IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 46 OF 2023

(Originating from Labour Dispute No. CMA/ARS/ARB/48/22/24/22)

FLORIAN THOBIAS MASSAWE..... APPLICANT

VERSUS

HADY NURSERY AND PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

17/04/2024 & 15/05/2024

NDUMBARO, J

Aggrieved by the decision of the Commission for Mediation and Arbitration (CMA), the applicant has filed this application challenging the Award of the Commission on the following grounds;

1. That the Commission for Mediation and Arbitration erred in both facts and law when it ruled that the respondent was not in breach of the employment contract.

2. The arbitrator erred in both facts and law by holding that the applicant be paid Tshs. 1,200,000/= as his final dues while disregarding the applicant's prayer in his complaint form (CMA F1) where he sought reinstatement.

3. That the arbitrator erred in both facts and law by not holding that the applicant be paid tuition allowance, extra duty allowance, and transport allowance to the applicant while acknowledging that the respondent created intolerable employment conditions.

4. That the Commission erred in law for not considering the principle that he who alleges must prove.

5. That the Commission erred in law to hold that the agreement under exhibit P2 binds the applicant whilst the same were not parties to the said agreement.

6. Any other relief as the Court shall see and find it fit and justifiable to grant.

Upon being served with the copy of the application, the respondent through his principal officer JAMES NOKWE MUNIKO opposed the application and maintained that it was not the fault of the respondent to pay the applicant his three months' salary, resulting in forced resignation. The respondent also stated that if there were intolerable employment conditions why would the applicant seek for reinstatement. The respondent urged this court to dismiss the application as it is unmaintainable and misconceived.

Before determining the merit of this application, perhaps it is apposite to give a brief background giving rise to this application. The applicant and the respondent entered into an employment relationship on 12th April 2021 where the applicant herein was employed by the respondent as a teacher. According to the applicant's complaint, his employment was constructively terminated by the respondent on 31st December 2021 on the reason that he was not paid his salaries on time by the respondent. The applicant went on to state that, until the time his employment was terminated, the respondent had not paid the applicant his salaries for October, November and December. He therefore prayed for the following; payment of 52 months' salaries equal to Tshs. 31,200,000/= as compensation for breaching the employment contract, payment of Tshs. 1,800,000/= for unpaid salaries from October to December 2021, payment of Tshs. 900,000/= as transport allowance, payment of Tshs. 500,000/= as tuition allowance, payment of Tshs. 300,000/= as severance pay, payment of Tshs. 600,000/= in lieu of notice of termination and Tshs. 600,000/= for unpaid annual leave for the year 2021.

After hearing the parties' evidence the Commission was satisfied that the applicant's contract of service was five years, however on the reason

of termination, the Commission was of the finding that, termination of the applicant's employment was not contractively as the respondent did not maliciously and deliberately cause the applicant to resign. Nevertheless, the Commission went on to award the applicant payment of his three months' salaries from October to December 2021 with a deduction of one-month salary in lieu of notice of termination.

When the matter was called on for hearing, the applicant was represented by the learned counsel **Mr. Macmillan Festo Makawia,** on the other hand, the respondent was under the legal representation of advocate **Erick Baltazar Kimaro**. With leave of the Court, the application was disposed of by way of written submissions.

Submitting on the first ground of this revision, Mr Makawia faulted the commission for holding that there was no breach of the employment contract. It was his stand that the respondent herein breached the employment contract by not paying the applicant his three months' salaries which led to forceful resignation of the employment by the applicant. Supporting his argument, the counsel cited the case of **Theopista E. Maziku vs Msama Promotion Co. Ltd,** Labour Revision No. 456 of 2020.

Submitting on ground No. 2, the counsel argued that it was improper for the Commission to award the applicant Tshs. 1,200,000/= while the contract between the parties was of five years. The counsel went further to state that since the applicant worked for less than a year, and therefore the applicant is entitled to the remaining period of the contract which is 52 months amounting to Tshs. 31,200,000/=.

