

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 364 OF 2019

BETWEEN

IMAN MORRIS MNZIRANZINZA APPLICANT

VERSUS

I CAN GO ON PLUS COMPANY..... RESPONDENT

JUDGMENT

Date of Last Order: 13/02/2020

Date of Judgment: 13/03/2020

S.A.N. Wambura, J.

Aggrieved by the Award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] delivered on 15/03/2019, the applicant **IMAN MORRIS MNZIRANZINZA** has filed this application under the provisions of Sections 91(1)(a), (2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(a)(c)(d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 praying for the following Orders:-

- (i). *That, this Honourable Court be pleased to revise and set aside the whole proceedings and award of the Commission for Mediation and Arbitration dated 15th March, 2019 in CMA/DSM/UBG/R.64/18/13.*
- (ii). *Any other relief this honourable Court may deem fit, just and equitable to grant.*

The application was supported by his sworn affidavit.

The respondent **I CAN GO ON PLUS COMPANY** bitterly challenged the application through the counter affidavit sworn by Pascal Vincent Mwita, the respondent's Finance and Administrative Officer.

The background of the dispute in brief is that, the applicant was employed by the respondent as a driver in an open ended contract for about 6 years. The applicant alleged to have been terminated from work on 22nd May, 2018 on unfounded reasons.

Dissatisfied by the said termination the applicant referred the dispute to CMA praying for compensation due to unfair termination. CMA decided in the respondent's favour that the applicant was not entitled to any remedies since he was not terminated from work.

At the hearing the applicant appeared in person while the respondent was represented by Mr. Pascal Vincent. The Court thus granted leave to the parties to dispose of the matter by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

Submitting on the grounds filed for revision the applicant alleged that CMA's award has been improperly procured. He cited a number of provisions to wit Section 91 (1) (a) and 92 (2) (b) of the Act as well as Rule 28 (1) (c) and (e) of the Labour Court Rules, without relating them to the circumstances of this case.

On the second ground of appeal the applicant alleged that the Arbitrator erred in law and in fact by holding that the applicant has not adduced sufficient evidence satisfying that the applicant was illegally and unfairly terminated from employment without any entitlements. Submitting on this ground the applicant referred to the case of **Markitha Y. Mputo Vs. Choice Investment Co. Ltd**, Rev. No. 248 of 2009 where it was held that:-

"It is true that the applicant was unfairly terminated from employment as the respondent failed to follow procedures provided under the Labour Laws and its

rules. The applicant was never issued with any warning notice or any other writings”

On the third ground of revision the applicant alleged that the decision was contrary to the evidence tendered. Quoting Section 39 of ELRA, he argued that the respondent failed to prove before CMA that there was fair termination.

The applicant’s last ground of revision is the same as the third ground. He alleged that CMA procured the award contrary to the evidence tendered by the applicant. He submitted that he tendered the employment contract to prove his employment relationship with the respondent. He was therefore entitled to all terminal benefits as claimed. He thus prayed for the application to be allowed.

Responding to the first ground the respondent submitted that the applicant has failed to convince this court how the said decision was improperly procured. Instead he quoted law provisions without construing his argument. Mr. Vincent submitted that one who alleges that justice is unfair to him must prove that unfairness. That the applicant at hand did not state how the award was improperly procured.

On the second ground it was submitted that the applicant himself was to be blamed for his actions. The respondent made efforts to demand him to go back to work but he did not respond to all the correspondences between them. That the applicant was issued with a warning letter but still refused to go back to work.

On the last ground of revision Mr. Vincent submitted that, the applicant was not terminated from work. He decided to abscond from work when he was ordered to pay the loss he caused the Company. He therefore prayed for the application to be dismissed.

In rejoinder the applicant reiterated his submissions in chief.

The respondent's also filed a rejoinder but it cannot be considered as it is not the procedure and they had not been granted leave to do so.

Having considered parties submissions, Court records as well as relevant applicable labour laws and practice I find the key issues for determination in this matter are:-

- a) Whether or not CMA's award was properly procured.**
- b) Whether or not the applicant was terminated from work.**
- c) To what relief are the parties entitled.**

1. Was CMA's award properly procured?

The applicant alleged before this Honourable Court that the award was improperly procured. In his submissions he cited a number of provisions as indicated above. I have gone through the relevant provisions and noted that they only vest powers to the Court to revise an award that was improperly procured.

As rightly submitted by the respondent, the applicant has failed to establish before this Court under what circumstances the award was improperly procured. He did not link the cited provisions to the situation at hand. As an aggrieved party he was duty bound to establish the error on point of law or fact to move the Court to act upon it in accordance with the cited provisions. Failure to do so, remains to be a mere allegation which has not been substantially proved. It is my belief therefore that, the applicant has failed to establish the circumstances in which the award was improperly procured.

2. Was the applicant terminated from work?

The applicant alleged that he was terminated from work on unfounded reasons. The respondent disputed the fact that the applicant was terminated from work. They submitted that the applicant absconded

from work when he was ordered to pay the loss he caused to the Company. Under such circumstances, the burden vested upon the employer to prove on fair termination as provided for under Section 39 of ELRA shifted to the employee to prove that he was actually unfairly terminated from work.

Having gone through the applicant's testimony adduced at CMA, I have gathered that the applicant was ordered to pay for the loss occasioned to the Company. He was aggrieved by the respondents Order to pay for the loss and therefore decided not to go back to work.

The applicant testified that on 22/05/2018 he called the Company's Director to discuss about his employment status and was told that if he does not wish to continue working with him, he should pay him his terminal benefits. He therefore went to the Company's Accountant to ask for his terminal benefits where he was told to wait for the Company's Director who had travelled.

The applicant could not testify that he was terminated from work as he was told to wait for the Company's Director. He did not state if he thereafter went back to work and was later terminated. As he was told to

wait, he decided to construe that answer as termination.

In the list of documents to be relied upon, the applicant attached a termination letter but the same was neither explained nor tendered during hearing. The day he alleged to be given the termination letter is the same day he testified that he was told to wait for the Company's Director who had travelled. The applicant did not even state as to who served him with the said termination letter which was not tendered as Exhibit.

I have also gone through the exhibits tendered by the respondent. In Exhibit D1 (employer's decision regarding loss) the respondent specifically informed the applicant that the deduction on the loss from his salary would start from October, 2018 when his loan was due. That information revealed the respondent's intention to continue working with the applicant. However, the applicant refused to go back to work. The employer warned him in writing as per Exhibit D3, but the applicant did not heed to it. The respondent wrote text messages to the applicant demanding him to go back to work and collect his letters but he refused.

Under these circumstances, it is my findings that the applicant was not terminated from work but rather absconded from work as rightly found

by the Arbitrator. The word abscondment was elaborated in the case of **Moshi University College of Cooperative & Business Studies Vs. Patrick John Ngwila**, Lab. Div. MSH. Rev. No. 31 of 2014 [2015] LCCD 1 where Mipawa J, defined it to mean:-

"Abscondment refers to cases where an employee stays away from work a long time or period, but with the clear intention not to continue with employment. This intention being evident from the employee's conduct or communications".

As it is, the applicant absconded from work without any intention of being an employee of the respondent. This is evidenced by his conduct. Therefore he cannot claim to have been unfairly terminated.

3. What reliefs are the parties entitled to?

Having found that the applicant was not terminated but that he absconded from work, I join hands with the Arbitrator that he is not entitled to enjoy the remedies available under Section 40 of ELRA.

In the result, I hereby uphold CMA's award and dismiss the application for lack of merit.

S.A.N. Wambura
JUDGE
13/03/2020