

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA DISTRICT REGISTRY

(LABOUR DIVISION)

AT TABORA

REVISION NO. 01 OF 2022

(Originating from CMA/TAB/TB-MJINI/100/2020 at Commission for
Mediation and Arbitration for Tabora at Tabora)

GRACE MUKAMA.....APPLICANT

VERSUS

ASSOCIATION OF TOBACCO TRADERS LTD.....1ST RESPONDENT

LIQUIDATION ASSOCIATION OF TOBACCO

TRADERS LTD.....2ND RESPONDENT

JUDGMENT

Date: 15/2/2023 & 10/3/2023

BAHATI SALEMA, J.:

The applicant, **Grace Mukama** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 26/11/2021 by Hon. Arbitrator, H.A Nyang'uye. The application for revision is made under sections 91 and 94

(1) (b) (i) of the Employment and Labour Relations Act, 2004 and Rules 24 (1) and (3) and Rule 28 (1) (a) of the Labour Court Rules, 2007.

The application is supported by the Affidavit sworn by Applicant Grace Mukama. The Respondent contests the Application, hence the Counter Affidavit sworn by Musa Kassim, learned counsel for the Respondent

The background leading to this application stems from the fact that the applicant was employed to the respondent as an attendant with a contract dated 1 July, 2002 in which in the course of performance of her work she was promoted to a new position of a clerk and the employer promoted her in a new position of cashier the position which she holds up to the date of unfair termination of her employment on 27th August 2015 where she had worked with the respondent for 13 years consecutive.

Dissatisfied with the notice of unfair termination she lately filed a labour dispute at the Commission for Mediation and Arbitration for the unfair termination of their employment. She submitted the reasons for her delay that during the time she was indisposed and informed her office of her sickness, that while she was nursing, she was summoned by police to give evidence on the issue of stolen tobacco whereas the boy whom she gave surety ran away. In view of galloping the person he was

guaranteed, she was apprehended by police and put into custody for five days. She was late to file her dispute because when two cases cropped she was engulfed with a criminal case as filed in Form No. 7 and she was sick at the same time. In that atmosphere of facing unfair termination, criminal case and sickness and as such she filed documents concerning sickness lost in her CMA file.

Upon hearing by the CMA the Commission dismissed her case on the ground that the reason adduced for the delay was not sufficient.

Aggrieved by the award the applicant filed the present application for an order on the following terms: -

- 1. That, this Honourable Court may be pleased to call and examine the proceedings and subsequent dismiss Award of Commission for Mediation and Arbitration at Tabora in Labour Dispute CMA/TAB/TB-MJINI/100/2020 and be satisfied as to the legality, correctness and proprieties of its decision and dismissal of the award.*
- 2. That, this Honourable Court be pleased to revise the award dismissed by the Commission for Mediation and Arbitration mentioned above.*

During the hearing, the applicant was unrepresented whereas Mr.Kelvin Kayaga appeared for the respondent. With the permission of this court, both parties agreed to proceed with the matter by way of written submissions.

Submitting in support of the application, the applicant prayed to adopt the affidavit to be part of the proceedings. She submitted that the applicant was under the contract of service and got sick. She informed the employer about her sickness, she was unfairly terminated from her employment and the employer never gave any reason whatsoever which was contrary to the Employment and Labour Relations Act, Cap.366 [R.E 2019].

She further submitted that sickness is the condition of feeling which the person who's sick can feel and not otherwise, failure of the respondent to consider the pain which the applicant was experiencing amounted to unfair termination. The law is well illustrated in the case of **PIMAK Professional Mutfak Limited v PIMAK Tanzania Limited and Another**, Misc. Commercial Application 'No. 55 of 2018 (Unreported where the court held that;

"Sickness is the condition which is experienced by a person who is sick. It is not a shared experience except for children who are not yet in a position to experience their feelings. Sickness is the sufficient reason."

She further submitted that at the time of sickness, she was summoned by the police to give evidence on the issue of stolen tobacco which the person which stole the tobacco, she had signed a bond in which the man runaway and the police officer arrested the applicant and put her into custody for 5 days the act which caused the applicant to be out of her work. She submitted that it was not possible at that time to tell the employer about the hardship she was passing through something which caused the employer to unfairly terminate the applicant from the employment.

She further submitted that, she was late to file her case at the Commission since she was faced with two cases for which criminal and sickness made her fail to file the case on time since she was apprehended in police custody at the Commission for Mediation and Arbitration for Tabora.

