IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 04 OF 2019

(Arising from the Award of the Commission for Mediation and Arbitration (CMA) at Mwanza, Hon. Msuwakollo, S, Arbitrator dated 31/12/2020 in Dispute No. CMA/MZ/NYAM/195/2020/62/2020)

BETWEEN

JC.GEAR EXPROCOM AB (T) LTD.....APPLICANT

VERSUS

JUMBE KARALA.....RESPONDENT

SWEKA OBADIA ....RESPONDENT

JUDGMENT

24th June, & 28th July, 2021

TIGANGA, J

This judgment is in respect of an application for revision that is Labour Revision No.04 of 2021 filed by a notice of application, notice of representation introducing one Advocates Renatus Lubango Shiduki and Malick Khatibu Hamza to be the representative of the applicant. Together with these two documents the applicant filed a chamber summons supported by an affidavit of **Pethuri Ibambasi**, a Human Resource Manager of the applicant who is conversant with the facts of the case.

The application was preferred under section 91(1)(a), 91(2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004, read together with Rule 24(1), (2) (a)(b)(c)(d)(e)(f) & (3)(a)(b)(c)(d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007.

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

1. To call for and examine the records, revise and set aside the award made by the Commission for Mediation and Arbitration, CMA at Mwanza, in Labour Dispute No. CMA/MZ/NYAM/195/2020/62/2020 (Hon. Msuwakollo,S. Arbitrator) delivered on 31st December, 2020 and make an order quashing and setting aside part of the said award, which is in favour of the 1st respondent on grounds that:
    (a) The said award was improperly procured, and
    (b) The said award is unlawful, illogical or irrational
2. That this Honourable court may be pleased to make any other order or orders as it may deem just and equitable to grant.

Briefly, the background of this dispute as reflected in the record and affidavit sworn in support of the application is that, the 1st respondent was employed by the applicant since 01st July 2016 as a filter mechanics and was paid monthly salary of Tshs.650,000/= The 2nd respondent has never been employed by the applicant. However, they were all the complainants in the labour dispute which was a subject of the decision before CMA, and subject of this revision. It is deposed that, on 02/03/2020 the 1st respondent asked and received Tshs. 300,000/= as a salary advance for a month of March, 2020 having so received his balance but on 03/03/2020, he did not go to work without notice to the applicant for almost two months and during this period, the applicant searched for him in vain but surprisingly, sometimes in May, 2020 the applicant was served with a summons and dispute referral form by the respondent in respect of Labour Dispute No.CMA/MZ/NYAM/157/2020 on unfair termination, dispute which was struck out on 17/06/2020 with leave to refile in seven days.

Subsequently, the respondent filed **Labour Dispute No. CMA/MZ/NYAM/195/2020/62/2020,** still alleging unfair termination of employment of the respondent by the applicant. Having received the pleadings from the parties, the CMA framed the following issues;

a) Whether there was an employer employee relationship between the 2nd complainant and the respondent,

b) Whether the 1st complainant was unfairly terminated by the respondent,

c) Whether the respondent followed proper procedure in terminating the 1st complainat, and

d) What relief are the parties entitled to?

After hearing of the dispute, the CMA decided in the favour of the 1st respondent that, he was unfairly terminated and awarded him a total of Tshs. 7,800,000/= as compensation for unfair termination, Tshs. 650,000/= a salary in lieu of notice, Tshs. 650,000/= payment for annual leave and Tshs. 455,000 as severance pay, thus totaling the awarded amount to be Tshs. 9,555,000/=

Dissatisfied by the award, the applicant filed this revision to challenge the award and raises eleven legal issues as follows;

i) That the legality and propriety of the commission in granting the respondent seven days to file the dispute a fresh, without any

formal or informal application to that effect from the respondents after finding the initial dispute incompetent.

ii) The legality and propriety of the Commission in holding that the applicant's alleged termination was on 02nd March 2020 and not 27th March 2020 as pleaded by the 1st respondent himself in CMA F.1 as a dispute referral form

iii) In the alternative to legal issue no.(ii) above, the legality and propriety of the commission in changing the 1st responding alleged date for termination and using the applicant's record to hold that the date of the alleged termination was 02nd March 2020,

iv) The legality and propriety of the Commission in holding that the Applicant terminated the 1st respondent from employment,

v) The legality and propriety of the Commission in holding that the 1st respondent continued to work for the applicant from 03rd March 2020 to the date of his alleged termination,

vi) The legality and propriety of commission in holding that the applicant terminated the 1st respondent from employment,

vii) The legality and propriety of commission in holding that the applicant did not establish that the 1st respondent absconded himself from his workplace,

viii) After noting that the applicant maintained that is never terminated the 1st respondent from employment, the legality and propriety of the commission in shifting the onus of proof to the applicant herein in proving that the 1st respondent absconded his work place from the applicant,

ix) The legality and propriety of the commission in holding that the applicant failed to adhere to proper procedures of termination of employee as required by law,

x) The legality and propriety of the commission in failing to analyse the evidence adduced thus delivering an illogical and irrational award; and,

xi) The legality and propriety of commission in holding that the 1st respondent was entitled to such a terminal benefits.

