IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LABOUR REVISION NO. 7 OF 2022

(Originating from Labour Dispute No. CMA/DOM/27/2021/9)

ABBAS GICHE BUGANGA ..... APPLICANT

VERSUS

NICE CATERING COMPANY LTD ..... RESPONDENT

JUDGMENT

21st March & 5th April 2023

Khalfan J.

This is an application for revision against the award of the Commission for Mediation and Arbitration (CMA) in labour Dispute No. CMA/DOM/27/2021/9 (the labour dispute). The brief facts leading to the present application are that: the Applicant was employed by the Respondent, Nice Catering Company Ltd as Site Manager on 1st October, 2020 and on 23rd December, 2020 his contract was terminated without adhering to legal procedures. Aggrieved with such termination, he filed a complaint before the CMA alleging that he was unfairly terminated from employment and sought to be paid the remaining monthly salaries Tshs. 5,000,000/= (Five Million Shillings Only) for unlawful termination.

After hearing the evidence from both parties, the CMA found that the termination was substantially and procedurally unfair. It thus awarded him to be paid a one-month salary amounting to Tshs. 500,000/= (Five Hundred Thousand Shillings Only) for breaching the contract.

Dissatisfied with the Award, the Applicant filed an application for revision in this Court. The application was disposed of by way of written submissions. Both parties were represented by learned advocates. The Applicant was represented by Mr. Charles B. Shipande, Learned Advocate, whereas the Respondent was represented by Mr. Alfred Tukiko Okechi.

In his submission, the Applicant's Advocate adopted the Applicant's Affidavit and he brought this Application under section 91(1)(a)(b), 91(2)(b) & (c), 91(4)(a)(b), 94(1)(b) & (i) of the Employment and Labour Relations Act [Cap 366 R. E 2019] (hereinafter 'ELRA') and Rule 24(1), 24(2)(a), (b), (c), (d), (e) & (f), 24(3)(a), (b), (c) & (d) and Rule 28(1)(b), (c), (d), and (e) of the Labour Court Rules (GN No. 106 of 2007).

It was submitted on behalf of the Applicant that the Applicant was employed by the Respondent as a site Manager on 1st October 2020 for a fixed term of one year. However, on 23rd December 2020 his contract was terminated without adhering to the laid down legal procedures, he filed a

dispute to the CMA at Dodoma challenging the decision of the Respondent. On 5th May 2022, the Award of CMA ordered the Applicant to be compensated one month salary payment only after observing that there was a breach of the contract.

The Applicant's Advocate further contended that the parties entered into fixed terms employment contract starting from 1st October 2020.However, the contract which was to end on 1st October 2021, he was terminated by the Respondent thus the Applicant's employment contract ended before its expiry. Reliance was made on Rule 4(2) of the ELRA (Code of Good Practice) Rules, G.N No. 42/2007 which provides that; *'where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provides otherwise'.*

The Applicant's Advocate insisted that the fixed term of their contract was one year and the Respondent terminated it ten months before its expiry. The termination amounted to breach of the contract which entitles the Applicant to compensation for salaries of the remaining period of ten months which is Tshs. 5,000,000/= (Five Million Only). He cited the case of **Daram Singh Hanspaul and Sons Ltd vs Oswald Christopher Charles & Another,** Revision Application No. 69 of 2021,

High Court of Tanzania at Arusha (Labour Division) (Unreported) where it was held that *'since the Respondents worked for a fixed term contract, the proper remedy was to compensate them for the remaining period of their contract'.*

The above cited case is, it was submitted, and similar to the instant case in which the Applicant who worked for just two months, was terminated before the expiry of the contract of which he is entitled for compensation of the remaining period of ten months. Based on the given explanations, the Advocate for the Applicant prayed that the CMA award be revised and set aside and the Respondent be ordered to pay the Applicant the remaining ten months' salaries as compensation.

The Respondent's advocate submitted in reply that, the Respondent entered into employment contract with the Applicant from 1st October 2020 to 1st October 2021. That, sometime in December 2020, the Applicant, without permission, decided to leave his office and went to Dar-es-Salaam for purported family matters, while purportedly was alleged to have made a request through *WhatsApp Social Media Network*. The Respondent used all frantic effort to settle the matter including calling him for disciplinary meeting; but all in vain. As the Applicant was not receptive, the Respondent's effort proved futile. Following the case filed by the

Applicant at the CMA, the Respondent was, by virtue of the award given, required to pay the Applicant one month salary amounting to Tshs. 500,000/=. It was so decided because the CMA was, among other things, satisfied that the Applicant did not follow the procedures, including the fact that the Applicant did not get the permission of his employer as there was no record that there was permission consent following his WhatsApp request.

