did not wish to be reinstated CMA was therefore justified to hold that the employment relationship between the

parties had not broken down and the fact that the respondent is willing to reinstate the applicant, the applicant concern cannot be ignored, this court is just a neutral part to resolve the dispute between the parties but I am of the considered view that it is parties who are in a better position to know and explain better the employment relationship that transpired between them. It shall not be prudent to order reinstatement to an employee who does not wish to continue working with his employer even when the employer is willing to do so, reference to be made on Rule 32 (2) (a) of the Labour Institutions (Mediation and Arbitration Guidelines) G. N. No. 67 of 2007. However once an order of reinstatement has already been made an option solely remains on the part of an employer as explained above

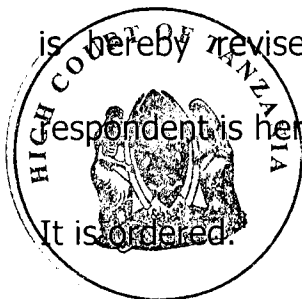
Bearing in mind that the burden to prove that termination was fair lies to the employer and having gone through the records of the CMA the employer alleges that the applicant had absconded from work and that it was the applicant himself who terminated his employment, the applicant also admits to have missed some days from work however he claimed that he was taking care of his sick child (no medical chits were produced).

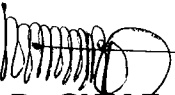
Much as there was a fair reason for termination on the ground of abscondment even though no termination letter was produced as the applicant alleged that he was terminated orally, the respondent ought to have followed proper procedures to have the applicant's employment terminated fairly. Failure

to follow proper procedures to terminate the applicant, the CMA findings were that the applicant was unfairly terminated which I join hands however since the applicant does not wish to be reinstated, he is thus considered to have resigned from his employment effectively the date of arbitration award that means he has to be paid from 9th June 2017 to 24th April 2018 when the award was procured,

The applicant also claimed to be paid his unpaid leave for seven years as well as over time, as rightly submitted by the respondent the applicant's claims are time barred as he ought to have claimed the same before the CMA within 60 days from when he was unpaid as per rule 10 of the Labour Institutions (Mediation and Arbitration) Rules G.N No. 64 of 2007.

In the events, the CMA award is hereby revised, the award of reinstatement is hereby revised and substituted to ten (10) months compensation, the respondent is hereby ordered to pay the applicant a total of Tshs. **2,500,000/=**.




M.R. GWAE
JUDGE
16/11/2020