



IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT BUKOBA

LABOUR REVISION NO. 23 OF 2018

*(From the original Award Decree of Decree of Decion No. CMA/BUK/52 of 2017 of
Commission for Mediation and Arbitration at Bukoba)*

EDWIN PIUS -----APPLICANT

VERSUS

MORITIES CORPORATION LTD-----RESPONDENT

RULING.

20/10/2020 & 16/12/2020

KAIRO, J.

The Applicant in this application is seeking for a court order to revise and set aside the arbitral award of the CMA before Hon. Kadeha dated 10/11/2017.

Briefly the facts that culminated to this application are as follows: -

The Applicant has instituted a labour dispute No. CMA/BUK/52/2017 at the CMA against the Respondent herein claiming to have been constructively terminated following the employer's failure to pay him his salaries for four months he has worked for; mentioning the unpaid salaries to be December 2016, February – April 2017. He thus prayed the CMA to order the Respondent to pay him a total of Tshs. 27,974,000/=.

The dispute was mediated to no avail. It was therefore accordingly declared to have been failed and a certificate to that effect was issued.

As required by law, the dispute escalated to an arbitration stage before Hon. Kadeha.

Together with this claim, the Applicant had applied for condonation after noting that he was out of time so that he could be granted leave to have it heard out of time, which leave was eventually granted. The condonation application was heard in the absence of the Respondent after failing to appear despite service to him. After hearing; The mediator was satisfied that the Applicant had sufficient cause and he wasn't negligent. The Mediator (CMA) thus granted the prayer to have the dispute heard out of time which after mediation failure was to escalate to arbitration stage. After the hearing of the claim, the Arbitrator found that the Applicant was constructively terminated by the Respondent and the Arbitrator thus ordered the Respondent to pay the Applicant a total of Tshs.784,700/= being a compensation for being unfairly terminated and further the Respondent was ordered to give the Applicant a certificate of service. The Applicant was not satisfied with the said award and decided to file this revision to challenge the same.

In his affidavit together with his oral submission to amplify the same, the Applicant stated that, the gist of his dissatisfaction is that, after



the CMA correctly found that he was constructively terminated for nonpayment of his salary for our months by the Respondent (his employer), it was not then correct to order that he be paid only one-month salary.

In his reply, the Respondent started by posing a question as to whether the Applicant was applying for the revision of the whole decision or just part of it arguing that his claim is vague. He went on and dismiss the Applicant's claim that he was put in difficult situation to work but he failed to prove that the employer (Respondent) withheld his salaries for December 2016, February 2017, March 2017 and 14 days of April 2017. The Respondent further dismissed the claim/prayer of Tshs. 27,974,000/= which he argued wasn't substantiated. He added that the CMA was correct to find out that the Applicant's salary was Tshs. 300,000/= per month and not Tshs. 600,000/= he claimed.

The Respondent further submitted that, the Applicant filed condonation for being late only on constructive termination aspect and not on nonpayment of salaries which the CMA correctly did not grant. The Advocate for the Respondent went on that the CMA was correct to conclude that the Applicant was already on leave as such the payment in lieu of leave couldn't arise. With regards to the prayer by the Applicant to be compensated for salary reduction, the Advocate submitted that it was correct for the CMA to rule out that the contract of employment which the Applicant signed shows that his salary per month was Tshs. 300,000/= and not Tshs. 600,000/=

as he claimed. He further argued that, the CMA didn't grant the gratuity prayer as it was not provided for in the employment contract. Besides, the Applicant failed to prove that he worked over time, as such, the CMA was correct not to grant the same. But also, the advocate argued that, the prayer for the overtime was brought/instituted a year after the lapse of the employment contract contrary to Rule 10(2) of GN No. 64/2007, thus couldn't be entertained. The Advocate also submitted that the Applicant was recruited at the work place, as such there was no reason for paying him repatriation cost.

Regarding the NSSF payments, he submitted that the CMA has no mandate to deal with it as it rightly ruled out and cited the case of **Masoudi Kondo vrs Ms. Tanganyika Investment Oil Transport** (2011 – 2012) LCCD 17 & **Managing Director Southern Link vrs Khamis Mgeleka** (2011 – 2012) LCCA 37. Advocate Bukagire has argued that the amount awarded to the Applicant was more than he was supposed to get as he was paid one-month salary in lieu of notice while the Respondent has given him the notice. The Advocate thus prayed the application for revision be dismissed with cost.

When invited for rejoinder, the Applicant submitted that, it wasn't correct that he ceased to work on 3/4/2017 while on 4/4/2017 the school started its vocation and they were all to go for the said vocation.

The Applicant also refuted the contention that he was recruited in Bukoba arguing that, his domicile is in Muleba and that he was



phoned while there and invited for the interview, insisting that even his address of Box 16 Muleba so depicts.

He reiterated his prayer to have the CMA decision revised.

Having gone through the Applicant's affidavit and rival oral arguments of the parties, the issues for determination in solving this dispute is whether it was correct for the Arbitrator to find out that the claim for the non-payment of the salaries for the months of December 2016 and February 2017 was time barred after finding that the Applicant was constructively terminated by the Respondent (employer).

The second issue for determination by this court is whether it was proper for the Arbitrator to rule out that the Applicant is not entitled to other consequential award after finding that the Applicant was constructively terminated.

It wasn't disputed that the Applicant's contract of one year was to lapse on 16/4/2017.

It is not in dispute either that the Applicant was granted leave by the CMA (mediator) to have his claim be instituted out of time through the condonation application. It is further not in dispute that the Arbitrator made a finding to which I join hands with that the Applicant was constructively terminated following non-payment of salaries to the Applicant by the Respondent who was his employer.

