IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 61 of 2021

(Originating from Commission for Mediation and Arbitration Application No. CMA/ARS/ARS/538/19/270/2019)

RHODA MUYANDEE.....APPLICANT

VERSUS

JOA CARE PHARMACY..... RESPONDENT

JUDGMENT

24/02/2022 & 31/03/2022

KAMUZORA, J.

The Applicant Rhoda Muyandee, being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1),(a)and(b),91(2)(a) or (b)or(c), and section 94(1) (b) (i) of the Employment and Labour Relations Act No. 6/2004, Rule 24(1) 24(2) (a) (b) (c) (d) (e) (f)and 24(3) (a) (b) (c)(d) and Rule 28(1) (a) (b)(c) (d) & (e) of the Labour Court Rules G.N No. 106/2007. The Applicant prays for this Court to be pleased to call for the records and revise the decision in CMA/ARS/ARS/270/2019.

The facts of the dispute between the parties as indicated in the CMA records as well as this application are such that, the Applicant was

working with the Respondent as a nurse and on 17/09/2019 she was terminated by the Respondent. It was alleged by the Applicant that she was terminated for unknown reasons via text message without the Respondent following proper termination procedure.

Being aggrieved by the said termination, the Applicant lodged a complaint at the CMA for unfair termination of her employment. The Applicant stated that she was not issued with a notice of termination as well as no reason for termination was issued to her. The CMA in considering the evidence and exhibits tendered before it, pronounced an award dismissing the complaint for lack of merit for reasons that there existed unenforceable contract between the Applicant and the Respondent hence the claim of unfair termination lacked merit. Being aggrieved by the CMA award, the Applicant preferred this current revision application on the following reasons: -

i) *That, the mediator erred in law and fact for failure to consider the fact adduced by the Applicant as the result he pronounced an erroneous decision.*
ii) *That, the mediator erred in law and fact for relying on mere statements of the Respondent that were not backed up by any evidence.*

iii) That, the mediator failed to realise that the Respondent was the Applicant's employer and could use any kind of technicality to pursue ends.

When the application came up for hearing, the Applicant was represented by Ms. Fransisca Lengeju learned counsel from Legal and Human Rights Centre, while the Respondent enjoyed the service of Mr. Reginald Rogati Lasway, learned advocate. Hearing of the application was by way of written submissions whereas both sides filed their respective submissions on time save that the Applicant did not file any rejoinder submission.

Arguing in support of the application, Ms. Lengeju submitted that, the Applicant was employed as a nurse by Plan Care Pharmacy which was later sold and changed its name to Joa Care Pharmacy, the Respondent. That, the Applicant worked with the Respondent from July 2017 until she was terminated on 12th September 2019 via text messages. That, the Applicant believes that there existed an employer and employee relationship between the Applicant and the Respondent.

The counsel submitted further that the Applicant was competent enough for the job and that was the reason that the Respondent

employed her after she bought the pharmacy. That, the allegation that she was unqualified could not be relied upon by the CMA.

Concerning the issue of abscondment from work the counsel submitted that, the Applicant did not abscond from her employment, but she was informed via text message that she should stay at home until she is informed due to some renovation taking place at the Pharmacy. That the Applicant presented such evidence at the CMA and the claim that it was not presented was an error of the mediator.

Ms. Lenguji went on and submitted that, it is a trite law that courts have to properly and critically analyse evidence and testimonies presented by both the prosecution and defense case before reaching a sober and just decision. That, it is improper for the court to rely on one party alone without taking into consideration of what the other party states. To cement on this issue, she cited the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 45/2017 CAT at Mwanza (Unreported).

Ms. Lengeju finalised by stating that, since in labour law the employer has the responsibility to prove his case and the balance is on probability, it was absurd to rely on mere words of the Respondent while the Applicant had presented evidence against that of the

Respondent. She thus prayed for the application to be allowed to reach the end of justice.

Contesting the application Mr. Lasway submitted that, it is clear from the CMA record that the Respondent tendered three exhibits which are business licence (exhibit P1), Permit to sell medicine (exhibit P2) and employment contract (exhibit P3). Mr. Laswai was of the view that, the arbitrator did not rely on mere facts but on evidence tendered in record.

He went on and submitted that, as per the evidence by PW2 it was dangerous to employ an unqualified person as it may lead to cancelation of the licence, overdose to the customers or cause death to the customers due to poor service provided by the Applicant.

On the averment that the Applicant was competent enough for the job Mr. Lasway replied that, it is clear from the record that the Applicant was unqualified person, and that is why when she was required to present her professional certificates she disappeared from work. That, even during hearing of the dispute at the CMA the Applicant failed to present those professional certificates even after the Respondent clearly started that she was willing to proceed with the Applicant if she would present the professional certificates.

On the allegation that the Applicant did not abscond from work but was informed to stay at home due to pharmacy renovation, the counsel for the Respondent submitted that, those allegations are not true because the Applicant disappeared from work after she was requested to submit her professional certificates.

The Respondent's counsel further submitted that, the Applicant did not present evidence such as SMS and that was the reason that the matter was ruled in favour of the Respondent. That, as the Applicant did not tender SMS, it could not be an error by the arbitrator not to regard the evidence that was not tendered.

On the allegation that there was no proper analysis of evidence and testimonies presented by both parties the Respondent's counsel submitted that the CMA clearly and properly evaluated the evidence. He referred page 5 and 6 of the awards of the CMA as capturing how the arbitrator analysed each and every argument and testimonies and connected it with the law thus resulting to a fair and just decision. The Respondent prayed that the revision application be dismissed for lack of merit and the award by the CMA be uphold.

After a thorough reading of the records of the CMA, the present application, affidavit in support of the application and the submissions

from counsel for the parties in respect of this application, the issue that needs this court determination is whether the CMA was correct to dismiss the Applicant's complaint.

