THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 05 OF 2023

(Originating from Labour Dispute CMA/MBY/109/2019/AR.65)

CHINA RAILWAY SEVENTH GROUP.....APPLICANT

VERSUS

ESTIMUS JACKSON TIRHON.....1ST RESPONDENT

VICTOR RWEHUMBIZA KAIJAGE.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 15/12/2023
Date of Judgment: 15/03/2024

NDUNGURU, J.

CHINA RAILWAY SEVETH GROUP (the applicant) was aggrieved by the award of the Commission for Mediation and Arbitration for Mbeya at Mbeya (henceforth the CMA) in Labour Dispute CMA/MBY/109/2019/AR.65 in which the applicant was ordered to pay terminal benefits and compensations to ESTIMUS JACKSON TIRHON and VICTOR RWEHUMBIZA KAIJAGE (the respondents) for unfair termination.

In the said dispute, the respondents claimed to have unfairly terminated from employment by the applicant. They alleged in the CMA form No.1 that on 6/9/2019 the applicant orally terminated them from employment. Being a requirement of law that in a claim of unfair termination, an employer is obliged to prove at the balance of probability that termination was fair in terms of reasons and procedure, the applicant denied in the evidence of a single witness, one Jacob Jeremia that the respondents had never been terminated instead they absented themselves from work place fearing to be apprehended for a criminal offence of stealing which a third party accused them.

On the other side, apart from the allegation of unfair termination levelled in the CMA Form No.1, the respondents did not enter appearance to state their case and give evidence on how the alleged termination occurred.

At the end, however, the CMA found the applicant liable for terminating the respondents' employment unfairly. It reasoned that, it was upon the employee to allege in the CMA form No. 1 that there was termination then the CMA was obliged to look at the evidence of the employer on the reasons for termination and the procedure applied. That when the employer failes to discharge that duty then she is liable

for unfair termination. Being aggrieved by the decision, the applicant filed this revision application seeking this Court to decide on three (3) issues as follows:

a) *Whether by evidence on record it can safely be said that the Applicant had terminated the Respondents.*
b) *Whether by the Respondent (Who were the complainants) failing to give their evidence at the Commission, they can be said to have proved their termination.*
c) *Whether the principle that it is the employer who has the duty to prove fairness of termination means that the employee who alleges termination has no duty to give evidence.*

At the hearing, advocate Rosemary Brasius Haule represented the applicant while the respondent was advocated for by Mr. Gerald Msegeya, learned advocate. The application was disposed of by way of written submission.

Submitting in support of the application, advocate Haule adopted the affidavit which was filed in support of the application then argued that, the applicant having denied to have terminated the respondents but the respondents absented themselves from work escaping from allegation of committing a crime, it was upon the respondents to adduce

evidence to controvert the applicants testimony and in the absence of any, the applicant's evidence remained uncontroverted thus that the CMA was not justified to hold that the applicant has unfairly terminated the respondents.

Advocate Haule further submitted that though the law shoulders the burden of proof of fairness of termination upon the employer it does not do so on the allegation of termination. Thus that since the respondents did not appear before the CMA to give evidence, and considering that the applicant denied to have terminated them there was nothing in the hands of the CMA to hold the applicant liable. She therefore, implored this court to allow the application, revise and set aside the award.

In response, Mr Msegeya submitted that though the respondents did not appear to give evidence on the alleged termination, there was CMA Form No.1 in which they claimed to be terminated verbally by the applicant. That it was upon the applicant to discharge her duty to prove that termination was fair. He argued further that it was not sufficient for the applicant to give evidence claiming that the respondents absconded from work without establishing what procedure or measures she took as

abscondment forms a misconduct to an employee. It was his view that, the CMA gave a well-reasoned award.

Mr. Msegeya also argued that the applicant failed to file opening statement under which the arbitration proceedings would have based on instead the applicant came at the hearing stage with mere words.

He went on that, the account by the applicant's counsel that the respondents were burdened to prove termination was not backed up with any authority and the fact that respondents ticked the aspect of termination and completed part B of the Form, then it was upon the applicant to prove fairness of termination without need for the respondents to give evidence concerning their claim of termination. He based his argument on this court decision in **Satnibic Bank Tanzania Limted vs Euzebius Sanga,** Revision No. 42 of 2017 HCT at Mbeya. Mr. Msegeya urged this court to dismiss the application for lacking merits.

I have considered the submissions by the counsel for the parties, the record and the law. The applicant's three issues are in my opinion centred to a single issue of whether the CMA decision of finding the applicant liable for unfair termination was justified considering that the respondents did not prove if they were really terminated.

