

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION NO. 563 OF 2021

BETWEEN

PRECISION AIR.....APPLICANT

VERSUS

NANCY NGOWI..... RESPONDENT

JUDGEMENT

Date of Last Order: 23/06/2021

Date of Judgement: 05/07/2021

M.Mnyukwa, J.

Aggrieved by the CMA's award which was delivered in favour of the respondent herein the applicant filed the present application. At the CMA the respondent referred the dispute claiming for payment of outstation allowance which were not paid by the applicant from November, 2013. After hearing both parties the Arbitrator was of the view that the respondent was entitled to the outstation allowance amounting to 1,750.00 dollars which were not paid from November, 2013 to 05th December, 2015 when the contract of employment between the two was terminated. Being dissatisfied by the CMA's award the applicant filed the present application.

The matter was argued orally. Both parties enjoyed the services of Learned Counsels. Mr. Migire Migire was for the applicant while Mr. Lupia Abraham and Ms. Ester Pius appeared for the respondent.

Arguing in support of the application, the applicant's Counsel adopted the affidavit of Migire Migire, applicant's Principal Officer to form part of his submission. He submitted that, in the affidavit they highlighted four legal issues forming the basis of this application but they abandon two issues and submitted on the remaining as follows:-

- i. That, the Honourable Arbitrator erred in law in entertaining the matter without condonation despite the fact that it was hopelessly time barred when filed before the CMA.
- ii. That, the award is defective and improperly procured for being based on the Arbitrator's personal opinion and not making reference to any specific legal provisions or interpretations thereof.

On the first issue it was submitted that, the honourable Arbitrator erred in entertaining the matter without condonation despite the fact that it was hopelessly time barred. It was argued that, Rule 10 (2) of Labour institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007 (herein GN. 64/2007) states that all other disputes must be referred to the CMA within 60 days from the date when the dispute arose. It was stated that, Rule 11 of the same GN. No. 64/2007 provides for the application for condonation for complaints delivered outside the applicable time.

It was strongly submitted that, at the CMA the matter was filed out of time. The Learned Counsel averred that, according to the employment contract, the respondent was entitled outstation allowance as a cabin crew, and the same was paid when she spent a night outside the main base of operation (Dar es Salaam).

It was further submitted that, in 2013 the applicant was going through serious financial challenge, he decided to withdraw the payment of outstation allowance. That, the withdrawn was communicated to all cabin crew including the respondent via email dated 31st May, 2013. It was stated that, withdraw of outstation allowance was to become effective from 1st June, 2013, he added that withdrawn of outstation allowance was substituted by provision of the meal at the hotel where they spent a night.

He submitted that, the respondent resigned on 5th December, 2015 and brought a claim at the CMA against the applicant claiming for her accrued outstation allowance. It was stated that, in her CMA complaint form (Form No. 1) she stated that the dispute arose on 5th

It was further submitted that, the dispute arose on 1st June, 2013 when the applicant effectively withdrew the outstation allowance. It was added that, in both the award and the ruling the Arbitrator states that the applicant had promised to pay their outstation allowance as

accrues but there is no any evidence tendered by the respondent to that effect.

It was contended that, the actual date when the dispute arose was 1st June, 2013 and not 5th December, 2015 as stated in the CMA Form No. 1. It was therefore argued that, since the dispute arose on 1st June, 2013 and filed on 28th December, 2015 the respondent ought to have supported her application with a condonation application for the time delayed to be condoned. It was submitted that, the fact that the complaint was heard without a condonation it was an error by the arbitrator, so we pray this court to dismiss the whole proceedings and Award of the CMA in its entirety.

On the second ground it was submitted that, the award is based on the Arbitrator's opinion and not making any specific legal provision or interpretation thereof. It was submitted that, Rule 27(3) (e) of the Labour Institution (Mediation and Arbitration) Rules of 2007 GN. 67/2007 provides among other things that an award is to contain the reasons for the decision. He said, referring to the impugned award, the decision of the honourable Arbitrator is contained under page 5 and 6 where in those pages the Arbitrator has not provided any reason or basis for his decision. He added the Arbitrator did not highlighted what law(s) was breached by the applicant or under what law the respondent was entitled remedy. He argued that, the same is contrary to Rule 27 (3) (e) of GN. No. 67/2007, and that the honourable arbitrator erred by not providing any reason for his decision. He therefore pray for the award to be quashed and set aside.

Responding to the application the respondent's Counsel prayed to adopt the counter affidavit within a notice of opposition. He submitted that, the matter was filed at the CMA timely on the reasons that, up to the end of December, 2015, there was no any dispute. He stated that, it is true that the email was sent on 31st May 2013, but it was a mere proposal of how the company (employer) would minimize the costs following financial constraints. He added that, the discussion was on progress in relation to that proposal.

It was further submitted that, the issue of outstation allowance is the issue which is under the contract of employment. Therefore, any changes concerned the stoppage of outstation allowance were to be made between employees and the employer. He argued that, since the issue of outstation allowance was part of the term of contract, that contract bind the parties since there was no any new contract prepared and signed between the parties.

The Learned Counsel went on to submit that, the proper time when the dispute arose between the applicant and the respondent was on December, 2015. That, it was proper for the Respondent to file a labour dispute on December, 2015 not on 1st June, 2013. He cited the case of **Zanzibar Insurance Corporation Vs. Zainab Ahmed** Labour Division No. 115 of 2015, reported in the labour court case Digest Part 1 of 2015 No. 106. He therefore prayed for declaration that the matter was timely filed.

