

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. LABOUR APPLICATION NO. 15 OF 2021

(Arising from the ruling of the Commission for Mediation and Arbitration of Shinyanga in Labour Complaint No. CMA/SHY/230/2020, A.D Kiwara, Arbitrator, dated 4th May 2021)

G4S SECURE SOLUTIONS(T) LIMITED.....APPLICANT

VERSUS

1. PETER STEWART MISAMBO.....RESPONDENT

2. EMANUEL ANYITIKE MWAKANJUKI..... RESPONDENT

JUDGMENT

26th August & 28th October 2022

MKWIZU, J.:

This court is through this revision invited to call for and revise the Commission for Mediation and Arbitration's (CMA) award in Labour Dispute No. CMA/SHY/230/2020 dated 4th May 2021 in which the two respondents' employment termination was declared unfair both substantively and procedurally awarding them their respective benefits including the notice pay, leave, subsistence allowances, 12 months' salary, salaries of the remaining period of the contract, and salary arrears for the months of July and August.

Aggrieved by the Commission's decision, the Applicant has approached this Court through a revision application seeking to impugn the award with a supporting affidavit raising six issues namely:

a) The award is tainted with illegality on the face of the records

- b) The Arbitrator erred in law and in facts for holding that there was unfair termination of Respondent's contract while the Respondent was under the Retrenchment process.*
- c) The Arbitrator erred in law and in facts for awarding the Complainants/Respondents compensation pursuant to section 40 (1) (c) of the Employment and Labour Relations Act Cap 366 RE 2019 which remedy is for unfair termination claims.*
- d) That the trial Arbitrator erred in law and in facts for ordering payment of 12 months' salary while the said contract was terminated on retrenchment process.*
- e) That the Arbitrator erred in law and in facts for failure to assess and/or analyses the evidence both oral and documentary tendered by the Applicant henceforth reached a wrong final decision*
- f) That the Arbitrator proceeded to determine the matter which was time-barred in absence of condonation.*

The Application was opposed through the Respondent's counter affidavit and written submissions filed by their advocate Ulisaja Kabisa from Clarity Law Chambers and Advocate.

The hearing of the matter was conducted through written submissions. Both parties were able to file their respective submissions, and I thank them for their industrious submissions which will assist the court in determining the matter.

Submitting in support of the revision, advocate Agricola Evarist for the Applicant said, the respondent's claim is wrongly preferred as unfair termination for they were employed under a fixed-term contract attracting

a breach of Contract claim. That the CMA was misguided by the respondent's claim resulting to an erroneous decision. He referred the court to the case of **Evagreen Mumba & Others vs New Bantu Morogoro Security Guard Ltd**, Revision No. 15 of 2018 citing the case of **Mtambua Shamte & 64 Others vs Care Sanitation and Suppliers**, Revision No. 154 at Dar es salaam (unreported) insisting that, the claim if any by the respondents would have been for a breach of contract and not unfair termination as asserted.

The counsel also blamed the arbitrator for holding that there was unfair termination while the respondents were properly retrenched from employment pursuant to Rule 23 of the Employment and Labour Relations (Code of Good Practice) 2007 Rules G.N 42 of 2007 and sections 37 (2) (ii) and section 38 of Employment Labour Relations Act (Cap 366 R.E 2019) necessitated by the unforeseen event after termination of the Applicants service by the tender provider Barrick Mines at Bulyanhulu Gold Mine.

Speaking of the procedural steps taken during the alleged retrenchment process, Applicant's counsel said, Respondents were on 14/07/2020 issued with the notice of intention to retrench and an invitation to consultation. They signed the attendance register on 15/07/2020 and the retrenchment agreement on 24/07/2020 followed by the issuance of the confirmation letter of retrenchment and payment of their statutory payment. He on this point cited to the court the case of **Terevael M. Ngalami vs Kampuni ya Simu (T) TTCL**, Civil Appeal No. 158 of 2017, CAT at Dar es salaam (unreported).

Regarding the complaint over the compensation awarded pursuant to section 40 (1) (c) of the Employment and Labour Relations Act by the arbitrator, on ground three of the revision, the Applicant's counsel said, such a remedy is for unfair termination and that since the termination of the respondent's employment was fair then, the applicant's claim was wrongly granted. And even if the termination was to be regarded as unfair, still the arbitrator was to consider the nature of the employment contract where the respondents were to claim for unpaid salaries and not payment of 12 months' salaries. He again supported his ground with the case of **Evagreen Mumba & 5 Others** (supra).

On the fourth ground, the arbitrator was also faulted for not assessing both oral and documentary evidence tendered by the applicant. The Counsel said, had the arbitrator properly considered the evidence, he would have realized that the nature of the respondent's employment contract, (that of the fixed term contract) attracts a breach of employment contract claim and that their contract was only reliant on the tender issued by the Barrick Mine linked to all Gold mining owned by Barrick Mines including Bulyanhulu Gold Mine whose termination necessitated the retrenchment which was consented to by the respondents.

