IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

LABOUR REVISION NO. 9 OF 2019

(Revision of the decision by Hon. Amosi Singo dated on 2nd December, 2016, in CMA Dispute No. CMA/RV/SON/MISC/MAY/03/2016)

HIDAYA A. NGENIKENI.....APPLICANT

VERSUS

AB AND ANN SECURITY ..... RESPONDENT

Date of last hearing: 30/11/2020
Date of judgment: 11/02/2021

JUDGMENT

I. ARUFANI, J

The applicant in this application is seeking for revision of the award issued by the Commission for Mediation and Arbitration for Songea (herein referred as the CMA) in Labour Dispute No. CMA/RUV/SON/MAY/03/2016 dated 2nd December, 2016. The CMA dismissed the complaint of the applicant that she was forced to terminate her contract of employment with the respondent after the respondent refused to cancel her transfer from Songea to Tukuyu. The application is made under section 91(1)(b), 91(2)(b); 91(4)(a) and 94 (1), (b)(1) of the Employment and Labour Relation Act, 2004, Act No. 6 of 2004 read together with Rule 24 (1); 24 (2)(a), (b), (c), (d), (e), and

(f); 28 (1),(b),(c) and (e) of the Labour Court Rules, GN No. 106 of 2007 published on 18/5/2007.

The background of the matter as per the CMA records and documents filed in this court by the parties is to the effect that, the applicant was employed by the respondent as a Watchman and later on she was promoted to a post of being the respondent's Manager within Songea Municipality. On 25th February, 2016 she was told orally by the respondent's secretary (PS) to quit the employment and she filed a complaint before the CMA. The complaint was determined in her favor through mediation whereby the respondent was ordered to reinstate the applicant in her employment without loss of her benefits and the respondent complied with the order.

On 15th April, 2016 which was fourteen days from the date of the applicant being reinstated in her employment she was given a letter of transferring her from Songea to Tukuyu. Due to her old age of fifty years and family responsibility she had, she wrote a letter to the respondent urging the respondent to cancel the letter of transfer so that she can remain at Songea. The prayer by the applicant was refused on the ground that, there is no vacancy for her post at Songea as it had already been taken by another employee. The applicant was aggrieved

by the decision taken by the respondent and terminated her employment with the respondent. Thereafter she filed the dispute before the CMA which failed to succeed.

As she was dissatisfied by the award issued by the CMA she decided to come to this court for revision of the award. The grounds upon which the applicant is inviting this court to revise the award are deposed at paragraph six of the affidavit supporting the application. As the grounds raised by the applicant were argued generally by her learned counsel the court has found there is no need of reproducing them in this judgment. In alternative the court will deal with them generally as argued by the counsel for the applicant in the oral submission he made before this court.

Advocate Maurice Mwamwenda who represented the applicant in this matter adopted the affidavit of the applicant as part of his submission and prayed the court to find the award of the CMA was procured without considering requirements of the law. The counsel for the applicant told the court that, firstly, the ground used by the CMA to issue the award in the applicant's matter is not recognized by the law. He argued that, as appearing at paragraph five of the second page of the award the CMA dismissed the applicant's complaint basing on the

ground that the applicant failed to prove her complaint beyond doubt while standard of prove in labour matters is on balance of probability.

Secondly, the learned counsel stated that the CMA erred in finding the applicant was required to prove her complaints. He argued that, the law requires what is alleged by an employee be proved by an employer and not vice versa. To support his argument her referred the court to section 7 (8) of the Employment and Labour Relations Act, Act No. 6 of 2004 (hereinafter referred as the ELRA). He submitted that, the requirement provided in the cited provision of the law was not considered when the CMA was issuing the award in the applicant's dispute.

He went on arguing that, the CMA states in its award that the applicant terminated her employment herself while it is not true. He stated that, the transfer given to the applicant was discriminatory and said discrimination can be direct or indirect. He argued that, the applicant replied the letter of transfer given to her and the evidence that the applicant had a family which was depending on her was given by her dependents who said if the applicant would have gone to Tukuyu they would have lived a difficult life.

The counsel for the applicant argued that, the respondent disregarded the said responsibility of the applicant to her family which is contrary to what is provided under section 7 (4) (k) of the ELRA. He stated that, instead of following the law the CMA defended the respondent by stating that the respondent did not know the size and problem of the family of the applicant while there was a letter stating the problem of the family of the applicant which was admitted in the matter as an exhibit.

