

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 201 OF 2019

BETWEEN

PETER REUBEN MASENGA.....APPLICANT

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY.....RESPONDENT

JUDGEMENT

Date of Last Order: 13/07/2020

Date of Judgement: 28/08/2020

Aboud, J.

This is an application to set aside the ruling of the Commission for Mediation and Arbitration (herein to be referred as CMA) on application for condonation delivered on 20/12/2017 by Hon. Mikidadi, A. Arbitrator in Labour Dispute No. CMA/DSM/TEM/454/2017. The application was made under the provisions of Section 91 (1) (a) (b), 91 (2) (c) 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a),

(b), (c), (d) and Rule 28 (1) (a), (c), (e) of the Labour Court Rules, 2007 GN. No. 106 of 2007 (herein the Rules).

The application was supported by the applicant's affidavit. The respondent **TANZANIA ZAMBIA RAILWAY AUTHORITY** bitterly challenged the application through the counter affidavit of the Principal Officer, Mercy Chimtawi.

During hearing both parties were represented by Learned Counsels. Mr. Carlos Cathbety was for the applicant while Ms. Mercy Chimtawi appeared for the respondent. The matter was argued by way of written submission.

Arguing in support of the application Mr. Carlos Cathbety submitted that, the Arbitrator's ruling was improperly procured as it contains material irregularity. That, the reasons for lateness were well and properly advanced by the applicant. He stated that, before and after retirement the applicant was throughout sick suffering from high blood pressure (BP), Chronic Hypertension and Multiple Cardiac diseases which compelled, necessitated and subjected the applicant to frequent prolonged bed rests. He added that besides being under close observations, numerous serial medical examinations and various

medications which subsequently eventually led to Hemorrhagic Stroke and was hospitalized at Muhimbili National Hospital.

Mr. Carlos Cathbety further submitted that, the applicant's health condition between 2008 and 2010 was very critical whereby in one of the Echocardiography examinations taken on 24/06/2010 detected severe left Ventricular Hypertrophy (LVH). He stated that, the applicant's heart working efficiency was very low. He further argued that after being discharged from Muhimbili National Hospital the applicant was on patient's wheel chair for six months while attending stroke physiotherapy clinics, neurology clinic, cardiac clinics at Jakaya Kikwete Cardiac Institute and PC Consultant medical clinics in Dar es Salaam.

Mr. Carlos Cathbety argued that, some of the medical records for the period from 2005 to 2009 are not included in the applicant's supporting documents because Tumaini Hospital records office misplaced his permanent file with all the required documents. The Learned Counsel added that for the whole period from 2010 till today the applicant is sick and still fighting for his rights in a court of law.

He further submitted, the CMA was supposed to direct itself in line with the submission of the applicant by considering that the case

is all about compulsory retirement benefits of the employee. He stated that, the Arbitrator was supposed to consider the issue of illegality as per Rule 11 (3) (e) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007.

Mr. Carlos Cathbety stated that, the Arbitrator failed to consider the point of illegality as stipulated in the applicant's affidavit at the CMA. He added that the Arbitrator was supposed to consider that the applicant was seriously sick and he made follow up to his employer but in vain. He therefore prayed for the application to be allowed.

Responding to the application Ms. Mercy Chimtawi submitted that, an error should be apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it as is in this case. She stated that the argument that the Arbitrator did not consider the applicant's reasons for the delay is not an error on the face of records.

Ms. Mercy Chimtawi submitted that, the applicant instituted his claims when he learnt that his fellow employees who retired at the age of 55 filed a dispute at the CMA contesting the early retirement and they were awarded 24 months salaries. That the applicant's claim is an afterthought. Ms. Mercy Chimtawi stated that, the applicant was

compulsorily retired on 31/12/2007 and the medical records indicated that his sickness started on 2010. She said the applicant did not give any reasons for his delay from 2008 to 2010. To cement her argument she cited the Court of Appeal case of **Azizi Mohamed Vs. The Republic**, Criminal Appeal No. 84/07 of 2019.

