

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
LABOUR DIVISION

MISC. LABOUR APPLICATION No. 48 OF 2020
(Originating from labour Dispute No. CMA/ SHY/40/2020)

ABDON PANTALEO MSAFIRI.....APPLICANT
VERSUS
TANZANIA POSTAL BANK RESPONDENT

RULING

5th & 20th August, 2021

MKWIZU, J

At the Commission for Mediation and Arbitration, applicant **Abdon Pantaleo Msafiri** filed CMA Form No 1 for unlawful termination and other employment benefits. He was however, late for about six (6) years. He for that reason filed along with his claims, CMA Form No 2 for condonation. The reasons for the delay argued at the CMA was that he was tied by the criminal proceedings filed against him by the respondent. He said, his employment was terminated on 17/4/2014 via a letter with reference No. TPB/PF NO. 0585 but just before he could refer the dispute to CMA, respondent filed against him a criminal case on 22/4/2014 via RB No. SHY/RB/2225/2014, which led to his arrest and subsequently to his arraignment before the court on 3/12/2015. applicant explained further that, the trial went to 15/3/2017 followed by an appeal by the respondents filed in November 2017 to its completion on 27/2/2020. On 18/3/2020 applicant requested the High Court

for a copy of the judgement which was served on him on 06/4/2020 while already out of time by six years.

The Commission dismissed the application for failure to account for the delay. Aggrieved, applicant has by a chamber summons made under sections 91 (1) (a) & (b) (2) (a) & (b) (40 (a) & (b) 94 (1) (b) (i) of the ELRA, No 6 of 2004, Rule 24, (1),(2),(3) and 28 (1) (a) (b) (c) (d) & (e) of the labour Court Rules 2007(GN No. 106 of 2007 , supported by an affidavit of Abdon Pantaleo Msafiri, the applicant sworn on 16th June 2020, preferred this revision.

His main grounds of complaint as enumerated under paragraph 7 of the supporting affidavit are three:

- i. "That the arbitrator erred in law and facts by dismissing the application for condonation for the reason that I filed out of time or time barred, without considering reasons and evaluating evidence adduced by the applicant as well as the applicant's submissions*
- ii. That the arbitral award is illogical or irrational as the erred both in law and facts by not considering the fact that my delay was due to accelerate of time of investigation and hearing of (prolonged case) as reasons of lateness for 6 years of my application*
- iii. That the arbitrator award was improperly procured as the same founded on charge for which I was not convicted. The arbitrator did not properly evaluate the evidence and arrive at a rational conclusion on the key issues of the reasons of termination so failure to keep proper records of the proceedings."*

When the revision came for hearing, applicant appeared in person without any legal representation whereas the respondent had the services of Mr. Innocent Mhina learned advocate.

Arguing the revision, applicant submitted that, he managed to explain the delay at the CMA that he delayed while waiting for the completion of the criminal proceedings against him. He was of the view that, his CMA case depended much on clearance by the court on his culpability on the matter that is why he had to wait the outcome of the criminal case. Applicant said, due to his employment's termination, he was financially unstable and therefore unable to run two cases at a time. He finally adopted his affidavit in support of the application and prayed for the court to allow the revision.

The application was opposed by the respondent. Mr. Mhina submitted that, reasons for the delay by the applicant were not sufficient enough to warrant the grant of his application for condonation at the CMA. Mr. Mhina contended further that, before his arrest on 5/5/2014 applicant stayed freely for 18 days after his employment's termination. He said, during investigation, applicant was out on bail, but took no action towards registering his complaint with the Commission. He on this point cited to the court the decision in **Allson Peter Gilman V. A-Z Textile Limited**, labour Revision no. 3 of 2014 LCCD page 11-12.

Secondly, stated Mr Mhina, applicant failed to account for each delay of the delay. He referred to the court the cases of **Bruno Wencenslaus Nyalifa V. Permanent Secretary Home Affairs and Another** , Civil appeal No 82 of 2017 and **Sospeter Augustine Musiba V Tanzania Postal Bank**, Labour revision No. 43 of 2016. He said, the reason of financial constrain submitted by the applicant and the waiting of the decision in criminal case by the applicant is without merit because, the criminal case decision had nothing to do with the labour disputes nat the CMA.Mr Mhina concluded that the condonation application before the CMA was an afterthought.

In his rejoinder, applicant argued that the time from 17/4/2014 to 16/5/2014, that is, the time between termination of his employment by the respondent to the time of his arrest, he was still within time to lodge his labour dispute. He insisted that, he could not fil a labour case during the pendency in court of the criminal case. Making a reply on the decision of **Sospeter Augiustine Musiba**, (Supra) applicant said that, case is distinguishable. He said, in that case, applicant had stayed at home for about five months after the decision of the court in criminal case without taking any action while in his case, he promptly filed the labour case after determination of the criminal charges. He invited the court to find that he had accounted for the delay. He said he had given a detailed account of the period of time from the 1st day of his arrest to the last day when the High Court gave its decision.

