IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 203 OF 2017

(Original CMA/ARS/ARB/30/2016)

SILVER JUSTINE ..... APPLICANT

Versus

LEOPARD TOURS LIMITED ..... RESPONDENT

JUDGMENT

22/10/2021 & 29/11/2021

GWAE, J

Aggrieved by the award procured by the Commission for Mediation and Arbitration of Arusha at Arusha (CMA), the applicant has now brought this application on the following grounds;

a. That, the Commission for Mediation and Arbitration failed to determine all of the agreed issues and directed itself on some of the issues and non-agreed issue and left some issues unattended
b. That, the Commission for Mediation and Arbitration failed to determine the important issue on whether the respondent provided safari to the complainant and complainant absconded and hence reached into unanimous decision

c. That, the Commission for Mediation and Arbitration failed to consider the evidence adduced by the Applicant that the applicants were not reported (sic) to work on daily basis and that they going to work whenever issued with safari, and that apart from being denied with an access to see the management in all time it was the applicant who was making follow up to be issued with safari

d. That, the Commission for Mediation and Arbitration failed to consider the evidence adduced by the respondent's witness that the applicant still recognizes the applicant as his employee

e. That, the Commission for Mediation and Arbitration failed that the respondent is still in holding of the applicant's driving license and NIT Certificate which could have let the applicant to apply and get employment somewhere else

f. That, the Commission for Mediation and Arbitration failed to consider the evidence brought by the applicant on his salary being $ 500 per month and not Tshs. 150,000/=

The factual background of the parties' dispute in the Commission was on the complaints by the applicant and another person called Charles G. Minja on unpaid salaries' arrears since December 2014 while fencing a criminal trial of the theft offence of Tshs. 800,000/= vide Criminal Case No. 3 of 2015 in the Resident Magistrate's Court of Arusha at Arusha. The

verdict in criminal case was entered in favour of the applicant on the 21st March 2016. He was thus acquitted while his co-accused was convicted and sentenced to one-year jail. On the respondent's side, it was contended that, the applicant was not paid his salaries due to his absenteeism and that he declined to report to his place of work when he was requested so, that, the respondent still recognizes the applicant as his employee and that both applicant and the said Minja were paid their salaries in terms of Tanzania shillings and not USD as claimed by them.

The Commission ultimately dismissed the complaints on the ground that, the abscondment from work by the applicant and his colleague whilst on statutory bail in respect of the criminal proceeding amounted to misconduct. The Commission was further of the view that, facing a criminal charge by an employee is not an automatic suspension.

Initially, this application was heard and determined in the absence of the respondent. Thus, the ex-parte judgment was eventually delivered on the 16th September 2019 in favour of the applicant. The applicant was therefore awarded his monthly salary from the date of his termination to the date of pronouncement of the ex-parte judgment or if he was truly terminated to the date of a formal termination (the awarded monthly salary

was found to be one hundred and fifty thousand, Tshs. 150, 000/= instead of USD 500 monthly).

Subsequent to the pronouncement of the ex-parte judgment by the court, the respondent timely filed his application for an order setting aside ex-parte judgment, the application which was granted on the 26th May 2021. Immediately after the delivery of the ruling, this application was then ordered to be expeditiously disposed of by way of written submission as it is the backlog case and the same was accordingly filed by the parties' advocates namely; **Mr. Elvaison E. Maro** and **Mr. Shedrack Mofulu** for the applicant and respondent respectively.

Although the applicant has advanced six grounds for the sought revision as depicted herein above but essentially there are only two (2) grounds notably; whether the arbitrator erred in law and fact for his failure to consider other framed issues and whether the arbitrator erred in law and fact for his failure to analyze the evidence before him. The rest of issues are now deemed to have been abandoned as the applicant's advocate abstained from arguing them.

Supporting the application, the counsel for the applicant argued that, the learned arbitrator erred in law and facts for its failure to determine all issues framed and for directing its mind on the issues that were not agreed by the parties and Commission.

