IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 28 OF 2021

(Originating from Labour Dispute No. CMA/ARS/MED/637/2020)

YAHAYA MWINYI.....APPLICANT

VERSUS

TANFOAM LIMITED.....RESPONDENT

JUDGMENT

29/11/2021 & 28/02/2022

GWAE, J

The applicant, Yahaya Ramadhani Mwingi has brought this application for revision under provisions of the Employment and Labour Relations Act, Chapter 366, Revised Edition, 2019 and Labour Court Rules, GN 106 of 2007. He is praying to have the decision of the Commission for Mediation and Arbitration of Arusha (CMA) dismissing his application for condonation on the 23rd April 2021 quashed and set aside.

Seemingly, the applicant was dissatisfied with the termination of his employment by his employer, Tanfoam Limited via the respondent's letter dated 29th July 2020 which considered the applicant's absence from work

place from 6th June 2020 to 29th July 2020. On the 16th December 2020 the applicant opted to the filing of the application for condonation in the Commission.

According to the sworn applicant's affidavit supporting his application for extension of time and as appearing in his form for condonation, the applicant's delay was of five (5) months (5 months' lateness) and the reason given was his failure to file the dispute within thirty (30) days from the date of the termination as stipulated under Rule 10 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. 64 being that, he was still under police investigation to the date of filing and that he was required to daily report at police station Adding that, to date he has not been not charged before any court of law.

The CMA's records further that, the applicant's termination of his employment via termination letter dated 29th July 2020 was due to the alleged abscondment or absenteeism from 6th day of June 2020 whereas the respondent in her counter affidavit strongly opposed the application by stating that, the applicant was **not** under any further police restraint since he was granted bail, thus he was not prevented from filing his complaints within the prescribed period.

The Commission mediator finally held that, the applicant had failed to explain what he was doing from the date he was terminated, investigated up to the date he filed his application for enlargement of time within which to refer his dispute to the Commission out of time. The mediator accordingly dismissed the applicant's dispute which was prematurely filed. Equally, the application for condonation.

Aggrieved by the CMA's decision, the applicant filed this application for revision equipped with mainly one ground to wit; that the mediator erred in law and fact for his failure to consider the evidence adduced before him as a result he arrived at erroneous decision.

When this application was called on for hearing, the parties' advocates namely, Mr. Richard Manyota and Mr. Andrew Maganga appeared and sought and obtained permission of the court to argue the application by way of written submission

Supporting the applicant's application, Mr. Manyota argued that it was prudent for the respondent to terminate the applicant's employment while she was the one who moved the legal machinery for the applicant's arrest and detention.

Vehemently resisting this application, the learned counsel for the respondent argued that the Commission was justified to hold that the applicant failed to give sufficient cause as he did not prove if he was under police custody from 19th July 2020 to 10th December 2020. According to the respondent's counsel, the applicant's assertion that he was in police custody ought to have substantiated by tangible evidence including an affidavit and other pieces of cogent evidence. The counsel went further to urge this court to make a reference to its own decision sitting at Mwanza (**Tiganga**, J) in **Amos Nkakyaga vs. Grumet Fund,** Revision No. 94 of 2020 (unreported) where it was held

> "For reason the arbitrator was justified by finding that the applicant was supposed to account for all the days delayed which the applicant does not dispute that he failed to account especially the days he was not remand"

The respondent's advocate further argued that, the contention by the applicant that police investigation against him resulted into his psychological sufferance, ought to be in his affidavit and not in written submission nor can it stand as a ground for the application for extension of time. He fortified his submission by a judicial decision in **Naibu S. Balozi vs. Dainken Tanzania Limited**, Misc. Application No. 18 of 2012 (LCCD 2014 at page 25.

Now, it is for the court's determination on, whether the mediator was justified in holding that, the applicant had not accounted for the delay from when he was terminated and investigated up to the date, he filed his application for enlargement of time within which to refer the dispute to the Commission out of time

Under Rule 11 (2) and (3) of the Labour Institution Mediation and Arbitration Rules, GN. 64 of 2007, in order the applicant's application for condonation to be granted, the applicant was to do the following; **firstly**, to demonstrate decree of his lateness, **secondly,** to give reasons for his lateness, **thirdly** to exhibit any prejudice and **fourthly,** exhibition of any other factors.