On ground number 3, Mr Makawia submitted that since the respondent herein created intolerable employment conditions for the applicant, the Commission ought to have awarded him all his terminal benefits including tuition allowance, extra duty allowance and transport allowance.

Submitting in support of ground number 4, it is the submission of the counsel that he who alleges must prove. Mr Makawia contended that the applicant herein proved before the Commission that he was an employee of the respondent by producing a letter and an employment contract and therefore it was his observation that had the Commission taken into consideration all these facts he would have not arrived in such a decision.

Unfortunately, ground number 5 was abandoned by the applicant's counsel and in that regard the same shall also not be part of my determination.

Responding to the above submission, the respondent through the of advocate Kimaro responded as follows; on ground number 1, it is the submission of the learned counsel that the Commission did not erred in holding that there is no breach of employment contract between the applicant and the respondent as it was the applicant who decided to resign from work despite knowing the financial status of the school. The counsel went on to state that the respondent was paying his employees' salaries including the applicant despite several delays due to financial constrain. He added that the applicant decided to quit his employment due to impatient despite the conversation he had with his employer that he would be paid after the school re-opened in January.

The counsel maintained that the Commission was correct to find that there was no constructive termination on the basis that the applicant failed to prove the intolerable working environment. he insisted that the duty to prove constructive termination is casted on the shoulder of the employee and not the employer.

Submitting on the 2nd ground, the learned counsel argued that the amount awarded to the applicant by the Commission is justifiable on the reason that he failed to prove that there was constructive termination and that his termination was unfair.

The third and fourth grounds were argued jointly as follows; it is the contention of the learned counsel that from the evidence adduced before the Commission, it was proved that the respondent on the balance of probability proved that the applicant was not entitled to what he prayed before the Commission. The counsel went further to state that the burden of proof lied on the applicant to substantiate that he was entitled to the allowance he claimed.

Mr Kimaro also went further to submit that Rule 32 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67/2007 provides for remedies available upon unfair termination. The counsel was of the view that in awarding compensation, the arbitrator must exercise his discretion based on the factors mentioned under rule 32 (5) (a-f) of G.N No. 67 of 2007. Thus it was his stand that the applicant's claim of 52 months' salaries is unjustifiable and it aims at enriching him with benefits he is not entitled with.

In his short rejoinder, the applicant basically reiterated what he stated in his submission in chief.

After reading the application, parties' submissions together with the record from the CMA the main issue to be determined by this court is whether the applicant herein was constructively terminated.

Under the law, the term unfair termination includes constructive termination. That term refers to *"a termination by an employee because the employer has made continued employment intolerable for the employee."* In plain language, an employee resigns because the employer's behaviour or treatment of the employee is so unreasonable as to make the employment relationship unworkable. That is the import of Section 36 (a) (ii) of the Employment and Labour Relations Act, Cap 366 R.E 2019 read together with Rule 7 (1) to (3) of the Employment and Labour Relations (Code of Good Practice) Rules GN 42/2007.

Constructive termination occurs when an employee terminates the employment or agrees to termination, but this termination or agreement was prompted or caused by the employer's conduct. The fact that the employee was caused to terminate his employment as a result of an employer's actions means that the termination was at the initiative of the employer. See the decision of this court in the case of **Girango**

Security Group v. Rajabu Masudi Nzige, Labour Revision No. 164 of 2013, at Dar es Salaam where Mipawa, J (retired) where it was held as follows;

> "In my view what constitutes employment intolerable may depend on the facts of each case and circumstances. However, what the above-quoted case of **Pretorial Society for the case of the retarded Vs. Loots** seems to suggest, [which is the clear interpretation of what may make an "employment intolerable" in my opinion] that the enquiry by the court on what makes employment intolerable is two folds: -
>
> 1. ***Firstly,*** *the employee must establish that there was no voluntary intention by the employee to resign – the employer must have caused the resignation.*
>
> 2. ***Secondly,*** *the court must look at the employer's conduct as a whole and determine whether its effect, judged reasonable and sensibly is such that the employee cannot be expected to put up with it."*

In the instant case, I think the major issue to be determined by this court is whether the applicant was constructively terminated and if

the answer is in the affirmative, to what relief is the applicant entitled to.

