

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT ARUSHA**

REVISION NO. 94 OF 2021

*(Originating from Commission for Mediation and Arbitration Application No
CMA/ARS/ARS 217/2021)*

ALLY DYAMBALAAPPLICANT

VERSUS

GREAT NORTH SERVICE STATION LTDRESPONDENT

JUDGMENT

08/09/2022 & 13/10/2022

KAMUZORA, J.

The Applicant brought this application under the provision of section 91(l)(a) or (b) and (2)(a) or(b)or(c), 94(1)(b)(i) of the Employment and Labour Relations No 6 of 2004 and Rule 24(1) 24(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(l)(a)(b)(c)(d)(e) of the Labour Court Rules, 2007, GN No. 106 of 2007. The Applicant is seeking for the revision of the ruling of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/217/2021 dated 30th August 2021 and the decision of this court to quash and set aside the said ruling.

Briefly, the Applicant was employed by the Respondent as a head mechanics from 01/02/2014. It is the Applicant's complaint that on 30th May 2021 he was verbally terminated from his employment contract for unknown reasons. The Applicant decided to file a complaint at the CMA claiming for unfair termination of his employment contract whereas the Respondent raised a point of preliminary objection that the dispute was prematurely filed. The CMA upheld the objection on account that, the Applicant was not terminated from work and ordered the Applicant to exhaust all internal remedy before he could file his referral. The complaint was therefore dismissed for being prematurely filed.

Discontented by the CMA ruling, the Applicant preferred this current application which was supported with an affidavit sworn by the Applicant himself. In the chamber application, the Applicant prays for this court to revise the CMA proceedings and ruling there to dated 30th August 2021 and quash the order of the CMA directing the Applicant to exhaust internal remedy before filing his referral. The application was strongly opposed by the Respondent through a counter affidavit sworn by Charles Mlay the Principal Officer of the Respondent.

The Applicant raised the following legal issues for determination: -

- 1) *That, the trial commission erred in law and in fact by dismissing the Applicant's complaint CMA/ARS/ARS/217/2021 prematurely referred before the Commission for Mediation and Arbitration.*
- 2) *That, the trial commission erred in law and in fact by ordering the Applicant to exhaust all internal remedy before refiling the matter to the commission.*
- 3) *That, the trial commission erred in law and in fact by failure to evaluate the evidence adduced by Applicant hence pronounce infecundus order.*
- 4) *That, the mediator failed to draw a line between suspension and unfair termination.*

The Applicant appeared in person while the Respondent enjoyed the service of Mr. Edwin Silayo a learned advocate. Hearing of the application was by way of written submission and both parties filed their respective submissions as scheduled.

Arguing in support of the application the Applicant submitted that, he was unfairly terminated by the Respondent on 05/05/2021. That, the Applicant received a letter from the Respondent which granted him one month leave so as to give room for the Respondent to conduct an inquiry following the loss of spare parts. That, after the lapse of the leave period the Applicant returned to his office to continue with his activities on 03/06/2021 but was orally prohibited by the Respondent from continuing with his activities. That, the Applicant approached the

Legal and Human Right Centre (LHRC) which wrote to the Respondent requesting to know the status of the Applicant's employment. That, the Respondent replied that, the Inquiry was not yet completed at the time the Applicant returned from leave hence they asked the Applicant for more time to conduct the investigation. That, the letter also informed the Applicant he could be heard in writing and explain on his allegation. That, on 12th June 2021 the Applicant wrote to the Respondent on the allegation but there was no any further response from the Respondent hence the matter was referred to the CMA.

The Applicant contended that, the CMA was bias as it did not consider the evidence by the Applicant regarding his work, status and unfair termination. That, after the CMA issued its ruling, it was when the Applicant was issued with a summons by the Respondent to attend to the disciplinary hearing on 10th September 2021 but the Applicant did not sign or attend the same believing that he was heard through a letter dated 12th June 2021.

The Applicant was of the view that, it was wrong for the CMA to rule in favour of the Respondent without considering all the circumstance explained by the Applicant who was out of work for more than six months without knowing his status and having a family and

needs to satisfy. To cement on his submission the Applicant referred section 31(8), 40(1) of the Employment and Labour Relation Act [Cap 366 R.E 2019] and prays that, the decision by the CMA be revised.