As to the alleged failure to consider the evidence for example that of the respondent's sole witness whose essence was that, the applicant and his fellow were still recognized as the respondent's employees and that, the respondent failed to provide safari for the reason that, they absconded. He added that, the arbitrator would make his appropriate decision pursuant to section 27 (3) of the Employment and Labour Relations Act, Cap 366, Revised Edition, 2019 ("ELRA") and that in the circumstances of the dispute he would have made an award of appropriate compensation based on the circumstances of the dispute at hand as per Rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) GN 67 Rules, 67 of 2007.

The applicant reiterated that, the applicant never absconded from the work since he was assigned duties/safari by the respondent through the calls and that he was not permitted by the guards to collects his salaries. He added that the Commission failed to attach weight to the applicant's

exhibits, especially his letters dated 14th May 2015 and 5th June 2015 claiming for payment of his monthly salaries. Supporting his argument, the applicant's learned counsel cited the case of **Cashson Risk Management vs. Rajabu Mlaponi**, Revision No. 15 of 2019 (unreported) where it was held that;

> "Suspension is not dismissal and suspension does not affect the employee's basic rights including salaries. Above all, suspension to an employee facing criminal accusations are correct, but always do not affect his rights of employment including his salaries".

In his response, the respondent's learned counsel argued as follows, that, the applicant did not strictly prove that he was denied access to the work and that he was supposed to immediately report to work after his release on bail. The counsel went on arguing that there was no mandatory requirement to determine each framed issue as wisdom may dictate that one issue or two issues are capable of disposing of the matter or appeal as the case may be. He then urged this court to make a reference to Order xx Rule 5 of the Civil Procedure Code, Cap 33 Revised Edition, 2019 (CPC) and a decision of the Court of Appeal in **Scan-Tan Tours Ltd vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal

No. 78 of 2012 (unreported) where the highest court of the land held that given its finding on the first ground of appeal, therefore it ought not to delve on the remaining grounds.

The counsel for the respondent also argued that; if the contention by the applicant that, he was not given or offered job or works to perform by the respondent was true, it would follow that, the applicant's nature of his employment was specific task, the contract of employment which is not continuous as provided for under section 14 (c) of ELRA as opposed to the respondent's exhibits showing that, the applicant was the monthly salaried employee who was duty bound to regularly report to his place of work. He then embraced his arguments by the decision of this court at Arusha (**Maige**, J as he then was now JA) in **Leopard Tours Limited vs. Honest Peter Kessy and 2 others** (unreported), which according to the learned counsel for the respondent had similar facts with the dispute in question.

Finally, the respondent's advocate submitted that, the case cited by the applicant's counsel, **Cashson's case** (supra) is distinguishable from the current case since in the former case the employees were truly

suspended unlike in our present case where the applicant's suspension is seriously contentious.

In his rejoinder, the applicant's reiteratedly stated that, the applicant was banned from entering his work place via the respondent's notice adding that, the applicant did not abscond and that the respondent did not really trace the applicant since there was no documentary exhibits to substantiate the respondent's assertion that, he traced the applicant. The respondent's counsel further stated that, the applicant was constructively terminated since it is plainly clear that, the work place was made unbearable by the respondent for the applicant to discharge his contractual obligation.

Having briefly summarized the factual background of the dispute between the parties and the parties' rival submissions for and against the applicant's application, I should now proceed determining the applicant's grounds for revision.

As to the 1st ground whether the arbitrator erred in law and fact for his failure to consider other framed issues.

It is trite law that, courts of law are ordinarily required to separately determine each and every issue framed by such courts after they have consulted the parties or and their respective advocates immediately before commencement of trials or subsequent issues framed in the course of hearing unless a determination or finding upon any issue or two issues is sufficient for the determination of the suit or is capable of disposing the matter in at hand (See Order xx Rule 5 of the CPC). This position was rightly demonstrated in the case of **Scan-Tan Tours Ltd vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported), when the Court of Appeal of Tanzania approved the foreign jurisprudence in **Blay v. Pollard & Morris** (1930) IKB 311 where it was held as follows;

> "Cases must be decided on the issues on record, and if it is desired to raise other issues, they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading and in my opinion, he was not entitled to take such course".

This position was also judicially demonstrated by the Court of Appeal in a situation where an appellate court is dealing with grounds of appeal in

Malmo Montagekonsult AB Tanzania Branch vs. Margret Gama, Civil Appeal No. 86 of 2001 (Unreported).

