THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA

(CORAM: HON. AUGUSTINE RWIZILE)

LABOUR REVISION NO. 5 OF 2023

ROSE M. KANANGO ..... COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF

VERSUS

1.\TTHE REGISTERED TRUSTEES OF THE DIOCESE OF WESTERN TANGANYIKA (THE ANGLICAN CHURCH OF TANZANIA & ANOTHER ..... RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

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Facts

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Ratio Decidendi

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20th of May 2024

Hon. RWIZILE.:

The application before this court is in respect of unfair labour practices. The applicant challenges the decision of the Commission of Mediation and Arbitration (CMA) in CMA/KGM/237/2021/16. The applicant prays for the following orders: -

1. That, this Honourable court be pleased to call for records of the commission for mediation and arbitration for Kigoma in labour dispute No. CMA/KIG/237/2021/16 dated 28/04/2023 examine and satisfying itself as to the correctness, legality and propriety of its decision against the applicant.
2. That, the honourable court further be pleased to revise and set aside the impugned arbitral award and proceedings of the CMA for Kigoma labour dispute No. CMA/KIG/237/2021/16
3. Any other relief(s) this honourable court deemed fit and just to grant

The dispute gets its original from the following background. In 2009, the applicant entered a contract between her and the 1st respondent for a term of 14 years as reflected in exhibit B2, it was a teaching contract at Archbishop Kahurananga Secondary School located at Kigoma and was appointed a headmistress, in terms of exhibit B1.

On 1st of February 2019, the applicant was transferred to another school owned by the 1st respondent, named Bishop Makaya Secondary School at Kasulu, as per exhibit B3. Upon reporting to a new school, the applicant was informed that the school was not registered yet, which is not disputed by the respondents. She stayed for two months without being paid any salary. On 1st April 2019, she with humility asked for the two months unpaid salaries, that is for the months of February and March 2019, as echoed in exhibit B4. The respondents claimed that, since the school was not registered, she had to wait until it is registered and should as well apply for a job like others and was told her employer could not pay her then. Meanwhile, she was informed may look for another job while waiting the registration as mirrored in exhibit B5.

That information could not make since to her, she therefore referred the matter to the CMA claiming for benefits due to unfair termination. The CMA mercilessly dismissed her application on several occasions, and she has landed before this court for the third time, being dissatisfied. She has filed this application inducing this court to determine the following issues, in her favour as per paragraph 14 of the affidavit supporting this application; -

1. Whether the arbitrator decided the matter based on the evidence of the parties.
2. Whether it is right to raise an issue suo moto without affording parties a right to be heard.
3. Whether the arbitrator properly analysed and serialized evidence of the parties.
4. Whether the arbitrator erred in law to determine the matter without referring to issues raised by the parties.

During the oral hearing, the applicant was under the services of Mr. Damas Sogomba learned advocate while the respondent was under the service of Mr. Michael Mwangati, learned advocate.

Arguing the first and second issues together, the learned counsel for the applicant submitted that it is the respondents who was bound at law to prove that termination was fair. He added that, the respondent did not discharge that obligation. According to him, there is no proof as to whether, the applicant was terminated or resigned. He further submitted that the witnesses of the respondents testified that he did not know why the applicant was terminated from the employment.

Further on the resignation, it was submitted that the working conditions are the cause of her resignation, and it was caused by the employer. The applicant was sent to teach at a school which was not registered, her salary was not paid and was informed to find another job. He added, that out of 14 years of her employment contract with the respondent, she had served only 10 years. The learned advocate submitted that the CMA decided there was frustration of contract between the parties, the issue which was not raised by the parties at the hearing.

He also contested that the evidence was not properly analysed, and was of the view that the proceedings be nullified, and evidence be re-evaluated. He also added that the applicant be paid her terminal benefit as per CMF1 or the matter be heard denovo, the case of **Anzamen Maliki v Rashidi Hussin** [2019] TLR 49 was cited to strengthen the submission.

It was submitted further that, the CMA decided the issue of frustration *suo motto*, parties were not heard. He supported the submission by citing the case of **EX-B. 8356 Sgt Sylvester Nyanda vs Inspector General of Police and another**, Civil Appeal No. 64 of 2024.

On the third issue, it stated that the CMA did not decide the matter based on the issues raised by the parties. In the view of the learned counsel, three issues raised at the trial, were not decided. He said, the case must be decided based on issues raised. The CMA he argued, ignored them, and came with its own issue, worse still, parties were not heard. Reference was made to the case of **Joseph Ndyamukama (Administrator of the estate of Gratian Ndyamukama) vs Nic Bank Tanzania LTD and 2 others**, civil appeal no 239/2017.

