IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MWANZA

LABOUR REVISION No. 42 OF 2020

(LABOUR DISPUTE No. CMA/MZ/NYAM/136/91/2019)

BETWEEN

JEMBE MEDIA LIMITED..... APPLICANT

VERSUS

GABRIEL RAYMOND..... RESPONDENT

JUDGMENT

25th Nov, 2020 & 11th February, 2021

TIGANGA, J

This judgment is in respect of an application for revision namely Labour Revision No.42 of 2020 filed by a notice of application and chamber summons supported by an affidavit of **Fred Daud Kikoti**, who introduced himself as the manager of the applicant who is conversant with the facts of the case.

The application was preferred under section 91(1)(a)(b), 91(2)(a)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act

No. 6 of 2004, as amended by section 14(b) of the Written Laws (Miscellaneous Amendment) Act No.03/2010 and Rule 24(1), 24(2) (a)(b)(c)(d)(e)(f) & 2(3) (a)(b)(c)(d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 and any other enabling provisions of the law.

The applicant herein calls upon this court to grant the following orders;

(i) To revise and set aside the award in respect of **Dispute No. CMA/MZ/NYAM/136/91/2019**.

(ii) Any other relief and/or further Orders the Court may consider just to grant.

Briefly, the background of this dispute as reflected in the record and affidavit sworn in support of the application is that the respondent was on 1st June 2015 employed by the applicant as a radio presenter on two years renewable contract, and that on the 1st June 2017, his contract was renewed for another two years terms which was to expire on 30th May 2019. However, on 14th day of August 2018 the respondent was suspended pending investigation and disciplinary measures. While under such investigation, the respondent lodged with the CMA, a labour complaint No.

CMA/MZ/NYAM/696,697/2018, claiming for the breach of contract, the dispute was unsuccessfully mediated, thus it was referred for arbitration.

Moreover the respondent abandoned the matter, and instead referred new dispute that is No. CMA/MZ/NYAM/136/91/2019 before the CMA, this time claiming for constructive termination. The base of the alleged constructive termination was on the resignation letter written by an Advocate for and on behalf of the applicant.

In that dispute, the CMA ruled in favour of the respondent and ordered the applicant to pay the total sum of Tshs. 7,700,000/= contrary to what was claimed in the CMA Form number 1 and through his opening statement.

Following that award, the applicant raised the following complaints, **one,** that the arbitrator erred by awarding the amount which was not pleaded in the CMA form number 1, **two,** that the arbitrator erred for entertaining the dispute which was hopelessly time barred, **three,** that the arbitrator erred by considering the resignation letter which was not written by the employee, **four,** that the learned arbitrator failed to evaluate the evidence which error resulted into the erroneous award. Basing on the

complaint he has raised, he prayed the award to be quashed and set aside as the respondent failed to prove the constructive termination.

In that affidavit the applicant proposed the following issues;

(i) Whether it was proper for arbitrator to hear and determine the matter which was time barred without being condoned?

(ii) Whether it was proper for the arbitrator to award contrary to what is claimed in the CMA form number 1 and subsequently in the respondents opening statement?

(iii) Whether it was proper for the arbitrator to consider the resignation letter which was not written by the employee himself?

(iv) Whether it was proper for the arbitrator to rule in favour of the respondent while no concrete evidence was adduced to prove the constructive termination.

(v) Whether it was proper for the arbitrator to issue an award out of prescribed time by the law without assigning sufficient reasons to that effect.

The application was opposed by the respondent by filing the Notice of representation and the counter affidavit drawn and filed by Felix James, learned counsel for the respondent. In the counter affidavit, the respondent disputed all the facts deposed in the affidavit filed in support of the application.

By the order of this court the hearing of the application was by way of written submissions, Mr. Al-Haji Majogoro, Advocate, started by adopting the affidavit, sworn and filed in support of the application, he thereafter argued the 1st, 2nd, 3rd, and 4th issues, but abandoned the 5th issue.

