IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 397 OF 2016

BETWEEN

DAVID MSANGI .....1ST APPLICANT

ISMAIL MBUYU .....2ND APPLICANT

VERSUS

NATIONAL OIL (T) LTD. ..... RESPONDENT

JUDGMENT

Date of Last Order 18/04/2018

Date of Judgment 27/04/2018

A.C. NYERERE, J.

The applicants are seeking revision of the decision and award of the Commission for Mediation and Arbitration (Herein to be referred as CMA) which was delivered on 10th December, 2012 in favour of the respondent. The series of events leads to the present application as per supporting affidavit filed in this court in support of the application are that; applicants worked for respondent in the capacity of "Marketing Representative" from 2000, 2007 respectively, however in September, 2011 respondent made applicant's employment intolerable continuously, by refusing to provide

work and by restricting applicants to enter into the work premise, thus forcing applicants to tender letter of resignation, on ground of constructive termination, further respondent forced applicants to go on leave, while on leave, respondent summoned applicants to attend disciplinary hearing.

Applicants after being aggrieved by respondent's deliberate actions of causing hardship at work for the applicants. They decided to refer the matter to the CMA alleging constructive termination. CMA in deliberating on the matter decided that applicants "walijitangaza wenyewe kuacha kazi" thus ordered respondent to pay applicants half month salary, equivalent to the duration applicants were on suspension. That decision aggrieved applicants who file the present revision application faulting Arbitrator's award.

During the hearing the applicants were represented by Mr. Michael Mgombozi -TUPSE representative whereas the respondent was represented Mr. Laurent Leonard, Advocate. Ultimately the hearing proceeded viva vorce.

Mr. Michael Mgombozi for the Applicants in support of the application argued that the arbitrator erred by not considering that, respondent made intolerable working to the applicants. Mr. Michael Mgombozi further argued the arbitrator misdirected himself for not considering that respondent

suspended and terminated applicant's while on annual leave, Exhibit "P2 and P6."

Mr. Michael Mgombozi for the applicant's went on to argue that Section 41 (4) (a) of the Employment states provides that employer cannot terminate employment while on annual leave, therefore its without doubt employer cannot conduct disciplinary hearing on an employee who is on annual leave.

Mr. Michael Mgombozi went further to argue that the charges against applicants was issued while applicants were on leave and added that also arbitrator misdirected himself on deciding that applicants were supposed to notify the employer that they contemplated to resign due to intolerable working conditions.

Furthermore Mr. Michael Mgombozi argued that applicants were denied entrance to the work place, forcing applicants to terminate their employment and cited the case of TUCTA VS NESTORY KILALA NGULA Rev. No. 39/2014 Labour Court cases Digest of 2014 Part I at page No. 186 at page 193-194; GIRANGO SECURITY GROUP VS RAJABU MASUDI NZIGE, at page 12-16.

Mr. Michael Mgombozi proceeded to argue that the arbitrator failed to consider that, the employer gave applicants a declaration form to sign.

The said forms contained allegations in which applicants were not involved, the allegation involved applicant's misusing company money for their own benefits i.e. approved motor Vehicle repairs payments, misrepresenting the amount of fuel stock, using company money Exhibit "PI", Exhibit "D1".

In that regard Mr. Michael Mgombozi for the applicants argued that respondent contravened Rule 13(5) GN. 42/2007 Code of Good Practice. For not attaching Investigation Report to prove allegation against applicants. Mr. Michael Mgombozi in support of his argument referred a Newspaper, Guardian of 25/10/2011 and Daily News of 19/9/2011 (Exhibit "P9") and prayed the court to quash and set aside the CMA decision.

In rebuttal Mr. Laurent Leonard learned Counsel for respondent argued that respondent denies making working conditions intolerable for the applicants, thus citing Rule 7(2) of The Employment and Labour Relations (Code of Good Practice) Rules GN. 42/2007, arguing that circumstances under Rule 7 (2)(a) and (b) have to be proved to warrant constructive termination.

Counsel for respondent was of the view that, in order to prove constructive termination; an employee has to resign from work, on intolerable working conditions as stated under Rule 7(2) (a) & (b) of GN

42/2007. Counsel for respondent argued that applicants herein never gave a Notice to terminate their employment.

Counsel for respondent further argued that applicants working conditions were never intolerable to warrant constructive termination, that Applicants were given paid leave pending investigation and not annual leave. Further applicants were to go to Morogoro where the offence had been committed however refused and went to CMA before the completion of the disciplinary hearing.

Furthermore Counsel for respondent in opposing applicant's allegations in regard to applicants conditioned to sign declaration form, he argued that, there was no declaration form issued to applicants, however Applicants were to collect bus fare and go to Morogoro for disciplinary hearing.

Counsel for respondent proceeded to argue that applicants were not terminated rather they choose to go to CMA before completing disciplinary hearing. In regard to Exhibit "P9" News Paper advertisement, Counsel for respondent submitted that, it does not justify constructive termination, as it was a Public Notice informing the general public that, that applicants are no longer employee of the respondent.

Counsel for respondent went further and submitted on the cited Rule 13(5) of GN No. 42/2007, arguing that respondent could not tender evidence against the applicants, because applicants decided to go to CMA instead of Morogoro where evidence of the allegations were located.

Submitting on the refereed cases by applicant, Counsel for respondent argued that the Revision No. 39/2014 (supra) and Revision No. 164/2013 (Supra), and Rule 7(2) (a) and (b) of GN No. 42/2007 are distinguishable in the present case, and cannot apply because the matter at hand does not involve constructive termination, and prayed the court to dismiss the application for revision.