He argued further that, the CMA stated in its award that the applicant was not terminated from her employment by being subjected into a difficult situation. He submitted that, it is too general to say there were other employees who were transferred in the respondent's company and others were transferred to the station where the applicant was working. He submitted further that, the transfer of the applicant to Tukuyu affected her to a great extent and prays the court to look at it by its special eye so as to enable the applicant to get her rights.

In reply Mr. Mbisi Deogratius, Manager who represented the respondent in this matter told the court that, the applicant was not discriminated in any how and said may be the CMA failed to put their evidence properly and caused the shortcoming stated by the counsel for

the applicant. He prayed the court to consider the evidence they gave before the CMA and if it will find the CMA erred as alleged by the counsel for the applicant to order the matter to be heard de novo before another Arbitrator. He argued that, the respondent adduced the evidence before the CMA which expounded clearly the reason for transferring the applicant and other employees of the respondent to different stations and said when the applicant prayed her transfer to be cancelled her position had already been taken by another employee.

In his brief rejoinder the counsel for the applicant told the court, the court cannot order the matter to be tried de novo as prayed by the respondent's Manager as that is not allowed by the law. He said the respondent wants the matter to be heard de novo so that they can fill the gaps appearing in their side. He submitted that, the court has a wide revisionary power which can be used to look the matter on both sides for the purpose of doing justice to the parties.

Having carefully considered the submissions made to the court by both sides and after going through the affidavit filed in this court by the applicant to support the application and the record of the CMA the court has found the issues for determination in this matter are as follows:-

(1) Whether the CMA failed to consider the cause of the applicant to terminate her employment was due to the refusal by the respondent to cancel the letter of transfer given to the applicant.

(2) Whether transfer of the applicant from Songea to Tukuyu was caused by the previous labour dispute which was determined in favour of the applicant and ordered for her reinstatement.

(3) Whether the CMA erred in stating the applicant failed to prove beyond doubt that her transfer from Songea to Tukuyu was due to the previous labour dispute while the standard of proof in labour matters is on balance of probability.

(4) Whether the CMA erred in stating the applicant failed to prove the dispute while the burden of proof was on the respondent as employer.

(5) Whether the transfer given to the applicant to go to Tukuyu was made on discrimination.

Starting with the first issue which was drafted basing on the ground raised in paragraph 6 (i) of the affidavit supporting the application the court has found the counsel for the applicant argued nothing to support that ground. However, as it was raised in the affidavit supporting the application which the counsel for the applicant prayed to adopt it, the court has found is duty bound to determine the same and it will do so by relying on the evidence contained in the record of the CMA.

The court has found that, as appearing in the evidence adduced before the CMA and the award issued by the CMA there is no dispute that the applicant terminated her contract of employment with the respondent after being given a letter of transfer from Songea to Tukuyu. The court has found the evidence adduced before the CMA shows that, after the applicant being given the letter of transfer from Songea to Tukuyu she wrote a letter to the respondent beseeching the letter of transfer given to her to be cancelled.

The grounds used by the applicant to seek for cancellation of her letter of transfer were her old age of fifty years and big family which was depending on her. The prayer of the applicant was refused by the respondent vide the letter written by the respondent on 24th April, 2016.

After the respondent refused to cancel the transfer of the applicant, the applicant decided to terminate her employment on the ground that the respondent had caused her to fail to continue with her employment.

The reason used by the applicant to terminate her employment with the respondent is recognized by our labour laws and is covered under Rule 7 (1) of the GN No. 42 of 2007 which states that, where an employer makes an employment of an employee intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination. Now the question to determine in the first issue is whether the CMA failed to consider the reason for the applicant to terminate her employment was because the respondent refused to cancel her transfer from Songea to Tukuyu and caused her to fail to continue with her employment.

The court has found it is not true that the CMA failed to consider the reason for the applicant to terminate her employment with the respondent was due to the refusal by the respondent to cancel the transfer of the applicant from Songea to Tukuyu. To the contrary the court has found the CMA considered the reason caused the applicant to terminate her employment with the respondent. That can be seeing at page 3 of the typed award of the CMA where the CMA found the stated

reason was not sufficient to cause the applicant to terminate her employment.