He started with the first issue which is whether it was proper for arbitrator to hear and determine the matter which was time barred without being condoned? He said the time limit allocated for filing of termination of employment is 30 days as provided under rule 10(1) of GN. No. 64 of 2007, he submitted that the respondent filed the dispute on 26/03/2019 claiming to be constructively terminated after being not paid salary from 14/08/2018. The said constructive termination was inferred from the non payment of salary, therefore the cause of action arose on 14/08/2018 when the respondent was not paid salary. Now computing from

14/08/2018 up to 26/03/ 2019 when this dispute was filed with the CMA, he submitted that the dispute was filed 7 months and 12 days which beyond the statutory limit of filing the dispute arising from termination of employment. He therefore submitted that since the delay was not condoned, the complaint was time barred. He referred this court to the case of **Hezrone M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers and Others**, Civil Appeal No.79 of 2001 Court of Appeal –DSM

Regarding the second issue which is whether it was proper for the arbitrator to award contrary to what is claimed in the CMA form number 1 and subsequently in the respondents opening statement, he submitted that the CMA form No. 1 is the document which sets the dispute in motion containing the reliefs sought. In this case, the relief claimed in the CMA form No. 1 is payment of salary from the date of resignation to the end of contract. That is so in the respondents opening statement, filed on 30/07/2019 insisted the claim to be Tshs.4,500,000/= which resulted form the salaries which was paid at Tshs. 700,000/= per month. However, the arbitrator in the award, awarded the respondent Tshs. 7,700,000/= which is above the claim in the CMA Form No. 1 making the award unjustified.

He asked this court to rely on the cases of **Power Roads (T) Limited, vs Haji Omari Ngomero,** Labour Revision No.36 of 2007 at page 2 and 3 in which this court faulted the Arbitrator for awarding more than what is claimed in the CMA form No. 1. The other case relied on is the case of **Saleh Sukur vs Tanzania Scouts Association,** Land Appeal No.80 of 2018 at page 12 and the case of **Elidhiana Fadhili v The Executive Director Mbeya District Council**, Civil Appeal No.24 of 2014 CAT, in these cases it was held that it was not proper for the arbitrator to grant the relief which was not claimed.

Arguing in support of the third issue, which is whether it was proper for the arbitrator to consider the resignation letter which was not written by the employee himself, he submitted that the resignation letter is a result of the relationship between an employee and employer. There could not be resignation if there is no employment relationship. He submitted that the resignation letter was not written and signed by the employee but by the advocate who has no employment relationship with the applicant. He submitted that, that being the case, then, the CMA was not justified to rely on such letter as the author has no any employment relationship with the

employer. Had the CMA relied not on the said letter the said constructive termination would have lacked merits and the same ought to be dismissed.

Arguing the fourth issue which is whether it was proper for the arbitrator to rule in favour of the respondent while no concrete evidence was adduced to prove the constructive termination, he submitted that there is nothing caused by the applicant that could be said to be intolerable and led the applicant to resignation. He submitted that, it was on unfair termination only where the employer is required to prove that the termination was fair. He submitted that passing on the record there is no any proof of non payment of his salary as alleging throughout the hearing. He reminded this court of the principle that he who alleges must prove.

In his reply filed in opposition of revision, the respondent through the service of Mr. Felix James, Advocate, agreed on the legal position provided under rule 10(1) of the GN. No.64 of 2007 which provide for time limit to file the dispute over the termination of employment that is 30 days.

He submitted that, the resignation letter was prepared on 22/02/2019 and served to the applicant on 25/02/2019 while the CMA Form number 1 was filed on 26/03/2019. He submitted that, rule 7(1) of the GN. No. 42 of 2007, provides the circumstances in which the employee

may resign due to the intolerable acts of the employer that is termed as forced resignation or constructive termination while section 36 of the ELRA states that termination of employment includes a termination by an employee where the employer has made the continued employment intolerable for the employee. He further submitted that, non payment of salaries from 14/08/2018 was one among the intolerable acts of the employer which led to the resignation of the employee, which act drove the applicant to consult the advocate who prepared a resignation letter on the employee's behalf.

According to him, the resignation was effective from 25/02/2019 being the day from when the resignation letter was served, therefore computing from that date, it is obvious that the matter was not time bared.

Regarding the second issue, it is clear that the arbitrator was proper to grant the award of Tshs. 7,700,000/= being a total sum of unpaid salaries for 11 months, for in CMA form No.1, the applicant prayed of his pending salaries from his resignation to the end of his contractual period.

