IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

REVISION APPLICATION NO. 32 OF 2020

(From the decision and award of the Commission for Mediation and Arbitration No. ***CMA/KLM/MOS/ARB/54/2020****)*

ANGELIC PENIEL MZIRAY ---------- APPLICANT

VERSUS

ARBOGAST ASSENGA ---------- RESPONDENT

JUDGMENT

MUTUNGI .J.

The applicant prays, this court be pleased to revise the Award of the Commission for Mediation and Arbitration of Moshi (the Commission) in Labour Dispute No. CMA/KLM/MOS/ARB/54/2020 dated 30th July, 2020 (A. Mwalongo).

The history behind the dispute is to the effect that, the applicant alleged was employed by the respondent in 2004 as a shop supervisor for a salary of Tshs. 250,000/= per month.

According to the evidence, the applicant claimed she was not paid from when she was employed in October 2004 up to the time the employment relationship changed in 2015. The Commission's record further reveals that, from 2015 there was an oral agreement that, the applicant turned and became the main supervisor of the business. She was buying goods for the business, paying rent, and even paying Tshs. 1,000,000/= monthly to the respondent as profit. It was also alleged that, she was paying herself salary from the business. However, the business deteriorated thus the respondent inquired for stock taking and took the shop keys. That was the essence of the conflict between the two that led to the closing of the shop by a court order which the respondent initiated.

The applicant then decided to file her complaint at the Commission claiming a total of Tshs. 134,292,307/= as salary from October 2004 to March 2020, leave allowance for ten years, Severance pay and 189 months salaries as compensation for unfair termination. The Commission decided that, the applicant become the owner of the business (shop) hence the respondent had no powers to

terminate her. Therefore the complaint was dismissed on the ground that there was no proof of unfair termination.

Aggrieved, the applicant filed this revision on the following grounds: -

1. That, the Arbitrator grossly erred in law and fact in holding that, the applicant was not constructively terminated, while the applicant proved all the required ingredients of the same.
2. That, the Arbitrator erred in law and fact in holding that in 2015 the terms of employment changed and the applicant was paying herself salary but there was no proof of the same.
3. That, the Arbitrator erred in law and fact in not ordering the respondent to pay the applicant 189 months unpaid salary, severance pay, unpaid leave and compensation for unfair termination.

The application is brought under sections 91 (1) (a), (2) (b) (c), (4) (1)(a)(b) and 94 (1) (b) (i) of the **Employment and Labour Relations Act** No. 6 of 2004 (the ELRA) and Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and 28 (1) (c) (d) (e) of the **Labour Court Rules**, GN. No. 106 of 2007 (Labour

Court Rules). The application is further supported by the applicant's advocate sworn affidavit whereas on the other hand the respondent filed a counter affidavit in dispute thereof.

During the hearing of the revision Ms. Elizabeth Maro Minde represented the applicant whereas Mr. Wallace Shayo represented the respondent. Ms. Minde submitted that, the relationship between the applicant and the respondent started way back in 2004 but the terms to such relationship were not properly substantiated since the respondent stated that, he had agreed to pay the applicant Tshs. 100,000/= per month as salary but the applicant alleged they had agreed on a salary of 250,000/= per month.

Ms. Minde added that, according to the evidence, the applicant claimed she was not paid from October 2004 up to the time the employment was terminated, while the respondent alleged that, he used to pay her salaries and she was allowed lunch and transport allowances. However, no exact amount was stated and neither confirmed by evidence at the Commission. Ms. Minde further submitted that although it was alleged that, from 2015 the terms of

employment were changed and the applicant was allowed to pay herself salaries from the shop which she managed, however, there was no proof on the said changes of terms of employment nor the exact amount which she was supposedly to pay herself exhibited.

Ms. Minde argued that, although a lot was not proved, still the Commission dismissed the claims without valid reasons assigned. Further that, the applicant lost her employment since the environment was made hostile (constructive termination), by forcefully closing the shop thus the Arbitrator should have considered this very carefully. The applicant was in town and could be easily found, but simply glossed over that fact.

