IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 403 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 07th day of October 2022 in Labour Dispute No. CMA/DSM/KIN/701/19/295/20 by (Kokusiima: Arbitrator)

PETER RWEGASIRA..... APPLICANT

VERSUS

NOTHERN ENGINEERING WORKS LTD.....RESPONDENT

EX PARTE JUDGEMENT

K. T. R. MTEULE, J.

25th April 2023 & 03rd May 2023

This Application for revision arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni **in Labour Dispute No. CMA/DSM/KIN/701/19/295/20**. The said Labour Dispute was preferred vide CMA Form No. 1 where the Applicant claimed to have been forced to resign due to intolerable acts of his employer.

According to the CMA record, the applicant was employed in 2011 by the Respondent as NOC Co-operator. He claimed that while on service, he was promoted to various positions till 14th November 2018 when he exited his position of as Energy Supervisor due to some misunderstanding which culminated to the resignation of the

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Applicant. Believing that the resignation was a forced undertaking, the Applicant considered it as constructive termination and lodged a labour dispute in the CMA claiming for reliefs arising from unfair termination.

In the CMA, the arbitrator found that there was no constructive termination regarding applicant's employment and dismissed the applicant's claims. The dismissal aggrieved the applicant who preferred this application for revision.

Along with this application an affidavit sworn by Mr. Peter Rwegasira, the applicant was lodged. The affidavit narrated the facts of the matter and raised the following grounds of revisiont: -

i) Whether it was proper for the trial Arbitrator to state that it was complainant's will to terminate his own employment.
ii) Whether it was proper for the trial arbitrator to ignore and state that the complainant failed to establish that there was constructive termination.
iii) Whether it was proper for the trial arbitrator to rule that claims such as travelling allowance, overtime, repatriation costs are baseless.

From the CMA record and the contents of the affidavit, the Applicant had the following allegations. That while discharging his duties, some

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a problem arose regarding fuel loss. The applicant complained that the incidence was followed by various reports and actions as follow up to uncover what caused the loss. It was claimed by the Applicant that while in that situation the Respondent stopped salary payments and monthly allowances. It was further alleged by the Applicant that the tension grew to the extent where the Respondent ordered the Applicant to either resign the position or compensate the loss incurred. He opted to resign and this was followed by his arrest and detention under a police custody without being bailed out subject to the condition of signing a contract of settling **TZS 20,000,000/=** as a debt resulting from the alleged loss.

The Respondent having been served with the Notice of Application and the affidavit, filed a notice of opposition and counter affidavit. In the counter affidavit the Respondent disputed all the material facts of the affidavit. The deponent of the counter affidavit averred that the award is proper and free from any error, misdirection, irregularities or injustice of whatever. He deponed further that the CMA reached its decision after a careful assessment and evaluation of the evidence adduced during the hearing.

In the presence of Advocates Tibiita and Samwel Mujaki for the Applicant and Advocate Zuberi Mkakatu for the Respondent, the

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matter was set to be heard by a way of written submission where each party was assigned a specific date to file submission. From the date of scheduling order, the Respondent neither appeared nor filed written submissions. Consequently, this court ordered the matter to proceed by fixing a date of judgment basing on sole submissions by the Applicant.

In his submission, Advocate Muganga commenced to address the issue as to whether it was the Applicant's wish to terminate the contract of employment. He referred to Rule 7 (1) of GN 42 of 2007 which explains the meaning of constructive termination. He quoted the Rule thus:-

> *"Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination."*

He further cited the case of **Kobil Tanzania Limited V. Fabrice Ezaovi Civil Appeal No. 134 of 2017 (unreported)** where the Court of Appeal of Tanzania when discussing the issue of constructive termination, did set the standard in proving constructive termination of the employment, making reference to the case of

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Solid Doors (Pty) Ltd V. Commissioner Thereon and Others, (2004) 25 ID 2337 (LAC) at para 28. He quoted the following words:-

> *" ... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. As these three requirements, must be preset for it to be said that a constructive dismissal has been established.*

According to Advocate Muganga a careful examination to the pattern of this matter would note that there is a continuous extraordinary and serious offending conducts of the employer which resulted to a fundamental breach of employment contract. He listed the acts which include:-

1. The Employer's failure to pay the applicant his monthly salaries.

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2. The respondent forcing the Applicant to go to Arusha to follow up his salary issues without being given transport and per Dien allowances.

3. Upon arrival at Arusha the applicant was further forced to attend unprecedented disciplinary meeting without being saved with a prior notice and formal charges.