He lastly challenged the arbitrator's award for being engendered from a time-barred dispute without condonation. He relied on rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007, which provides a period of 30 days to file a labour dispute counted from the date of the employer's last decision to terminate. He was of the

view that the respondent's dispute referred to the Commission on 02/10/2020 after the final decision of the employer done on 28/8/2020 was time barred and therefore respondents were required to first seek invocation of rule 11 of the labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007 before the claim is determined on merit. He finally urged the court to allow the application.

In response, respondents were clear that their employment contract with the applicant was for one year starting from 19/06/2018 with a reasonable expectation of renewal and that the termination was effected in 2020. They contended that failure to renew a fixed term contract on the same or similar terms amounts to termination of employment as per section 36 (a) (iii) of the Employment and Labour Relation Act Cap 366 and the decision in **G4S Secure Solution (T) LTD vs Japhet Manumbu**, Labour Revision No. 77 of 2020 at page 3.

They stressed that the applicant has failed to prove the validity and fairness of their termination contrary to the provisions of section 37 (1) ELRA Cap 366, and therefore the arbitrator's award is justified.

Speaking of the reasons for termination in ground two, the respondents said, no valid reason for termination was availed to the Commission as the tender termination notice was for the tender of North Mara Gold Mine as evidenced by annexure G4S-2 while the Respondents were working at Bulyanhulu Gold Mine at Kahama which was not terminated rendering the termination of their employment unfair justifying the invocation of section 40 of the ELRA Cap 366 by the arbitrator.

Regarding the procedural aspect of the termination, Respondents submitted that while on suspension pending investigation of their criminal case at Kahama District Court, the applicant forced them to sign the retrenchment documents. And this was after the instigation of criminal prosecution on 19th June 2020 contrary to section 37 of the ELRA Cap 366. They insisted that the applicant failed to prove the fairness of the termination as required under Section 39 of Cap 366.

Supporting the arbitrator's award and in reply to ground three of the revision, the respondent said, the arbitrator had properly analyzed the evidence on the records arguing that though their employment contract was for a specific period of time, they managed to prove before the commission that the termination of their employment was substantively and procedurally unfair. They added that the terminated tender mentioned by the applicant, was between the Applicant and Barrick Mine in respect of North Mara Gold Mine and not Bulyanhulu Gold Mine, the respondent's employment location. They were keen enough to admit that 2nd respondent's claim was filed out of time but quickly added that the condonation was granted by the commission. They finally prayed for the dismissal of the application.

In his short rejoinder, the applicant advocate submitted to the effect that the termination was valid since the said Notice of termination was linked with Barrick Mines of Bulyanhulu Gold since at the beginning of the Notice of termination, the Notice was addressed to North Mara Gold Mine Ltd and others including G4S Secure Solution (T) Limited meaning that all

Mines owned by Barrick Mines including the Bulyanhulu Gold mines was affected by the notice.

I have carefully considered the matter. I propose to begin with the last grounds on time limitation for its confirmation would have the effect of end up the matter between the parties. On this point, the Arbitrator is faulted for determining the matter which was time-barred and in the absence of condonation. Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007 provided:

*Rule 10 (1) Dispute about **the fairness of an employee's termination of employment** must be referred to the Commission **within thirty days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.***

Undeniably, the record clearly shows that the respondent had confirmed the retrenchment of their employment on 28th August 2020 as exhibited by the information of the last part of Item 3 of the 2nd respondent's CMA Form No 1 filed at the Commission and Confirmation of Retrenchment letter signed by both respondents on 31/8/2020 accepting the retrenchment and its package as supported by the respondent's evidence at the commission.

According to the CMA Form 1 filed by the respondents and CMA form No 6 signed by the parties and the Mediator on 26/11/2021, the complaint was instituted on 2nd November 2020, almost 62 days which is beyond the time prescribed by the law. In their effort to convince the court that the dispute was duly filed within time, the respondent said, the 2nd

respondent's complaint, which they admit to having filed out of time, was condoned by the Commission before filing the complaint on the main issue. But my perusal of the records has failed to find any application for condonation or order in support of the respondent's augment. The record is to the effect that having filed their complaint on 2nd November 2020, the summons was issued instantly on the same date requiring parties to appear for mediation/arbitration before the Commission on 16th November 2020 followed by the signing of the non-settlement agreement on 26/11/2021 and the hearing of the parties on merit. There is nothing on the records signaling condonation of the delay by the Commission.

This court, therefore, agrees with the Applicant's counsel that the arbitrator was wrong to determine a time-barred matter without first condoning the application as required by the law. This grounds alone suffices to dispose of the matter, I will for that reason not determine the other grounds.

As a result, the entire proceedings are declared a nullity resulting in quashing and setting aside both the proceedings and the CMA award with no order as to costs.

DATED at Shinyanga this 28th day of October 2022.



Court:


E. Y MKWIZU
JUDGE
28/10/2022

Right of Appeal explained


E. Y MKWIZU
JUDGE