The applicant seeks from this court the following reliefs;

a. A declaration that the commission did not have jurisdiction to extend time for the respondent to file this dispute in absence any application to that effect,

b. The commission's proceedings and its award dated 31st December 2020 to the extent of awarding adjudging that the 1st respondent was unfairly terminated and entitlements to reliefs therein be quashed and set aside; and

c. Any other relief as this court deems fit to grant.

In the counter affidavit filed in opposition of this revision, the 1st respondent states that, he never absconded from work even one day and it is evident that the applicant failed to tender the attendance register to justify the same and form part of evidence to support her case.

He also deposed that the applicant was served with CMA F.1 and that the responsibility to prove that the respondent absconded from work lies on the applicant who failed to prove the same. He also disputed all legal issue in paragraphs (i) to (xi) above and so as the relief sought under paragraphs (a) to (c) herein above

By the order of this court the hearing of the revision was by way of written submissions, Mr. Malick Khatibu Hamza, Advocate started by adopting the affidavit sworn in support of the application, and reminded this court that he raised about 11 legal issues. In his submission he started with the first legal issue which challenges the legality and propriety of the commission in granting the respondent seven days to file the dispute a fresh, without any formal or informal application to that effect from the respondents after finding the initial dispute was incompetent. He submitted that the granting of the seven days leave to the respondent to file a fresh complaint without the respondent filing a fresh application to seek for extension of time is contrary to rule 10 and 29 of the Labour Court Rules, 2007, which requires the application for order of this sort to be made by a formal application. Therefore in his view, the respondent was required after the dispute was struck out to file the same after formally asking for extension of time, which he did not do. He said the granting of leave without formal application being filed, is a mis conduct on the part of the arbitrator and improper procurement of the award in terms of section 91(2)(a) and (b) of the Employment and Labour Relations Act, (supra)

Regarding the second legal issue, which challenges the legality and propriety of the Commission in holding that the applicant's alleged termination was on 02nd March 2020 and not 27th March 2020 as pleaded by the 1st respondent himself in CMA F.1 as a dispute referral form, he submitted that, the respondent was in the CMA F.1 allegedly terminated on 02/03/2020, but the Commission changed the date of termination. That was an error as parties are bound by their pleadings. He reffered this court to the case of **Judicate Rumishael Shoo &64 others vs The Guardian Ltd,** Lab, Div, DSM Rev. No. 80 of 2010 where this court held that, it is just a sample that CMA F.1 was part of the pleadings and as parties are bound by their pleadings the courts also are bound by pleadings. Therefore CMA erred in changing the date of the alleged termination.

Regarding the legal issues No. iv, v, vi, vii, viii, ix, x for revision he consolidated and argued them together as they relate. The applicant is challenging the legality and propriety of the Commission's findings that the applicant terminated the 1st respondent as alleged at page 15, paragraph 1 of the award. He submitted that, first, the arbitrator failed to analyse the evidence of the applicant in that respect in terms of rule 9(3) of the Code of Good Practice which only needs proof of reasons to be on the balance of

probabilities, as held by the court in the case of **Amina Ramadhani vs Staywell Apartment Ltd,** Rev. No. 461/2017 HC Labour Division at Dar es Salaam at page 14. He submitted that the evidence that the respondent received his salary advance on 02/03/2020 for last time was not disputed as the same was acknowledged; the applicant tendered the attendance register book which was used to track the employees, and further gave evidence that, the respondent absconded from duty which evidence was not disputed by the respondent. He submitted that the commission failed to analyse evidence as a results, it ended up giving irrational and illogical award. He said despite the fact that exhibit P1 the attendance register was tendered and admitted, yet the arbitrator held "....*ikiwa kweli mlalamikiwa aliacha kazi mwenyewe ni wazi mwajiri angetuletea attendance register ama chochote cha kuthibitisha mahudhurio ya kazini....."* this holding imputes the feeling that the CMA wanted the applicant probably to prove beyond reasonable doubt which is not the standard in labour cases as provided under rule 9(3) of the Code of Good Practice as interpreted by the case of **Amina Ramadhani** (supra). He submitted that the applicant discharged his duty of proving that the respondent absconded and was never terminated, therefore the burden shifted to the respondent to prove

that he did not abscond. The CMA missed it to find that absence from work for more than 5 days without permission is the reasons for termination.