4. The meeting chaired by Dicrector of Finance was also attended by security manager of the respondent with an environment of full threats and scarring words.

5. The respondent gave the Applicant ultimatum and/ or Hobson's choice and to put him at a ransom as to whether he settles the loss or resigns.

6. The Respondent failure to take action against the staff who had taken fuel without TT despite being informed by the applicant through emails as per Exhibits A2;

7. The arrest of the applicant and a being forced to sign the compensation of loss under police custody.

He referred the Court to the case of **The copy Cat (T) Ltd V. Mariam Chamba** Labour Revision No. 421 of 2019, where it was stated at page 9 that "..*for a claim of constructive termination to stand there must be a series of acts and conducts at the initiative of*

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the employer causing extreme intolerable working conditions necessitating the employee to resign"

It is Advocate Muganga's submissions that, there is impeccable evidence on record showing the surrounding circumstance which although were intolerable the applicant had opted his rank to be reduce and be given a different responsibility but the conduct of the respondent continued to be intolerable, unbearable, scrupulous, annoying, or unpleasant to continue with the contract of employment. In her view, since the resignation was not truly voluntary, it is in effect a termination.

He insisted that even after the Applicant was arrested on the command of Director of Finance, and coerced to sign the settlement of a debt agreement so that he would be released from police custody and upon signing the said deed he was released and when he went back to office he was asked to check out verbally.

According to Advocate Muganga, the prevalent working condition during the period when the applicant tendered resignation of his position answer in affirmative all of the factors set in **Girango case supra**.

In addressing as to Whether it was appropriate for the CMA – Arbitrator to find that travel claims, overtime, repatriation were

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baseless, it is the submission by Advocate Muganga that due to the constructive termination, the Applicants is eligible for terminal benefits as per section of **43 (10) of the Employment and Labour Relations Act of 2007** which are severance allowance, transport allowance, subsistence expenses during the period between the date of termination of the contract to the date transporting the employee to the place of recruitment, one month salary in lieu of notice and 12 months salaries being compensation for unfair termination. He referred to the interpretation of the provision in the case of **Jerome Tesha V. University of Dar es Salaam at page 8 to 11.**

It is further submission by Advocate Muganaga that the question of the applicant travelling to Kahama on duty was not disputed neither was the recruitment station to Arusha which he considers to be implied admission of fact which does not need further proof. He challenged the Arbitrator's holding that the applicant did not present any evidence on this matter which was purely not challenged.

Referring to **section 43 (1), (a), (b) and (c), (2) and (3) of the Employment and Labour Relations Act of 2004**; which requires an Employees and his family to be repatriated to the place of recruitment, Advocate Muganga stated that there is no dispute that

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the applicant was recruited in Arusha and subsequently transferred to Dar re Salaam and that upon his termination he was not repatriated .

In his view, the applicant is entitled by the law to be transported with his personal belongings, paid daily subsistence expenses during the period between the date of termination of the contract and date of transporting the employee and his family to the place of recruitment, at the rate of Bus fare to the place nearest to the place of recruitment.

He therefore prayed for this court to quash the CMA award and Order that there was constructive Termination which existed and the that the applicant is entitle to the remedies sought in the CMA.

Having gone through the applicant's submissions and the parties' sworn statements together with the record of the CMA, I have noticed two issues to address. The first issue is **whether there are sufficient grounds for this Court to revise and vary the CMA award issued in Labour Dispute No. CMA/DSM/KIN/701/19/295/20**. If the answer is affirmative then the second issue is, **to what reliefs are parties entitled?**

In addressing the issue as to whether the applicant has adduced sufficient grounds for this Court to revise and interfere with the CMA

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award, the three grounds of revision will be considered in establishing as to **whether there was a Constructive termination**.

The Applicant is claiming to have been constructively terminated from employment. Constructive termination of employment is provided for under **Section 36 (a) (ii) of the Employment and Labour Relations Act, (Cap 366 R.E of 2019).** The section provides:

> *"36. For purposes of this Sub-Part-*
>
> *(a) "termination of employment" includes-*
>
> *(i) a lawful termination of employment under the common law*
>
> *(ii) a termination by an employee because the employer made continued employment intolerable for the employee;"*

In this matter the Applicant alleged to have been forced to resign due to intolerable work conditions created by the employer. Where an employee is forced to resign due to intolerable work environment, such resignation constitutes constructive termination. This is so provided under **Rule 7(1) of GN 42 of 2007** which clearly provides that: -

> *"Rule 7(1) - Where the employer makes an employment intolerable which may result to resignation of the employee, that resignation*

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amounts to a forced resignation or constructive termination."