In reply, Mr. Sogomba submitted that the evidence was well analysed and the case was proved. The records, he said, show that the applicant resign by letter and was not terminated, in terms of exhibit A1. The learned advocate went on submitting that all issues framed were determined, and the issue of frustration was discussed. He finally, asked this court to dismiss this application.

In a rejoinder, the advocate for the applicant, reiterated his submission in chief and insisted that the letter of resignation came after termination.

Based on the submissions, records and evidence adduced for the parties at the trial, the hub of the dispute is whether there was a termination, and whether it was fair. In resolving the disputed issues, it is important to note that termination is defined under section 36(a)(i) of the Employment and Labour Relations Act (ELRA), that "termination of employment" includes- a termination by an employee because the employer made continued employment intolerable for the employee". Reading the above provision with rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, such termination includes resignation, in the sense that "where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amounts to forced resignation or constructive termination."

It is therefore the dictates of the cited law that when working conditions are made hard to the employee, it amounts to not only termination but also unfair termination within the meaning of the law. In consideration of undisputed facts that the applicant was transferred to work to an unregistered school and not paid her salaries for months, worse enough told to look for another school and that when the school she was transferred complies with registration requirement, to have the applicant apply for a new employment like other applicants, has no other meaning than termination of his contract.

It is from the records that due to the circumstance; it is where the applicant wrote a letter to resign which is not disputed by the respondents. In the case of **Fabrice Ezaovi vs Kobil Tanzania Limited, (CAT),** Civil Application No. 578/01 of 2021, at page 15, it was stated: -

" In our considered view, rule 7 (1) above, read within the purview of section 36 (a) (ii) of the Act, creates the concept of constructive dismissal in the sense that the unjustified conduct of an employer that drives an employer to leave his employment is deemed as a dismissal even though, as a matter of fact, it is the employee who resigns "

There is no doubt that the applicant wrote a letter to resign, it was written on 8th December 2020, this was long after the parties had a dispute before CMA and before this court. Termination was clearly spelt out by the 1st respondent when the applicant requested for her salary for the months of February and March 2019, as shown hereunder.

"YAH: MAOMBI YA MSHAHARA WAKO WA MWEZI FEBRUARY NA MARCH 2019.

Baba Askofu Sadock Yakobo Makaya anapenda kukufahamisha kuwa ombi lako la kulipwa mshahara miezi miwili amelikubali. Lakini kwa kuwa ulikuwa umepewa uhamisho wa kuhamia Bishop Makaya Secondary School na kulingana na ushauri wa wizara ya elimu, shule hiyo haiwezi kuanza mpaka mwezi September 2019. Hivyo tunakufahamisha kuwa unaweza kuwa huru, maana hatutaweza kukulipa kuanzia mwezi April. Shule itakapoanza utafanyiwa usaili kama watu wengine watakao omba. Kwa sasa unaweza kutafuta ajira sehemu yeyote na tupo tayari kuku- recommend sehemu yeyote utakayo amua kuomba kazi."

Its literal translation is that:

RE: YOUR REUQEST FOR THE SALARY FOR FEBRUARY AND MARCH 2019

Bishop Sadock Yakobo Makaya informs you that your request for two months salaries has been accepted. But because you were on transfer to Bishop Makaya Secondary School and based on the advice from the Ministry for Education, school will not start until September 2019. We are therefore informing you that you are free, because we cannot pay you starting from April. When the school will start, you be interviewed like others who will apply. You can now look for employment elsewhere and we are ready to recommend you anywhere you will apply"

In my view, this letter was in all fours terminating her employment, the reaction of the respondent towards this letter notwithstanding. The CMA held this as frustration of contract, I do not think, it was by accident that the bishop transferred her to a school he owns while not aware, it was not registered. It is common sense that she was terminated by design. But if am wrong, it is otherwise found that her employment was not terminated by this letter, still, the applicant's resignation due to intolerable working conditions cannot count because it came after dispute between the parties was already filed. Failure to register the school in time was not out of control of the first respondent, it might have been by design or negligence on her part. It cannot be taken as frustration of contract as the CMA held.

In the end, upon all considerations, I find the application meritorious. The award of the CMA is quashed, and its orders set aside.

From that basis, the respondent is required to pay the applicant the following;

1. Compensation of 48 months equivalent to 4 years equal to TZS 57,744,000.00 which was the remaining period of the contract
2. Notice in lieu of termination TZS 1,203,000.00
3. Gratuity 15% TZS 30,315,600.00
4. severance allowance of TZS 3,238,846.00

The applicant to be paid the total amount of TZS 92,500,846.00

Dated at KIGOMA ZONE this 20th of May 2024.

AUGUSTINE RWIZILE

JUDGE OF THE HIGH COURT