On the issue of determining the appropriate amount of compensation to be awarded, the arbitrator has discretion and is allowed to take into consideration all relevant factors including those stipulated under rule

32(5) of GN.No.67 of 2007. He cited the case of **Kulwa Solomon Kalile vs Salama Pharmaceuticals Ltd,** Revision No.155 of 2019 High Court. He also submitted that under section 40 of the Employment and Labour Relations Act, the powers of the CMA of the awarding remedies is discretional, therefore the arbitrator used his discretion to award Ths. 7,700,000/=being a total sum of unpaid salaries. He cited the provision of rule 24(2) of GN. No. 67 of 2007, which provides for the procedure for opening statements, provides that opening statement are not evidence, on that, he cited the case of **Maswi Masero vs Kahama Oil Mills Ltd**, Revision Application No. 12 of 2020 HC it is his conviction therefore that, the content of the statement can not affect the evidence given before the CMA.

Submitting in opposition of the third issue, the counsel submitted that the arbitrator was justified to consider the letter prepared by the advocate, on the following reasons, first, the letter is clear that the same was prepared under the instruction of the respondent himself. Second, the applicant failed to cite any law which restricts the advocates to prepare resignation letters on behalf of their client. Third, through such letter, the respondent exercised his right to be represented as stipulated under Article

13(a) of the Constitution of the URT, 1977 and, Forth, during the arbitration the respondent testified that he instructed his advocate to write the resignation letter on his behalf.

On the fourth issue, he submitted that, there was concrete evidence on record to prove constructive termination, to support his contention, he submitted that the respondent was constructively terminated, in that during the time when the second two years term contract was going on, which was to end on May 2019 he was accused of misconduct and was suspended for one month pending to be taken to the disciplinary hearing within 30 days. However, the applicant did not call the respondent in the disciplinary hearing as promised. He cited the provision of rule 27(1) of the GN. No.42 of 2007 providing that where there are serious allegations of misconduct or incapacity, an employer may suspend an employee on full remunerations whilst the allegations are investigated and pending further action. He said in this case, during the suspension, the respondent was not paid his remuneration, and when he was suspended he was not called for disciplinary hearing as notified in the notice of suspension.

He said these acts by the applicant were intolerable and therefore can be termed as constructive termination which forced the respondent to

resign, the resignation which was not voluntary. He cited the case of **Girango Security Group vs Rajabu Masuli Nzige**, Revison No.164 of 2013 HC-LD which defines constructive termination and provides what makes the employment intolerable. He in the end asked for the application to be dismissed and the court uphold the CMA award.

In rejoinder, the counsel for the respondent seemingly conceding to the proposition posed by the counsel for the respondent on when should the termination be said to have commenced, he submitted that, he has now changed his stand regarding when the termination started, he said it was the time when the resignation letter was composed not the date when the same was served to the applicant. He in that new stand submitted that, the respondent referred the matter on the 33rd day which also makes the matter before the CMA time barred.

He also said the respondent submitted that, the respondent did not respond to the argument since he was awarded salaries from 14/08/2018 indicates that by virtue of rule 10(2) GN. No. 64 of 2007 ought to be awarded after being filed within 60 days from 14/08/2018 when the cause of action arose. However, instead of filing them within that period, the

respondent filed the matter about seven months, which proves the argument that the matter was filed out of time.

According to him, the discretion by the CMA to award compensation does not extend to cases filed out of time without condonation. He submitted that the relief to be paid his all pending salaries from his resignation day to the end of his contractual period sought by the respondent had three effects, **one,** that the cause of action arose from the date of resignation, therefore the dispute for constructive termination was filed out of time which is 33 days, **two**, it proves that the arbitrator was wrong in awarding the salaries from 14/08/2018 which was not the date for resignation as prayed in the relief, and **three,** by supporting what was awarded by the arbitrator which is from 14/08/2018, while they filed the matter on 26/03/2019, they firmly tell the court that what was awarded was not condoned and therefore the dispute before the CMA ought to be dismissed for being out of time.

The applicant distinguished the case **Kulwa Solomon Kalile vs Salama Pharmaceutical Ltd**, because in that case, the arbitrator did not award the relief which was out of time and which was pleaded in CMA form No.1. He stressed that the opening statement of the respondent insisted on

what he claimed on the CMA form No.1, therefore it should not be ignored and that the case of **Maswi Masero** is also irrelevant in the circumstances of this case.

