IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO. 84 OF 2021

(Originating from Commission for Mediation and Arbitration Application No. CMA/ARS/ARS/23/2021)

MARTIN FABIAN SIMON.....APPLICANT

VERSUS

ZAYN TRADERS.....RESPONDENT

Date: 05/10/2022 & 11/10/2022

BARTHY, J

JUDGMENT

The Applicant, Martin Fabian Simon, moved this Court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in Employment Dispute No. CMA/ARS/ARS/23/2021. The application is made under the provisions of the Labour Court Rules, G.N. No. 106/2007 and the Employment and Labour Relations Act, No. 6 of 2004 and supported by an affidavit sworn by the Applicant.

The Applicant lodged Employment Dispute No. CMA/ARS/ARS/23/2021 at the CMA against his employer, the Respondent claiming for unfair termination and all the entitlements in accordance to the laws. After the hearing, the CMA decided that the application was pre maturely filed and the same was dismissed.

Brief background drawn is that, the applicant was employed orally by the respondent on 02/2/2006 as sales person until 18/11/2020 when he stopped him from working due to his old age.

Following the termination, the applicant referred the matter to CMA where it was decided that the application was prematurely filed as the respondent did not terminate the applicant rather, he absconded from work without notice.

During the hearing of this revision, the applicant was represented by Mr. Salvatory Mosha, learned Counsel while the respondent enjoyed the legal service of Ms. Flora Okambo the learned Counsel. The hearing proceeded orally.

Arguing in support of the application, the applicant submitted that, he knew the respondent way back in 1994 before he started working for him in the year 2006. He added further that a dispute arose on 7/11/2020, then on 18/11/2020 he told him to stop working due to his old age.

The applicant filed a claim before CMA which was dismissed for being premature. Aggrieved with the CMA decision he knocked the door of this court armed to seek the award to be revised.

On the respondent's side Ms. Flora Okombo the learned counsel argued that, the applicant was not terminated from his work but he left on 03/12/2020 after taking advance salary Tsh. 100,000/- He was never heard of until he filed a complaint at the CMA.

She added that the applicant filed defective form F1 before the CMA stating he was working in the organization while the respondent was not the organization. She further argued that, in the said form it was not clear

who is the complainant and who is the respondent. Thus, she prayed the application to be dismissed.

In the rejoinder submission, Mr. Mosha the counsel for the applicant reiterated that the applicant was unfairly termination and the respondent was duty bound to prove that the said termination was fair and the duty was not casted to the applicant. He made reference to Section 37 (2) (a) (b) and (c) of the Employment and Labour Relation Act, No. 6 of 2004.

Addressing the issue of CMA F1, he argued that, if the same was defective the respondent ought to have raised it before the CMA and not at this stage. In addition to that, he stated that Form F1 was clear as to who is the complainant and if there were any irregularities, then it did not occasion any injustice.

To conclude, he maintained their prayers that the applicant was unfairly terminated and he deserved to be compensated.

Having heard the rival submissions from both parties and venturing on the records of this matter, this court before addressing the issue pertaining to this application, it is best in outset to point out that the respondent's counsel had brought up on the irregularity of CMA F1, that was used to institute the matter before the CMA. The applicant on that issue had responded that, the respondent ought to have raised it before the commission for the same to be ascertained. He added that, even if there was irregularity but it did not occasion any injustice.

The court should not dwell much on this issue as it was not properly raised before this court or being deposed on the pleadings before this court. The court is only bound by the pleadings filed by the parties. See the case of **Temeke Municipal Director v. Nixon Njolla and Another**, Revision

No. 564 of 2019, High Court Labour Revision, at Dar es salaam (unreported).

Having that being said, in this matter the issue to be addressed by this court is;

(i) Whether the CMA failed to evaluate the evidence on record as a result it arrived at erroneous award.

(ii) What reliefs are the parties entitled to

To begin with the first issue, where the applicant is faulting the decision of the CMA to have been unjust for holding that the matter was brought prematurely instead of finding that the applicant was unfairly terminated. Whereas, on the respondent's side they find CMA was proper as the applicant was not terminated by the respondent, but he left work after he took salary advance.

From the arguments of both sides, it is not in dispute that the applicant was employed by the respondent. The time of employment differs according to the argument of each side as reflected in the records of CMA. The common factor from both sides is that the applicant has worked with the respondent for more than twelve months and there was no formal contract of employment. Under Rule 10(4) of the Employment and Labour Relations (Code of Good Practice, Rules GN No. 64 of 2007 the period of a probationary employee is not more that 12 months.

According from the argument and evidence on record of CMA, the applicant claimed to have been dismissed from work, whereas the respondent claimed the applicant had absconded to go to work after receiving advance salary payment.

In labour matter, the employer is duty bound to prove that the termination of the employee was fair and justified. Section 37 (2) of the Employment and Labour Relation Act, Cap 366 R.E 2019 provides for factors to be considered for fair termination.

The award of the CMA was that the applicant was not terminated from work. For that reason, the matter was pre-maturely instituted. But the applicant had stated that the respondent had told him his brain got old and he was not useful, then he was stopped to enter the office premises.

Since the burden of proof lies to the employer who is now the respondent, on her side she claimed the applicant absconded from work. However, she insisted the applicant was not terminated from work. The only proof he had was the petty voucher to show the applicant had obtained advanced loan and then absconded from work. It was not made clear as to what made the applicant just abscond from work without any reason.

Despite the fact that there are no sufficient facts or evidence to prove matters alleged by the parties. But what is generally gathered is that, whether the applicant had absconded from work or not but his employment condition was made intolerable by the respondent. Which had either been a reason for his termination or forced to terminate his employment.

In either of the circumstances, the respondent denies to have terminated the applicant from work. Since the law has casted the burden to the employer to prove termination, whereas in this matter the employer refused to have terminated the employment. The respondent had no proof of abscondment by the applicant.

In the circumstances, the court therefore has to verify if there was no constructive termination of employment. In proving constructive termination, the employee will be required to prove the same in a set of questions as stated in the case of **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161 where the questions are;

> *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 created intolerable situation?*
>
> *4. Was the in tolerable 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?*

It is clear that if you go through the set of questions above, with the available evidence from the record of CMA, it is not easy to determine there was constructive employment termination to the applicant, as there is no sufficient evidence to prove the same. There is also no evidence to prove the applicant was terminated by the respondent.

Therefore, the court finds that the applicant was not terminated in accordance to the provision of law and the respondent had denied to have terminated her employment.

Considering the relation of the parties in this matter, having in mind the provision of section 40(3) of the Labour and Employment Relations Act, 2004, the respondent is therefore ordered to reinstate the respondent

with immediate effect. Should the respondent decide not to reinstate the applicant, she should pay him compensation of twelve months salary,

That being said and done, the application has partly succeeded to the extent the award is revised as shown above.

It is so ordered.

DATED at **ARUSHA** this 11th day of October, 2022.

G.N. BARTHY
JUDGE
11/10/2022