IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
LABOUR REVISION NO. 20231229000028639 OF 2024

SAMU SECURICOR INTERNATIONAL LTD.....APPLICANT

VERSUS

1. MARTIN MSENGI KINGU
2. SHABAN HAMIS
3. HAMFREY MUGUNDA } **.....RESPONDENTS**

[Application from the decision of the Commission for Mediation and Arbitration for Shinyanga at Shinyanga.]

(Hon. A. Massay.)

dated the 7th day of March,2024
in
CMA/SHY/68/2023

JUDGMENT

8 & 31th May, 2024.

F.H. MAHIMBALI, J.:

This labour application, has been filed by the Applicant by way of chamber summons and notice of application, in terms of the provisions of sections 91 (1) (a) & (b) (2) (a) & (b) 3 91(3) and section 94(1)b(i) of the Employment and Labour Relations Act, 2004 , Act No. 6 of 2004) Cap. 366 RE 2019 and Rule 28 (1) (c) and Rule 24 (1), 24(2)

(a)(b)(c)(d)(e)(f) and 24(3)(a)(b)(c) of the Labour Court Rules, 2007, G.N. No. 106 of 2007.

In the chamber summons, the Applicant firstly, prays for this Court to revise the decision of the Commission for Mediation and Arbitration at Shinyanga, in dispute No. CMA/SHY/68/2023 which was delivered on 7th March, 2024. Secondly, the applicant prays for stay of execution of the said Award, pending revision application of the same. The application is supported by an affidavit sworn by the Deputy Managing Director of the applicant on 11th March, 2024.

Brief facts of the matter as can be gathered from the records is to the effect that, the respondents were working for the applicant in a position of security guards. Sometimes in July 2023, respondents came to learn that, as per the introduction of the Minimum Wage Order Regulation GN 687 of 2022 which came into operation on 1st January,2023, their salaries ought to have been not less than Tshs. 148,000/=. Consequently, respondents started claiming for their salary arears.

The records provide that, before the applicant complied to the respondents' claims on salary arrears, she demanded from the respondents to avail her with the following: **one,** an application letter

for employment. **Two**, names of guarantors. **Three,** passport size and **four,** an introductory letter from the local government official.

With this demand from the applicant, the respondents replied to the effect that, they would not heed to such demand, as they had already applied for and got employed. Further, the respondents knew that, as soon as they submit a new application letter for employment, it would mean that, their entitlements including salary arrears claims would have been forfeited. Consequently, respondents claim that, the applicant terminated their employment, verbally.

Following that termination, respondents lodged a labour dispute at CMA alleging for unfair termination. On that account, they claimed for compensation equal to 12 months remuneration, notice pay, severance pay and accrued leave.

On her part, the applicant refuted to have terminated the respondents' employment stating that, it is the respondents who have absconded themselves from job after she had demanded their personal particulars.

The dispute was heard and finally determined in favor of the respondents. That stance aggrieved the applicant, hence this application for revision.

On 8th May, 2024 the application came for hearing. On that day Ms. Grace Egha, Advocate, represented the applicant whereas respondents appeared unrepresented.

In support of the application Ms. Egha firstly prayed for the applicant's affidavit be adopted, to form part of their submissions. Then she submitted that, the applicant never terminated the respondents' employment but it was the respondents who terminated themselves for failure to attend at work. She insisted her position by contending that, all respondents failed to prove that it was the applicant who had terminated their employment.

Further, Ms. Egha stated that, as in a previous case No. 81 of 2022 these respondents were awarded terminal benefits of twelve months, to her, the arbitrator had no legal justification to regrant a similar award to the same respondents.

It was Ms. Egha's further assertion that, as Shaban Hamis had worked with the applicant for nine months only, she formed an opinion that, he was not entitled for leave pay.

On the respondents' part, also prayed to adopt their affidavits and went on insisting that, they were verbally terminated from employment.

In proving the same, they simply urged this court refer to the records filed in court.

I have keenly gone through parties' submissions and the entire records concerning this case. I have also taken into consideration the rival issues between parties.

From the applicant's affidavit and the submissions, the central question that calls for determination in the first place, is, who actually terminated employment as between the applicant and respondents?

As we have seen earlier, the respondents claim to have been terminated verbally soon after they had initiated their claims for salary arears which followed by their rejection to avail the applicant with their employment particulars including a new job application letter.

On her part, the records show that, the applicant testified to have not terminated the respondents and claimed that, it is the respondents who have terminated themselves after they were demanded to avail her with employment particulars.

At this juncture, it is where the court is left with the task to decide as to who actually terminated the employment as between the two.

I am alive with the principle of law that, in civil cases, the standard of proof is on balance of probabilities. See, the case of **Antony M. Masanga vs. Penina (Mama Mgesi) and Another, Civil Appeal**

No. 118 of 2014, CAT MWANZA in which, Lord Hoffman in **Re B [2008] UKHL 35**, is quoted to have defined the term "balance of probabilities" as; -

> *"**If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened.** The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. I f the tribunal is left in doubt| the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of O is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

In proving that the applicant verbally terminated their employment, the respondents testified all this at CMA. The applicant on her side is of the view that, the respondents have failed to prove the same. But the law is clear under section 143 of the Evidence Act, and case law **(See YOHANES MSIGWA v. R (1990) TLR 148)** that, there

is no specific number of witnesses for any party to produce in court in order to prove a fact. What is required is the quality of evidence and the credibility of witnesses (See **Yohanis Msigwa v. Republic, [1990] TLR 148**; and **Hassan Juma Kanenyera v. Republic, [1992] TLR 100).** Moreover, in a situation where the respondents claim to have been terminated verbally, I do not think that, the respondents would be able to tender any document in court to verify the same.