The court has arrived to the above finding after seeing that, when the CMA was considering the reasons which may be taken as sufficient reasons to justify forced termination of employment as provided under Rule 7 (2) of the GN No. 42 of 2007 it stated at page 3 of its typed award as follows:

> *"Kanuni hapo juu imeshaelekeza mazingira ambayo yanaweza kuchukuliwa kuwa ni sababu za kutosha kuhalalisha kuacha kazi kwa kulazimika, uhamisho wa mlalamikaji sidhani kama ni unyanyasaji wa kijinsia, wala sidhani kama mwajiriwa hakutendewa haki kwani mlalamikaji hakuithibitishia Tume kwamba makubaliano baina yake na mwajiri wake yalikuwa afanyie kazi Songea pekee."*

The above quoted part of the award shows clearly that, the CMA considered the reason caused the applicant to terminate her employment with the respondent which was refusal by the respondent to cancel her transfer from Songea to Tukuyu but the CMA found that reason was not sufficient to cause the applicant to resign or terminate her employment. In the premises the court has found the first issue is required to be answered in negative as the CMA did not fail to consider

the reason caused the applicant to terminate her employment with the respondent was the respondent's refusal to cancel the letter of transferring the applicant from Songea to Tukuyu.

Coming to the second issue which states whether transfer of the applicant was due to the previous labour dispute which was between the applicant and the respondent the court has found that, as it was for the first issue the counsel for the applicant submitted nothing in relation to this issue which is emanating from paragraph 6 (ii) of the affidavit supporting the application. The court has found it is stated in the evidence of the applicant and without being disputed by the respondent that there was a previous labour dispute between the applicant and the respondent. It was also not disputed that the said labour dispute was determined in favour of the applicant whereby the respondent was ordered to reinstate the applicant in her employment without loss of her benefit.

The dispute is whether the said labour dispute was the cause of the applicant to be transferred from Songea to Tukuyu. The court has found the evidence adduced by the applicant before the CMA to establish the cause of the applicant to be transferred from Songea to Tukuyu was just a suspicion and she had nothing material to prove her

transfer to the said new station of work was caused by the previous labour dispute.

The court has arrived to the above finding after seeing that, when the applicant was being cross examined by the representative of the respondent and asked whether the previous labour dispute had any relationship with her transfer to a new station she said she saw the previous labour dispute was one of the reason caused her to be transferred to another station. For being more precise the applicant stated at page 7 of the proceedings of the CMA that;

> *"Niliona kama ni moja ya sababu, kwa sababu mara ya kwanza uliniachisha kazi kwa mdomo ndio hivyo tukamalizana, baada ya siku 14 ndio nilipewa uhamisho huo."*

From the above quoted part of the evidence of the applicant it is crystal clear that, the reason for the applicant to state her transfer was made because of their previous labour dispute was based on mere sentiment or suspicion because as rightly found by the CMA there was no evidence adduced to show the transfer was made because of the previous labour dispute. To the contrary and as rightly stated at page 2 of the award of the CMA the applicant said herself in her evidence that,

the transfer was not for herself as there were other employees of the respondent who were transferred in other stations and others were transferred to Songea.

The position of the law in relation to the use of sentiment or suspicion to prove anything before the court was put clear in the case of **Ally Fundi V. R**, [1983] TLR 210 where it was stated that, suspicion, however grave it may be cannot be a substitute for proof in a court of justice. From what I have stated hereinabove the court has come to the settled finding that, the CMA did not error in finding the applicant failed to prove her transfer from Songea to Tukuyu was due the previous labour dispute which was determined in her favour.

The above finding take me to the third issue which states the CMA erred in stating the applicant failed to prove beyond doubt that her transfer was caused by their previous labour dispute while the standard of proof in labour matters is on balance of probability. The court has found that, as rightly argued by the counsel for the applicant it is true that the CMA stated at paragraph five of page two of its award that the applicant failed to prove beyond doubt that, her transfer from Songea to Tukuyu was caused by the previous labour dispute which was between

her and the respondent as her employer. To be more precise the CMA's award states as quoted hereunder:

> *"Hivyo mlalamikaji ameshindwa* ***kuithibitishia Tume pasipo shaka*** *kwamba kuhamishwa kwake kutoka Songea kwenda Tukuyu ilikuwa ni matokeo ya mgogoro uliopita."* [Emphasis added].