She submitted that she has furnished good reason for failure to file her case to the Commission timely on 4 December, 2021 the doctor wrote a letter confirming her sickness and the letter of confirmation issued by the doctor has been attached by the applicant in her application so that the court can examine it and make the revision of the dismissal award in the interest of justice since the procedure for termination of the applicant employment was not fair as it was done

during the sickness and being arrested and put into custody by the police force.

She prayed to this court to order the respondent to pay the applicant subsistence allowance from 2007 up to the date of unfair termination as she had no good reasons for her termination and neither the procedure was followed and urged the court to make the examination of the whole proceedings of the Commission for Mediation and Arbitration and revise the dismissal award issued by the Commission on 7/12/2021

In his response, the counsel for the respondent, Mr. Kelvin Kayaga cautioned this court that the matter beforehand was decided by the CMA on the aspect of condonation and not on merit.

He submitted that the applicant is trying to explain the period of delay and bringing fresh evidence in an attempt to justify her delay to refer the matter before the CMA as seen in paragraph 6,7,8,9,10 and 11 and partly 14. He submitted that the applicant was only required to state facts and grounds upon which she challenges the propriety and legality of the order of the CMA and not on such other evidence not part of the record. Submitting on the relevant grounds for revision on the failure of the CMA to consider sickness as a ground for condonation. He submitted that the affidavit in support of the application for condonation filed before CMA

and the said ground was raised in paragraph “iii” of the affidavit. He submitted that in the case at hand the applicant failed to prove that she was sick as she did not attach any medical records even though she deposed that she included the same. He further submitted that she did not inform the CMA when exactly she recovered from the sickness to proceed with taking legal action against the employer. He also stated that the applicant did not explain how the sickness made it impossible for her to take actions in relation to her rights to take actions against the alleged termination of employment (including instructing a person, a legal representative or seeking legal assistance for purpose of assessing diligence in her actions and lastly the applicant did not state when she recovered from the sickness for purposes of assessing diligence in taking action. To substantiate his argument he cited the case of **Lujuna Shubi Balonzi V Sosthenes Thomas Maliti and Another**, Civil Application No 13/1990 CA held that;

“We are satisfied that there was absolutely no good reason why the appellant failed twice to the fresh notice of motion. He should have produced some evidence to support his claim of medical fitness.”

Also in **Paskaria Steven Kakoroja v Nyanswe Mwita Tambara**, Misc. Land Appeal No 47 /2021 HC Musoma that;

“It is also trite law that a person alleging the existence of a certain fact is duty to prove that facts exist, Sickness is proved by medical

evidence and the appellant has to show how the sickness barred her from appealing in time."

The court went further;

"The appellant is also supposed to account for each day of delay and in the case at hand are 80 days. She stated she was sick but there is no proof providing for that assertion. To warrant extension of time, there must be an accounting of all the delay days."

He submitted that in the case at hand the applicant did not prove sickness as a ground for an extension of time to the required standards.

He further submitted that on the allegation that the applicant lost medical records, this assertion was not featured in evidence as it was not part of the explanation offered in the affidavit supporting the application for condonation before the CMA. As such the same has featured for the 1st time in this proceedings before this court and was brought and raised by the applicant's submission in chief at page 3. But also such allegation over the presence of such letter dated 04 December, 2021 are found at para 14 of the affidavit.

He countered that such a letter cannot and should not be by all stances used as a ground to challenge the decision and proceedings of the CMA since the same was not part of the CMA records. The decision of CMA was delivered on 26 November, 2021 and the alleged letter is alleged to

have been written on 14 December, 2021. This letter was prepared 9 days after the CMA decision. To support his position in the case of **Salma Mohamed V Hadija Kido**, PC Probate Appeal No. 02/2016 High Court at Tabora (unreported) the court held that;

“As earlier pointed, no decision ought to be based on evidence recorded on appeal. An appeal at every level has to be determined on the basis of evidence recorded at the level of hearing of the original matter.”

He further argued that if this court takes the trouble to look at CMA application form No 7 for condonation of late Referral of Dispute filed by the applicant at CMA also added pleading having a criminal case as a ground for condonation.

He countered the argument the applicant relied upon the Proceedings of Criminal Case No 185 of 2015 in the RMs court of Tabora, the applicant was making an appearance, she never missed which means she was not sick up to failure to appear before the court and the case was not scheduled to proceed every day but rather on intervals between 14 days and 30 days at times but there was no explanation as to why she failed to take action to initiate his allegation against unfair termination. To substantiate his stance in the case of **Salum Migandu v Zaituni Lipika**, Misc. Land Application no 527 /2020 HC DSM (unreported);

“The law assists the vigilant and not the one who sleeps over his rights.”

