

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 231 OF 2019

BETWEEN

LILIAN ISHABAKAKI.....APPLICANT

VERSUS

CARTRACK (TZ) LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 30/10/2020

Date of Judgment: 18/11/2020

Z.G. Muruke, J.

Lilian Ishabakaki applied for a job Vacancy Tele – sales with Cartrack (TZ) LTD in 2017. After interview, she signed contract on 12th October, 2017, same to run from 1st day of November, 2017 to 1st November, 2018.

Applicant alleged at Commission for Mediation and Arbitration (CMA) that, after working for 10 days, respondent principal officer Jayne Taylor discovered that she was pregnancy then questioned about her pregnancy. Later, she was told to go home until she has done with delivery of her baby. Applicant resisted the order, on the ground that she has no any problem with her pregnancy, but respondent principal officer insisted. She then went home. After delivery of her new born, she called respondent principal office who asked to go home and come back after she has done with her pregnancy, but respondent was giving her vague promise that she

will be called. It was until 17th July, 2018, when she last called, and replied that, her employment was terminated, they no longer needed her service, she will be called once need for hiring arises. Applicant was very surprised of such information as all these times she was kept on hold because of her pregnancy, with hope to resume her work after delivery. Being aggrieved, she filed dispute at CMA on 31st July, 2018, claiming for, **one**, 12 months' salary in terms of contract, to the tune of 9,000,000 Tshs, **two**, Compensation for breach of contract to the tune of 9,000,000 Tshs, **three**, Compensation for disturbances, false hopes and damages occasioned by such injustice to the tune of Tshs. 32,000,000, and **four**, Punitive damages and any other relief.

CMA upon hearing both parties dismissed all other claims except salary for 10 days that applicant worked for to the tune of 250,000/=.

Applicant was dissatisfied referred present revision raising following issues for determination.

- (i) The arbitrator erred in law and facts by holding that the respondent did not discriminate the applicant.
- (ii) The arbitrator erred in law and facts by disregarding the applicant's termonial and by thereby holding that the respondent did not terminate the applicant.
- (iii) There is an error material to the merits of the said award occasioning injustice on the part of applicant hence this application.

Hearing was done by way of written submission. Applicant was represented by Bertha Nanyaro, advocate while advocate Avitus Rugakingira from ATE represented respondent.

Applicant counsel submitted that it is a judicial notice that for one to proof any claim in court, Evidence Act requires the claim/fact in issue to be proved by either oral evidence or written evidence. In oral evidence, the testimony shall be produced by a person who says he heard that particular fact in issue. In our case the applicant was directly informed by the respondent that they couldn't continue engaging with her for she was pregnant and that during the recruitment they were not aware of that fact. She personally testified this fact before the arbitrator. Wherefore pursuant to the requirement of evidence Act, it is clear that oral evidence/testimony made by the applicant was sufficient enough to proof discrimination against the respondent.

In the outset, it is also legal requirement that where employee alleges discrimination, employer is required to proof that discrimination did not happen. This is the requirement under Section 7(8)(a)(1) of Employment and Labour Relations Act, 2004. Failure to do that constitute failure of employer to discharge the duty entrusted to him under the referred provision. This was the finding in the Revision No. 117 of 2013 between Feza Primary School Vs. Wahida Kibarabara, Labour Division at Dar es Salaam, reported at Labour Court Cases Digest of 2014 Volume No. 11 where Aboud, J was of the view that;

"I agree with arbitrator that the applicant failed to discharge duty entrusted under section 7(8)(a) of ELRA to prove that discrimination did not take place as alleged by respondent."

The claim for discrimination was proved by the applicant but the same was not disproved by the respondent as per the above provision of

the law and decision of this very court. Respondent herein simply testified at the Commission that the applicant left work and never returned. It was expected if that was the case, the respondent should have taken necessary measures against the applicant. Absconding work for five working days without reason and prior permission constitute professional misconduct warranting disciplinary hearing and termination thereto. This was not the case with the respondent as there is absolutely no action taken against the applicant for absconding work as contemplated by the respondent. Thus, suffice that the respondent did not disprove discrimination against applicant hence the respondent indeed discriminated the applicant. For that reason, the arbitrator erred in fact and law for holding that the respondent did not discriminate the applicant hence pray for setting aside of award and revision of this matter.

It was further submitted by applicant counsel that according to clause 15 of the Employment contract between applicant and respondent, during probation period employment may be terminated by giving 7 days' notice to the other part and after probation one month notice. At the time respondent stopped applicant from working due to her pregnancy, applicant was still under probation, so the respondent was supposed to give applicant a 7 days' notice of termination. This was not the case with the respondent. But again as submitted in support of ground one, Respondent testified that the applicant just disappeared without telling anyone and for no reason. In law this is abscondment warranting disciplinary actions and where possible termination. Unfortunately the applicant was not given a 7 days' notice of termination (during probation) and was neither summoned for disciplinary hearing so that she can defend

herself from the charges of abscondment as levelled against her. This constitute unfair termination and for this reason it is crystal clear that arbitrator erred in law and fact by holding that respondent did not unfair terminated the applicant, Thus this court is to revise and set aside the award by CMA Arbitrator.