On the second issue it was submitted that, at page 5 and 6 of the Award the arbitrator provided the reason for the decision. He said, the

arbitrator based on the contract of employment so it was like in the law of contract that is in any contract there should be consensus as it was stated by the arbitrator. He therefore urged the court to uphold the CMA's award.

In rejoinder it was submitted that, allegation that an email of 31st May, 2013 was a mere proposal and is a mere assertion which has no proof. On this issue he reiterated his submission in chief. On the case of **Zanzibar Insurance Corporation** (supra) it was submitted that, the decision of Hon. Judge was to the effect that discussion was going on between the employer and employee so final determination was not made. It was argued that the said case is distinguishable to this case because the final determination has been made effective from 1st June, 2013. Therefore, he reiterated his prayers as sought in the application.

After considering the rival submissions from both Counsels, I find that the Court is called upon to determine the following issues, whether the matter was timely filed at the CMA and whether the award was

(2) all other disputes must be referred to the Commission within sixty days from the date when the dispute arised.'

In the application at hand the dispute was referred at the CMA on 28th December, 2015, in the CMA Form no. 1 which initiates proceeding at the CMA. The respondent alleged that, the dispute arose on 05/12/2015. For the purpose of clarity I hereunder quote part of the respondent's testimony at the CMA in her own verbatim as follows:-

'Malalamiko yangu ni kuhusu posho ya nje ya nchi (Nairobi) ambayo sijalipwa tangu 2013 hadi 2015. Posho zenyewe ni kutokea Novemver, 2013 hadi 2015. Hizi posho zilizuiliwa tangu Machi, 2013'

In the above quotation the respondent testified that, her claim is on outstation allowance which was stopped to be paid from November, 2013. Her evidence was also supported by her witness PW1. On the basis of such testimony, it is my view that the dispute arose on November, 2013 when the applicant withdrew the said outstation allowance as correctly submitted by the applicant's Counsel.

Upon careful examining the record in CMA's file, I find one Gasper Nigido wrote an email titled **"WITHDRAW OF CREW NIGHT STOPPING ALLOWANCE"**. The email reads as follows:-

"Dear all, please take note Hotel The BOMA AND REDCOURT shall be providing diner for crew night stopping at their hotel with effect from 1st June 2013 thus as from the date, no night stop allowance shall be provided for crew night stopping at the NBO STATION. Note crew shall sign whenever taking dinner."

From the above correspondence, if the respondent was not satisfied with the decision of the Management on measures of costs cutting, she would have been expected to pursue the matter the moment payment was not effected to her.

Furthermore, on perusal of the record in the CMA's file, I find the cabin crew held a meeting on 13th January, 2015 whereby among other things they complained that they were not involved on removal of the allowance in which cabin crew considered it as dictatorship. As it was rightly submitted by the applicant's counsel there neither a reply nor a promise that their accrued outstation allowance will be paid in the future date. Therefore, in that circumstances it is very difficult to establish if there was ongoing discussion between the parties concern the payment of outstation allowance. To prove otherwise, respondent was expected to tender documentary evidence to support her argument before the CMA.

As it can be observed in the case of **Zanzibar Insurance Corporation** (supra) the court stated that:-

"...the date cannot be counted from the date when she was transferred as there was no dispute the respondent employees was in a very high discipline awaiting for the employer applicant to fulfill his employment obligation to pay the respondent her benefits of employment i.e. transfer allowance. The dispute arose when the applicant became unwilling to pay the employees transfer allowance."

In the case at hand the respondent failed to show when she made a final demand of her claim and the employer kept silent. The record

suggests that withdrawal of outstation allowance was in the year 2013, therefore that period is considered as a time when the applicant refusing to pay the respondent outstation allowance. Therefore, a claim that the dispute arose on 05/12/2015 when the contract between the parties was terminated lacks legal stance.

The position of the law under Rule 10 of the GN. No 64/2004 requires any dispute apart from the disputes of unfairly termination to be referred to the CMA within 60 days from the date when the dispute arose. Undoubtedly, the dispute at hand falls within other disputes and not a dispute of unfair termination. Therefore, the same was required to be filed within 60 days from November, 2013. Under the circumstances of this case, I fully agree with the applicant's Counsel that the matter was referred at the CMA out of time. From that analysis it is crystal clear that the CMA proceeded to determine the matter without having jurisdiction thereto. In my view the application was supposed to be accompanied by the application for condonation.

I have considered the respondent's Counsel Submission that the applicant is still in negotiation with his employees on payment of the relevant allowance. In my view, such fact does not waive the respondent to apply for condonation so long as the dispute arose on November, 2013 and he delayed to refer the same at the CMA.

Since, the first issue has an effect of disposing the application, I find no need to labour much on the remaining issue.

In the result I find the present application has merit. The CMA had no jurisdiction to determine the matter because it was filed out of time.

In the event, the Arbitrator's award and proceedings thereto are hereby quashed and set aside.

It is so ordered.



M. Mnyukwa

JUDGE

05/07/2021

Judgment delivered in the presence of Migire Migire, Advocate of the applicant who is also holding brief of Mr. Lupia Abraham, Advocate of the respondent .



M. Mnyukwa

JUDGE

05/07/2021