

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 225 OF 2020

EMMANUEL MWANGOSI..... APPLICANT

VERSUS

AMANI CARGO LIMITED.....RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(Kiangi : Arbitrator)

dated 14th day of May 2020

in

Labour Dispute No. CMA/DSM/TEM/371/19

JUDGEMENT

28th October & 17th December 2021

Rwizile, J

EMMANUEL MWANGOSI the applicant herein, has preferred this application against the award of the Commission for Mediation and Arbitration (CMA). The applicant is praying for the following orders: -

1. That this Honourable Court be pleased to call for the records of the Commission for Mediation and Arbitration and revise the proceedings and the award and an order issued by CMA on 14th May 2020 at Dar es salaam zone by Hon. Kiangi, N. Arbitrator in Complaint No. CMA/DSM/TEM/371/19.

2. That this Honourable Court be pleased to make a finding that the termination of the applicant by the respondent was unfair.
3. That this Honourable Court be pleased to make any other order that meets the ends of justice.

The application is supported by the applicant's affidavit. Opposing the application, the counter affidavit of Atilio Yolam Kalinga respondent's Human Resource Officer was filed.

The background of the dispute in brief is that; the applicant was employed by the respondent as a car mechanic. Their relationship became bad after the applicant alleged was terminated by his supervisor. The applicant referred the matter to the CMA which dismissed his application for failure to prove termination. Dissatisfied with the decision, he has filed this application.

Mr. Emmanuel Mwangosi appeared in person, whereas the respondent was represented by Ms. Magreth Kisoka, learned advocate. The hearing proceeded orally.

Supporting the application Mr. Mwangosi submitted that basing on the record, he was terminated, that is why he filed a dispute with the CMA. The respondent when replying said, the applicant has never been terminated from his employment. But the applicant insisted, he was

not permitted to work and was denied entry at the work place. His view is that his employment contract was terminated.

Secondly Mr. Mwangosi submitted that he was employed in February 2013, and he had witnesses, but they were not afforded with right of being heard. He further said, what he submitted at CMA was not properly recorded. Based on the stated weaknesses, he alleged, he lost the case. This means, he proved that he had a point but was never considered by the arbitrator.

It was further submitted that what was testified by the Human Resource Officer at the commission was not true, on the ground that he has never met with him and could not do so. His claims of NSSF and validation card and other evidence was not accepted such as his passport, he submitted. He stated that the employer did not prove anything about his employment.

Lastly Mr. Mwangosi submitted that he was not paid salaries from 2013 to 2017. Further, he said, when he claimed for payment of NSSF and arrears of salaries, he was terminated. He thus prayed for the CMA award to be set aside.

Arguing against the application Ms. Kisoka submitted that the applicant has never been terminated. According to the learned advocate, the

applicant was in conflict with Hezron Kyando who was his supervisor in the yard when he left the office, he did not come back. She stated that he was asked by HR as he testified but did not come. Therefore, the applicant absconded from the work but he has never been terminated. Ms. Kisoka submitted that the applicant was employed in 2017 as the car mechanic. It is with doubt if he was employed before 2017 and for the same to be believed by the commission it needed proof that he was employed in that time.

She stated that the payroll proved so, because the applicant left the office, without being terminated. It was argued that the applicant has never brought the passport but only brought the validation certificate/ card which did not prove that he was employed before 2017.

She was of the view that since the applicant was afforded a chance of tendering documentary evidence, his allegation regarding witness lacks merits. She prayed that the application be dismissed.

Having considered applicant's submissions and the record of the Commission, this Court finds it worth to determine three issues which are a reflection of what the applicant asked this court to determine.

The issues are as follows; -

- i) Whether the parties had employment relationship since 2013?

ii) If yes whether the applicant was terminated and termination was fair?

iii) Whether the applicant was paid salaries and other reliefs.

Before going into the merits of the application, I have to say that, the applicant's allegation that his evidence was not properly recorded and witnesses were rejected are baseless claims. It should be noted that, the same did not feature in his affidavit. It should be understood that the record of the commission, in my view, is a serious document which should not be lightly impeached. I think, the applicant has no evidence to prove so.

Going back to the merits, I have to comment that in the first place, it has been submitted that the applicant and respondent were in employment relation. What has not been clear is when did that relationship start. Was it in 2017 or 2013? The applicant has stated that he was employed as a car mechanic by the respondent. The respondent did not dispute that fact. Indeed, the respondent's evidence from the Human resource officer is clear that the applicant was employed in that capacity in 2017.

I do not think, I have to labour much on this point. It is the duty of the employer to keep records of the employees. In case there is a dispute, the employer is to lead evidence to prove when the employee

was engaged. In the absence of such evidence, it is taken that the applicant was employed in 2013 as he alleged.

In addressing the issue as to whether the applicant was terminated or not. Before delving into fairness of termination, the main disputed here is whether the applicant was terminated. The law as under section 37(2) and 39 of the ELRA burdens the employer to prove fairness of termination. In the event there is an issue as in this case, as to whether there was termination, the duty to prove so is cast on a person who alleges so. I think, section 112 of the evidence Act provides so. It states as follows;

Section 112,

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person

I am aware, and I think it is not disputed that the Law of Evidence Act, being a statute of general application, applies in the proceedings of this nature. The applicant has stated that he was terminated by the respondent, which is denied. It means, I am certain that he has the duty to prove so. That done, the question of fairness of termination

lies on the employer as the law does not mince words on that. I have gone through the evidence of the applicant. He told the commission that he was denied entry into the work premises. But his word, is against the respondent's, who said, she efforted to call him back to work upon leaving the office due to the conflict with his supervisor. The applicant did not accept and therefore did not go back to work. This means, when the applicant left the office, he ought to prove how he was denied entry. Who did that, when and who witnessed the doing? None of the above was shown. In my considered view, the applicant failed to prove he was terminated.

Having so held, I do not think, I have to go further to determine fairness of termination. It was stated by the respondent that the applicant had developed certain bad behaviour. He absented himself from duty as the evidence of Dw1 a human resource officer stated. The second issue is therefore without merit. Like the first one, it is dismissed.

Lastly, it was the applicant's submission that he was claiming his salaries of 2013 to 2017. In CMA form Number one, he alleged the dispute arose on 14th April 2019. But yet he claimed for payment of arrears of salaries of 2013 to 2017, I think this was not proper. He claimed as well apart from termination, breach of contract and did not

supply particulars to that effect. It is my considered opinion that salary claims were out of time and ought not be claimed and it was proper that the same were not entertained.

In all fairness, I hold that the applicant did not prove his case before the commission. This means therefore, the commission was justified to dismiss the same. It is safe to dismiss this application because it has no merit. It is dismissed with no order as to costs.




A.K. Rwizile

JUDGE

17.12.2021