IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LABOUR REVISION NO. 05 OF 2022

(Arising from Labour Dispute No. CMA/KMG/209/2020)

1. **HUSSEIN IDD ----------1ST APPLICANT**
2. **SWALEHE YAHAYA---------- 2ND APPLICANT**
3. **BASHIRU AHAMAD MIGINA----------3RD APPLICANT**

VERSUS

1. **THE REGISTERED TRUSTEES OF GOMBE SCHOOL OF ENVIRONMENT SOCIETY (GOSESO)----------1ST RESPONDENT**
2. **GOMBE HIGH SCHOOL ----------2ND RESPONDENT**

JUDGMENT

09/09/2022 & 06/02/2023

MANYANDA, J.

The Applicants, namely, Hussein Idd, Swalehe Yahaya and Bashiru Ahamad Migina, hereafter referred to as the 1st, 2nd and 3rd Applicants, respectively, approached the Commission for Mediation and Arbitration (CMA) for Kigoma at Kigoma, hereafter the CMA, three times against

their employers, the Registered Trustees of Gombe School of Environment Society (GOSESO) and Gombe High School, now the respondents in this Application. The source of the dispute is COVID-19 pandemic effect during which schools were among the institutes affected due to closure of their activities, hence running short of money to meet their expenditures including employees' salaries.

The Applicants approached the CMA three times. They first visited the CMA in Labour Dispute No. CMA/KIG/185/2020/05 claiming among others unpaid 15 months salaries. The CMA awarded them. Then, they approached the CMA for the second time in Labour Dispute No. CMA/KIG/183/2020 claiming for unpaid three months salaries during which period they were contesting with the Respondents before the CMA in Labour Dispute No. CMA/KIG/185/2020/05.

Having tested the honey, they approached the CMA for the third time, in the instant matter, claiming among other things twelve salaries compensation for what they call forced or constructive termination. They led evidence that when they reported back to their work following the CMA's award of reinstatement in Labour Dispute No. CMA/KIG/185/2020/05, they were denied teaching periods, hence they only signed in the attendance register which was also later on hidden.

Hence to fear further disciplinary actions, such as dismissal, and the like as there were no clear internal management mechanisms for settling the dispute amicably, they tendered resignation letters.

This time the CMA declined to grant the application on grounds that the Applicants failed to establish constructive termination. The Applicants are challenging that decision by moving this Court to call for the impugned record of the CMA and after getting satisfied as to correctness, legality and propriety or otherwise, revise the same.

In the affidavit sworn by Silvester Damas Sogomba, Counsel for the Applicants complaints are leveled on four grounds namely: -

1. *That the CMA failed to evaluate the evidence properly the evidence adduced by the Applicants regarding force resignation;*
2. *The CMA failed to note that the Applicants' resignation was not voluntary due to intolerance working environment by been discriminated and denied work to do;*
3. *The CMA erred when it held that the Applicants failed to exhaust internal management steps while the management had no such management system; and*
4. *Evaluation of evidence by CMA was vague as it failed to know what the parties had settled per Exhibit X1.*

At oral hearing of the Application, the Applicants were represented by Mr. Silvester Damas Sogomba, learned Advocate, and the Respondents were represented by Mr. Ignatus Rweyemamu Kagashe, learned Advocate.

Mr. Sogomba submitted in support of the application by adopting his affidavit and arguing that upon reinstatement, the Applicants were discriminated and subjected to harsh and intolerable working conditions. They were not given periods to teach but ended up reporting and signing in attendance registers which latter on got hidden. That the Applicants signed for the last time on 20/10/2020. The allegations by DW1 Albert Ntibasiga that the Applicants were absentees is unfounded because he was also absent when the dispute emerged as he was not employed, he got employed on 01/11/2020, he didn't tell what caused the Applicants' absenteeism.

In such conditions, they had no any other option than to resign. He pointed out that there was evidence that a resignation letter was served to the Respondent by expeditated mail by Tanzania Posts Corporation driver who delivered the letter by hand, but the Respondents refused. He could not tender a dispatch to acknowledge

the refused service because the same was an official document of Tanzania Posts Corporation.

The Counsel went on submitting that the CMA didn't evaluate this piece of evidence, instead, it dealt with an issue of failure by the Applicants to exhaust internal management dispute resolution mechanism, which according to their evidence was lacking in the Respondents' management.

Lastly, the Counsel pointed out what he called contradictions between DW1 and DW2 testimonies; that, while DW2 said the Applicants were not assigned teaching periods due to their absenteeism, on the other hand, DW1 said they were not assigned teaching periods due to their unsteady attendance.