Having gone through the record I have noticed that though termination was at issue, it was neither raised nor resolved by the CMA. That is where the discontent of the applicant emerged.

It is now, upon this court at this stage to determine whether allegation of termination by the respondents was proved. And the minor issue is to whom the burden of proof of termination lies. As a general rule, he who alleges must prove, section 110 of the Law of Evidence Act, Cap 6 R.E. 2019 is to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. See also the case of **Barelia Karangirangi v. Asteria Nyalwamba,** Civil Appeal No. 237 of 2017, CAT (unreported).

Notwithstanding of the above general rule, in labour cases like the one at hand, when there is issue of whether or not termination was fair, the burden of proof lies to the employer. This is according to section 39 of the Employment and Labour Relations Act, Cap. 366 R.E 2019 and Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, it provides that:

"39. In any proceeding concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

That being the provision of the law, it should be noted therefore, that, the law requires an employer to prove in labour disputes fairness of reasons and procedure for termination and not termination itself.

Basing on the foregone position of the law, it is my considered view that, the employee is duty bound to establish the existence of termination and not the employer. The similar position was underscored by this court in the case **CRJ Construction Co (T) Ltd v. Maneno Ndalije & another,** Labour Revision No. 205 of 2015, High Court of Tanzania at Dar es Salaam (unreported) where it was observed in part that:

"Looking at the evidence on record I find the respondents contention to be mere allegations not supported by any evidence. There is no any evidence which proves that the respondents allege to have been terminated from employment and the applicant denies to have terminated them. ***I find the respondents had the duty to***

establish the termination by evidence*" (bold emphasis supplied).*

In the instant matter therefore, the respondents were supposed to prove existence of the alleged termination. Nonetheless, as I have hinted earlier, the only evidence on the record is of the applicant's witness, (that is DW1). In his testimony, DW1 denied the allegation of the applicant to terminate the respondents. Counsel for the respondents calls that evidence as mere words just on the reason that the applicant did not file opening statement. With due respect to the counsel, evidence is not mere words. This is because, it is a rule of thumb that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See **Goodluck Kyando vs Republic,** [2006] TLR 363, and **Mathias Bundala vs Republic**, Criminal Appeal No. 62 of 2004 (unreported).

In the circumstances, what the applicant's witness testified was evidence worthy to be considered and being weighed with another

evidence to the contrary for determination as to whether or not the applicant terminated the respondents. This issue was required to be resolved firstly, before jumping onto the issue of whether termination was fair.

The honourable Arbitrator of the CMA in this matter observed that, the CMA has only to look at the claim given in the CMA Form No. 1 and opening statement, then analyse evidence of the employer if has proved that termination was fair. In her reasoning, the honourable Arbitrator was fortified by the observation of this Court in **Stanibic Bank Tanzania Limted vs Euzebius Sanga,** (supra). Indeed, I join hand with that observation if the only issue to be considered is fairness of termination. Thus, in that case this Court stressed on the requirement of section 39 of the ELRA which presses burden of proving fairness of termination on the employer. However, it should be recalled that, you cannot prove fairness of termination before you decide whether or not termination existed. In the case of **Stanibic Bank** (supra), for example, the fact that the employer terminated the employee was not at issue. Unlike this case at hand, where the applicant gave evidence opposing to have terminated the respondents. And the respondents did not give evidence before the CMA elaborating how termination occurred.

They claimed that they were terminated orally the fact which was negated on the account that they absented themselves from work. The reasoning by the honourable Arbitrator that termination is only looked from the CMA Form No. 1 and opening statement is misconception of the law. This is because, neither of the two, that is Form No. 1 or opening statement is evidence. In my considered opinion they are pleadings. And pleadings without evidence to reinforce them remain to be mere allegation. See, **AMC Trade Finance Limited vs SANLAM General Insurance (Tanzania) Limited**, Civil Appeal No. 393 of 2020 CAT at Dar es Salaam (unreported) where the Court held that documents annexed to the pleadings but not admitted at the trial to form part of the record do not form part of the record capable of being relied upon by the trial court.

That being the position, I concur with advocate Haule that having the applicant denied to have terminated the respondents and in the absence of the evidence by the respondents stating how and why the alleged termination occurred the CMA had nothing to weigh against the applicant's evidence and the case would have remained that the respondents failed to prove termination.

In the premises, owing to the above discussion, I find the claim of termination by the respondents remained mere allegations. And the CMA was not justified by finding the applicant liable for unfair termination of the respondents. In the end, I hereby revise the CMA award dated 16th September 2021 and consequently quash it and set aside the resultant orders. No order as to costs.

Ordered accordingly.

D.B. NDUNGURU,

JUDGE

15/03/2024