IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LABOUR REVISION NO. 48 OF 2021

(Originating from consolidated Labour Dispute No. CMA/MZ/NYAM/175/2021/94/2021 & CMA/MZ/NYAM/158/2021/93/2021)

BETWEEN

JACKSON CHRISTOPHER MOSHA..... APPLICANT

AND

POLTAN AFRICA LIMITED..... RESPONDENT

JUDGMENT

14/9/2022 & 28/10/2022

ROBERT, J:-

The applicant, Jackson Christopher Mosha seek to revise an award of the Commission for Mediation and Arbitration (CMA) dated 13th December, 2021 in consolidated Labour Dispute No. CMA/MZ/NYAM/158/2021 on grounds that the award was improperly procured and further that the award is is unlawful, illogical and irrational.

Facts giving rise to this application reveals that, the applicant was an employee of the respondent in a position of a driver from the year 2019 to the time of his resignation in 2021. After resigning, the applicant instituted a dispute at the CMA alleging constructive termination on grounds that he was forced to resign as a result of being subjected to the difficult working conditions by the respondent as well as salary arrears.

Having heard both parties, the CMA made a finding that there was no constructive termination thus the applicant did not deserve any terminal benefits. However, the CMA proceeded to make a finding that the applicant had a valid claim of 10 months unpaid salary which is equivalent to TZS 7,500,000/= and granted the same. Further to that, the CMA made an order that due to the loss of TZS 16,000,000/= caused by the applicant, the respondent is entitled to a set-off of that amount plus the remaining/outstanding balance to the tune of Tzs 8,500,000/= to be paid by the applicant within fourteen (14) days from the date the date he became aware of the award.

The applicant was aggrieved by the said CMA award thus lodged this application so as to have it revised and set aside on the grounds contained in paragraph 20 of the applicant's supporting affidavit as follows;

1. *After finding that the applicant was not paid his salaries from October 2020 to July 2021, the Arbitrator failed to hold that the applicant was subjected to intolerable working environment which forced him to resign.*
2. *Arbitrator erred in law by awarding the respondent Tshs 8,500,000/= without the respondent neither referring a complaint/referral nor praying for said relief in evidence.*

3. *Arbitrator erred in law and fact by holding that the applicant resigned in disguise to run away from paying loss of Tshs. 16,000,000/=.*
4. *Whether the Arbitrator was right to treat exhibit D3 as the applicant's admission of loss of Tshs. 16,000,000/=.*
5. *Arbitrator erred in law and fact to hold that the applicant refused to attend disciplinary hearing without considering the applicant's evidence.*
6. *Whether the employee who constructively terminated is entitled to repatriation costs to the place of recruitment and subsistence allowance.*

Hearing proceeded by way of written submissions. The applicant was represented by Mr. Kyariga. N. Kyariga, learned counsel whereas the respondent was represented by Mr. Castory Peja, learned counsel.

Submitting in support of the first issue, Mr. Kyariga argued that it is undisputed fact that the applicant was not paid his salaries from October 2020 to July, 2021 as rightly found by the Hon. Arbitrator at page 9 of the CMA Award and the said fact was not challenged by the respondent. He maintained that, before the CMA the applicant testified that the non-payment of salaries made his life difficult and had to sell his personal utensils for his family's upkeep. It was his opinion that such testimony was enough proof that the working condition was intolerable and the

applicant's resignation was caused by the respondent and the same is regarded as constructive termination.

To reinforce his argument that the respondent's denial to pay the applicant salaries for ten months resulted to the applicant's forceful resignation, he cited the case of **The Registered Trustees of Chamazi Islamic Centre vs Ibrahim Isack Rwegoshora**, Revision No. 55 of 2020.

Highlighting on the second issue, the learned counsel argued that labour disputes are instituted by CMA Form No. 01 and the same is regarded as a plaint. He argued further that it is trite law that reliefs not founded on pleadings and which are not incidental to the main prayers sought in a plaint should not be awarded. He referred the Court to the case of **Dew Drop Co. Ltd vs Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 CAT-Mbeya.

He informed the Court that, the respondent did not file any complaint claiming payment of the alleged loss of TZS 16,000,000/= or ask for them in his evidence. It was his opinion therefore that the Arbitrator had no power to order any reliefs not sought by either party to the dispute and therefore it was wrong for him to award the respondent TZS 8,500,000/=.