To bolster his arguments, Mr. Sogomba cited the case of **Kobil (T) Ltd vs. Fabrice Ezaovi,** Civil Appeal No. 134 of 2017 CAT – DSM (unreported) in which tests for constructive dismissal were spelt out. He also cited the case of **Barclays Bank Tanzania vs. Pendo Mbinda,** Labour Revision No. 804 of 2018 (unreported) which lists constructive termination of employment.

On his side Mr. Kagashe opposed the application adopting his counter affidavit, the Counsel submitted that the application by the

Applicants before the CMA was about forced resignation or constructive termination as provided under Section 36 of the Employment and Relations Act, [cap 366 R. E. 2019] and Rule 7 of GN No. 42 of 2007. In such labour disputes, the onus of proof lies on the employee.

The Counsel elaborated that in this matter the Applicants were employees of the Respondents as teachers at Gombe Secondary School from 2015 to 2019. During this period there were no grievances. The dispute arose in 2019 during closure and reopening of the schools due to the COVID 19 Pandemic. An arrangement for paying salary arrears in lump-sum of three months was made, but the Applicants did not heed to. Hence the first dispute which was resolved by the CMA by ordering the Applicants report to work on 01/10/2020. However, the Applicants never reported, while Swalehe reported only once in October, others reported less than six to eight days and all of them reported for the last time on 20/10/2020. He was of the view that the CMA rightly found that allegations of hiding the attendance register were unreliable.

The Counsel submitted further that the Applicants alleged to have served the Respondents with resignation letters allegedly due to working hardships, but the said letters were never served to the Respondents, instead they purported to serve his advocate. There was no proof of

service either to the Respondents or their advocate as neither a dispatch book nor envelop serial number was tendered before the CMA. The Counsel was of the views that the conditions in the case of **Kobil (T) Ltd vs Fabrice Ezaovi (supra)** were not proved.

The Counsel went on submitting that the arrears of salary were a result of the Applicants' deliberately designed absenteeism, there was no hardship.

As regard to evidence of DW1 (Albert Ntibasiga), the Counsel conceded that it didn't touch the Applicants because he was employed on 01/11/2020 while the Applicants were already totally absent from 20/10/2020. He also conceded that the Applicants were not given teaching periods due to uncertainties of their attendance, however, despite all these, the Respondents paid them.

In rejoinder, Mr. Sogomba for the Applicants reiterated what he had submitted in chief.

Those were the submissions by the Counsel for both parties. As it can be gathered from the Counsel's submissions, the main issue is whether the CMA failed to sufficiently evaluate the evidence. The Counsel for the Applicants answered this issue in affirmative while the Respondents' Counsel answered it in negative. My perusal of the

proceedings and the impugned award leads me to answering this issue in negative as I will demonstrate hereunder.

The CMA framed two issues to guide it in deliberating the dispute namely, whether there were circumstances warranting forced resignation and what reliefs to parties.

In answering the first issue the CMA summarized the evidence tendered by both sides. The Applicants adduced evidence through five (5) witnesses being Hussein Iddi (PW1), Swalehe Yahaya (PW2), Zaituni Falidu Juma (PW3), Bashiru Haman Migina (PW4) and Noel Timotheo Mgube. The Respondents had two (2) witnesses namely, Albert Ntibasiga (DW1) and Moshi Ibrahim Sindamenya (DW2). The CMA made reference to the provisions of Rule 7 of the Employment and Labour Relations (the Code of Good Prictice) Rules, GN No. 42 of 2007 which reads: -

> *7. Where the employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination."*

The CMA rightly pronounced the principles underlying forced resignation or constructive termination by citing **Kobil (T) Ltd vs Fabrice Ezaovi's case (supra)** among others that the duty of proving

the intolerable working environment lies on the employee and must exhaust all the available internal dispute resolution mechanisms.

Moreover, the CMA analyzed the circumstances listed in the cited case and rightly found that the same were not met. One, the CMA found as a matter of facts, that the Applicants letter of resignation was not dully served to the Respondents. The serving witness, PW5 simply said he sent a letter to a person whom he was told was a lawyer of the Respondents. Unfortunately, PW5 did not even mention the name of the alleged lawyer apart from failing to tender in court the dispatch book. In short, the alleged latter did not reach the Respondents.

