

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 816 OF 2018

BETWEEN

VIETTEL TANZANIA LIMITED.....APPLICANT

AND

EDMUND KABONGE.....RESPONDENT

JUDGMENT

Date of Last Order: 07/09/2020

Date of Judgment: 06/11/2020

A. E. MWIPOPO, J

This is an application for revision against the Commission for Mediation and Arbitration Award (CMA) in Labour Complaint No. CMA/DSM/ILA/R.200/17/308 dated 28th September, 2018. The applicant namely Viettel Tanzania Limited is praying for the following orders:-

1. That this Court be pleased to revise and set aside an Arbitral Award of the Commission for Mediation and Arbitration sat in Dar Es Salaam in the matter CMA/DSM/ILA/R.200/17/308 delivered on 28th September, 2018, by Hon. William, R., Arbitrator.

2. That this Court be pleased to grant any other order(s) and/or relief(s) it may deem fit and just to grant in circumstances available.
3. That cost to follow the event.

The respondent namely Edmund Kabonge was employed by the applicant on 3rd August, 2015 in the post of Area Sales Staff at Applicant's Temeke Centre. The applicant observed in 12th May, 2015, that there is a loss of shillings 5,445,987.50 from sales which was not deposited by the Respondent. The Respondent acknowledged the loss and agreed in a commitment letter dated 12th May, 2016, for the Applicant to deduct shillings 300,000/= every month from his salary until the debt is cleared. However, on 7th February, 2017, the Respondent did write a resignation letter giving a one month notice to the applicant which was not approved by the Applicant on the ground that the Respondent has to clear the outstanding debt first before resignation. On 6th March, 2017, the Respondent stopped to work and referred the labour dispute to the Commission. The Commission heard both sides and issued an award in favour of the Respondent. Aggrieved by the Commission Award the Applicant filed the present application for revision.

When the matter came for hearing both parties to the application were represented. The Applicant was represented by Mr. Anasely Lesika,

Advocate, whereas the Respondent was represented by Mr. Abraham Mkande, Personal Representative.

The Counsel for the Applicant submitted in support of the application that the Hon. Arbitrator erred to grant the Award in favour of the Respondent while the evidence available failed to prove that there was constructive termination. Rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, provides for circumstances for constructive termination. The Arbitrator failed to consider the evidence adduced by the Applicant which provides for the circumstances for constructive termination. The Respondent's letter to the Applicant – Exhibit D4 shows that the Respondent admitted to commit the misconduct and was willing to take responsibility for the loss by permitting deduction from his salary. The evidence in Exhibit D4 was not considered by the trial Arbitrator.

Further, the Applicant's Counsel was of the opinion that the trial Arbitrator erred to hold that the Applicant granted the Respondent emergency leave. There is no such evidence in the record to support the Arbitrator's holding. The evidence available prove that the Applicant willingly decided to resign as shown in resignation letter – Exhibit D8. As a result, the award granted by then Commission were wrong. The Applicant prayed for the application be allowed and the CMA Award be set aside.

In reply, the Personal Representative for the Respondent submitted that the Respondent's employment was constructively terminated as it was proved by the evidence before the CMA. The employer deducted shillings 300,000/= out of shillings 450,000/= which was Respondent's salary as result the salary failed to fulfill his basic needs. The Applicant failed to show the evidence to prove that the Respondent caused loss to the company. The act of deducting the amount in the respondent salary is contrary to section 28 (2) (e) of the Employment and Labour Relations Act, 2004.

The Respondent argued that he proved before the Commission that he was transferred to Kinondoni from Temeke. After the transfer, the respondent was not assigned any duty to perform. The circumstances caused the respondent to resign. The Respondent did not resign willingly, he resigned for lack of options to work with the Applicant. It is the Applicant who caused the Respondent to resign. The Respondent was of the opinion that the Commission awarded what the law provides and he prayed for the application be dismissed.

In rejoinder, the Applicant submitted that the evidence available proves that the deduction of Respondent's remuneration was done in accordance to section 28(1) (b) of the Employment and Labour Relations Act, 2004 following the act of the Respondent to permits the deduction. Also

there is no evidence to prove Respondent's allegation that he was not given work to do. There is no evidence at all to prove constructive termination in the present application.

Following the above submissions, the only issue for determination in this application is whether the evidence available is sufficient to prove that the Applicant forced the Respondent's resignation from the employment.

