

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

REVISION APPLICATION No. 8 of 2023

(C/f Labour Dispute No. CMA/ARS/ARS/95/22/37/22)

NOEL MGASA APPLICANT

VERSUS

XINIFEIDA TECHNOLOGY LTD RESPONDENT

RULING

10th August & 8th September, 2023

TIGANGA, J.

The applicant seeks for revision of the decision from the Commission for Mediation and Arbitration of Arusha (the CMA) in Labour Application No. CMA/ARS/ARS/95/22/37/22 dated on 21st January, 2023 by A.K. Anosisye, Arbitrator. According to his application, the applicant urges this Court to revise the Award on the following grounds;

1. That, this Court be pleased to determine the matter in the manner it considers appropriate.
2. That, this Court be pleased to find that, the trial arbitrator cooked the evidence which was not testified by the witness during hearing and what was testified was not recorded which led to wrong Award

3. That, this Court be pleased to revise the proceedings, set aside the Award and make an order for the application to be tried *de novo* as the evidence is totally cooked up and the applicant's evidence was not recorded.
4. This Court be pleased to give any other reliefs as it may deem just and fit to grant.

To understand what triggered this application a brief history of the dispute is important, and it shows that, the applicant was employed by the respondent as a Sales Supervisor on 03rd November, 2019 on a one year fixed term contract renewable each year upon mutual agreement between parties. That, after the expiration of initial contract, parties agreed to renew another one year fixed term contract which was to expire on 4th November, 2022. However, according to the applicant, on 1st March, 2022 before his contract ended, the respondent employed another person by the name George Makata who allegedly took over his work responsibilities. He also alleged that, the respondent removed him from her WhatsApp work groups, an interference which made his working environment uncomfortable thus, decided to inquire from the respondent. The latter was not cooperative rather stopped his salaries hence decided to file his complaint at the CMA.

The respondent on the other side had a different version of story, according to her, on 04th March, 2022, on his own whims, the applicant quit his employment without giving notice to the respondent. He just wrote a letter alleging the respondent is ruining his carrier and when inquired to elaborate more, he decided to file his complaints at the CMA. Regarding George Makata, the respondent was of the view that, he did not cause any inconvenience or assumed applicant's role as he alleged because the said George was transferred to Arusha from Mwanza to work as Regional Manager and not as a Sales Supervisor. At the end, the Commission dismissed applicant's claim for want of merit hence the current Revision.

The application was brought under section 91 (1) (a), (2) (a) (b) and 94 (1) (b) (i) of the **Employment and Labour Relations Act**, No. 6 of 2004, R.E 2019 (the ELRA) and Rule 24 (1), (2) (a) (b) (c) (d) (f), (3) (a) (b) (c) (d) and 28 (1) (d) and (e) of the **Labour Court Rules, 2007, GN. 106 of 2007** (Labour Court Rules). The application is also supported by applicant's sworn affidavit in which he deponed that, after the CMA had delivered its decision on 21st January, 2023, he was availed with the copy of the said Award on 31st January, 2023. Upon thorough perusal of the same, he discovered that there were new matters which were never discussed

during proceedings but are featured in the said Award. He further deponed that, there were matters not discussed by either party but were considered in the Award and there are some of the applicant's evidence not discussed at all. According to her, that made the CMA not to reach a fair decision. For the interest of justice, he urged the Court to revise the Commissions Award.

The respondent disputed the application and filed a counter affidavit sworn by Ms. Edith Mushi, the respondent's Principal Officer in which she contested the application. She contested the fact that, there are part of cooked or unrecorded witness testimonies in the Award or the fact that, there are new facts reflected thereof. She put the applicant under strict proof.

During the hearing, the respondent defaulted appearance thus, the matter was heard *ex-parte*. Through his Advocate Ms. Upendo Msuya, the applicant submitted that, upon carefully perusal of the entire proceedings and the Award, it is clear that, there were a new evidence which was neither testified by the applicant nor the respondent. That, at page two and three of the Award it shows that, a Human Resource Manager testified that, the applicant wrote her an email to which she responded. However, in reality she testified that the email was sent to General Manager and the said

General Manager was the one who responded not the Human Resources Manager.

Ms. Msuya further submitted that, there are other irregularities seen such as the fact that, the respondent testified to have an office at Mega Complex but it was not recorded anywhere. Also the applicant was removed to all groups of wechart and whatsapp group which was crucial for work but this fact was not recorded. On top of that, the arbitrator delayed to announce the award for more than 30 days without any valid reasons. She prayed that this matter start afresh so that applicant's rights can be heard because it is clear that the evidence was tempered at higher standard as a result caused miscarriage of justice to him.

After considering both parties' affidavits, and their respective submissions and after a thorough perusal of the records and decision of the Commission, it is undisputed that, the applicant had one-year fixed term contracts with the respondent from 2019 and the last contract was to end on 4th November, 2022. However the same was cut short on applicant's claim that there was constructive termination of contract due to unfavorable working conditions. The CMA had dismissed his allegations for lacking evidence to back it up. He is now challenging the CMA Award for cooking

evidence. Now, basing on materials submitted by the parties, the questions to be determined by this Court which covers all grounds of revision raised will include the following which I will answer interchangeably;

- 1. Whether the applicant was treated unfairly leading for his early resignation.***
- 2. Whether the Commission was justified to dismiss his claims.***
- 3. Whether there are evidence on record which did not form the testimony of the witnesses and whether there was evidence which were not recorded by the arbitrator***

According to the applicant's, he decided to quit after his working environment became intolerable i.e. constructive termination of contract.

Rule 7 (1) (2) and (3) of Employment and Labour Relations (Code of Good Practice) GN 42/2007 (the Code of Good Practice) reads;

"7 (1) Where an employer makes an employment intolerable which may result in the resignation of the employee that resignation amount to forced resignation or constructive termination.