In the CMA, the arbitrator found that there was no constructive termination on basis that the applicant failed to prove his allegation concerning intolerable work environment.

Section 39 of Cap 366 places the burden of prove of fairness of termination of employment upon the Employer. In this application the applicant advanced five alleged Respondent's conduct which he considers to have made the working condition intolerable. These are non-payment of travel allowances, salary withholding in October 2018, unfair disciplinary action against him and unlawful dentation which forced him to resign from his employment.

In determining as to whether there was constructive termination the matter has been addressed by the Court of Appeal in the case of **Kobil Tanzania Limited v. Fabrice Ezaov,** Civil Appeal No. 134 of 2017, Court of Appeal of Tanzania, at Dar es salaam (reported in Tanzlii) citing the case of **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161 and the case of **Solid Doors (Pty) Ltd v. Commissioner Theron and Others,** (2004) 25 ID 2337 (LAC) at para 28. The Court come with a view that five things must be considered. These are; -

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i. Did the employee intend to bring the employment relationship to an end?

ii. Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?

iii. Did the employer create an intolerable situation?

iv. Was the intolerable situation likely to continue for a period that justified termination o f the relationship by the employee?

v. Was the termination of the employment contract the only reasonable option open to the employee?

From the above authority the alleged reasons advanced by the applicant must be tested in those factors for constructive termination to stand.

Starting with non-payment of allowance and salaries Mr. Muganga submitted that the applicant was claiming pending allowances as per Exhibit A-4 (email conversation regarding payment), this allegation plus exhibit A-4 was never challenged by the respondent at CMA nor at this Court. Equally the claim of unpaid salaries remained unchallenged. The respondent could not counter the claims even by tendering salary slips in consonant with **Section 15(5) of the Employment and Labour Relations Act, Cap 366 R.E 2019**

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which requires an employer to keep records of an employee and prove its existence. Since these allegations remain to be unchallenged, this court can validly hold it as a confirmed fact. In my view, withholding someone's payment which is important for his survival creates intolerable condition of work.

Regarding unfair disciplinary action against him, and unlawful dentation, the applicant contended that after arriving at Arusha for his allowance and salary, he was subjected to allegations that there was a loss of fuel without being served with a notice of a charge. Apart from that the applicant claimed that after resigning his position as Energy Supervisor he was detained under the police custody on condition to sign a contract so as to be bailable. I could not see sufficient facts in the CMA to negate these assertions. All this acts in my view amount to intolerable circumstances, which possibly forced the applicant's resignation.

In the case of **MIC Tanzania Ltd vs Imelda Gerald** (Civil Appeal 186 of 2019) [2022] TZCA 141 and **Nyakuboga Boniface vs Republic** (Criminal Appeal 434 of 2016) [2019] TZCA 461, it was held:-

"It is trite law that, every witness is entitled to credence and whoever questions the

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credibility of a witness must bring cogent reasons beyond mere allegations as it was held in the case of Goodluck Kyando v. Republic, Criminal Appeal No. 218 of 2003(Unreported)"

From the above legal reasonings since the applicant's evidence remained uncountered in the CMA, I have no hesitation to say that respondent's acts against the applicant justify constructive termination and the arbitrator errored in findings that applicant failed to prove his case while his evidence was never challenged.

Having found the first issue answered affirmatively, I differ with the arbitrator's holding and find that the applicant was terminated unfairly. As such, the issue as to whether there are sufficient reasons to revise the CMA award is answered affirmatively.

Regarding relief, in CMA form No. 1, the Applicant claimed for the following;- One month salary in lieu of notice, severance allowance, nights differentials, pending leave for two years, repatriation costs and allowances. I see no reason to differ with the Applicants prayers. He is entitled to what is pleaded and for payment of compensation of 12 months remuneration and certificate of services.

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On the above reasoning, I allow the Application, quash and set aside the award of the Commission for Mediation and Arbitration and order the Applicant to be paid one month salary in lieu of notice, severance allowance, nights differencial for 68 nights as clarified in the opening statement, pending leave for two years, repatriation costs, unpaid allowances including subsistence allowance pending repatriation and for payment of compensation of 12 months remuneration for unfair termination plus certificate of service. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 03rd day of May 2023.

KATARINA REVOCATI MTEULE

JUDGE

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