Rejoindering on the third issue, he insisted that the resignation letter is the product of the employer and employee relationship. He submitted that, as much as the employer is the one mandated to write the termination letter to the employee, then it is only the employee who has the mandate of writing the resignation letter to the employer. He was of the view that an advocate can only assist an employee in writing the resignation letter but not going beyond by signing the same on behalf of the employee. That being the case, it is his humble view that there is no resignation letter in the eyes of the law and therefore the element set for constructive termination does not meet. He reiterated the prayers that the CMA award be quashed and set aside.

Now having summarized at length the contents of the documents filed in support and opposition of this application, I will discuss and dispose the issues raised in the manner adopted by the counsel for parties in their respective submissions. In that, I will start with the first issue which raises

a question, whether it was proper for arbitrator to hear and determine the matter which was time barred without being condoned?

While the applicant is insisting that the matter was time bared as he starts computing the period from 14/08/2018 when the payment of salaries ceased, up to when the dispute was filed on 26/03/2019, the respondent disputed the matter to be time barred on the ground that, the computation starts on the date when the respondent through the advocate served the resignation letter to the applicant, that is on 25/03/2019. On that base the respondent said the dispute was filed within 30 days. The applicant insisted that the computation was supposed to commence from 14/08/2018, but even if we find that, the same starts with when the resignation process started, then the same was supposed to be computed starting from, 22/03/2019 when the respondent wrote a letter not on 25/03/2019 when the letter was served to the applicant.

From these arguments, I find the issue for determination to be, whether the dispute before the CMA was filed out of time or within time? To get an answer to this issue, we need to know the concept of accrual of rights of action. Section 5 of the law of limitations act provides that,

"Subject to the provisions of this Act, the right of action in respect of any proceedings shall accrue on the date on which the cause of action arises."

Now, when did the cause of action arise in this case? Is it on 14/08/2018 when the applicant stopped to pay the salaries to the respondent, or on 22/03/2019 when the respondent wrote a letter for resignation or on 25/03/2019 when the letter was served to the applicant?

To understand these concepts, we need to appreciate the meaning of the term cause of action. In the case of **Musanga Ng'anda Andwa vs Chief Japheth Wanzagi & 8 Others** [2006] TLR 351 it was held that,

"A cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree, in other words, a cause of action is the sum total of those allegations upon which the right to relief claimed is founded"

In a plain language that can be otherwise termed as, all facts on which, the right to claim anything is founded, which a party moving the court must prove in order to be entitled to the decree. From the said definition, the cause of action may be founded on one fact or occasion, or more than one facts or occasions or incidents.

In this case, the resignation by the respondent cannot be said to be a fact which entitles him the right to the relief sought, but the fact that the

employee who was still in employment, without being terminated is denied his salary without legal justification, is the fact which in my considered view constitutes the cause of action. This reasoning is founded on the fact that in the CMA form No. 1 the employee claimed to be paid his pending salaries from the date of his resignation to the end of his contractual period. However the resignation letter was categorically clear that since when the respondent was suspended pending disciplinary measures, the respondent has not been paid salaries which he believes was his entitlement.

Therefore in my considered view, the cause of action which would entitle the respondent the award which was awarded arose one month after 14/08/2018 when he was suspended and promised to be taken to the disciplinary hearing and after the applicant had stopped to pay him the salary which was his entitlement at the end of the month which he was entitled as an employee who was on suspension.

As rightly submitted by the applicant and conceded by the respondent, the limitation period within which to refer the matter is 30 days, and in this matter, the dispute was filed 29/03/2019 which is about six months, and about 15 days which is well beyond the statutory limits of

30 days. This being the case, it goes without saying that the dispute was referred to the CMA out of time, the consequence of which the CMA was not justified in entertaining the dispute at hand without being condoned.

That said, I find that the rest of the issues are intertainable only when the matter was referred to the CMA within time, or out of time but with the condonation order condoning the period delayed. I thus find that on that ground alone, the application succeeds, I therefore do hereby allow the application. The proceedings conducted before the CMA are hereby quashed and the award passed is set aside for the reasons given.

It is accordingly ordered.

DATED at **MWANZA** this 18th day of May, 2021

J. C. Tiganga

Judge

Judgment delivered in open chambers in the presence of the Advocates for the parties. Right of appeal explained and guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. TIGANGA

JUDGE

18/05/2021