It is an undisputed fact that the applicant and the respondent were in an employment relationship which came to an end on 31st December 2021. It is also an undisputed fact that the term of the employment contract between the parties herein is of five years as it was properly held by the Commission. Nevertheless, what this Court finds to be at issue is whether the applicant herein was forced to resign from his work due to intolerable working conditions created by the respondent.

Without beating around the bush, I hasten to say that my answer to the above question is not very far from what the Commission held in its award and I will be guided by the above-cited case of **Girango Security Group.** In this case, we are reminded that what constitutes employment intolerable may depend on the facts of each case and circumstances. However, there are standards set to determine what are the intolerable conditions which are; first; that the employee had no any intention to resign from his work and that it is the employer who caused his resignation. Secondly; the conduct of the employer must be looked at in a way that the employee could not put up with such conduct. I am

also subscribed to the decision of the Court of Appeal of Tanzania in the case of **Kobil Tanzania Limited vs Fabrice Ezaovi** (Civil Appeal 134 of 2017) [2021] TZCA 477 (16 September 2021). In this case, the Court posed some questions to be considered while determining whether the employee was constructively terminated, the following are the questions;

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?"*

Guided by the above decisions together with the facts of this case, I am not convinced that the respondent **willingly** and **intentionally** created an intolerable situation for the applicant which forced him to resign from his employment for the following reasons; One, from the evidence tendered at the Commission, it is not disputed fact from both parties that, at moment the respondent was facing financial instability

was basically caused by the Covid 19 pandemic which in fact had its effect worldwide. It should be remembered that the respondent is a school and its upkeeping to a large extent depends on the payment of school fees by parents. Due to the effects of the pandemic, it was testified that the payment of the school fees by the parents deteriorated the fact which was also acknowledged by the applicant. In that regard, it is my firm view that the intolerable situation was not caused by the **wishes** of the respondent herein.

Secondly, from the records it is established that it was not only the applicant who was not paid his salaries, the delay in payment of the salaries affected all the teachers and in fact, the respondent had promised the applicant to bear with her for only a few days waiting for re-opening of the school in January hoping the parents would pay the school fees. Lastly, the applicant himself testified that it is not that the respondent was not paying them salaries at all, but the payments were delayed. He gave an example that the salary of May was paid in July, the salary of July was paid in September and the salary of September was paid in January. This means that the respondent did not have the intention to hold the applicant's salaries intentionally and it is an indication that the respondent was struggling with the situation.

The above said, this court is fully satisfied that constructive termination was not proved and therefore the applicant here was not forced to resign from his work. Therefore, the Commission was correct to hold that the respondent did not breach the employment contract.

As to the issue of payment, following the above finding of this court, the applicant is thus not entitled to the benefits from the breach of contract together with other claims of tuition allowance, extra duty allowance and transport allowance. However, from his testimony, the applicant stated that he is claiming unpaid three months' salaries from October November and December 2021 the fact that the respondent also did not dispute the claims which I also find to be genuine. Nevertheless, since the applicant did not issue any notice to the respondent showing his intention to resign from his work the Commission was justified to hold that he breached the terms of his contract. I have made reference to the applicant's employment contract (Exhibit P2) under clause 2.0 (a) which provides as follows;

> *"The commencement of this contract shall be the date of taking up an appointment for a period of five years. Termination of appointment may be done at any time by either party giving the other one (1) month notice*

in writing or by paying one-month salary in lieu of notice pegged on basic salary."

In that regard, since the applicant was entitled to 3 months' salary, he is now entitled to 2 month's salaries with a deduction of his one-month salary in lieu of the notice of termination.

As alluded to above, it is the holding of this court that this application is without merit and is consequently dismissed. No order as to costs is issued.

It is so ordered

D. D. NDUMBARO

JUDGE

15/05/2024