Responding to the Applicants submission Mr. Silayo argued that, the Applicant's employment contract was not terminated but rather suspended with full payment pending the conduct of an investigation. That, it was the Applicant's duty to prove that he was terminated and in support of the this the counsel cited the case of **Irene Julius Kakubebe Vs. Fem Security Services Company**, Revision No. 178 of 2019 HC DSM (Unreported), **Attorney General Vs. Maria Mselemu**, Labour Revision No. 270 of 2008. He contended that, during the suspension period the Applicant was paid his salaries and other lawful entitlements as an employee and after the investigation was completed on 08/09/2021 the Applicant was summoned to appear to a disciplinary committee.

Responding to the issue of bias the Respondent's counsel submitted that, the same have to be proved by evidence to support such allegation on how the CMA was biased. He urged this court not to consider such allegation and referred the case of **Minister for Migration and Multicultural Affairs Vs. Jia Legend** (2002) 205 CLR 507 which was

cited in the case of **Mucoba Bank Pls Vs. Herry Bwende**, Labour Revision No 32 of 2017 HC at Iringa.

On the claim that the Applicant has family and needs to be fulfilled the counsel for the Respondent submitted that, the Applicant was paid his salaries and other entitlements and the Respondent was correct to conduct investigation on the allegation against the Applicant. He insisted that, there was no termination of the Applicant's employment contract and the Applicant had disobeyed the Respondent's summons to appear for disciplinary hearing. He maintained that, the complaint was prematurely filed before the CMA thus prays that the application be dismissed.

Upon a rejoinder submission, the Applicant reiterated his submission in chief and insisted that, he was terminated from his employment after he returned back to work after the leave period ended. He was of the view that, it is the duty of the Respondent to prove that the termination was fair according to Section 39 of the Employment and Labour Relation Act (Cap 366 R.E 2019). That, the trial mediator failed to award compensation for unfair termination as well as notice, severance pay, salary arrears and annual leave as required under section 40(1), 31(8) of the Employment and Labour relations Act Cap 366 R.E 2019.

I have considered the records of the CMA, the application and submission by both parties. From the analysis of the record, there is no dispute that the Applicant was employed by the Respondent in the position of a head mechanics. What is in dispute is whether the Applicant was terminated from employment before he referred the dispute to CMA. The Applicant claim that he was orally terminated by the Respondent but the Respondent on his part claims that, the Applicant was not terminated from his employment rather suspended pending investigation of the allegations against him. In determining whether the Applicant was terminated from his employment or not, this court will be guided by the records.

The records show that in the CMA FI, the Applicant claimed to be terminated on 30th May 2021 for unknown reason. The Respondent raised a preliminary objection and claimed that the Applicant was not terminated but he filed the claim prematurely.

During the hearing of the preliminary objection the Respondent submitted that, the Applicant took leave so that he can give a room for the investigation to be conducted and he was still receiving his salary and other entitlements hence, it was not proper for the Applicant to prefer the dispute to the CMA while he was yet to be terminated. The

Respondent insisted that, as the Applicant was still being paid his salary and other employees benefits it cannot be said that he was terminated as there cannot be termination if the employee is receiving salary. While responding to the preliminary objection the Applicant did not deny the fact that he was being paid salary but he raised an issue that his salary was not paid in full as he was informed that it was deducted to cover the stolen spares. He also stated in his rejoinder submission to this application that he was out of work from May 2021 and he was paid his salary up to August 2021 and thus believe that he was terminated.

It is in record that the dispute was referred to CMA on 21st June 2021 and but that time the Applicant was still receiving salary up to August 2021. The decision of the CMA was made on 30th August 2021 and the Applicant claim that he was summoned to attend disciplinary hearing but he refused. We all know that, full salary or half salary cannot be paid where the employment contract is terminated. With the above record, the Applicant filed a dispute while he was still paid his salary and the same was paid until when he was summoned for disciplinary hearing and deliberately opted not to attend. It is my considered view that, at the time the Applicant lodged a complaint at CMA he was not terminated from employment. I therefore agree with

the CMA conclusion that, the dispute was prematurely filed at the CMA before the Applicant could exhaust all internal remedy as required under the law.

In the upshot, the CMA was correct to hold that the Complaint filed before it was premature. I therefore find no merit in this Application, I proceed on dismissing the same but in considering that this is a labour dispute, I make no order as costs.

DATED at **ARUSHA** this 13th day of October 2022




D.C. KAMUZORA

JUDGE

