IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

LABOUR REVISION NO. 23 OF 2021

(Arising out of Labour Dispute No. CMA/KLM/MOS/ARB/22/2020)

ROYNALD GONZALVES ..... APPLICANT

VERSUS

ZARA INTERNATIONAL

TRAVEL AGENCY ..... RESPONDENT

JUDGEMENT

14/12/2021, 22/2/2022

MWENEMPAZI, J.

The applicant has made this application under the provisions of Section 91(1) (a) 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) and 24(3)

(a) (b) (c) (d) and 28(c) (d) (e) of the Labour court Rules of 2007 G.N. No. 106 of 2007 and any other enabling provisions of law. He is seeking for an order calling for the recording of the CMA on the Labour Dispute No. CMA/KLM/MOS/ARB/22/2020 with a view of satisfying itself as to its legality and correctness thereof. He prays this court to revise and set aside the CMA award by Hon. G.P. Migire delivered on the 16th April, 2021. He is of the opinion that the award by the arbitrator is unlawful and irrational.

The application is supported by the affidavit of Caesser A. Shayo who is an advocate representing the applicant. In it the deponent has averred that the applicant was an employee of the Respondent. He was employed and was working as a driver and tour guide of the respondent agency since October, 2003. His employment commenced by an agreement of employment was entered into between the applicant and the respondent on the 1st October, 2003. It was terminated on the 1st October, 2019. According to the applicant the termination was for unfair reasons and procedures.

The Respondent are opposing the application for revision. They duly filed counter affidavit. In the counter affidavit has an averment that the applicant's employment was never terminated and the award which was granted by the Honourable Arbitrator was properly procured, lawful and

rational as the applicant herein failed to prove his case. He absconded from work without any lawful justification.

In the decision of the CMA, it was decided that the applicant sent the case to CMA prematurely before the disciplinary proceedings were concluded. Since he continued to draw salary from November, 2019 to May, 2020 without rendering any service and without going back to work, he is an absconder. He terminated employment himself. He was ordered therefore to refund the Salary received without working. The case was thus dismissed.

This application was scheduled to be heard by way of written submission. Parties complied to an order of the court. The applicant is being represented by Zuhura Twalibu, Advocate and the Respondent has been represented by Joshua Jonas Minja and Peres Seneto Parpai Massada law chambers.

According to the submission by the applicant's counsel, the arbitrator erred in law and facts by deciding in favour of the respondent as the applicant was not given the chance to be heard by the respondent upon the termination. In the opinion of the counsel for the applicant, the CMA award

lacked merit on the basis of the material particulars and evidence presented at the time of hearing. The right of the applicant was ignored as the applicant had the right to a fair hearing before a disciplinary committee from which the respondent and arbitrator violated, hence breach of the fundamental principle of natural justice, the right to be heard.

In the opinion of the counsel for the applicant the applicant was not heard in the disciplinary committee; even if he may be suspended, he ought to be receiving basic wages for the period of suspension. The counsel suggests that under the circumstances, the applicant should be reinstated until applicant's disciplinary case is sorted out.

On the second point, the counsel argues that the termination was tainted with irregularities as he received various instruction at the incidence of the alleged misconduct. The applicant's counsel has a strong view that the respondent has breached the procedure and that she should pay the applicant compensation or the applicant be reinstated.

The respondent has a general argument that the submission by the applicant is baseless, misleading and misconceived. The applicant has failed to prove the facts of the conduct to constitute the contravention of the laws

governing employment. She has cited Section 60 (2)(a) of the Labour Institutions Act. In Section 60(2) (a) it is provided that

> *"In any civil proceedings concerning a contravention of a labour law (a) the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subsection (1) (b) apply;"*

Also, the counsel referred to Section 110 of the Evidence Act, Cap 6 RE 2019 for the principle that the one who allege must prove the allegations.

In the submission, the Respondent has argued that there was no any termination of employment of the applicant and for the point she has referred to the evidence by the applicant himself when he was being cross examined.

The respondent's counsel has also argued that the applicant absconded from work and was not terminated. The term abscondment has been defined in the case of ***Iman Morris Mnziranzinza Vs. I can Go on plus Company,*** Labour Revision No. 364 of 2019 at page 9 where the case of *Moshi University college of cooperative & Business studies Vs. Patrick John Ngwita,*

Labour Division Moshi Revision No. 31 of 2014 (2015) LCCD 1 where Mipawa, J defined it as follows;

> *"Abscondment refers to cases where an employee stays away from work (for) a long time or period but with the clear intention not to continue with employment. This intention being evident from the employee's conduct or communications".*

The applicant absconded from employment he cannot therefore claim to have been unfairly terminated.