Last is legal issue No. xi which challenges the legality and propriety of the Commission in holding that the 1st respondent was entitled to such terminal benefits. It is his submission that, since the 1st respondent absconded himself then the reliefs do not arise. At page 18-19 of the award the Arbitrator ordered payment of compensation and there is no any basis for the quantum of compensation. It is already evident that the 1st respondent absconded from work place and he is therefore not entitled to any compensation whatsoever from the applicant. He in the end asked for the application to be granted basing on the strength of the submission made in support of the application.

The respondent in his submission in reply, started by adopting the content of the counter affidavit, he submitted in respect of the first legal issue that, as the complaint was filed for the first time on 18/06/2020 via CMA F.1 as shown on the first page of the award, and that there is no evidence submitted that the respondent had once opened the complaint before. Therefore the first legal issue has no merit and should be dismissed.

Regarding the second legal issue he submitted that, it has no merit in that as the respondent pleaded in CMA F.1 the date of termination is pleaded to be on 27/03/2020 and the CMA did not change the date as alleged by the applicant. To buttress his argument he quoted part of the award as reflected at page 15 of the award that;

> *"Ikiwa kweli aliacha kazi mwenyewe ni wazi mwajiri angetuletea attendance register ama chochote cha kuthibitisha mahudhurio ya kazini inayoonyesha mara ya kwanza mlalamikaji kutofika ofisini ilikuwa ni tarehe 02/03/2020 na siyo tarehe 27/03/2020 kama ambavyo mlalamikaji ameeleza tume kuwa ndo siku ya mgogoro wa kuachishwa kazi ulipotokea, kwamba ni dhahiri baada ya tarehe 03/03/2020 aliendelea kufanya kazi kama kawaida hadi tarehe ambayo aliachishwa kazi bila sababu za msingi."*

Regarding legal issue No. iv, v, vi, vii, viii, ix, and x have no substance because the arbitrator followed all the procedures in analyzing the evidence of both parties on the balance of probabilities and complied with rule 9(3) of the Employment and Labour Relations (Code of Good Practice) GN.No. 42 of 2007, which requires the employer to prove the case which the applicant failed to do. He said the exhibit relied on that

exhibit P1 a petty cash voucher which the respondent used, did not prove that he was at work for last time on 02/03/2020 but the attendance register would have resolved the question as to whether he was present or absent at workplace. He submitted that the applicant failed to prove that the respondent absconded from work and there is no proof that they searched for him in vain. There is also no document that the respondent voluntarily absconded from workplace.

He said as the respondent failed to prove as he was required by law under section 39 of the Employment and Labour Relations Act, [Cap 366 R.E 2019] which requires the employer to prove that the employee was fairly terminated. He cited the case of **MIC Tanzania PLC vs Sinai Mwakisisile**, Revision No. 387 of 2019 at page 9.

He submitted that following the fact that the applicant failed the fairness and legality test of terminating the respondent, therefore section 40(1) of Cap 366 was to come into play. He therefore prayed the application to be dismissed for want of merits and the award of the CMA be upheld.

In rejoinder the applicant asked the court to adopt what he submitted in chief. Regarding the first legal issue, he said by evidence

annexture JCG-2 it is evidently clear that the dispute was firstly heard on 17th June, 2020. The respondent's contention that the dispute prior to 18/06/2020 has never been tabled before the Commission is absolutely ridiculous. He said the Commission on 27/06/2020 noted that the CMA F.1 was not properly filed by the respondent and proceeded to strike it out and the CMA ordered that the respondent file a fresh complaint in seven days. That order was made without the respondent filing formal or even informal application.

Regarding to the legal issue No. (ii), he submitted that the reply has nothing substantial as it has reiterated citing paragraph 15 which is a reason as to why the applicant is complaining.

Regarding the reply to the legal issue No. iii, iv, v, vi, vii, viii, ix, and x, he insisted that he tendered enough evidence to prove that the respondent absconded and that at no any particular time has the applicant terminated the respondent. He reiterated the prayers he made in the submission in chief, and asked the application to be granted.

This being a summary of the application, the counter affidavit as well as submissions made by the counsel for the parties, I find it to be out of dispute that the respondent was employed by the applicant. It is also not

disputed that at the time when the respondent filed the complaint he was not in active service of the employment of the applicant. While the applicant alleges that the respondent absconded from workplace, the respondent said he was terminated. The main contention therefore is whether the respondent was terminated or not. From the arguments this court needs to resolve the following issues namely;

i. Whether the respondent was terminated or absconded from duty.

ii. If he was terminated, whether the termination based on fair reasons and adhered to the fair procedure.

iii. Whether the act of the arbitrator of striking out the labour dispute with leave to refile the same in seven days was procedurally incorrect.

iv. Whether the arbitrator changed the date of termination pleaded by the respondent in the CMA F.1

v. Whether the arbitrator properly considered and analysed the evidence on record.

vi. Whether the applicant proved on the balance of probability that the termination of the respondent based on fair reasons and fair procedure.