In rejoinder Mr. Michael Mgombozi representative for the applicants reiterated his submission in chief, and went on to argue that respondent has not terminated the applicants rather suspended them, that respondent was supposed to pay applicants salary, as per Labour law and prayed the court to quash and set aside the CMA decision.

After considering both parties submissions, court records as well as relevant applicable laws I find the key issue for determination is whether or not the CMA findings that there was no constructive termination was correct.

The law under Rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007 define constructive termination to mean a circumstance:-

> "Where an employer makes an employment intolerable which may result to the resignation of the employee that resignation amount to forced or constructive termination."

above provision of law was stressed by this Court in the case of MS TCDC v. Elda Mtalo Labour Revision No. 1/2013 HC Arusha Sub registry where my Sister Rweyemamu J (As she then was) held that:

> "The principle of constructive termination refers to termination by employee because the employer made continued employment intolerable for the employee. The principle cannot be invoked where employee resigns after being charged with misconduct or even to pre-empty the employer misconduct action."

And Arbitrator or Court in order to determine the issue of constructive termination the following question are imperatives this was held by My Brother Mipawa J. in the case of Girango Security Group v. Rajabu Masudi Nzige Labour Revision No 164/2013 (Unreported) that:-

i) Did the employee intend to bring the employment relationship to an end?

ii) Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfill his obligation to work?

iii) Did the employer create the intolerable situation?

iv) Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?

v) Was the termination of the employment contract the only reasonable option open to the employee?

And one essential element was added in Murray v. Minister of Defense (383/2006)[2008] ZASCA 44 South African Supreme Court held that; the onus rest on employee to prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship.

In the present case Arbitrator framed and determined the issue on whether there existed intolerable conditions to prove that applicant resignation was not voluntary, and that applicants did not intend to terminate their work relationship.

In the instant case, applicants at the CMA applicant's advanced their reasons for resignation to include being denied entrance to the work place, and forced to sign a declaration form, involving applicants in misusing company money for their own benefits by approving motor Vehicle repairs payments, misrepresenting fuel stock and using company money .Exhibit

"PI" and Exhibit "D1". The same was observed at page 13 of the CMA award that,

> **".....PW1 alieleza mazingira magumu aliyotengenezewa ni kwamba walipewa barua ya tuhuma 10/09/2011 yenye marekebisho kidogo tofauti na barua ya awali, na akasimamishwa kazi akaitwa kwenye kikao cha nidhamu tarehe 15/09/2011 ambapo kikao kilifanyika kikakosa ushahidi kikavurugika na wakatoa amri kuwa kikafanyike Morogoro na wakatakiwa kwenda kuchukua posho ya safari tarehe 16/09/2011 lakini walipofika wakakuta barua ya declaration.....lakini walikataa kusaini declaration hiyo."**

In regard to applicants being forced to sign a declaration form, in an attempt to involve applicant's misappropriation of assets, the supporting evidence Exhibit "PI" and Exhibit "D1", on that issue it shows that on 30th August 2011 applicants were to show cause for misappropriating company funds and facilities resulting to financial loss, consequently applicants were to write written explanation within 48 hours, as to how the loss occurred as

per Exhibit "D1"- SHOW CAUSE NOTICE. On showing cause, applicant's responded to the misappropriation of company funds and denied to have been involved in any manner.

Responding to the allegations that applicants were denied entrance to the respondent premises, thus alleging the respondent subjected them into intolerable working conditions, I have a different view on this bearing in mind Exhibit "D" last paragraph of page . I state and quote:

> **" in the meantime and until further notice, <u>you are required to report to Head Office on daily basis until further notice</u> and will neither be communicating with any of our Retail Networking Personnel nor have any responsibility for any of stations". (Emphasis is mine).**

From the above, it is clear Exhibit "PI" and Exhibit "D1", does not support applicants claims of being refused entrance in the respondent's premises nor does it prove that applicants were forced to sign a declaration form, involving applicant's misusing company money for their own benefits, as Exhibit "D1" required applicants to give explanations on to the loss . And further ordered the applicants to report daily at the Head Office until further notice.

I am of the view that the applicants are yet to establish their claim in view of Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state inter alia:

> 110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.
>
> 111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

Further CMA records established that applicants were suspended on full pay from the date of the notice to attend disciplinary hearing, 9th September, 2011 to the date of final determination of the matter Exhibit D3 – NOTICE TO ATTEND HEARING.

Furthermore Exhibit D3 shows applicants were to appear for disciplinary hearing on the 15th September, 2011 to defend themselves on the allegation against them; however applicant's challenged the notice to attend disciplinary hearing, and condemning the suspension for violation of the law Exhibit "P4".

In view of the above, applicants have not proved constructive termination, as observed at page 13 of the CMA award that:

".....walalamikaji wote walieleza kuwa mwajiri alitengeneza mazingira magumu yaliyopelekea wao kuacha kazi na hivyo kuona kuwa wameachishwa kazi na mlalamikiwa".

The applicants are required to prove that the resignation was not voluntary as per Rule 7 of the Employment and Labour Relations (Code of Good Practice) GN 42/2007, and that they did not intend to terminate the employment relationship, in which applicants have failed to do, therefore I see no reason to fault Arbitrator's decision that applicants had no good reason to resign from their employment.

In the end result respondent is hereby ordered to pay David Msangi Tsh. 500,000/=; Ismail Mbuyu Tsh 450,000/= equivalent to half months salary, pay due for work done before the disciplinary hearing on the 15th September, 2011 thus complying with Section 44(1)(a) of the Employment and Labour Relations Act No. 6 of 2004.

In the upshot, this application merited to the extent elaborated above.

It is so ordered.

A.C. Nyerere
JUDGE
27/04/2018