The Respondent cited the case of **AsanteRabi Mkonyi vs Tanesco**, Civil Appeal No. 53 of 2019 (Unreported) CAT at Dar- es-Salaam where it was held that *'employer was not obliged to call for disciplinary hearing after the employee ....absconded himself'.* See also the case of **Mtambua Shamte & 64 Others Vs Care Sanitation and Suppliers**, Revision No. 154 of 2010 (Unreported) and Section 37 (1) of ELRA which provides in details what amounts to unfair termination of employment. It was therefore argued that the CMA was right to award one month salary owing to the fact that the Employment of the Applicant was terminated following the Applicant's un-procedural action of leaving the work premises without permission.

The Respondent insisted that at the CMA, the Applicant agreed that he left his office without permission and thereby absconding from work

without permission from his employer. The Applicant contended that he requested permission through WhatsApp which is not an official means of communication within the Office. See the case of **TBL vs John Mugabe and 3 Others;** Labour Revision No. 81 of 2020 at Mwanza, where it was held that, *'the Court did not accept the notice for being informally issued through WhatsApp network'.*

The Respondent winded up his submission by saying that the Application of the Applicant is misconceived for being frivolous and an abuse of the process of the Court as it is undisputable that the Applicant himself without permission from the employer, decided to behave in a manner making the contract between himself and the Respondent intolerable.

From the submission made by the learned counsel for the Applicant and the reply by the Respondent, I find that there are only two main issues for our determination. The first issue is whether the Applicant's termination was fair. And the second issue is whether the reliefs awarded were pleaded by the Applicant.

I shall start with the first issue where the learned counsel for the Applicant stated that the termination was unfair. Section 37 (2) of ELRA

requires an employer to prove that the termination was substantially and procedurally fair. For ease of reference, I reproduce hereunder section 37 (2) of ELRA that reads:

> *'(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-*
> *(i) related to the employee's conduct, capacity or compatibility; or*
> *(ii) based on the operational requirements of the employer, and*
> *(c) that the employment was terminated in accordance with a fair procedure'.*

From the above provision of the law, the burden of proof is placed upon the employer to prove that there was valid and fair reason to terminate the employee and the due process in terminating such an employee was observed. In that regard, I am satisfied with the evidence of the Respondent (i.e., the Employer) who stated that the Applicant, without any permission from the employer, decided to leave the work premises and undertook his known mission and after being cautioned and questioned for the reason of taking that action, he opted to file a complaint at the CMA for an allegation of breach of Contract.

On my part, I have revisited the record, particularly, the CMA's proceedings and observed from the Applicant's evidence that he allegedly wrote a letter and requested 7 days without pay leave permission from the Respondent through *WhatsApp Social Media Network*. However, the said letter was not submitted or shown at the CMA by the Applicant. The Applicant did not even prove that the said letter was received by the Respondent and if the Respondent, consequently, granted the said request.

There was therefore a mere assertion by the Applicant that he was unfairly terminated. Even when he said he was terminated through phone call, he failed to prove before the CMA the said voice of Human Resource Officer who terminated his employment; he just stated that he was called by the Human Resource Officer and told that his employment was over.

Having revisited the record of CMA, and the submission of both parties especially the Applicant, I failed to see if he was terminated. Failure of the Applicant to submit any proof showing that he was terminated; it is hard for this court to believe just his mere words that he was terminated by the Human Resource Officer as alleged.

As a result, this court agrees with the Respondent's evidence that the Applicant himself absconded from work, having failed to seek and obtain permission before leaving for Dar-es-Salaam for alleged family matters. His absence from work without permission and any proof of being permitted to leave the work place was likely to cause loss to the employer.

I have also considered the entire CMA evidence. It is apparent that the respondent denied to have terminated the Applicant. He stated that the Applicant is still his employee; the Applicant even admitted to have been called by the Human Resource Officer for disciplinary hearing and disciplinary proceedings but he refused and went to lodge a complaint at the CMA.

In the case of **C.R.J.E Co. Ltd versus Maneno Ndalije & Others,** Labour Division, Revision No. 205 of 2015, (unreported), it was held that; 'the Applicants had a duty to prove that the termination actually took place in circumstances where the Respondent denies to have terminated them'. (See also the case of **Said Seleman and 13 Others versus A- One Product & Bottlers Ltd**, Revision No. 890/2018, High Court Labour Division where the court found that the matter lodged in the CMA was premature).

In my view, I find that there is no proof of termination of the Applicant's employment and that the Applicant sent his complaint to the CMA prematurely. I see that the arbitrator properly evaluated the evidence on record. The issue as to whether there are sufficient reasons adduced by the Applicant to warrant revision and setting aside of the matter is therefore answered negatively.

From the above analysis, I find this application for revision devoid of merit. The application is dismissed, and the arbitrator's award is upheld. Each party to take care of its own costs.

It is so ordered.

Dated at **Dodoma** this 5th day of April, 2023.

F. R. KHALFAN

JUDGE