In this ruling I will deal with the issues in a series in which they have been framed above. I will start with the first issue which is whether the respondent was terminated or absconded from duty. In law, abscondment or absenteeism from workplace for five consecutive days without reasonable cause or acceptable reasons is one of the grounds for termination of the employment of the employee. This is the position of this court in the case of **M/S Komesha Security Services Ltd vs Said Ching'umba,** Lab. Div, Labour Court Cases Digest Part II, 2015.

However, for the same to be the ground of termination, it must firstly be established, that the employee actually absented himself from workplace, secondly that he gave no acceptable reasons for his absence, thirdly, that after establishing absenteeism as the ground of termination, the termination must be in accordance with the procedures,which starts by serving the employee the charge sheet through his known address or residence, containing the accusation of absenteeism. The charge should give him reasonable time practically not less than seven days, to respond, failure of which shall entitle the disciplinary hearing committee to hear the employer exparte and it is upon being satisfied that the charge has been proved at the required standard, the disciplinary hearing committee will

find him guilty and forward the recommendation to the respective authority for action. In this case, there only evidence brought to prove absenteeism was the petty cash voucher proving that, he appeared for the last time when he signed the said petty cash voucher and received his salary advance. In the normal course, the proof as to whether the employee was at work or not isn't proved by petty cash vouchers which are signed twice a month, it is normally proved by the attendance register in which the employees are routinely signing as a proof of attendance. In the submission, the counsel for the applicant said that the applicant tendered the attendance register, however, I have passed through the proceedings which constitute the testimonial evidence of the sole defence witness one Peruthi Ibambazi, I established that the only exhibit tendered and admitted is the petty cash voucher which was admitted and marked as exhibit AB-1, there is no attendance register which the applicant alleges to have tendered as exhibit. It is possible that, the attendance register may be attached with the documents filed, but that with due respect, was not an exhibit, it remains to be attachment which lacks evidential value.

The fact that the only evidence was the petty cash is proved even by the evidence of the same witness that the only evidence is the petty cash

voucher. Therefore, this leads to a conclusion that, the allegation of absenteeism was not proved by the employer. Even if we assume for the sake of argument that the absenteeism was proved which not the case in this revision is, yet the procedure for termination was not followed.

Having resolved the first issue in the negative, I find the second issue which is "If he was terminated, whether the termination based on fair reasons and adhered to the fair procedure? to have also been resolved that, failure to prove that there was absenteeism means there was no valid reasons for termination and having not followed the procedure of charging the respondent and disciplinary hearing, the purported self termination by absenteeism should not be validated. The issue is thus also resolved in negative.

Regarding the third issue, which is whether the act of the arbitrator of striking out the labour dispute with leave to refile the same in seven days was procedurally incorrect? I find this issue to be a bit minor and of no significance and in my considered view should not spend most of this court's time, as there is no dispute that the first complaint was filed within time, and the same was struck out by the court (not dismissed) for being incompetent. Though not expressly said, but in so holding, the court was

mindful and did so after assessing the situation before it and found it to be prudent and in the interest of justice, after striking out the application to grant leave to refile it in seven days.

It is also worthy to note that the powers to grant or refuse leave to file an application out of time is in the discretion of the court, as long as the same is exercised judiciously, See the case of **Moses Mchunguzi vs Tanzania Cigarette Co. Ltd,** Civil Reference No. 3 Of 2018, CAT-Bukoba. Therefore it was within the discretion of the Arbitrator to grant or refuse the extension of time. Having assessed the situation I find that the arbitrator properly and judiciously exercised the said discretion and the grant of that leave did not in any way prejudice the applicant. The issue is therefore resolved in the negative as well.

Now having resolved the above issues as such, I find the rest of the issues are automatically rendered nugatory and of no effect. For that reasons, I find the Arbitrator to be justified in the finding that led her to reach to an award. I find nothing to revise in the award passed by the Arbitrator. The application for revision is hereby dismissed for want of merits; the award passed by the arbitrator is upheld for the reasons given herein above.

It is accordingly ordered.

DATED at **MWANZA** this 28th day of July, 2021

J. C. Tiganga

Judge

28/07/2021

Judgment delivered in open chambers in the absence of the applicant but in the presence Rashid Mkama Personal Representative of the respondents' own choice.

J. C. TIGANGA

JUDGE

28/07/2021