IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.401 OF 2019

BETWEEN

VICTORIA JONATHAN....................................... .APPLICANT

VERSUS

STATOIL TANZANIA(currently known as
EQUINOR TANZANIA.....................................1ST RESPONDENT
ELISE GRUNER...2ND RESPONDENT

JUDGMENT

Date of Last Order: 16/10/2020

Date of Judgment: 26/10/2020

Z. G. Muruke ,

The applicant, **VICTORIA JONATHAN** was employed by the respondent on 1st August, 2012 as Human Resource Consultant. He worked with the respondent until 15th December, 2014 when she decided to give notice of resignation. The applicant alleged that respondent made her working environment intolerable as she was accused and harassed by the 2nd respondent for about eight months without taking any legal action against her. After resignation she referred the dispute before the Commission of Mediation and Arbitration (CMA) claiming to have been constructively terminated. CMA's decision was contrary to her as they

Labour Court tz

found that there was no constructive termination. Being dissatisfied with CMA's decision, the applicant filed the present application seeking to revise and set aside the CMA's award on the following grounds:

i. **That, the trial arbitrator erred in law by failure to properly analyze the evidence given before her.**

ii. **That, arbitrator erred in law by holding that the applicant did not conduct investigation prior to disciplinary hearing.**

The application was supported by the affidavit of the applicant herself. In opposition the respondent's Human Resources officer filed his counter affidavit. Hearing was by way of written submissions. Am grateful as both parties complied with the schedule. The applicant was served by Advocates Evod Paul Mushi and Innocent Felix Mushi, of law front advocates whereas the respondent was represented by advocates Aireen Ruchaki, Samah Salah, Miriam Bachuba and Fatma Mgunya at different times from IMMMA Advocates.

On the first ground of revision it was submitted that following judgment of Hon. S.C. Moshi, J, which remitted back the matter to the CMA, was supposed to summon parties for a fresh arbitration hearing, however, the CMA proceeded to issue an award without affording them a right to be heard hence, the second award cannot stand due to that illegality.

On the second ground, applicant counsel submitted that the arbitrator failed to properly evaluate the evidence of the parties, consequently arrived to a wrong decision that there was no constructive

termination. The applicant proved that respondent made her working environment intolerable and she had no option than to resign from her employment, because second respondent was accusing and harassing her without taking any legal actions.

The allegations were admitted as **Exhibit VJ2** collectively and the same were mentioned by **DW1** and **DW2** as noted under exhibits **STEG2,STEG3, STEG5, STEG6 STEG8, STEG9** tendered by the respondent. All the accusations and alleged offences were said to have been committed since february,2015, but up to the date of her resignation in December 2015, no any legal actions was taken against her. As a result she faced psychological torture and led to her resignation. It was further submitted that DW2 testified that according to the Respondent's grievance procedure, the applicant was supposed to raise her grievances to her line manager to be dealt with, but failed to tender the said policy. The policy does not exist in which they were required to take legal actions against applicant for the alleged offence. Failure to do so for about eight months, amounted to the applicant's constructive termination. Applicant counsel prayed for the grant of the application.

In reply, the respondent's counsel on the first ground argued that, the ground is baseless since they were heard by Hon. Mkombozi, arbitrator. The judgment by Hon. S.C. Moshi,J just quashed the CMA award and not the proceedings, thus, there was no order for retrial denovo as alleged by the applicant.

On regard to the second ground it was submitted that the arbitrator properly evaluated the evidence to arrive into the decision that there was no constructive. The applicant was supposed to perform her duties contained in her job description, and abide to all lawful instructions and carry out tasks assigned by the 1st respondent, abide to employers governing documents and policies which included the PO Handbook, Debit Card policy, work for eight hours a day, commencing from 08:00am to 17:00hrs, provide a 1st respondent with a medical report for every sick leave taken, retire, reconcile, and settle expenses incurred on behalf of the 1st respondent ,referring exhibit STEG1.

Further respondent's counsel submitted that, even the applicant herself admits that she was required to abide by the rules and regulations of employment, and the 1st respondent being the line manager had every right to make follow up and remind the applicant to comply. That constructive termination is provided under Rule 7 (1),(2) of The Employment and Labour Relations (Code of Good Practice) Rules,2007 which provides that ;

> **7.-(I) Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount 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-**

labourcourt.tz

(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.