The position for applications for extension of time in order to refer a dispute or an application for revision in labour disputed is not different from applications for extension of time in ordinary civil cases within which to file an appeal, or filing an application out of time or a notice of appeal out of the prescribed period for instance in the case of **Tanga Cement Ltd v. Jumanne Masangwa,** Civil Application No. 2001 (unreported), where the Court of Appeal held;

> "What amount to sufficient cause has been defined. From cases, a number of factors have to be taken into account, including whether including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant"

See also **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania (unreported-CAT)** and **Stephano Mluge vs. 21st century Textiles Ltd,** Revision No. 59 of 2020 (unreported-H.C)

In our instant dispute, the applicant's delay is glaring of 139 days (29th July 2020 to 16th December 2020 and not five months as wrongly indicated by the applicant in his both affidavit and application form. I am holding so simply because the respondent terminated the applicant's employment through the termination letter dated 29th July 2020.

The delay of 139 days is intensely inordinate delay which ought to have pertained with sufficient explanation by the applicant. In our case the main cause for such a long delay of filing the dispute as depicted in the applicant's affidavit duly filed in the Commission on the 16th December 2020 is and was the applicant was being under police investigation.

I am sound of the principle that no employer who is entitled to terminate the contract of employment while an employee is facing a criminal charge as envisaged under section 37 (5) of the Employment and Labour Relations, Cap 366, Revised Edition, 2019 (See also **Stella Manyah and another vs. Shirika la Posta** Labour Div. Reference No. 2 of 2010 reported in Labour Court Digest 2013).

In our present dispute, the applicant is found contending that he was and still under investigation, but that alone in my view did not prevent him from reporting to his office. However, no tangible evidence to support the applicant's assertion that there was still a pending criminal case till 16th December 2016 or the investigation is still going on. The applicant ought to substantiate his assertions by appending an affidavit from police authority to that effect and or evidence that he was prevented from entering his work place.

Even by assuming that, the applicant was required to regularly report to police for investigation purposes, yet I am not satisfied if the police could put him under restraint for all working hours from 19th July 2020 to 15th December 2020. Since it is evident from the applicant's affidavit that he had been under police investigation from 3rd June 2020 to the date of filing the

application in the Commission but this averment being strongly opposed by the respondent who contended that the applicant was neither under detention nor was under police restraint that would have prevented him from filing the dispute on time (See para.5 of the respondent's counter affidavit filed in the Commission). Had the applicant been able to establish that he was under detention or police restrain for such a long period, the finding of this court would turn down the decision of the Commission.

More so, there is no apparent point of law as rightly observed by the mediator. Having observed as herein, the applicant is found to have clearly not been diligent and serious and above all he has failed to account for such inordinate delay from 29th July 2020 to 16th December 2020.

Before concluding composing this judgment, I find it worth noting that, it was not proper for the mediator to dismiss the applicant's dispute which was merely appended on the ground that it was filed out of the prescribed period (thirty days). I am of that thought for an obvious reason that, the applicant was yet to file the labour dispute that is why he filed his application for condonation in order that if his application was granted, it would follow that, the appended Referral Form ought to have been considered as an appended document like a proposed Memorandum of Appeal in an

application for leave extra and not treating it as having been filed out of the time.

It follows therefore admitting Referral Form No. 1 before condonation is unprocedural though it seems to a usual practice of the Commission to admit Referral Forms No. 1 whose disputes need to be condoned, that is absolutely wrong save that it operates as annextures appended to the applications subject of being admitted immediately after grant of the sought extension of time.

Consequently, the applicant's application for revision is devoid of merit, it is entirely dismissed. No order as to costs is made since the same is neither vexatious nor frivolous.

It is so ordered

M. R. GWAE
JUDGE
28/02/2022