Coming to the third issue, the learned counsel submitted that the Arbitrator treated exhibit D3 as the applicant's admission of the loss of TZS 16,000,000/=. He faulted the Arbitrator's findings that even the applicant's resignation was a disguise to run away from the liability of the said loss. He strongly argued that before the CMA the applicant testified that according to exhibit D2 the applicant denied the allegation and asked the respondent to conduct investigation or provide evidence to prove that the alleged loss was caused by the applicant however, the respondent never conducted any investigation to ascertain the alleged loss as no proof of the said investigation was tendered. It was his conclusion based on the case of **Viettel Tanzania Limited vs Edmund Kabonge**, Revision Application No. 816 of 2018 (unreported) that the CMA was wrong to treat exhibit D2 as an admission to causing loss.

On the fourth issue as to whether it was right for the Arbitrator to hold that the applicant refused to attend the disciplinary hearing, he contended that through exhibit C3, the applicant accepted the invitation and informed the Manager that he would attend but the respondent should facilitate his transport, meals and accommodation expenses as he had not been paid his salaries since October, 2020. It was his further testimony that though the respondent committed to provide all the

expenses, he only received TZS 50,000/= and never heard from the respondent regarding the rest of the expenses so he failed to attend the said hearing and never received any outcome of the hearing until he decided to resign.

On the last issue, whether the employee who is constructively terminated is entitled to repatriation costs to the place of recruitment and subsistence allowance, he submitted that according to the provisions of section 43(1) of the Code of Good Practice, an employee who is terminated at a place other than the one he was recruited at, is entitled to transport costs from the employer. He submitted further that during mediation as evidenced in CMA Form 7 which is a settlement agreement, the respondent agreed to repatriate the applicant and his family and pay subsistence allowance but that has never been done to date. He calculated repatriation costs to be TZS 3,448,000/=.

As for the subsistence allowance, he stated that since the respondent failed to pay one month salary within seven days after the settlement was made, the applicant is now entitled to be paid 14 months' salary which equals to TZS 10,500,000/=. He concluded by submitting that the applicant's employment was constructively terminated therefore he is

entitled to the unpaid salaries, the award be set aside and reliefs prayed for in the CMA F.1 be granted.

In the reply submissions, submitting in response to the first issue, the learned counsel for the respondent argued that although the applicant testified before the CMA that the non-payment of salaries made his working conditions intolerable which prompted his resignation, the respondent had testified that the non-payment of salaries was caused by Covid 19 and the applicant was made aware of the situation which he understood. It cannot therefore be claimed that his working conditions were made intolerable as he knew the situation and accepted the same.

From those facts, the learned counsel told this court that the conditions for constructive termination were not met as stipulated in **Kobil Tanzania Limited vs Fabrice Ezaovi**, Civil Appeal No. 134 of 2017, CAT (unreported). He stated that when testifying on the issue of failure to pay salaries due to Covid 19, the witness was not cross examined thus the applicant is taken to have accepted the truthfulness of the said testimony. He cited the case of **Sanlam General Insurance (T) Ltd & Others vs Gulf Petroleum (T) Ltd**, Civil Appeal No. 170 of 2016 CAT-DSM (unreported) to that effect.

As regards the testimony that the applicant was forced to sell his utensils so as to be able to take care of his family, he said that the same was not proved. He maintained therefore that no evidence was brought to show or prove any intolerable situation caused by the respondent. He distinguished the case of **The Registered Trustees of Chamazi Islamic Centre** (supra) cited by the applicant on grounds that in this matter the respondent sufficiently proved that failure to pay salary did not create intolerable situation to the applicant.

Replying to the second issue which touched on the award of TZS 8,500,000/= to the respondent without there being a prayer, he stated that the Arbitrator was justified to make such an order under the provisions of section 88(10) of the Employment and Labour Relations Act which empowers him to make any appropriate award. He stated further that since there was no any employment relationship subsisting between the parties, it was proper for the Arbitrator to invoke the provision and make the award.

On the third issue, it was counsel's reply that there is no dispute that the applicant was the maker of exhibit D3 in which he admitted causing the loss of TZS 16,000,000/=, pleaded to continue working and that the respondent should deduct from his salary to recover the lost amount. He

distinguished the cited case of **Viettel Tanzania Limited** (supra) and stated that the categorical admission of the applicant points to his guilt. He contended that the Arbitrator was right to conclude that the applicant's resignation was not caused by intolerable working conditions but it was a way to escape liability. Moreover, the conditions for constructive termination as set out in the case of **Kobil Tanzania Limited** (supra) were not met as the evidence showed that the applicant's resignation was not prompted by the respondent.

Coming to the fourth issue, the respondent's reply is that the applicant received fare from the respondent the fact which he admitted during hearing. He however wilfully neglected travelling to Dar es Salaam to attend the disciplinary hearing. He further submitted that the trip to Dar es Salaam takes only a day so the applicant did not need any enroute accommodation thus he was supposed to use the money he received from the respondent to travel. He told this court that the conduct of the applicant stating in his testimony that he used the money for his personal uses clearly indicates that he had no intention of attending the disciplinary hearing therefore the Arbitrator cannot be faulted for holding that the applicant had no any justifiable cause for his failure to attend the hearing.