(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination –

(a) sexual harassment or the failure to protect an employee from sexual harassment; and

(b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) where it is established that the employer made employment intolerable as a result of resignations of the employee, it shall be legally regarded as the termination of employment by the employer."

In the case of **Katavi Resort vs. Munirah J. Rashid**, Labour Division at Dar es Salaam; Labour Revision No. 174 of 2018 laid down principles for constructive termination as follows;

- 1. The employer should have made the employment intolerable.*
- 2. Termination should have been prompted or caused by the conduct of the employer.*
- 3. The employee must establish there was no voluntary intention by the employee to resign. The employer must have caused the resignation.*
- 4. The Arbitrator or court must look at the employer's conduct as a whole and determine whether its effects, judged reasonably and sensibly, is that the employee cannot be expected to put up with it.*

From the above positions it is therefore important to note that in order to determine the issue of constructive termination/resignation, it has to be proved that the employer created intolerable employment conditions to the

employee. In the matter at hand, I honestly do not see how the applicant contract was terminated by the employer constructively. I hold so because from his evidence, the applicant averred that, there were a number of reasons that made him quit to wit; he was harassed by a person called George Makata who invaded his working space and assumed his duties without proper notice.

Going through the evidence, he wrote the respondent regarding the alleged harassment as exhibited in P2 in which he did not specifically mention being harassed by the said George. However, when he was told to elaborate more on the nature of his grievance as exhibited in P3, he did not, instead, he ran to the Commission. More so, such George Makata was shifted from Mwanza to Arusha as a Regional Manager and not as a new Sales Supervisor as alleged by the applicant. Another matter he considered as an intolerable circumstances is the fact that, he was removed from all WhatsApp groups and WeChat which were work related. When cross examined on this fact he replied as follows;

"Q; Uliondolewa lini kwenye ma group?"

A; Group la kwanza la northern 05/03/2022, head office 04/04/2022, 06/04/2022 VIVO brand group, Arusha VBA management group 04/04/2022, GTDA VBA sales Group Dar

*04/04/2022 northern sales officer management group 06/04/2022,
VIVO sales group 17/03/2022.*

*Q; Uliondolewa mbele ya barua yako, yaani barua Exh. P2 ilitangulia
ndipo ukaondolewa, huoni hakuna relation na harassment
unayodai.*

A; Haiwezekani uandike barua tarehe 03 na 04 niondolewe.

*Q; Hoja ya sababu ya wewe kuandika barua barua Exh. P2 ni
kutoakana na kuondolea katika group?*

A; Siyo sababu."

It is on record that, the applicant wrote to the respondent regarding his unfair treatment on 4th March, 2022, he referred the dispute to the CMA on 7th March, 2022 and the respondent was summoned to the CMA on 8th March, 2022. With his own testimony he said was removed from WhatsApp groups and other social groups which according to her were work related after he started the commotion. In one of the grounds of revision, the appellant claimed that the Commission did not consider such evidence however, under page 2, 4, 6 and 9 of the Award the evidence relating to WhatsApp and other social media groups were discussed. Also the respondent testified that, after most of the groups he was removed after he filed the dispute at the Commission.

Be as it may, apart from the fact that, these were social media groups, created by his fellow officers, the applicant did not give any evidence to show if they were the only media of communication and how not being on such groups affected his work that made him quit. It is therefore my considered opinion that, there were no intolerable circumstances proved by the applicant to amount to constructive termination of contract, and the CMA did not err in holding so. He quit his employment out of his own volition and without notice. As an ancient adage goes "he who comes to equity must come with clean hands", the applicant act of breaching his contract was unjustifiable, he cannot benefit from such act.

Another issue challenged by the applicant is the fact that, there were cooked evidence which the Commission relied in reaching its decision while other evidence was left out. In the circumstance he prayed that, the matter should start afresh. Looking at his submission he mentioned such cooked evidence as the fact that, it was the Managing Director who replied to his letter, exhibit P3, and not the HR who testified as DW1. However, in the impugned Award I did not see any statement to prove this contention. Even if it was, he did not indicate how it prejudice her for the matter to start afresh. Scanning this complaint, it intends to impeach the record of the court.

On that I borrow leaf from the decision of the case of **Nestory Ludovick vs Mariana Mahundi**, PC Civil Appeal No. 95 of 2020, Masabo, J HC-DSM District Registry it was held that,

*"It trite principle of law that, Court record being a serious documents should not be lightly impeached as there is always a presumption that court record represent accurately what happened in Court. See. **Alfani Sudi Abieza Chichi** [1998] TLR 527 at page 529."*

Allowing the impeachment o court record on flimsy ground on the instant case would lead to anarchy and disorderly in the administration of justice and ultimately prevent dispensation of justice.

Lastly, applicant's claimed another irregularity as the fact that the Award took so long to be delivered. Reading on the last paragraph of the Award the Arbitrator stated;

"The Commission regrets that, this award is issued outside the prescribed time. The same is due to the reason that, the arbitrator was on annual leave"


Taking into account the proceedings show that, on 19th December, 2022 the Arbitrator informed parties that, he was going for his annual leave and adjourned the Award to 22nd January, 2023, a day which he delivered

the same, a reason for such lateness was fairly disclosed. As the applicant did not elaborate how he was prejudiced by such lateness, I find his assertion meritless. In light of the above analysis, this application for revision is dismissed for want of merit. The Award issued by the Commission is hereby upheld. This being labour dispute, I give no orders as to cost.

It is so ordered.

DATED and delivered at **ARUSHA** this 8th day of September, 2023




J.C. TIGANGA
JUDGE