In the light of the above quoted excerpt and specifically the bolded part it is crystal clear that the CMA stated the applicant failed to prove beyond doubt that, her transfer from Songea to Tukuyu was due to their previous labour dispute which was determined in her favour. To the view of this court and as rightly argued by the counsel for the applicant, the standard of proof of any fact relating to termination of employment in labour matters is on balance of probability and not beyond doubt as stated by the CMA. The above finding of this court is getting support from section 39 of the ELRA read together with Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007.

The above cited provisions of the law states clearly that, in any proceedings concerning unfair termination of an employee, an employer is required to prove on balance of probability that, the reason for termination of employment of an employee was fair. The court has

found that, apart from the cited provisions of the law there is no any other provision of the law in our labour laws or any other law requiring an employee whose employment has been terminated as it happened to the applicant to prove beyond doubt that termination of his or her employment was caused by his or her employer. That makes the court to find that, the answer to the third issue is supposed to be in affirmative that the CMA erred in stating the applicant was required to prove the alleged reason for termination of her employment beyond doubt.

However, although the CMA stated the applicant failed to prove beyond doubt that her transfer was due to the previous labour dispute but the court has found that statement cannot be taken alone as a sufficient ground for revising the award of the CMA. The reason for coming to the above finding is based on the ground that, before arriving to the finding that the CMA erred in its finding this court has a duty of re-evaluating the evidence adduced before the CMA for the purpose of being satisfied the matter was proved to the standard required by the law which as stated hereinabove is on balance of probability and not beyond doubt as stated by the CMA.

As the court has already found the evidence adduced before the CMA failed to prove to the standard required by the law that the transfer of the applicant was due to the previous labour dispute which was between the applicant and the respondent the said statement is supposed to be taken it was made inadvertently and it did not cause any miscarriage of justice to the parties. In the premises the court has found that, although the third issue was supposed to be determined in affirmative but it has not affected the finding of the CMA.

As for the fourth issue which relates to the burden of proof of the allegations made by the applicant against the respondent the counsel for the applicant argued that, the CMA erred in finding the burden to prove the facts alleged by the applicant was on the applicant while the burden of prove in labour matter is on the employer who in the matter at hand is the respondent and not vice versa but failed to side with his argument. The court has arrived to the above finding after seeing that, as provided under section 39 of the ELRA read together with Rule 9 (3) of the GN No. 42 of 2007 the burden of proof casted on an employer in labour matters is to prove the reason for termination of employment of an employee is fair.

To the view of this court an employer is not given a burden of proving each and every allegation made by an employee to establish termination of his or her employment was unfair before an employee has made out a prima facie case of what he or she has alleged. To say an employer is required to prove each and every allegation made by an employee to establish termination was fair will be going contrary to what is provided under section 110 (1) and (2) of the Evidence Act Cap 6 R.E 2019 which states whoever desires any court to give judgment as to any legal right is required to prove existence of the alleged right.

Since the burden of proof casted on an employer by section 39 read together with Rule 9 (3) of the GN No. 42 of 2007 is only to proof the reason for termination of an employee is fair, then the applicant had a duty to establish a prima facie case that termination of her employment was due to their previous labour dispute. Thereafter is when the respondent as an employer would have been required to discharge her duty of disproving the allegation made by the applicant that termination of her employment was not because of the alleged reason and if it was because of the alleged reason, termination was fair.

It is also the view of this court that, where the issue for determination in a labour matter is in relation to an employee who has

resigned or terminated his or her employment on a ground of being subjected into an intolerable circumstances as alleged by the applicant in the matter at hand, the duty to prove the employee was forced to resign or terminate her employment is on the employee and not on the employer as argued by the counsel for the applicant. The above view of this court is getting support from South African case of **Murray V. Minister of Defence**, (383/2006) [2008] ZASCA 44 which was quoted by this court in the case of **Yaaqub Ismail Enzron V. Mbaraka Bawaziri Filling Station**, Labour Revision No. 33 of 2018, HC Labour Division at DSM (unreported) where it was stated inter alia that:

> *"... the onus rest on employee to prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship."*

From what I have stated hereinabove and the quoted cases the court has come to the settled finding that, the CMA did not error to state the applicant was required to prove her transfer from Songea to Tukuyu was caused by their previous labour dispute. The applicant was required to establish the reason for termination of her employment was due to their previous labour dispute before requiring the respondent to disprove the stated allegation. In the premises the court has found the argument by the counsel for the applicant that the CMA erred in stating the

applicant failed to prove her transfer from Songea to Tukuyu was caused by their previous labour dispute has no merit as it was not proved to the standard required by the law.