On the last issue regarding whether the employee who has been constructively terminated is entitled to repatriation costs to the place of recruitment and subsistence allowance, it was his submission that the parties had entered into a settlement agreement regarding the said costs and the respondent agreed to pay the applicant one month subsistence allowance and repatriate him to Dar es Salaam. He submitted further that in terms of section 88(7) of the ELRA the agreement is considered a decree of the court thus it was wrong for the applicant to bring it up during arbitration. That if the applicant felt like the terms of the agreement were not complied with, he ought to have sought execution instead of reopening the claim.

He submitted in the alternative that the applicant was not constructively terminated but resigned on his own volition as it was rightly found by the CMA and that being the case, he is not entitled to terminal benefits. He cited the case of **Cocacola Kwanza vs Kajeri Misyangi**, Labour Revision No. 238 of 2008, LD DSM to cement his argument that the employee who is not constructively terminated is not entitled to terminal benefits. He distinguished the cited case of **Pangea Minerals Ltd** (supra) stating that the circumstances in that case are not relevant

to the matter at hand. Finally, he prayed that the revision application be dismissed.

In his rejoinder submissions, the learned counsel for the applicant stated with regard to the first issue that the employer's failure to pay the employee salary constitutes a fundamental breach of contract of employment and justifies summary termination by the employee. The respondent's argument that the applicant stopped working from October, 2020 to July, 2021 when he resigned cannot stand as the respondent was supposed to either terminate or retrench but that did not happen. The applicant was therefore entitled to resign.

With regard to the second issue, the applicant reiterated what he stated in his submissions in chief that there was neither the respondent's CMA F1 nor counter claim that contained a prayer for deduction of the alleged loss.

On the third issue, the applicant denied admission and claimed that if D3 was an admission, why did the respondent call him to attend a disciplinary hearing to answer the same allegations? If it was true that he had admitted to causing the loss the respondent ought to have terminated his employment but did not. He maintained that his resignation was caused by intolerable working conditions caused by the respondent.

With regards to the fourth issue, it was the applicant's rejoinder that the amount sent TZS 50,000/= was insufficient as there were withdrawal charges. The fare was TZS 50,000/= but also there were incidental costs from home to the bus stand, enroute meals etc. He referred to his reply to the employer that he was willing to attend the meeting but the respondent did not facilitate the expenses.

On the fifth and last issue concerning repatriation, the learned counsel for the applicant submitted that the respondent agreed in the settlement deed to repatriate the applicant but did not comply with the said deed. He stated further that he could not execute the deed as it was a partial settlement and the amount continued to accrue. He contended that since the CMA made a finding that the applicant was not entitled to repatriation and subsistence allowance, there was nothing to execute. He concluded with a prayer that the award be reversed and set aside except for the 10 months unpaid salaries.

Having gone through parties' submissions and the records of this matter, I will now turn to the determination of issues as raised and argued by parties.

In the first issue, the applicant is faulting the CMA for failing to hold that non-payment of salaries from October, 2020 to July, 2021 subjected

the applicant to intolerable working condition forcing him to resign. The records show that it has not been disputed by the respondent that the applicant was not paid his salary for ten months consecutively from October, 2020 until July, 2021 at the time of his resignation. It was the applicant's testimony before the CMA that the non-payment placed him in a difficult situation that forced him to start selling his personal items so as to be able to take care of his family.

The respondent on his part denied not the allegation but argued that the situation was caused by the economic hardship as a result of Covid 19 a situation which he argued that the applicant was notified of and agreed to endure thus he should not claim that he was placed in an intolerable working condition.

On this issue, the Court is in agreement with the findings of the CMA that the applicant had a rightful claim of the unpaid salaries and granted the same. However, the Court shares the applicant's view that having found that the applicant had not been receiving his salaries for ten consecutive months, the CMA ought to have concluded that he was subjected to intolerable working condition that forced him to resign. The respondent's argument that the applicant had accepted this situation is untenable as failure to pay an employee his salaries for ten consecutive

months subjects the employee to insufferable condition which can hardly be justified by any reason not even covid 19 pandemic. The applicant's testimony that he had to start selling his personal belongings for his family's upkeep cannot be ignored. Non- payment of salary, as correctly put by the applicant, amounts to breach of employment contract by the employer and that left the applicant with no other choice than to resign so as to pursue his rights before the CMA.