In this case, the records provide that, neither the respondents nor the applicant who tendered any exhibit to verify testimonies of their sides particularly on the issue of termination. In this situation, where no documents were tendered to verify testimonies by both sides, should this court fail to decide on a balance of probability on account of the witnesses' testimonies? The answer is not. This is because, a dispute may also be determined solely by evaluating testimonies of witnesses of both sides.

That is where the principles of the law of evidence as per the case of **Goodluck Kyando v. R, [2006] T.L.R. 363** comes into play. In it, the Court of Appeal held that:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness:"*

According to the case of **Aloyce Maridadi v. R, Criminal Appeal No. 208 of 2016,** good and cogent reasons for not believing a witness include the fact that, the witness has given improbable and implausible evidence or that the evidence has materially contradicted any other witness or witnesses. It should be known that, the above cited are principles of evidence which apply to both, criminal and civil cases.

Looking at the two sides' testimonies, I find it that, the respondents' testimonies are more convincing that they were verbally terminated than that of the applicant. This is because, one, for respondents who claim to have been terminated verbally, I expect them to have no document to verify their employer's termination, two, labour laws do not put it mandatory that, whenever one is terminated verbally, that one must first seek verification letter from the employer before institution of a dispute at the CMA, three, as the applicant shows that it is the respondents who have absconded themselves from job, that answer could have been plausible and probable, if and only if the applicant could have verified by testifying that she took disciplinary measures against respondents as shown in a Code of Good Practice as insisted in Section 37(4) of the Employment and Labour Relations Act. But what we have in record is that, after seeing that the respondents are not attending at work, the applicant only filled their vacancies.

It is true as testified by respondents that, claims over salary arrears, relates to when that claiming employee was firstly employed. That is why the respondents rejected to rewrite a new application letter for the job which they have already got and worked for. The act of the applicant to refill the respondents' positions by employing new people without first conducting disciplinary measures if they really absconded, proves the applicant's intention to wave the respondents' claims over salary arrears, when she demanded a new application letters from them. All of this discussion, shows that, testimony by the applicant is improbable as compared to that of the respondents. On that note, I am firm that, there is no point to fault the trial arbitrator in this issue, as it is the applicant who has terminated the respondents' employment.

As the law dictates, termination in itself is not a problem so long as it is for a fair reason and it adheres to the fair procedures. Section 37(1) and (2) of the Employment and Labour Relation Act provides that; -

> *37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(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.

As we have seen shortly above, the applicant terminated verbally the respondents' employment without adhering to the fair procedures as enumerated in the Code of Good Practice. As well, terminating the respondents for rejection to freshly apply for the job which they have already got, is not among the fair reasons enumerated in section 37(2)(b)(i)(ii) of the ELRA as quoted above. For that matter, the respondents were unfairly terminated.

Having seen that, the respondents' employment was terminated unfairly, the court directs its mind as to what should be done then. The answer is not far to fetch, Section 40 of the ELRA provides for three options which are as I hereunder quote; -

40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months' remuneration.

As alluded earlier that the respondents prayed to be awarded 12 months' compensation for unfair termination and as long as the relationship between the employer and employees has entered into sour, I find no point to fault the trial arbitrator to award the same instead of the first two options of re instatement or re engagement.

This is a 12 months' compensation which is equal to 12 months' remuneration because of the unfair termination. It should not be taken as salary arears as argued by Ms. Egha.

Further, the 12 months' compensation should be calculated from what the respondents were receiving as their remuneration at the date of their termination. The records show that, the respondents before their termination were each receiving remuneration less Tshs.

148,000/=. But by the introduction of the Minimum Wage Order Regulation GN 687/2022 on 1st January, 2023, the respondents were entitled to receive as remuneration not less than Tshs. 148,000/=, then it was correct for the arbitrator to calculate the 12 months' compensation by using a scale of Tshs. 148,000/= as it is what the respondents were entitled by the time of their termination on 1st August, 2023.

However, the 12 months' compensation for a fair termination is not a bar to other entitlement the respondents have. This is as per section 40 (2) of the ELRA.

> *(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.*

From the above quoted excerpt, it is where the power to grant in addition to leave entitlement by the arbitrator, stems. In the application, the applicant does not dispute all entitlements granted to the respondents except, leave pay to Shaban Hamis, contending that, he had not finished twelve months working for the applicant from when he was employed.

The records show that, Shabani Hamis Kingu was employed by the applicant on 1st November, 2022 and terminated on 1st August, 2023. On that sense, he worked for the applicant for 10 months only. Section 31(1) of the ELRA provides for; -

> *31.-(1) An employer shall grant an employee at least 28 consecutive days' leave in respect of each leave cycle, and such leave shall be inclusive of any public holiday that may fall within the period of leave.*

However, leave cycle has been stated to be a period of 12 months. This is as per section 30(1)(i) of the ELRA. As Shabani Hamis Kingu worked for 10 months only with the applicant before termination, he still had one month to qualify for a paid leave. On that account, the trial arbitrator wronged to award him that entitlement.

All said and done, as I have endeavored in my determination above, the applicant's application is hereby found to be unmeritorious to that extent only.

It is so ordered.

DATED at **SHINYANGA** this 31st day of May, 2024.

F.H. MAHIMBALI

JUDGE