Finally, Ms. Minde submitted that, the Arbitrator did not consider the severance allowances paid at the end of the contract, leave pays and compensation for unfair termination, hence this Court should revise the orders granted unfairly and unreasonably since the Commission did not take into consideration the environment surrounding the applicant's unfair termination.

In reply, Mr. Shayo submitted that, the applicant was paid Tshs. 100,000/= per month and not Tshs. 250,000/= as alleged. Further that, the applicant was paid such amount from 2004 up to 2014 when the employer and employee relationship ceased after reaching to a new agreement. He argued, it is not possible for a person to work with the same employer for 16 years without a single pay.

Mr. Shayo argued that, in the new arrangement, the applicant was to manage the business and pay the respondent 1,000,000/= each month, the fact which was not objected to during the hearing. Therefore, from that agreement it is clear the employer – employee relation had seized in 2014. From such time the applicant was not entitled to anything, rather she was the one to pay the respondent.

Mr. Shayo further argued that, the order issued ordering the closure of the business premises was vide **Misc. Application No. 94/2020 Rose Arbogast Shirima vs. Angela Peniel Mziray (Applicant)**, before the District Land and Housing Tribunal, a case which the respondent was not a party therein. It cannot therefore be concluded that, the respondent led to the lockout of the applicant from the premises thus the

Commission was correct to proceed on hearing the complaint and issuing the impugned orders.

It was Mr. Shayo's contention that, if at all there are allegations of a lockout, then the Employment and Labour Relations Act (Supra) should be visited. This would mean where there is a lockout, the employer should have locked out the employee, which is not the case in this matter. The foregoing apart, if at all there are allegations of constructive termination at least 2 questions should be answered.

(1) Did the employer intend to bring the relationship to an end?
(2) Did the employer create the intolerable situation?

The Learned counsel argued that, the above 2 questions are to be answered in the negative since the parties' employer – employee relationship ceased in 2014 and the applicant had testified at the Commission that, she made an offer and rented the premises of the business in 2020. To cap it all, there was no proof of the unpaid leave, salaries and other entitlements at the Commission, hence the applicant is not entitled to any.

According to **Rule 28 (1) (a) – 6 of Labour Court Rules of 2007**, the applicant had to prove that the Commission exercised jurisdiction not vested to it by law or failed to exercise jurisdiction so vested or did so illegally or with material irregularity or with an error. Glancing through the applicant's submission none of the 4 requirements has been substantiated. In conclusion the respondent's counsel prayed that, the application be dismissed in its entirety for lack of merit.

In her brief rejoinder, Ms. Minde reiterated her submission in chief and added that, whether or not the actual salary was ascertained, it is far from suggesting that, the applicant was never employed. She also objected the fact that in 2014 the employer – employee relationship ceased and in that regard the applicant is still an employee and she has never became the owner of the shop. Given such a scenario the only conclusion is that, the applicant all the time remained a faithful employee.

On the allegation that, the respondent is not a party in the land tribunal case, Ms. Minde argued that the application reflected the businessname and the employer is the sole

proprietor of the business. If the veil if lifted, it is still the same person.

Regarding the lockout conditions, Ms. Minde argued that, the respondent started compelling the applicant to surrender the keys to his son and he wanted to conduct a stock taking exercise in an attempt to evict the applicant from the shop. She contended that, such behaviour was intentionally calculated to end the employer – employee relationship which also included filing a case in the land tribunal and obtaining an Ex-parte Order for closing the premises without giving a chance to the applicant to say anything.

Ms. Minde also contended that, even if the relationship ended, the applicant continued to pay herself salaries which means she was still an employee. She finally submitted that the entire process that led to the lockout was illegal and irregular thus, the Commission erred not to look at that aspect. She insisted that in order to protect the interest of both parties, this Court is argued to go through the proceeding and see what is entitled to the applicant.

After going through the Commission's Award and parties' submission the issues for determination are: -

i. Whether the applicant was constructively terminated

ii. Whether there was change in terms of employment relationship between the parties in 2015.

iii. Whether the Commission erred in dismissing the applicant's claims.