Scanning the CMA's record and the parties' rival submissions, it goes without saying that, the Commission on the 10th March 2016 framed a total of four issues, to wit;

1. Whether the complaints (sic) before the Commission for salaries are premature
2. Whether criminal charges (Criminal Case No. 3 of 2015) at District Court of Arusha at Arusha against the complaints was automatically amounting to suspension
3. Whether the respondent provided safari to the complainants and the complainants absconded for the complainants
4. To what relief parties are entitled

Therefore, it is evidently from the record that, the arbitrator, in his award, erroneously ignored 3rd and 4th issues as he wrongly indicated two issues only for his determination. This is wrong as rightly complained and argued by the applicant. Having indicated two issues in his award, the learned arbitrator consequently determined the 1st issue in affirmative that, the complaints by the applicant and the said Charles Minja were still

premature as they were required to go back to their work place since they were released on bail. The arbitrator further held that the applicant would not be entitled to salaries which he had not work for them unless reason for his absenteeism were explained and accepted by the employer. Equally, the 2nd ground was answered in affirmative on the ground that, the suspension must be proven tendering an employer's letter as opposed to the dispute at hand.

Though in practice, the learned arbitrator was obligated to indicate that, there were four issues framed by the Commission for determination and state in his arbitration award if the 1st and 2nd issues were capable of disposing of the matter and therefore, he was not required to be curtailed by the remaining issues as doing so would amount to wastage of precious time. Nevertheless, when I carefully look at the consequences of the CMA's determination of the 1st and 2nd issue, there was no serious need on the part of the learned arbitrator to embark to answering the 3rd ground since he lucidly held that, the applicant and his fellow were to report to their duty station and give reason as to their absence without notice. For clarity, part of page 6 of the typed award is reproduced herein under;

> "The applicants can complain for their unpaid salaries since December 2014 to date after the respondent has determined their reasons for not reporting to work. Therefore, claims for unpaid salaries are prematurely filed".

In our present dispute, how can the respondent be in position to give the applicant job and his salaries while he was not at his duty station if at all their contract of employments were of specific tasks? The answerer is negative. CMA's holding that, the applicant and his colleague ought to give reason for their absence to their employer, the 3rd issue was therefore, in my considered view, generally determined by the arbitrator together with other issues. Consequently, this ground succeeds to the extent that, the arbitrator wrongly omitted to include the 3rd and 4th issue while composing his award however through his determination of the 1st and 2nd issues, he was not obliged to proceed with the 3rd issue.

As to the 2nd ground, whether the arbitrator erred in law and fact for his failure to analyze the evidence before him

In essence, the applicant was duty bound to establish before the Commission, if he was really suspended by the respondent and if he successfully proved to that effect, he was then justified to pray for an order

of the Commission directing the respondent to pay salaries arrears in his favour while in suspension. That is why the arbitration proceedings before the Commission commenced with the complainants giving their testimonies in instead of the employer as it usually used to be the case. Thus, the applicant owed a duty to prove that he was suspended by his employer, respondent.

Since it is undisputed facts that, the applicant was initially accused with an offence of stealing by servant, arrested and arraigned to the court of law and eventually acquitted and since it is undeniably clear that, before the judgment was rendered on the 21st March 2016 while the applicant had already filed this dispute since September 2015 and that, the applicant was released on bail pending trial of the charge against him since 16th January 2015, the applicant was therefore duty bound to report to his duty station without failure unless prevented by reasons beyond his control which were to be advanced to the employer or that, the respondent expressly prohibited him from reporting to the workplace pending pronouncement of judgment in criminal proceedings or after delivery of the judgment in the criminal proceeding against the applicant, suspension, if referred by the respondent, pending disciplinary proceedings. All these are found to have

not been proven in our case. The letter dated 11th June 2015 (RE2) entails that the applicant would not be given either his salaries and or work to do due to his absenteeism, the letter addressed to the applicant dated 11th June 2015 para.3 reads;

> "We understand very well that you have been accused of stealing by servant and the matter is still pending in the District Court of Arusha. We also understand that having a case in the court of law does not prevent a servant from reporting to work and continue working pending judgment by the court".