The respondent also referred the case of **Girango Security Group v Rajabu Masudi Nzige** Rev. No.164/2013 which cited with approval the case of **Pretoria Society for care of the retarded v Loots** [1997]18 ILJ 981[LAC].

It was further submitted that as rightly stated by the arbitrator at page 36 of the award, each employer has different tolerance level. Other employers would have reported the applicant to the police for misuse of funds, but respondent decided to give the applicant the opportunity to repay the same. The respondent's decision to give the applicant an opportunity to rectify the misdeeds should not be used to punish the respondent. Respondent counsel prayed for dismissal of the application for want of merit.

Having considered the parties submissions, CMA records and the relevant laws, the issues for determination are;

i. **Whether the parties were afforded with a right to be heard**
ii. **Whether the applicant was constructively terminated.**
iii. **Reliefs entitled to the parties.**

Starting with the first issue it is on record that the impugned award is the second award, after the former being quashed and set aside by Hon. S.C. Moshi,J in revision no.428/2016 and the file was remitted back to the CMA to be dealt with another arbitrator. The applicant alleged that after remission, they were not afforded with a right to be heard as ordered by Hon. S. C. Moshi,J. I find worth to reproduce the said order for easy reference;

> "Therefore, for the aforesaid reasons I will not decide on the substantive part of the matter, consequently, I quash and set aside the arbitrator award of the CMA. **I order that the award be written afresh in accordance with the law by a different arbitrator basing on the evidence on record and the legal arguments which were already presented by the CMA.**"[Emphasis added]

From the wording of the order above, it was clearly divulged that another award be written by another arbitrator, basing on the evidence on record and the legal arguments which were already presented by the parties at the hearing done by the former arbitrator. As stated by the respondent's counsel, there is no order for a fresh arbitration hearing. Therefore the applicant misdirected herself, hence the ground lacks merit.

On the second issue, the applicant's counsel stated that the respondent's act of not taking any legal actions against applicant for about eight months, amounted to constructive termination of her employment as she was compelled to resign of her employment due to psychological torture.

The law under Rule 7 (1) of the GN No. 42/ 2007 provides foe constructive termination, to mean: -

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

In order to determine whether the applicant was constructively terminated, this court took a look on the case **Girango Security Group v. Rajabu Masudi Nzige**, Rev. No.164/2003 that provides for things to be considered by the arbitrator or court in determining the existence of constructive termination. In that case the following questions were posed;

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?

In the case at hand, the applicant alleged that the respondents laid a number of accusations including her being poorly performing her duties and misappropriation of company's money etc. It is on record that the respondent communicated to the applicant on regard to the allegations in **exhibits VJ 6**. What I have noted from the applicant's claims is the delay of the respondents to take measures against her on the alleged misconducts.

From the records, there is no any proof from the applicant concerning the respondent's treatment that made her working environment intolerable. What I have seen is just a set of emails from the line manager reminding her of her responsibilities and her conducts as required by the Company's rules. The applicant failed to prove that her resignation was caused by the respondent's actions. Even in her resignation letter dated 15th December, 2014, the applicant did not state that her resignation was caused by the intolerable working environment. As stated by the arbitrator, she gave a three months' notice of resignation, means that she was still able to dwell in those environment despite of being intolerable to her as she alleged.

Again having found that the line manager was harassing her for a such a long time, applicant ought to have reported the grievances as required by the law. There is no any evidence showing that she did so. Even if the respondents have not tendered any policy regarding the procedure for filing grievances in their office, she could have reported to the senior authorities so they could have dealt with the line manager. Issue of resignation was discussed in the case of **Murray V. Minister of Defense** (383/2006) [2008] ZASCA 44 where it was 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."

This court is of the view that, the applicant has failed to prove that, her resignation was not voluntary. She just resigned on her own whims, there was no constructive termination. Most of the accusations were based on her conducts and her performance. The applicant ought to have concentrated on insuring that she improves her performance, rather than feeling offended on the reminders and opting for resignation.

Basing on the above discussion, I find no need to fault the arbitrator's finding that there was no constructive termination. CMA's decision is up held. I consequently dismiss the application for want of merit.

Z.G.Muruke

JUDGE

26/10/2020

Judgment delivered in the presence of Advocate Godfrey Ngassa for applicant and Advocate Fatma Mgunya for the respondent.

Z.G.Muruke

JUDGE

26/10/2020

Labour Court tz.