The burden of proof in labour matters lies upon the employer to prove that the employee was fairly terminated and the procedures for termination were followed. Section 37(2) of the Employment and Labour Relations Act No. 6/2004 provides that: -

"37. -(2) A termination of employment by an employer is unfair if the employer fails to prove:-
(a) that the reason for the termination is valid;
(b) that the reason is a fair reason"

The intention of the legislature is to require employer to terminate employees only with valid reasons and not at their own will or whims. The Applicant claimed unfair termination against the Respondent at the CMA. The first issue that was framed at the CMA was whether there was employment contract between parties.

Reading on page 4 of the CMA award first paragraph the CMA ruled out that and I quote for easy of reference,

" On the first issue, there is no dispute that parties worked to each other as employer and employee. This is supported with the common facts that the Respondent used to pay the Applicant with monthly remunerations, and she used to work in her pharmacy.

Notwithstanding what cropped up later in the course of business, but parties had the contract. Therefore, without much to labour on, the commission finds there existed employment contract between parties."

I agree with the CMA conclusion that there existed employment contract between the parties even if the same the same was not in writing. The fact that the Applicant was working for the Respondent and the Respondent was paying her salary, in the absence of any other evidence to the contrary, that justifies the existence of employment contract.

Upon determining that there existed an employer and employee relationship between the parties, the CMA went on determining whether there was termination of employment. It must be noted that where there is allegation for unfair termination, the employer is bound to prove that the termination was fair. For this, see section 39 of the Employment and Labour relations Act No 6/2004. But as a matter of law and practice, before the burden to prove that the termination was fair shift to the employer, there must evidence proving that there was termination of employment.

In its award the CMA formed a view that the Applicant did not prove if she was terminated from her employment. Having gone

through the CMA proceedings, the evidence on record revels that, while the Applicant claimed that she was terminated through SMS/text messages, the Respondent claimed that the Applicant was not terminated rather she was asked to submit her professional certificate but did not comply and instead absconded from employment. It is unfortunate that the said text messages alleged to terminate the Applicant's employment were not made part of her evidence. However, there is no dispute that the Applicant no longer works and receive salary from the Respondent. This implies that her employment contract no longer exists. Thus, the question is whether her employment was substantively and procedurally terminated.

The Respondent claimed that the Applicant absconded from work and as a matter of law abscondment is considered to constitute a good ground for termination. Having established that the Respondent had absconded from work, the Applicant ought to have conducted a disciplinary hearing. The Respondent was therefore required to follow the proper procedures to have the Applicants' employment terminated fairly as provided under Rule 9 (1) of the Employment and Labour Relations (Code of Good Practice) G.N No 42 of 2007 that: -

" An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination."

Rule 13 of G.N No. 42 of 2007 also provides for procedures of conducting disciplinary hearing before terminating an employee. In the instant case the Respondent could have conducted a disciplinary hearing with regard to the misconduct shown by the Applicant for failure to attend at workplace and submit certificates as requested by the employer. Although the Respondent denied having terminated the Applicants, the act of not paying for the salary justifies her termination without following fair procedures.

Since no disciplinary hearing was conducted, the Applicant was denied her right to fair hearing as envisaged under Rule 13 of the Code of Good Practice. The Respondent did not prove before the CMA if any effort was made to conduct disciplinary hearing which would have determined if the Applicant committed any misconduct. There is no evidence on the action taken by the Respondent after the abscondment of the Applicant from work.

The fact that the Applicant was employed by the Respondent makes it a mandatory requirement for the Respondent to prove that the

procedures were followed to fairly terminate her employment. Failure to observe the rules on termination is a fundamental irregularity because it denied Respondent her right to be heard. That being observed, I find that there was unfair termination of employment contract done by the Respondent to the Applicant in both substantive and procedural aspect.

The Applicant at the CMA also raised the issue of unpaid annual leave from the year 2017 to 2019. The Applicant was by law duty bound to prove the issue of unpaid leave of the years claimed and since she did not discharge that burden at the CMA then the same remain a mere allegation with no legal justifications. In this I refer section 60(2) of the Labour Institutions Act Cap. 300 [RE 2019] which provides that:

"In any civil proceedings concerning a contravention of a labour law

a) the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subsection (l)(b) apply; and

(b) the party who is alleged to have engaged in the conduct in question shall then prove that the conduct does not constitute a contravention,"

It was also contended by the Applicant that she was paid Tshs. 300,000 as salary the fact that was denied by the Respondent. As the record of the CMA portrays, the Applicant states that she was paid on hand, via M-pesa and by signing the office book a total of Tshs. 300,000/= per month. The Respondent on the other side did not dispute the fact that she was paying the Applicant salary but claimed that the Applicant was being paid Tshs. 100,000 as monthly salary. As the Applicant was unable to bring evidence on the amount paid as salary, I consider Tshs. 100,000/ as monthly salary that was paid to the Applicant.

In the final analysis, since this court found that there was employer, employee relationship between the Applicant and the Respondent and since it is concluded that the termination of the Applicants' employment was unfair, by virtual of Section 40 (1) (c) of the Employment and Labour Relations Act No. 6/2004 the Applicant is entitled to the payment of 12 months compensation at the rate of Tshs. 100,000/=, equivalent to Tshs. 1,200,000/= as well as severance pay under section 42 (1) of the Act to the tune of Tshs. 171,428/= making a grand total of Tshs. 1,371,428/=.

In the upshot, the revision application is found to have merit. The CMA award is quashed and set aside for the reason stated above. The Application is allowed with no order for costs.

DATED at **ARUSHA** this 31st day of March 2022

D.C. KAMUZORA

JUDGE