

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 3 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARB/220/2016)

BETWEEN

AJABU ADVENTURE LIMITED.....APPLICANT

VERSUS

JOSEPHAT JUSTINE GENDA.....RESPONDENT

JUDGMENT

16/05/2022 & 18/07/2022

GWAE, J

The applicant, Joseph Justine Genda is dissatisfied with the award procured by the Commission for Mediation and Arbitration (CMA) in favour of the respondent by holding that, the respondent was constructively terminated and therefore the applicant was ordered to pay the respondent 12 months' compensation for unfair termination, his salary arrears for 9 months and other terminal benefits.

The applicant is now before this court seeking an order of the court revising proceedings, orders and the award delivered on 07th December 2020 and make such orders it deems fit. The application was supported a

sworn affidavit of the counsel for the applicant, Mr. George Stephen Njooka. The application is based on the following complaints;

- a) That, the arbitrator erred in law and in fact for holding that the respondent was constructively terminated.
- b) That, the arbitrator erred in law and in fact for holding that the respondent was forced to resign.
- c) That, the arbitrator erred in law and in fact for holding that the respondent was suspended.
- d) That, the arbitrator erred in law and in fact by his failure to properly assess and evaluate the evidence tendered before it, leading to wrong findings.
- e) That, the arbitrator erred in law and in fact for considering matters which were not part of the proceedings.
- f) That, the arbitrator award has occasioned miscarriage of justice to the applicant.

The application was opposed by the respondent's counter affidavit where it was stated that the respondent's contract had not expired and that, he never absconded from work. The respondent maintained that the reliefs granted to him were reasonable.

Brief facts giving rise to the parties' dispute are such that; the respondent was an employee of the applicant at the position of a driver guide from 27/09/2011 for six months' period renewable at the employer's option. However, parties' contracts kept being renewed automatically till 05/04/2016 when the respondent wrote his resignation letter. It was the respondent's allegation that, he was constructively terminated by his employer, applicant as he was orally suspended and he was not given his salaries.

On the other hand, the applicant alleged that, the respondent absconded from work from June 2015 up to 5/04/2016 when the applicant received a resignation letter from the respondent.

At the hearing, the applicant was represented by Mr. George Njooka the learned counsel, the respondent on the other hand was under the representation of Mr. Herode Bilyamtwe, personal representative. The revision was ordered to argued by way of written submissions which I shall consider while disposing this application.

After reading the application, the parties' submissions together with the record from the CMA, the main issue to be determined by this court is whether the trial arbitrator was justified to hold that the respondent was constructively terminated. It should be noted that, this is the second

time, I am determining the applicant's revision after this court had ordered for the re-trial of the parties' dispute as the evidence on record was very scanty to enable the court determine parties' rights. It was observed that, the respondent herein established that he was constructively terminated while on the other hand the applicant alleged that the applicant absconded from his work place, however all these allegations were found to be mere assertions with no tangible evidence to assist the court to reach into a just and fair decision. Therefore, an order for re-trial was issued through the assistance of their advocates to sufficiently prove the alleged facts.

Unfortunately, as observed from my reading of the proceedings of the CMA, this court is saddened as the evidence is not so far from the previous proceedings of the CMA as the parties' evidence is still insufficient to prove the facts alleged by the parties. The respondent herein alleged that he was constructively terminated, he stated that his employment was made intolerable by the applicant as he was orally suspended from work without being paid his salaries until when he decided to write a resignation letter.

On the other hand, the applicant denied to have suspended the respondent and alleged that it was the respondent who absconded from

his working place and therefore he is the one who breached his own employment contract.

Looking at the parties' allegations, as already stated earlier on by this court they need sufficient evidence to prove or disprove what has been alleged by each party. It is very dangerous to determine the rights of the parties on mere speculations, the respondent's termination could have indeed been made intolerable by the applicant, but this court finds it difficult to hold so as there is no proof that he was suspended from his working station by the applicant. Even if this court is to assume that the respondent was orally suspended but this court expected the applicant to bring a witness from his fellow working mates to substantiate that the alleged fact that, he was not attending to his working station and that he was under suspension. It is my considered view that suspension must be in writing.

The applicant's allegation is that, it was the respondent who breached his employment contract by absconding from his working station however there is no any evidence from the employer showing that the respondent was not attending to his work place, the applicant ought to have also produced even the attendance register (duty roster) to substantiate that

the assertion the respondent has been absent for all the days. However, this fact is not contentious,

It should be noted that constructive termination is governed by section 36 (a) (ii) of the Employment and Labour Relations Act Cap 366 Revised Edition, 2019 reading together with rule 7 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42/2017. However, in cases where an employee has alleged termination on constructive reasons the burden to prove shifts to the employee to prove that, the employer has made his employment intolerable. Case laws have also set some tests to be proved by an employee who alleges that, there was constructive termination. The Court of Appeal of Tanzania in the case of **Kobil Tanzania Limited vs Fabrice Ezaovi**, Civil Appeal No. 134 of 2017 (unreported), adopted the questions posed in the cases of **Katavi Resort vs. Munirah J. Rashid** [2013] LCCD 161 and **Girango Security Group vs Rajabu Masudi Nzige**, Labour Revision No. 164/2013 where the questions are as follows;

- 1. Did the employer intend to bring the employment relationship to an end?*
- 2. Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?*

- 3. Did the employer create an intolerable situation?*
- 4. Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*
- 5. Was the termination of the employment contract the only reasonable option open to the employee?"*

The respondent in this matter was supposed to have answered the above questions in affirmative so as to prove that there was constructive termination. Unfortunately, as the evidence before the CMA is insufficient to prove that he was constructively terminated, this court cannot rely on the mere assertions by the respondent to determine the rights and obligations of the parties.

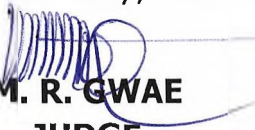
As long as the parties had already been given a second chance to prove their case but they had failed to do so, I am therefore not afraid to hold that the respondent in this case has failed to prove his case that, he was constructively terminated by the applicant. If this type of complaints founded on the constructive termination will be considered in favour of employees it is likely to jeopardize employers and their business arena since it is easier for an employee to abscond from his or her work place for the reason best known to him or whenever he or she secures another employment and immediately

thereafter he or she issues a resignation letter followed by a reference of the dispute to the Commission on the pretence that he or she was constructively terminated from his employment. The courts of law should always be alerted of that danger.

As alluded herein, I unhesitatingly hold that, this application succeeds as explained above. Consequently, the award of the CMA is hereby quashed and set aside. Each party to bear his or her costs of this application and those in CMA.

It is so ordered.

Delivered and dated this 18th July, 2022



M. R. GWAE
JUDGE
18/07/2022

Court: Right of appeal to the Court of Appeal fully explained



M. R. GWAE
JUDGE
18/07/2022