IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
APPLICATION FOR REVISION NO. 67 OF 2019

(Original CMA/ARS/ARB/91/2017)

CANAL LAND GIRLS SECONDARY SCHOOL ..... APPLICANT
Versus
LOSERIAN MILENYI ..... RESPONDENT

JUDGMENT

15/2/2021 &28/04/2021

M. R. GWAE, J

On the 14th March 2017, the respondent, Loserian Milenyi duly filed a labour dispute against the applicant seeking an order awarding him terminal benefits and compensation for unfair termination specifically that, he was not given an opportunity of being heard. He therefore claimed a total of Tshs. 25, 935,000/= against the applicant.

Upon hearing the parties to the dispute, the Commission for Mediation and Arbitration for Arusha at Arusha (Commission) found that the applicant changed the terms and condition of employment contract from specified contract which came to an end on the 31st December 2016 to unspecified contract of employment without consultation pursuant to section 15 (4) of the Employment and Labour Relations Act, Cap 366 Revised Edition, 2009. The Commission

eventually procured its award by awarding the respondent compensation for the remaining period for the specified period that is from March 2017 to 31st December 2017 which is equal ten months compensation and one month's salary in lieu of notice totaling Tshs. 11,550,000/

Facts giving rise to the parties' dispute are not complicated; they are briefly as follows; that, the applicant and respondent were an employer and an employee respectively. The respondent had been employed by the respondent as teacher since 2012. His contract of employment was for a specified period, one year but renewable at the liberty of the parties. However, at the beginning of 2017, the employer opted to change the type of employment to her employees from specified period to unspecified period. The later contract was to commence from 1st January 2017.

That, on a date of January 2017, the applicant's employees including the respondent were given copies of the later contract of employment to go through the same and return them while signed. That on the 2nd March 2017, the applicant wrote a letter (DE3) to the applicant's Executive Director titled "Signing of job contract" informing him that he was not ready and willing to sign new contract on the ground that he needed some parts of the contract to be improved. In that letter, the respondent stated that he was ordered by the

applicant's lawyer not to report at the work if he could not sign the new contract. Hence institution of the dispute by the respondent.

Aggrieved by the arbitration award, the applicant filed this application for revision challenging the arbitral award, essentially, on the following grounds;

1. That, the arbitrator wrongly held that the applicant unfairly terminated the respondent while the respondent terminated himself from his employment.
2. That, the learned arbitrator erred in law in holding that the expired contract was renewed by default
3. That, the learned arbitrator erred in holding that there was breach of contract and constructive termination

Both applicant and respondent when appeared before me for hearing on 7th December 20120 were represented by representatives of their own choice, namely; Mr. Herode and Mr. Antony respectively. The personal representatives who appeared for the parties sought and obtained leave of the court to dispose of this application by way of written submission. I shall according consider their written submissions in the course of composing this judgment hereinunder.

I would not prefer to being curtailed by the issue of delay in the procurement of the award subject of the application out of thirty (30) days, sufficing to instructive hold that the lateness to delivery the award as required by the law would not vitiate an award provided that the arbitrator has given good

cause for his delay as the case here. Hence the complaint by the applicant has no legs to stand taking into account that the arbitrator has reasonably and sufficiently explained as why he did not meet the prescribed period in preparing and delivery the award.

Now, coming to the **1st ground above**, as it is clearly established by the parties' testimonies, nowhere it can be conveniently said that the employer expressly terminated the employee, respondent. The letter dated 2nd March 2017 (DE3) duly written by the respondent and addressed to the Executive Director, in my firm view, does not implicate the applicant of the complained termination. Those are words from the respondent and not evidently from the applicant or his agent. even by carefully examining the respondent's testimony, nowhere he had told the Commission that he was ordered to stop working if did not sign the contract in order to constitute whether the respondent was fairly terminated or unfairly terminated be it expressly or impliedly/constructively.

In **Tanzania Cigarette Company Limited v. Hassan Marua,** Lab. Div. (Mashaka, J), DSM, Revision No. 154 of 2014, 30/06/15 with approval of the Southern African Jurisprudence whose laws are parimateria to our laws in the case of **Stanley Jabulani Fakude Vs. Spoornet and Others** (JR 1327/06) [2010] ZALC 189 where it was held that, in order to establish constructive dismissal, there shall be the following three requirements; **firstly,** the employee

must have terminated the contract of employment, s**econdly,** the reason for termination of the contract of employment must be that continued employment has become intolerable for the employee and t**hirdly,** it must have been the employee's employer who had made continued employment intolerable

In our instant dispute, the only evidence on records of the Commission is that of the respondent who was given a copy of the new contract of employment commencing from 1st January 2017 to read and to sign but it was not to his satisfaction as a result he refused to sign as earlier explained and finally wrote the letter (DE3) with the words which, to my view, carry little weight as nowhere none of the above outlined requirements were proved.

I am alive of the settled law under section 37 of the Employment and Labour Relations Act which provides that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with valid reason (s) and fair procedure (See also Article 7 of the Termination of Employment Convention (ILO) No. 158 of 1984). In our case it is quite unclear if the respondent was terminated by the respondent since his refusal to sign the new contract on the alleged basis that the same did not meet standard working conditions nor can it be termed a constructive termination since it was not only the respondent who was served with copies of new contract of employment but together with other employees.

Consequently, it was therefore legally wrong for the Commission's arbitrator to consider the letter composed of the respondent's own words to treat it as the applicant's constructive termination.

In the **2nd issue**, from the outset, I am of the considered view that, the applicant never terminated the respondent's employment equally the respondent did not terminate his employment but he might have a cause of action against his employer but in a different as indicated in the PF1 based on the terms and conditions of employment as far as new contract of employment is concern. I conveniently hold so simply because the respondent had not given any credible evidence such as termination letter or any conducts on the part of the applicant to be capable of legally construing that, there was constructive termination for instance that, he had been denied an access to his office. Equally, I am sound of the section 36 of the Employment and Labour Relations Act, 6/2004 where an employer may make continued employment relation intolerable but, in our case, there is no scintilla of such evidence.

It is settled law that courts of law do not act upon mere assertions and uncertainties but on cogent evidence taking into consideration that an employee may not wish to continue working with his employer due to many reasons including, securing another employment with better wage or any other reason (See a decision of this court sitting at Arusha in the case of **Ajabu Adverture**

Ltd vs. Josephat Juastine Genda, Labour Revision No. 209 of 2017. This applicant's ground is equally found meritorious.

As to the **3rd ground**, in this ground I will abstain from determining issue of constructive as the same has been determined herein above except the issue of breach of contract. The respondent's Identity Card exhibits that, from 1st January 2017 he was an employee of the applicant. But that alone does not give any detail as, to any breach of the contract of the employment between the parties. Seemingly, the respondent was issued with ID pending preparation of the contract and signing of the same. More so the issue of breach of contract was not vividly raised by the respondent nor was it framed by the Commission as among narrowed issues for its determination nevertheless the word appearing from the arbitral award of the Commission at page 1, to my understanding, was inadvertently recorded.

In the light of the above findings, For the interest of substantive justice it is prudent to re-engage the respondent, if he so wishes to continue working with applicant as I have considered the fact that the respondent was not terminated by the respondent, if he refuses being re-engaged, he shall be deemed to have voluntarily resigned from his employment. The proceedings and award of the Commission are consequently quashed and set aside. Each party shall bear his own costs of this application and those in the CMA.

It is so ordered

M. R. GWAE,
JUDGE
27/04/2021