Having considered material available on record, applicant's affidavit in support of the application for condonation at the CMA and parties submissions made before this court during hearing of this revision, the point

for determination is "Whether applicant has succeeded in making out a "sufficient cause" meriting condonation of delay by the CMA.

Regulations 10 (1) of GN No. 64 f 2007 provides specifically that dispute on fairness of termination may be referred to the Commission within 30 days from the date of the termination, However, in case of any delay, applicant may seek for condonation under regulation 11 of the same GN .

In the present case, it is not in dispute that the applicant was desirous to file a labour dispute challenging the termination of his employment after a lapse of six years after the challenged termination. To be safe, he filed condonation application. In an application for condonation, the CMA is guided by Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64/2007 which requires a party to furnish good cause. Also Rule 11 (3) of the GN No. 64/2007 provides that:

" An application for condonation shall set out grounds for seeking condonation and shall include the referring party's submissions on the following:

a) The degree of lateness;

b) The reasons for lateness;

c) Its prospects of succeeding with the dispute and obtaining the reliefs sought against other party;

d) Any prejudice to the other party; and

e) Any other relevant factor."

According to his affidavit at the CMA, Applicant's reason for the delay was the pendency in the court of law criminal proceedings against him instigated by the respondent. Part of para 7 of the applicant's affidavit at the CMA reads:

"Sababu za kuchelewa kuwasilisha mgogoro Tume ni kuwa baada ya mleta maombi kuachishwa kazi na wakati anajiandaa kufungua mgogoro Tume ya Usuluhishi na Uamuzi kupinga uamuzi wa mwajiri, mnamo tarehe 22/4/2014 mjibu maombi alifungua kesi ya jinai kituo cha polisi Shinyanga RB. Na SHY/RB/2225/2014..."

It is a trite law that condonation of delay is the discretion of the court, granted upon on sufficient cause. It is also the settled position in our jurisdiction that categories of sufficient cause are never exhaustive. Each case spells out a peerless experience to be dealt with by the court. The determination of what amount to a sufficient cause depends on the peculiarity of each case and the onus lies upon the applicant.

According to the records, applicant was arrested on criminal charges, investigated and finally prosecuted. It is clear from the records also that, Applicant was arrested on 5/5/2014 and was released on bail on the following day that is 6/5/2014. The investigation of the accusations against him took almost 19 months from 22/4/2014 to 3/12/2015. The trial was conducted in a one year period to 16/12/2016 followed by an appeal to

the High court which ended on 27th February, 2020. Applicant waited to be supplied with the copy of the decision after he had requested the same up to 6th April 2020 before filing condonation application at the CMA on 17/4/2020.

Supporting his application for condonation at the CMA as well as in this court applicant said he could not file labour dispute challenging the fairness of his termination based on the theft allegations before determination on whether he is guilty or not by the court in the criminal proceedings. In his oral submissions at the CMA, applicant said, I quote for convenience;

"Na nilibaini aliyefungua ni bank ya Posta kwa tuhuma zilezile hearing Committee iliyonituhumu na kiasi kilekile cha pesa. Kwa vile ilikuwa kesi ya msingi kama vile kesi ya jinai na kwa vile ndiyo iliyotangulia kufunguliwa, Na kwa vile ndiyo pekee hitimisho lake kwa njia ya hukumu ya mahakama ndiyo ingenipa fursa ya kufungua mgogoro Tume. Nisingeweza kuja tume kufungua mgogoro ambao sababu yake kuu ni kutoiba. Sikuwa na fursa ya kufungua mgogoro Tume kwa sababu sikuiba na sababu kuwa sikuiba ingetolewa na mahakama na wakati huo kesi ya msingi ilikuwa imeshaanza na nisingeweza kuthibitisha kuwa sikuiba mpaka pale hukumu itakapotolewa"

It is on this ground that he waited for the conclusion of the criminal case before resorting into challenging the termination.

Dismissing the application for condonation, CMA stated that because applicant was out on bail, institution of a criminal case against him was not sufficient reason warranting the grant of the application. On this CMA said:

"Tume imejionea wazi kwamba ni kweli alikuwa amefunguliwa kesi ya jinai katika mahakama ya Wilaya na alitolewa nje kwa dhamana akawa huru kuendesha kesi yake.

Na inaonyesha wazi kwamba alikuwa akitokea nyumbani/urairani na kuhudhiuria shaurini mpaka siku uamuzi ulipotoka alikuwa akitokea nyumbani na sio jela.