According to section 37 (1) of the Employment and Labour Relations Act, 2004, it is unlawful for an employer to terminate the employment of an employee unfairly. The law provides further in Section 37 (2) that in the dispute for termination of employment the employer has duty to prove that the termination was fair. The termination is unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair.

The circumstances for constructive termination are stipulated under rule 7 of the Employment and Labour relation (Code of Good practice) Rules, G.N. No. 42 of 2007. The rule provides as follows hereunder;

7(1) Where an employer makes an employment intolerable which may result to the resignation of the employee that resignation amounts to forced resignation or constructive termination.

(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-

(a) Sexual harassment or the failure to protect an employee from sexual harassment and;

(b) if an employee has been unfairly deal with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer.

This Court in the case of **Girango Security Group Versus Rajabu Masudi Nzige**, Revision No 164 of 2013, High Court Labour Division, at Dar Es Salaam, (unreported), held that, I quote:

"Constructive termination takes place where an employee terminates the employment or agrees to terminate but this termination or agreement was prompted or caused by the conduct of the employer. The fact that the employee was caused to terminate his employment as a result of an employer's actions means that the termination was at the initiative of the employer."

In the present application the evidence available in the records proves that there was no voluntary intention by the employee not to proceed with employment as it was held by the Arbitrator. The resignation letter written by the Respondent – Exhibit A6 (also tendered by DW1 as Exhibit D8) provides that the Respondent have considered all factors as his salary does not fulfill his basic needs like family expenses and transportation to work due to the incident occurred on May, 2016. The letter states further that the Applicant act of deducting salary affected Respondent work and life at large.

From the content of Exhibit A6 the Respondent stated that he was forced to resign as the act of deducting the salary has affected his work and life at large.

The Applicant in his submission was of the view that the Respondent conducted several misconduct including loss of shillings 5,445,987.50 in his hands and not attending at work. The loss was discovered during stock taking where it was found that there are some products sent in Respondent user account but there was neither actual products in the stock nor the money deposited the Applicants account for the sales of the products. The Applicant concluded that the products were lost in the hand of the Respondent who committed himself to pay for the loss by allowing the employer to deduct shillings 300,000/= each month from his salary until the loss is covered in full. The commitment deed was tendered by the Respondent as Exhibit A4. The Respondent did write a letter dated 30th November, 2016, committing himself to pay the debt of shillings 4,809,529/= to the Applicant. The Applicant is of the view that this evidence proved that the Respondent occasioned the loss and that the deduction was permitted in accordance with the law.

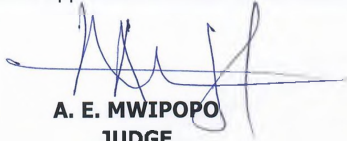
The Respondent argued that there was no proof that he caused the alleged loss. I agree with the Respondent's argument that there was need for further investigation as the evidence available shows that the sales officer

request for the stock to the store keeper orally and it is a Store Keeper who issue the products online to the user account of the requesting officer. There is no evidence to prove that the actual products were handled to the Respondent after the products were issued online. Thus, there was need to make inquiry or to provide evidence to prove that the products were actually received by the Respondent. The Respondent testified that he never received the products from the store keeper and he has been asking the Applicant to conduct investigation to ascertain the alleged loss but the Applicant never agreed to the request. This evidence was not disputed by the Applicant. Hence, I'm of the view that there was no sufficient evidence to prove that the alleged products lost in the hand of the Respondent and I find that the Commission rightly held that the Applicant failed to prove that the Respondent lost the alleged amount from sales of products.

Therefore, the evidence available failed to prove that the Respondent did cause the loss of shillings 5,445.987.50 as alleged by the Applicant and as result the commitment deed and the deduction of Respondent's salary were not proper. And, since the Respondent resigned due to the difficulties caused by deduction of his salary as stated in Exhibit A6, then the resignation was not voluntary one as the working condition was intolerable due to the conduct of the employer. In the circumstances, the Respondent was forced

to resign. Thus, I find the Respondent was constructively unfairly terminated by the applicant.

Consequently, the Application is dismissed and the Commission award is upheld. Each party to the application to bear its own cost of the suit.

A handwritten signature in blue ink, appearing to read 'A. E. Mwiopo', is written over a horizontal line.

A. E. MWIPOPO
JUDGE
06/11/2020