Therefore, he submitted that no valid ground for condonation before the CMA has been disclosed to fault the decision and proceedings of the CMA. He prayed to this court to dismiss the application for want of merit.

In her shorter rejoinder, the applicant reiterated her submission in chief and stated that the applicant proved her sickness in the Commission for CMA by bringing the letter from the doctor who wrote to the Commission but the Commission failed to consider the sickness of the applicant and dismissed the application.

After going through the parties' submissions, court records and relevant applicable laws, the finding of the court will base on the issue of whether the application is meritorious.

There is no dispute that the applicant was employed by the employer and she was unfairly terminated. It is undisputed that the record of this CMA reveals that the applicant delayed for 277 days to file the dispute at CMA which was from 6 September, 2016, on her date of termination. Her reasons for the delay were that she was sick and also she faced criminal charges hence failed to file promptly.

According to Rule 10(1) of the Labour Institutions (Mediation and Arbitration), GN 64/2007 that, I quote;

"Disputes about the fairness of an employee's termination must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate."

As I was perusing through the CMA F.1 Form which was presented before the Commission, the dispute before is on unfair termination. The law provides for such kinds of disputes be presented within 30 days from its occurrence.

In this matter at hand there is no dispute that the dispute has been presented after 277 days according to CMA F.7 where the provision of Rule 11(3) of the Labour Institutions (Mediation and Arbitration Rules) GN 64/2007 provides for the grounds to be considered for condonation and the Arbitrator has to satisfy himself if there is good reason or cause to condone the delay, given the fact that the applicant filed together Form No. 1 and CMA No. 7 for condonation. The Hon arbitrator has to consider the degree of lateness, reasons for lateness, prospects of succeeding with the dispute and obtaining the relief sought against other parties, any prejudice to the other party, and any other relevant factors.

In entertaining the referral at the CMA; the Hon arbitrator found that the reasons advanced do not constitute good cause for the delay.

It is trite law that sufficient reason is a pre-condition for the court or arbitrator to grant an extension of time. What constitutes sufficient reason or good cause has been defined in the Court of Appeal in the case of **John Moses and Three Others vs Republic**, Criminal Appeal No. 145 of 2006. Similarly in the case of **Melane V Santam Insurance Co. LTD**, 1962 (4) SA 531 at 532 C where it was held;

“Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without the prospects of success no matter how good the explanation for the delay, an application for condonation should be refused.”

Now coming to the issue before me, I subscribe with Mr. Kayaga that there was absolutely no good reason why the appellant failed to file the dispute timely. According to the affidavit of the Applicant 2nd paragraph, the Application was presented before the Commission on 06 September, 2016 while she was terminated on 27 August, 2015 which is about 277 days. She should have produced some evidence to support her claim of medical unfitness as per the case of **Paskaria Steven Kakoroja, (supra)**. The appellant was also supposed to account for each day of delay to warrant the extension of time.

The applicant in her revision raised concern over the presence of such a letter dated 04 December, 2021 which is found at para 14 of the affidavit. The court is aware that this is not the first court such letter

cannot be used as a ground to challenge the decision and proceedings of the CMA since the same was not part of the CMA records. See also **Salma Mohamed V Hadija Kido(supra)**. Therefore I find no justification for this ground.

In this matter, the applicant has submitted that she failed to file timely as she had Criminal Case No.185/2015. The court upon traversing through the records noted that it is true that the applicant had a Criminal Case No.5. Still the records reveal that she was terminated on 27 August, 2015 and she had a criminal case on 16 September,2015 according to the JL-1, however, I noted that during the criminal case, she entered appearance scheduled for all days and the case was not scheduled to proceed every day but rather on intervals between 14 days and 30 days at times except for one day.

Therefore from my analysis as per the requirements of Rule 11(3) of GN No. 64 of 2007, the applicant was supposed to explain the reason for her lateness from 27 August,2015 which is about 277 days on what caused the delay to file the dispute at CMA. The applicant has failed to account for each day of delay for 277 days.

In that regard, this court agrees with the findings of the Hon arbitrator that the applicant failed to adduce sufficient reason for each day of delay to file the dispute at CMA within time. Therefore, for the court to exercise its discretion, it has to act judiciously and the party

requesting has to account for each day of delay, in absence of such reason this court can not speculate that there was a valid reason. The delay was contributed to by lack of diligence. As a result, the application for revision is devoid of merit and accordingly dismissed.

Order accordingly.



A. BAHATI SALEMA
JUDGE
10/03/2023

Court: Judgment delivered in presence of both parties.



A. BAHATI SALEMA
JUDGE
10/03/2023

Right of Appeal fully explained.



A. BAHATI SALEMA
JUDGE
10/03/2023