Secondly, the CMA found that the Applicants did not exhibit exhaustion of internal grievance resolution mechanism. The Applicants in their testimonies conceded on this fact, but they alleged that there was no such mechanism. This contention is unfounded. I say so because there was leadership at the school as well at the Registered Trustees of the Gombe School. The Applicant ought to have at least shown that they reported to these leaders their grievance. To say that they failed to report their grievance because there was no leadership is to read the authority upside down. There was school Headmaster and a School Manager or Director. This is leadership chain to which the Applicants

ought to have reported their grievance. This fact when coupled by the fact that the Applicants failed to serve their resignation letters to the Respondents makes their complaint an afterthought.

Also, the Counsel for the Applicants pointed out what he believed to be contradictions between DW1 and DW2 testimonies; that, while DW2 said the Applicants were not assigned teaching periods due to their absenteeism, on the other hand, DW1 said they were not assigned teaching periods due to their unsteady attendance. This, in my views, is not contradiction because unsteady attendance connotes existence of absenteeism, the witnesses spoke about the same thing. The CMA was correct in disbelieving the Applicants' story.

Another sub issue is whether there was intolerable working environment. In their testimonies the Applicants presumed that non scheduling of teaching periods to them was a negative attitude by the employer towards them. But the evidence by DW2 was so clear that scheduling of teaching periods to a teacher depended on availability of the lessons, availability of the teacher, performance of a teacher or assignment of other duties to the teacher; himself (DW2) at one time had no teaching periods and that it was normal circumstances at the school. Secondly, there was no evidence by the Applicants showing that

the grievance took long time as such it became intolerable. The Applicants complaint of non-assignment of teaching periods covers only a few days in one month, that is, from 01/10/2020 when they reported to 20/10/2020 when they absented themselves in the disguise of resigning.

As to non-signing of the attendance register by the Applicants, the CMA analyzed their testimonies as follows: -

> *"Walalamikaji wamekiri wenyewe kutokusini daftari la mahudhurio, kielelezo X2 na kutokusaini katika daftari la mahudhurio ni dhahiri inahesabika kuwa mwajiriwa hayupo kazini. Sababu walizotoa kwamba daftari lilikuwa linafichwa haina mashiko kwa kukosa uthibitisho."*

Literally means that the Applicants admitted that they didn't sign in the attendance register Exhibit X2 and none-signing attendance register is clear evidence that one did not attend at work.

The allegations of the attendance register been hidden is unfounded.

To this end, as it can be seen, the CMA adequately analyzed the evidence of both sides and came to a right conclusion that the Applicants failed to establish forced resignation.

In the case of **Kobil (T) Ltd vs Fabrice Ezaovi's case (supra)** the Court of Appeal stated as follows: -

> ***In order*** *in order to answer whether there was constructive dismissal in this matter, we need to answer the questions as posed in* ***Katavi Resort vs Munirah J. Rashid*** *[2013] LCCD 161 and* ***Girango Security Group vs Rajabu Masudi Nzige,*** *Labour Revision No. 164/2013 (unreported).*
>
> *These are:*
>
> *"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 word "intolerable" was discussed in a South African case of **Van Tonder v. Armaments Corporation of SA (SOC) Ltd and Others,** (2019) 40 ID 1539 (LAC) which was cited with approval by the Court of Appeal of Tanzania in the **Kobil (T) Ltd's case (supra)** in the following words: -

> *"... The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is*

something which is simply too great to bear, not to be put up with or beyond the limits of tolerance...,"

Fitting the above questions into the circumstances of this case one can see that though the Applicants intended to terminate their employments, yet they did not manage to make their intention clear to the Respondent because they failed to serve the letters of resignation. Had they served the letters probably the situation could not have been as happened. This is the reason that Rule 64 of GN No. 42 of 2007 strictly require proof of service.

Moreover, a question that the employer created the intolerable conditions, has been answered in negative in that, per DW2 testimony, there was no proof of discrimination. As to the questions about duration of the intolerance been endurable and absence of other options, the evidence is clear that the Applicants didn't act any how to alert their employer by lodging complaints to them. More or so, non-assignment of teaching periods was a short time phenomenon which was also felt by others including DW2 who testified that it was a normal routine depending on the available works at the station, availability of a teacher and been assigned with other duties.

In this matter, the period complained of was within one month of October. In my view this was still a short time to be regarded as "*more than can be tolerated or endured; or insufferable or too great to bear, not to be put up with or beyond the limits of tolerance*" so as to justify termination of the relationship by the employee. The CMA was correct in its findings.

In the result, for reasons stated above, I find that this application has no merit. I dismiss it. This been a labour dispute and there been no evidence of vexatious or frivolous on the part of Applicants, I make no order as to costs. It is so ordered.

Dated at Kigoma this 06th day of February, 2023

F. K. MANYANDA

JUDGE