Starting with the 1st issue, **Rule 7 (1) (2) and (3) of Employment and Labour Relations (Code of Good Practice) GN 42/2007** (the Code of Good Practice) reads: -

> *"7 (1) Where an employer makes an employment intolerable which may result in the resignation of the employee that resignation amounts to forced resignation or constructive termination.*
>
> *(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination –*
>
> *(a) Sexual harassment or the failure to protect an employee from sexual harassment; and*

(b) If an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) Where it is established that the employer made employment intolerable as a result of resignations of the employee, it shall be legally regarded as the termination of employment by the employer."

This position was well enunciated by this Court in the case of **Katavi Resort V Munirah J. Rashid, Labour Division at Dar es Salaam, Labour Revision No. 174 of 2018** which laid down principles for constructive termination as follows: -

1. *The employer should have made the employment intolerable.*
2. *Termination should have been prompted or caused by the conduct of the employer.*
3. *The employee must establish there was no voluntary intention by the employee to resign. The employer must have caused the resignation.*

4. *The Arbitrator or court must look at the employer's conduct as a whole and determine whether its effects, judged reasonably and sensibly, is that the employee cannot be expected to put up with it.*

From the above positions it is therefore important to note that in order to determine the issue of constructive termination it has to be proved that the employer created intolerable employment conditions to the employee.

In the matter at hand I honestly do not see how the applicant was constructively terminated. From the evidence adduced at the Commission, when cross examined at page 9 of the typed proceeding the applicant stated that: -

> ***Question***: *Since when business was under your supervision?*
>
> ***Answer***: *2015 up to 2018 there was no problem.*
>
> ***Question***: *all income and everything were under your capacity/position*
>
> ***Answer***: *Yes*
>
> ***Question***: *Through that income u were giving Asenga Money?*
>
> ***Answer***: *Yes I was giving him money*

Question: *You were giving his money without you to take your salary?*

Answer: *Yes*

Question: *2019 – who was supervising the business*

Answer: *It is me*

Question: *2019 – Asenga was not supervising*

Answer: *Yes was not there*

Question: *Why you paid rent of 3 months? Where did you get the money?*

Answer: *I asked from other sources. The business became mine. I tendered the business then it became mine. I paid myself the rent.*

Question: *Now who own the business after you tendered?*

Answer: *it because (sic) mine (in the handwritten proceeding it reads, "It became mine")*

It is a trite principle that, in labour disputes, since it is the complainant who alleged constructive termination, therefore the burden of proving the same on a balance of probability was upon her. The trend of replies above indicate

that, the applicant was owning the business she was in full command of the business, she cannot claim constructive termination on herself. In the circumstances, the first issue is answered in the negative.

The same stance goes to the 2nd issue, according to the above cross examination, it leaves no doubt on a balance of probability that, the parties had a new agreement from 2015. Such assertion is clearly seen in the applicant's replies, that she was the main supervisor and owner of the business. If that was the case and in the event she had any claims before entering the new agreement she would have filed such claims in 2015. Her silence until when (shop premises) a dispute arose at the District Land and Housing Tribunal leaves a lot to be desired. The circumstances are that she was contended with whatever arrangement they had, she cannot now in 2020 come up with unfounded claims. It is definite that the employer – employee relationship had seized.

I also fail to grasp how the applicant was surviving from 2004 when she was allegedly employed by the respondent to 2015 when they changed the employment terms on a merger

allowance of Tshs. 3000/= a day. Further she did not prove how she was terminated or what happened before the change of the employment agreement prior to the year 2015. As rightly observed by the Arbitrator it is obvious that she was benefiting from such business as she also failed to expound on other sources she was referring to when cross examined. Therefore it is my settled view that, although the applicant was initially employed by the respondent, there was a change of terms in 2015 where the applicant became the owner of the business and there was no proof of arrears of the previous employment relationship nor any complaints whatsoever regarding the said employment undertaking.

On the last issue, as I find no fault in the Commission's Award, consequently the revision at hand lacks merit and is hereby dismissed with no costs.

It is so ordered

B. R. MUTUNGI

JUDGE

26/11/2020

Judgment read this day of 26/11/2020 in presence of the Applicant, Miss Minde the Applicant's Advocate and in absence of the Respondent dully notified.

B. R. MUTUNGI

JUDGE

26/11/2020

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI

JUDGE

26/11/2020