The respondent has also argued that since he continued to be paid salary up to May 2020, that means he was not terminated and to buttress the point the respondent has cited the case of *Arusha Meru Secondary School Vs. Francis Laizer & Charles William*, Revision No. 33 of 2018. In the case it was observed.

> *"The respondent submitted that they were orally terminated in December, 2016 but the records at the CMA indicates that they continued to receive their salaries until April, 2017. This court does not see why the applicant would continue paying salaries to employees who were already terminated. It is obvious that by January, 2017 when*

the Respondents filed their claim at the CMA they were not yet terminated and therefore their complaints before the CMA were made prematurely."

It is thus obvious the complaint made at CMA were made prematurely and therefore the arbitrator was right in the award.

The applicant in rejoinder has submitted insisting that there was termination which was not fair. Under the circumstances he has cited section 39 of ELRA which lays the burden of proof to the employer to show that the termination of the employment was fair in conclusion. She prays that the application be granted and the applicant be awarded the remedies prayed for.

I have read the record and am satisfied that I am in a position to determine this matter. First of all, I have no doubt that the applicant was employed by the respondent as a driver. And that on the material date when this dispute came into life, that is on the 1st October, 2019, the applicant was coming from safari as a tour guide and the tyres of the motor vehicle were to be changed and or replaced at the garage. In their practice, wherever a need arose to change and or replace tyres, the applicant would sell the torn

tyres and he apply the money to compensate cost for washing the car. According to the evidence, that was an understanding not incorporated in the contract of employment. The practice was changed this time and the applicant was denied to sell the tyres.

In the exchange of instruction on the question whether the tyres should be sold by the applicant or not, a misunderstanding arose leading to bitter words from the applicant, which allegation has not been proved. In the end, the applicant alleges that one Rahma Adam told him that his service may not be needed given the situation. The applicant was instructed to leave the motor vehicle; he sought permission from DW2 to collect his belonging from the car and left for his home. He did not report at work for almost 8 days and on the 10th October, 2019, he received a letter from Zainabu to report at work.

At the hearing in the CMA the respondents have testified to the effect that the applicant was instructed to leave a car at the garage and he decided to abscond from work. The instructions were issued on the 1st October, 2019 and there is uncontroverted evidence that he continued receiving salary without attending at his work.

According to the evidence by Bernad Sahili (DW1), Lomayani John Mollel, Safari coordinator the applicant was not until when the matter was being heard still an employee of the Respondent. Bernad Sahili was categorical that no formal termination proceedings have ever been commenced and there were only some misunderstandings which had to be sorted out before the applicant could be assigned other duties.

It is clear in the evidence tendered at the CMA the applicant could not heed to any instruction from his superior, though he continued to receive salary up to May, 2020 when the respondent stopped operation due to Covid 19 pandemic. This affected all employee. At this time the applicant also had already made a decision to complain to the CMA. He filed a complaint on 12 December, 2019 and after failure of mediation a reference was made to the arbitration on 19th February, 2020 as shown in CMA F8. After hearing the decision was as shown in this Judgement herein above.

The question is whether that decision is flawed and therefore should be revised. In my opinion, this case was premature as decided by the Arbitrator in the award. It is however, a peculiar case because it is a suspension which is self-imposed by the employee thus not eligible to fit into termination properly so said. However, the employer seems to have

condoned that as she continued to pay salary to the applicant. DW1 and DW2 and even the counsel in this case asserts the employment of the applicant was not terminated. Under the circumstances I think it may validity argue out the need to refund the salary advanced to the applicant as ordered in the award. Once we arrive at the point, with the established circumstances showing there were condensation to the behavior shown by the applicant from the 1st October, 2019.

Having found as I have done, I have a strong conviction that the order to the applicant to refund salary paid from November, 2019 should be set aside; the applicant be reinstated by the respondent and the disciplinary issues be sorted out before further measures (assignment of work or termination) follows. Therefore, the application is granted to the extent explained.

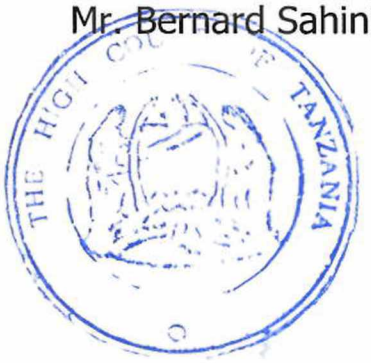
It is ordered accordingly.

Dated and delivered at Moshi this 22nd day of February, 2022

T. M. MWENEMPAZI

JUDGE

Ruling delivered at Moshi this 22nd day of February, 20 in the presence of the applicant in person; Ms. Zuhura Twalibu, advocate for the applicant and Mr. Bernard Sahini, Human Resource Manager of the respondent.



T. M. MWENEMPAZI

JUDGE