She further stated that the applicant did not condone the delay of 10 years thus; the Arbitrator properly dismissed the applicant's application. Ms. Mercy Chimtawi therefore prayed for the present application to be dismissed.

After evaluating parties' submissions, applicant's supported affidavit and counter affidavit, the relevant applicable Labour Laws and practice; I find the issue for determination is, whether the applicant has adduced sufficient reasons for his delay.

Limitation of time in referring disputes at the CMA is governed by Rule 10 (1) of the **Labour Institutions (Mediation and Arbitration) Rules**, 2007 (GN. 64 of 2004) (herein Mediation and Arbitration Rules) which provides that:-

"Rule 10 (1) Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty

days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.

(2) all other disputes must be referred to the Commission within sixty days from the date when the dispute arised."

Factors to be taken into consideration in examining sufficient or good cause have been discussed in a number of cases including the Court of Appeal case of **Azizi Mohamed** (supra), where it was held that:-

"Factors to be taken into consideration in determining whether or not to exercise the Court's discretion have been outlined in various decisions of this Court. Admittedly, such factors are not necessarily exhaustive but at the moment, they include; cause of the delay, length of the delay, whether or not the applicant has accounted for the delay, and degree of prejudice to the respondent and whether there is illegality or any issue of law of sufficient public importance in the decision

sought to be challenged.”

In applying the factors established in the above case, the applicant's submitted that, he had Hemorrhagic stroke so was hospitalized at Muhimbili National Hospital and attended several medical clinics which are the causes of his delay to file the present application.

It is on record that the applicant retired on 31/12/2007 while the present application was referred at the CMA on 01/08/2017 which is almost 10 years delay.

In a situation of this matter, I fully agree with Mr. Carlos Cathbety that, the applicant adduced reasons for his delay from 2010 to 2017; however in my view he did not state any sufficient reason for his delay from 2008 to 2010 when the dispute was referred to CMA. In his submission Mr. Carlos Cathbety submitted that during that time the applicant was attended at Tumaini hospital but the records are misplaced. In my view such argument is baseless because it is not backed up with any evidence on record. The applicant would have requested the Tumaini Hospital to verify such information even if by a letter. It does not click on one's mind that the records in

question could not be procured from the concerned hospital. In fact it reflects the applicant's negligence in handling this matter.

In my considered view the delay of 10 years was inordinate and the applicant ought to have accounted for each day of the delay. In this matter the applicant did not act with due diligence at all, because even if was sick, he was an outpatient, so he would have appointed someone to represent him and initiate his claims at the CMA within the prescribed time limit as discussed above. The Court is mindful that litigating have to come to an end, so observing laws and principles established on adherence of time limitation is of paramount important in order to allow the one who worn the case before the Court or tribunal to enjoy his fruits without any unreasonable delays. I therefore respectful agree with Ms. Chimtawi's argument that allowing the applicant to lodge dispute which its cause of action arose 13 years ago will be prejudice to the respondent. This was also the position in the case of **Azizi Mohamed** (supra) where it was held that:-

"By any standard, the length of the delay cannot be said to be without prejudice to the respondent."

Mr. Carlos Cathbety for the applicant also urged the Court to grant the application because the employer's decision to terminate the applicant's employment contract is tainted with illegalities. No doubt that would have been a good ground if the applicant had referred the dispute timely. However, as discussed above the applicant lodge his complaint at the CMA after ten (10) years plus contrary to the time set to do so without any justifiable reasons. The importance of limitation was emphasized in the case of **Tanzania Fish Processors Ltd. Vs. Christopher Luhangula**, Civil Appeal No 161/1994, CAT at Mwanza where it was held that:-

"Limitation is there to ensure that a party does not come to court as and when he chooses".

In the result I find the present application has no merit. The applicant failed to adduce any sufficient reason for the delay of more than ten years to warrant this Court to fault the Arbitrator's ruling. The CMA's ruling dated 20/12/2017 by Hon. Mikidadi is hereby upheld and the application is dismissed accordingly.

It so ordered.



I.D. Aboud

JUDGE

28/08/2020