With regards to the fifth issue which states whether transfer of the applicant from Songea to Tukuyu was made on discrimination the court has found proper to state at this juncture that, the law requires an employee who has alleged he or she was terminated from his or her employment because of discrimination to establish a prima facie case of discrimination before requiring the employer to disprove the allegation of discrimination. That is provided under section 7 (8) of the ELRA which was considered by the court in the case of **Kondrad Kambona V. Tanga Cement C. Ltd**, [2013] 152 and stated inter alia that:

> *"The law prescribes procedures relating to proof of employment discrimination claims. In such claims, the complainant/employee has a duty to establish a prima facie case of discrimination. ... Once a prima facie case is made out, the burden shifts to the employer to prove that either, that discrimination did not take place; or if it did, it was not based on prohibited traits or such discrimination was based on accepted grounds, section 7 (8) (a) (i) or (ii) or 7 (6) of the Act, respectively."*

That being the position of the law the court has found that, as it can be deduced from the record of the CMA, the affidavit filed in this court by the applicant to support the application and the submission made to the court by the counsel for the applicant the complaint made by the applicant is to the effect that, she failed to continue with her employment with the respondent after being transferred from Songea to Tukuyu and the respondent refused to cancel the transfer while she had a big family to take care at Songea and she would have not managed to take care of it if she would have gone to Tukuyu.

In supporting his submission that the transfer of the applicant was discriminatory he referred the court to section 7 (4) (K) of the ELRA which prohibits an employer to discriminate an employee directly or indirectly on ground of family responsibility. To the view of this court transfer given to the applicant by her employer cannot be equated with discrimination provided in the above cited provision of the law. The court has arrived to the above view after seeing there is no any evidence adduced before the CMA by the applicant to establish she was transferred to another station because of her family responsibility.

The court has found the evidence adduced before the CMA by the applicant and her witnesses centered on establishing she had a family

responsibility at Songea and not that her transfer to Tukuyu was made because of her family responsibility so that it can be said she was discriminated.

To the view of this court and as rightly stated in the award of the CMA the transfer of the applicant from Songea to Tukuyu was a normal transfer of an employee which was also made to other employees of the respondent. The argument by counsel for the applicant that the refusal by the respondent to cancel the transfer given to the applicant is discriminatory has not been accepted by the court because the question of where an employee should work is within the prerogative of an employer. The above view of this court is getting support from the holding made in the case of **Lina Nyange V. The Guardian**, [2013] LCCD 206 where Rweyemamu, J, (as she then was) stated inter alia that:

> *"I will in fact add further that in practice, deciding which location an employee should work at is within an employer's prerogative. Short of positive evidence that exercise of such prerogative is prompted by malice or unfair reasons, the law would not interfere."*

The similar view was made by Munisi, J (as she then was) in the case of **Evarist Donald Kulwa V. Kenyakazi Security (T) Ltd**,

[2013] LCCD 57. When the learned judge was dealing with the issue of the employee who terminated her employment after being transferred to another station she stated that, transfer of an employee from one station to another to work on the same post cannot be equated with forced or constructive termination.

Since there is no evidence to establish the respondent's exercised of transferring the applicant from Songea to Tukuyu was prompted by malice or unfair reasons and as the court has found there is no evidence to establish the transfer of the applicant was made on discrimination the court has failed to see any reason which can make it to answer the fifth issue in affirmative.

In the light of all what I have stated hereinabove the court has found the applicant has not managed to convince the court there is any material error in the award issued by the CMA which deserve to be revised by this court as prayed by the applicant. In the upshot the application is hereby dismissed in its entirety for want of merit. It is so ordered.

Dated at Songea this 11th day of February, 2021

I. ARUFANI

JUDGE

11/02/2021

Court:

Judgment delivered today 11th day of February, 2021 in the presence of the applicant who is also represented by Mr. Maurice Mwamwenda, learned advocate and in the presence of Mr. Deogratius Mbisi, Manager for the respondent. Right of appeal to the Court of Appeal is fully explained to the parties.

I. ARUFANI

JUDGE

11/02/2021