Respondent counsel on the other hand submitted that applicant never proved before the Commission for Mediation and Arbitration that she was discriminated due to her pregnancy. This is because the applicant never provided any proof before the commission that could suggest that she was discriminated apart from her mere verbal allegations that she was discriminated. Furthermore, there was no any proof that the respondent did anything and/or omitted to do anything that could be interpreted as discrimination in the meaning of Section 7(4) of the Employment and Labour Relations Act 2004. This is further supported by the arbitrator holding at page 7 of the award where it was held that the applicant never proved that she was discriminated as provided below.

"Mlalamikaji ameeleza kwamba alibaguliwa kwa sababu ya kuwa mjamzito. Hakuna ushahidi wowote aliouleta wa kudhibitisha kuwa alibaguliwa na mlalamikiwa."

Therefore since there was no any proof and or evidence that the applicant was discriminated on reason of pregnancy, there was no duty for the respondent to disapprove the same. This is because you cannot disapprove something that was not proved.

Second, the applicant submit that if it is true that the applicant left work and never returned then the respondent should have charged the

applicant and terminated her for reason of abscondence and since this was not done, then, this is another proof that the respondent discriminated the applicant. There is no law which forces the employer to take disciplinary action against the employee even where there is clear evidence that the employee has committed misconduct an employee commits a misconduct the employer is at liberty to take disciplinary action against the employee, and therefore the action for the respondent not taking disciplinary action against the applicant cannot be interpreted as discrimination on the part of the applicant.

Having heard both parties submissions, records of the court and CMA records, it is worth reproducing evidence of Lilian Ishabakaki. Applicant while being cross examined by respondent counsel from page 11-12 of CMA typed proceedings as follows:

S: Una ushahidi wowote wa kuonyesha kwamba huyo Gayme Nyimbo alikwambia uende nyumbani zaidi ya maneno?

J: Sina ushahidi wa zaidi wa mfanyakazi aliyekuwa ameitwa Amtrain ndiye peke yake aliyeshuhudia.

S: Wewe uliwahi kuandika Email kumbukumbu kwamba uliweka ile ruhusa aliyokwambia ya kwenda nyumbani kwa maandishi.

J: Sikuwahi

S: Ulipoomba kazi Car Track ulituma barua?

J: Sikutuma barua, kazi ilitangazwa kupita Briter Monday nikaaply Briter Monday ndiyo walioniambia kwamba Car track wangependa kunifanyia interview.

S: Ulipokubaliwa kuuifanyia kazi Car track uliajiriwa kwa barua?

J: Hapana nilipigiwa simu

S: Baada ya kuzungushwa sana na Gayma uliwahii kumjulisha Anna Nyimbo tatizo hilo.

J: Hapana

S: Umesema ulijifungua mwezi wa 1, 2018 si ndiyo?

J: Ndiyo

S: Na Ukaomba urudi kazini mwezi wa 4, 2018 si ndiyo?

J: Ndiyo

S: Na Gayme alikataa si ndiyo

J: Hukukataa Direct alikuwa ananizungusha

S: Kwa hiyo Gayme hakuwahi kukataliwa wewe kurudi kazini si ndiyo?

J: Ndiyo hoja kata alikuwa anazungusha.

S: Na wewe hajawahi kwenda Physically pale ofisini zaidi ya kuwasiliana na Gayme si ndiyo?

J: Ndiyo

S: Umesema kwamba umefukuzwa kazi kwa mdomo si ndiyo?

J: Ndiyo

S: Nani alikutamkia kwamba umefukuzwa kazi wakati umetaka mwenyewe hata Gayme haja kuachisha kazi?

J: Nilikuwa nampigia anazungushia wakati mwingine anasema mafaili yako huko mpaka aongee na watu wa South Africa.

S: Nani alikutamkia kuanzia sasa kazi hamna tena

J: Niliamua kuchukulia hivyo kwa sababu kazi ilitangazwa.

S: Nani aliyekwambia kama umefukuzwa kazi?

J: Hamna

From the above evidence of applicant herself attained during cross-examination at CMA, it is clear that, she decided on her own to stay at

home. It might be true that, she was told orally, but in the eyes of law, evidence is needed, on the following reasons:

- One:** Applicant was told to go home she did not report or complain to senior officer Anna Nyimbo.
- Two:** Applicant did not write any or produce, a document anything as regards communication between herself and chief operation person Mr. Geyme Tailler Nyimbo.
- Three:** Applicant ought to have produced phone conversations and SMS between herself and her chief of operation.

Serious allegation of discrimination at work place like the one, applicants alleging, needs evidence. Otherwise, evidence available proves that, applicant just decided to go home on her own. The fact that respondent did not take disciplinary action, after applicant disappearance does not prove applicant allegations either. To this court, application for revision lacks merits. Accordingly dismissed.


Z.G. Muruke

JUDGE

18/11/2020

Judgment delivered in the presence of Fatma Songoro for applicant and in the absence of respondent.


Z.G. Muruke

JUDGE

18/11/2020