IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 27 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARS/105/2020)

HARUNA MWAKU.....APPLICANT

VERSUS

KEARSLEY TANZANIA LIMITED..... RESPONDENT

JUDGMENT

19/10/2022 & 14/12/2022

MWASEBA, J.

This is an application for revision which has been brought by the applicant **Haruna Mwaku** against his former employer **Kearsley Tanzania Limited.** The applicant is seeking for revision of an award of the Commission for Mediation and Arbitration (CMA) which was delivered on 19th day of March, 2021 in favour of the respondent.

The CMA decision was to the effect that, the application was prematurely filed and ordered the applicant to go back to his work immediately as he was not yet terminated rather, he absconded with no just reasons.

The application is supported by an affidavit of the applicant where he faulted the award of the CMA by stating that:

1. *That, the Hon. Arbitrator erred in law and fact by not considering and evaluate properly the disputable issues drawn before him.*
2. *That, the Arbitrator erred in law and in fact by ordering the applicant to report back at his work place while he has no power to do so.*
3. *That, the Arbitrator erred in law and fact by holding that, the applicant was not paid his June salary 2019 and not assigned work place as he was absent at work while the Respondent did not assign the applicant work after coming back from annual leave and no anywhere it is shown that the respondent assigned the Applicant work after completion of his annual leave even only from 1st May to 25th May, 2019.*
4. *That, Hon. Arbitrator erred in law and in fact by concluding that the applicant disappeared himself from work while the Respondent did not allow the Applicant to resume work after the completion of the leave circle.*

The respondent, on the other hand, strongly opposed the application through the counter affidavit sworn by the respondent's Counsel one Praygod Jimmy Uiso stating that the CMA award was properly procured.

Briefly, the applicant was employed by the respondent on 1st day of October, 2014, as a Tour Guide Driver. Their dispute arose on 13/04/2019 when the applicant attended his work place after being called from his

annual leave only to find that the respondent wanted him to sign a termination by agreement. It was revealed further that, the applicant refused to sign the said letter, hence the respondent ordered the gate keeper not to open the door for him again.

However, the applicant continued to receive his salary of April and May until June,2019 when the respondent removed him from the payroll. Thereafter, the matter was referred to the Commission via CMA F1 where he prayed that "*The employer has been treating him unfairly leading to intolerable working environment*". After a full trial, the Hon. Arbitrator ruled that the application was pre maturely filed as there was no proof of termination. The said decision aggrieved the applicant who knocked the door of this court challenging the impugned award.

At the hearing of this application the applicant was represented by Mr. Stalon Baraka, the applicant's personal Representative (PR) while the respondent enjoyed legal services from Mr. Arnold Luoga, the learned counsel. The application was argued orally on 19/10/2022.

When he was submitting in support of the raised legal issues, Mr Baraka decided to abandoned the first legal issue and proceeded with the rest.

Starting with the second legal issue, personal representative of the applicant argued that, it was wrong for the Hon. Arbitrator to order the

applicant to resume at his work while the circumstances does not allow him to do so. He argued further that, if the application was pre maturely filed it was wrong to order re-instatement. As per his view that was material irregularities which leads to injustice on the part of the applicant.

On his side, the respondent's counsel replied that, the appellant failed to prove that he was unfairly terminated thus, he cannot be benefited under section 40 (1) of **the Employment and Labour Relations Act**, Cap. 366 R.E 2019. He added that the only evidence of the applicant is exhibit P3 (the termination agreement) which was not signed by the parties as they never reached an agreement. More to that, the Arbitrator was correct to order the respondent to return back to his work as the records shows he was till an employee of the respondent. He supported his argument with the case of **Abdulkarim Haji vs Raymond Nchimbi Aloyce and Another**, (2006) TLR No. 420.

Regarding the third legal issue, Mr Baraka submitted that it was the employer who did not assign any work to the applicant due to his act of refusing to sign a letter of termination by agreement. He averred further that the respondent told a gate keeper not to allow the applicant inside the working place which means the respondent was looking for a reason to terminate the applicant.

Responding to this issue, Mr Luoga submitted that the applicant was not terminated but he alleged that he was denied his right to be assigned works. More to that, it was DW2's submission at the trial court that the applicant absconded from workplace as evidenced by attendance register (Exhibit P4). Further to that, since exhibit P3 shows no one had signed it, it was wrong for the applicant to submit that he was forced to sign the termination by agreement.

As for the 4th legal issue, the applicant's Personal Representative (PR) argued that, the respondent did not abscond from his work place, it was the respondent who told him to disappear from the workplace. He added that if the applicant was really absconded, why he was not charged with any misconduct or called at the disciplinary hearing to answer his charge.

In his reply, Mr Luoga submitted that the applicant absconded himself from the work place, therefore there was no need for the employee to convene a disciplinary hearing. The applicant's personal representative's arguments were just a misconception of the law. His act of abscondment from his work place moved Hon. Arbitrator to order him to return to his work place.

In brief rejoinder, Mr Baraka apart from reiterating what he had already submitted he added that lack of Salary of June proved the applicant was already terminated.

From the submissions of the parties and records of this matter, it appears to this Court that the relevant issues for determination of this application are: whether the trial arbitrator was justified to hold that the applicant's application was pre-maturely filed and to what reliefs are the parties entitled.

Going through the legal issues raised by the applicant herein, it goes without saying that the applicant via his three legal issues is challenging the act of Hon Arbitrator to rule out that his application was prematurely filed while he believes he was forced to resign by the respondent which amounts to constructive termination. Now this court asks itself what are the constructive termination?

It should be noted that constructive termination is governed by Section 36 (a) (ii) **of the Employment and Labour Relations Act**, Cap 366 R.E 2019 reading together with rule 7 of the **Employment and Labour Relations (Code of Good Practice),** G.N No. 42/2017. Section 36 (a) (ii) of Cap 366 provides that:

> *"For purposes of this Sub-Part-*
>
> *(a) "Termination of employment" includes-*
>
> *(ii) a termination by an employee because the employer made continued employment intolerable for the employee."*

Guided by the cited authority, where the employee has alleged termination on constructive reasons the burden to proof shifts to the employee to prove that the employer has made his employment intolerable. The test of proving constructive termination has been shown in many cases. The Court of Appeal of Tanzania in the case of **Kobil Tanzania Limited vs Fabrice Ezaovi,** Civil Appeal No. 134 of 2017 the Court adopted the questions posed in the cases of **Katavi Resort vs Munirah J. Rashid** [2013] LCCD 161 and **Girango Security Group vs Rajabu Masudi Nzige,** Labour Revision No. 164/2013 where the questions are as follows:

1. *Did the employee 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 create an intolerable situation?*
4. *Was the intolerable 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?"*

The applicant in this matter was supposed to have answered the above questions in affirmative so as to prove that there was constructive

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termination. The applicant only alleged to have been terminated without any evidence to prove the same while he denied to sign the termination by agreement which was submitted to him by the respondent.

Unfortunately, as the evidence before the CMA is insufficient to prove that he was constructively terminated, this court cannot rely on mere assertions to determine the rights of the parties. I am inclined to say that the applicant failed to prove his case that he was constructively terminated by the respondent.

As alluded above, it is the holding of this court that the application lacks merit. Consequently, the award of the CMA is left undisturbed. Each party to bear his/her costs taking into consideration the nature of the application.

Ordered Accordingly.

DATED at **ARUSHA** this 14th day of December, 2022.

N.R. MWASEBA

JUDGE

14/12/2022