In the second issue, the applicant faults the Arbitrator for awarding the respondent TZS 8,500,000/= without there being a complaint from the respondent nor a prayer for the said relief. This issue will not take much of my time as the records are clear that the respondent did not refer any complaint nor prayed for such relief before the CMA. The Arbitrator would have the power to make the award in the respondent's favour had there been a cross complaint or counter claim put forward and proved by the respondent. Since there was none, it was not proper for the Arbitrator to order the applicant to pay the respondent that sum of money. See **Melchiades John Mwenda vs Gizelle Mbaga (Administratrix of the estate of John Japhet Mbaga) & Two Others**, Civil Appeal No. 57 of 2018 in which the Court of Appeal of Tanzania held;

"it is elementary law which is settled in our jurisdiction that the court will grant only a relief which has been prayed for"

The respondent can always find another recourse to make the applicant make up for the loss. This issue is allowed.

On the third issue the applicant faults the Arbitrator for treating exhibit D3 as the applicant's admission of loss of TZS 16,000,000/= and that his resignation was done so that he could run away from paying the said loss. This Court finds no merit in the first part of this ground while the last part is meritorious. The first part of the issue faults the Arbitrator for treating exhibit D3 as the applicant's admission to the loss. Having gone through the said exhibit D3 it is clear that the applicant admitted to have been responsible for the loss of TZS 16,000,000/= he also went forward and pleaded with the respondent to let him continue working and have part of his salary deducted to pay off the loss. The applicant cannot be heard at this point disclaiming the said document. Therefore, this Court cannot fault the Arbitrator for treating exhibit D3 as the applicant's admission because it was an admission.

The second part of the issue which I find meritorious is that the Arbitrator erred in his finding that the applicant resigned so as to run away

from the loss that he had caused. It was discussed in the first issue that the applicant's reason for resignation was the non-payment of salaries for ten consecutive months which subjected the applicant to intolerable working condition that necessitated him to submit his resignation letter and pursue his rights before the CMA. The issue is partly allowed.

With regards to the fourth issue, the complaint by the applicant is that the Arbitrator erred in holding that he refused to attend disciplinary hearing without considering the applicant's evidence. The applicant testified at the CMA that through exhibit C2 he received an invitation to attend the disciplinary hearing in Dar es Salaam and the respondent wanted him to confirm his attendance. He confirmed his attendance through exhibit C3 but requested the respondent to facilitate transport, meals and accommodation while he attends the hearing as he had no means to afford the costs. The respondent through exhibit C4 agreed to accommodate him and rescheduled the hearing date.

However, the evidence further reveals that the respondent only sent him TZS 50,000/= which, according to the applicant, was not enough even for the bus fare to Dar es Salaam let alone other costs that he would incur along the way. He communicated his concern to the respondent via e-mail as shown in exhibit C5 but there was no reply from the respondent

so he could not travel and instead admitted that he used the money for his personal uses. The respondent did not dispute sending TZS 50,000/= to the applicant but kept insisting that the applicant was supposed to use the money to travel and attend the hearing.

From what is available on the records, I would agree with the applicant that it was not right for the Arbitrator to hold that the applicant refused to attend the disciplinary hearing while there was evidence to the contrary. The applicant made it clear that since he had no way to afford the costs, his attendance was conditional upon the respondent accommodating him. It would therefore be unfair to hold the applicant responsible for the respondent's failure to fully facilitate his attendance as they had agreed.

Nevertheless, I find this issue overtaken by events as the applicant has already resigned and there is no any employment relationship subsisting between the parties. Whether or not a disciplinary hearing was conducted and if the applicant attended the same or not is of no use at this stage. This issue is dismissed.

The fifth and last issue pertains to the question whether an employee who is constructively terminated is entitled to repatriation costs and subsistence allowance. As already stated in the first issue, the evidence

proves that the applicant was constructively terminated as he was forced to resign from his employment due to intolerable working condition that he was subjected to by the respondent for its failure to pay him his salaries for ten months. It is clear therefore that he is entitled to repatriation costs and subsistence allowance.

Since parties had agreed during mediation before Hon. Msuwakollo, Mediator, that the respondent was to repatriate the applicant within fourteen (14) days and also pay him TZS 650,000/= subsistence allowance within seven (7) days from the date of settlement, see CMA F.7 dated 20th of August 2021, this issue was settled and the applicant is entitled to repatriation and subsistence allowance as per the settlement agreement.

For the reasons above, I find merit in this application. The CMA award is revised to the extent shown above. The applicant is entitled to all terminal benefits as prayed, ten months unpaid salaries, repatriation and subsistence allowance as per the settlement agreement.

It is so ordered.

K.N.ROBERT
JUDGE
28/10/2022