During the hearing at the CMA, it was revealed/resolved that, the salaries which weren't paid to the Applicant were of December 2016, February 2017, March 2017 and part of April, 2017. According to



record, the Applicant's contract was to lapse on 16/4/2017 and the 16 days of April 2017 are subject to the claim of the non-payment of the salaries.

In her decision, the Arbitrator awarded the Applicant a total of Tshs. 784,7000/= being one-month salary in lieu of notice, a salary for the month of March, 2017 and the days for the month of April before the lapse of his employment contract ie. 16 days. In her decision, the Arbitrator hinged her decision not to award the payment for the months of December, 2016 and February, 2017 on Rule 10(2) of GN. No. 64/2007 which according to her requires the institutions of other claims apart from unfair termination to be within 60 days. The Arbitrator clarified that the Applicant instituted the claim on 26/5/2017 and thus the claim for non-payment of the salaries which were of more than 60 days were time barred. The decision aggrieved the Applicant who argued that he applied for condonation at the CMA which was granted by the mediator, as such it was not correct for the Arbitrator to find out that the claim was out of time.

The begging question therefore is whether it was justifiable in the circumstances of this case for the Arbitrator to find out that the months of December, 2016 and February, 2017 were out of time thus the Applicant wasn't entitled for its payments.

As alluded earlier, the application for condonation was granted by the Mediator after finding that there were negotiations going on between the Applicant and the Respondent which geared at settling the matter

amicably and thus the same was a sufficient cause to warrant the grant of condonation since the Applicant wasn't negligent.

It was the finding of the Mediator that the dispute of non-payment of the salary ensued on 31/01/2017 but he instituted the same on 26/5/2017 (Pg 4 of Mediator's decision). The Mediator went on that according to Rule 10 of 64 GN No. 64/2007, the Applicant was time barred, but allowed the institution of the claim out of time as the Applicant wasn't negligent. I wish to quote Rule 10 for easy reference as hereunder:

"Mgogoro kuhusu uhalali wa kumwachisha kazi Mfanyakazi lazima ukatiwe rufaa kwenye Tume ndani ya siku 30 kuanzia tarehe ya kumwachisha kazi au tarehe ambayo mwajiri ametoa uamuzi wa mwisho wa kumwachisha kazi au kuthibitisha uamuzi wa kumwachisha kazi. Migogoro mingine yote iwasilishwe kwenye Tume ndani ya siku 60 kuanzia tarehe ya kuanza mgogoro".

However, when the matter/dispute went to the Arbitrator, she made a finding that the Applicant was not entitled to the salary of December, 2016 and February, 2017 as the same were claimed beyond the 60 days provided by law under Rule 10 of GN No. 64/2007. To say the least, I don't subscribe to the said reasoning. This is because, it is the same Commission which granted condonation application so that the Applicant can claim the unpaid salaries by the Respondent out of time after finding that the said delay was with sufficient cause.



I am aware that it was the Mediator who granted the application for condonation and the one who granted the award was the Arbitrator, but in my understanding, both have concurrent jurisdiction legally. Besides, the two are the decisions of the Commission. To allow the said reasoning by the Arbitrator will amount to overrule the Mediator's decision to grant the condonation applied for, which legally is unacceptable.

Further to that, the Arbitrator in her decision has made a finding that the Applicant was constructively terminated. Yet she rejected the reason which has made her to reach to such a decision; that is nonpayment of salaries to which I found to be absurd. In my view, it was the repetitive omission to pay the salaries which has resulted to the Arbitrator's findings. Thus, it wasn't proper at the end of the day to start demarcating the said omissions. In my conviction, the Applicant was entitled to all of his salaries which weren't paid with due respect to the Hon. Arbitrator.

The second issue is whether non granting of other consequential award after finding that the Applicant was constructively terminated was correct.

As alluded earlier, the Applicant was employed on fixed term basis. Thus, his entitlement has been stipulated in the contract document. According to the Arbitrator's findings to which I join hands with, the Applicant was constructively terminated.

In his claim, the Applicant has prayed to be awarded other entitlements after being declared to have been constructively

terminated. I have gone through the employment contract and found that the contract didn't provide for other payments apart from the salaries as was rightly analyzed by the Arbitrator at the CMA.

I am aware that the Applicant has prayed for repatriation cost claiming that he was recruited from Muleba and even his address shows to be P.O.Box 16 Muleba. However, his contract of employment doesn't so depict, and thus this court cannot grant unsubstantiated claim.

In the upshot, his claims for other entitlements has no merit and I accordingly dismiss them.

Basing on the above findings, the Applicant was entitled to be awarded the unpaid salaries of December 2016 and February 2017 as well. I therefore order the addition of Tshs. 600,000/=, to the former award of Tshs. 784,700/= thereby making the total payment payable to the Applicant by the Respondent to be Tshs. 1,384,700/=.

The case is revised to the above stated extent.

No cost is awarded.

It is so ordered.




L.G. Kairo
Judge

16/12/2020.

R/A Explained.




L.G. Kairo
Judge

16/12/2020.

Date: 16/12/2020

Coram: Hon. J. M. Minde, DR

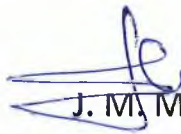
Applicant: Present

Respondent: Present

B/C: Gosbert Rugaika

Court: This matter was set for ruling today. I deliver the said ruling in the presence of both parties. Let them supplied with copies.




J. M. Minde
DEPUTY REGISTRAR
16/12/2020