In my firm view, the applicant was supposed to give reasons for his absence from his duty station as per the letter above (RE2) followed by the respondent's letter dated 17th July 2015 tendered by the applicant (CE4). Failure of which would not justify him to rush to CMA claiming for unpaid salaries from December 2014 to the date of his referral.

Examining the requirement of Rule 27 (2) of GN. 67 of 2007, it is evident that the applicant was not issued with suspension letter nor was it possible for the respondent to initiate disciplinary proceedings against the applicant while the criminal charge was yet to be finalized pursuant to section 37 (5) of ELRA. Therefore, the applicant cannot be said to have

been suspended justifying him be eligible for being paid his salaries during the purporting suspension. I am alive of the principle of the law that an employee who is suspended is entitled to his full salaries as was rightly and judicially stressed by my learned brother, **Mipawa**, J in **Cashson Risk Management vs. Rajabu Mlaponi**, (supra). However, the decision in the case of **Cashson** (supra) above is distinguishable from the present dispute as correctly argued by the respondent's counsel.

I hold that view simply because the applicant had failed to prove if he was given a suspension by the respondent during criminal prosecution of which he would inevitably be entitled to his monthly salaries. It is my established opinion, that suspension of any employment of an employee must be proved by tangible evidence and not mere assertions by the employee that, the security guards prevented the applicant from entering his duty station. In my considered opinion the wordings of Rule 27 of GN. 42 OF 2007 entail that, there ought to be a suspension letter from the respondent or strong proven directives from him with effect that, the applicant was suspended pending finalization of the criminal charge against the applicant and his co-accused person which is not the case here as the

applicant was, **firstly,** required to report and s**econdly**, required to give reasons for his failure to report to the work place.

I would like to subscribe the decision of this court in **Labour** Revision Application No. 24 of 2016 between **Leopard Tours Limited vs. Honest Peter Kessy and 2 others** (unreported) when this court (**Justice Maige,** J as he then was now JA) dealing with the dispute of the similar situation in which the respondents plainly complained to have been unfairly terminated from their employments by the applicant who seriously maintained that, he did not terminate them, this court held that;

> "Mere denial of entry by a security guard in one day does not amount to termination of contract of by the employer. The respondents would have by themselves or their trade unions asked for formal clarification from the employer as to the status of their employments. In any event, in the absence of a proof of there being direction or approval by the employer, a security guard was not a person capable of terminating the services of the respondent.
>
> It is substituted by an order that the services of the respondents, had as of the date of the institution of the referral, not been terminated, the applicant is ordered to receive them in services and pay their salaries as of

> the date of the institution of the referral. The respondent cannot be paid for the period subsequent to the institution of the referral as in so doing they will be benefiting from their own wrongs"

Assuming that, the present applicant was certainly denied access by the respondent's security guards as per his assertions, yet the applicant had failed to prove if he gave reasons of his absence as required by the respondent's letters (RE2&AE4) referred above. The applicant's failure to make a reply to the respondent's letters requiring the applicant to report to his duty station, sufficiently exonerate the respondent from being held liable for the purportedly alleged constructive termination by the applicant's counsel.

In order to achieve the overriding objective provided by the labour laws that is enhancement of industrial relationship, both an employer and an employee must exercise fairness, trust and integrity towards their contractual employment relationship. The applicant did not at all bother to either report to his work or give reasons of his absence from work as required by his employer. In my view, that is wrong as no one who can benefit from his wrong doing or no an employee who can be entitled to payment of his salaries without working unless it is proven that such an

employee was prevented from working on particular period by sufficient reason (s), reasons out of his control for example being seriously sick and admitted, being detained in a lawful custody so on and so forth.

Nevertheless, I find that, the applicant was entitled to his December 2014's salary since he worked on that period and ½ salary of January 2015 when he was in prison custody till when he was released on bail on the 16th day of January 2015 at the rate of Tshs.150,000.00. Other applicant's salaries, if any, may be claimed in the Commission in the event the same are refused by the respondent after his due process.

In the upshot, this application is dismissed save to the above extent namely; payment of salary of December 2014 and half salary for January 2015 by the applicant. Otherwise, the CMA award is hereby confirmed. No order as to costs is made for an obvious reason that, this matter is a labour dispute where ordinarily costs are exceptionally granted.

It is ordered.

M.R. GWAE
JUDGE
29/11/2021