Kutokana na maono hayo Tume inaona kwamba mleta maombi bado alikuwa na fursa kamili bila kikwazo cha kuweza kufungua shauri lake mbele ya Tumen a baada yah apo kesi yake ingehurishwa hadi hapo mahakama ya Wilaya itakapotoa Uamuzi wake"

Apart from the above, it was the CMA's findings that applicant failed to account for each day of the delay. Respondent's advocate submissions were in support of the CMA's findings. Court's attention was drawn on the decision of **Sospeter Augustine Musiba** (Supra). I have revisited that decision. Though I am in agreement with the applicant that facts of that case are different with the facts at hand. In both cases, Applicants were prosecuted, and waited until the completion of the criminal proceedings. However, unlike the applicant in the present case, applicant in the cited case, spent unexplained five months after the decision in criminal case before filing a

labour dispute. In this case, applicant condonation application was filed 23 days that is on 29/4/2020 after service on him the decision on the criminal appeal on 6/4/2020.

Nevertheless, the filing of the condonation application immediately after finalization of the criminal case is not what matters. The important issue to be answered here is- Did applicant's application at the CMA exhibited good cause for condonation? Expounding on what sufficient cause entails, Court of appeal in **Felix Tumbo Kisima Vs. TTC Ltd and Another** [1997] TLR 57, observed that;

*"it should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation **to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary steps.**"*
(Emphasis added)

I do not buy the applicant's submissions that reference of his labour dispute would have been complete/ viable after determination of the criminal charges against him . I entirely agree with Mr. Mhina that, the applicant had 18 days from the date of termination of his employment to the date of his arrest that is between 17/4/2014 to 5/5/2014. It is also on the records that applicant was released on bail only a day after his arrest that is on 6/5/2014. Meaning that applicant was free again to file his labour dispute if he so desired during investigation period which took almost 19 months from 6/5/2014 to 13/12/2015 . It is also from the records that in a period o five

years between 13/12/2015 to February, 2020 applicant was attending his criminal trial and appeal from home meaning that all this period was open for him to do what he was required by the law to do if he so wished. The pendency of the criminal charges against him alone could not have prevented him from instituting his labour dispute with the CMA.

Again, in his oral submissions at the CMA, applicant contended that, failure to file his labour dispute within time was due to the fact that he was financially unfit to run two cases at per. I don't think if this ground is sufficient enough warranting the grant of an application for condonation. Apart from the facts that no explanation on the costs of each case applicant was supposed to bear had he refereed the labour complaint to the commission. Financial constraints are never good grounds for extension of time. In **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/ 20 of 2017 (CAT-DSM) (unreported), Hon. Mwambegele, J.A had this to say and I quote;

"...Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence" [Emphasis supplied]

It should be noted here that rules of limitations are made to ensure that parties do not resort to dilatory strategies but that they punctually seek their remedy. In **Tanzania Fish Processors Ltd v. Christopher Luhanga**, Civil Appeal No. 161 of 1994, it was observed that :

"The question of limitation of time is fundamental issue involving...jurisdiction as held by the CA, it goes to the very root of dealing with dealing with civil claims. Limitation is material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to court as and when he chooses".

Applicant was duty bound to follow the dictates of the law. He had no room of deciding on what time to approach the Commission. The best way out for him was to present the matter before the CMA for directives or otherwise but not to choose whether to comply with the period of limitations prescribed by the law or not for any reasons whatsoever. To allow this, would be to open up a door where litigants would on their own intellectual assessment choose whether to obey the law or not. I am not in a position to indorse that proposition. In **Dr. Ally Shabbay V. Tanga Bohora Jamaat** (1997) TLR, 305 citing with approval the decision in **Edwards v Edwards** [1968] 1 WLR 149 at 151 Court of appeal had this to say :

*"So far as procedural delays are concerned, Parliament has left a discretion in the courts to dispense with the time requirements in certain respects. That does not mean, however, that the rules are to be regarded as, so to speak, I antique timepieces of an ornamental value but no chronometric significance, so that lip service only need be paid to them. On the contrary, **in my view the stipulations which Parliament has laid down or sanctioned as to time are to be observed***

unless justice clearly indicates that they should be relaxed." (emphasis added)

The delay of six years by the applicant is inordinate. Applicant acted negligently. The explanation given by the applicant that to succeed in his labour dispute was only dependent on the decision by the court on criminal charges lacks legal backup. After all, CMA was only to determine the employment rights of the parties regulated by employments laws. The condonation application by the applicant at the CMA was without sufficient cause.

The revision is for the above reasons dismissed

Order accordingly.

DATED at SHINYANGA this 20th day of August, 2021


E. Y. MKWIZU
JUDGE
20/08/2021

COURT: Right of appeal explained




E. Y. MKWIZU
JUDGE
20/08/2021