IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 466 OF 2020

BETWEEN

GRAYSON MBOGO ..... APPLICANT

VERSUS

CYPRIAN MUGEMUZI t/a
MKURUGENZI LEOPARD RESORT HOTEL ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The notice of application and the Chamber Summons were both lodged under the provisions of Section 91(1)(a),(b), 2(a),(b),(c) and Section 94(1),(b),(i) of the Employment and Labour Relations Act CAP 366, R.E. 2019 and Rule 24(1), (2)(a),(b),(c),(d),(e) & (f) &(3)(a),(b), (c) and (d) and Rule 28(1)(a),(d) and (e) of the Labour Court Rules GN. No. 106 of 2007. In the Chamber Summons, the applicant is moving the Court for the following:

1. This Honorable Court be pleased to call for records, revise the proceedings and set aside the award of the Commission for Mediation and Arbitration for Dar-es-salaam in Labor Dispute No. CMA/DSM/KIN/94/19/45 (The Dispute) dated 25/09/2020.

2. Costs to follow events and
3. Any other relief(s) this Honorable Court may deem fit and just to grant.

The Chamber Summons was supported by an affidavit of the applicant's Counsel one Mkwikwini Robert Joseph dated 04th November, 2021. The application was disposed by way of written submissions. In this application, the applicant was represented by Mr. Mkwikwini Robert Joseph learned Counsel while the respondent was represented by Mr. Thomas Brashi, learned Counsel.

Brief background is that at the CMA, the applicant was the complainant in the dispute, he was complaining of unfair breach of employment contract, seeking reliefs of payment of notice and salary arrears. The CMA was not convinced of his claim and eventually dismissed the dispute hence this application whereby in his affidavit to support the application, the applicant raised the following legal issues:

1. Whether the trial arbitrator properly reached her decision that the matter at the CMA was prematurely referred.
2. Whether the honorable trial arbitrator properly evaluated the evidence tendered before her to reach the arbitral award.
3. Whether the applicant is entitled to any relief.

On those grounds, I find the issue to be determined by this court is whether the dispute was prematurely lodged at the CMA. The applicant claims that the respondent made employment condition impossible, it appears that the applicant wants the court to make a finding that there was a constructive termination. The only question, before I take that direction, is whether that issue was raised at the CMA. This took me to the CMA Form No. 1 on the Part 4 of the Form (FAIRNESS/UNFAIRNESS OF THE TERMINATION) the applicant alleged that the termination was procedurally unfair on the ground that the reasons for termination were not given, notice for termination was not given and other employment rights not paid. On the substantive reasons for termination, the applicant alleged that the reasons for termination were not communicated to him, he was not given the right to be heard nor were there any disciplinary hearing held to that effect. So up to this point, I find that the applicant had mixed the substantive and procedural grounds for termination in his CMA F. 1.

The above notwithstanding, there is no place in the form that the applicant pleaded constructive termination on the ground that the employer made the working condition impossible. The issue is therefore an afterthought, not determine at the first instance, it cannot be raised at this

point as it is an issue of evidence. Having said that, I will now proceed to determine whether the dispute was prematurely filed at the CMA.

In his submissions to support this ground, the applicant started by praying that the affidavit in support of the application be adopted to form part of his submissions. He then submitted that he was employed as a waiter since 2015 and his monthly salary was Tshs. 220,000/- and that on 18th January, 2019 he was orally terminated from employment and he immediately reported the dispute to the CMA. He submitted further that the respondent allege that the applicant was not terminated but absconded and argued that he was always in the office except the day which he went to the CMA to report the dispute. He moved the court to find that the conduct of defaulting payment of salaries made employment of the applicant impossible amounting to unfair termination of employment. He argued that the respondent did not prove the alleged abscondment in the standard required by law and on the contrary, the burden of proof was shifted to the applicant.

He then submitted that the holding of the CMA that the complaint was prematurely filed connotes that there is still pending employer/employee relationship between the parties while there is not. He supported his argument by citing the provisions of Section 61(a)(e)(f) &(g) of the Labor Institutions Act, Cap. 300 R.E 2019 providing that a person is presumed an

employee regardless of the form of contract until contrary is proved. That by the time the dispute was referred to the CMA, the above shown elements were not existing between parties. That it is undisputed that the respondent alleges that the applicant had absconded from work hence the dispute was not prematurely filed as held by the CMA. He supported his submissions by citing the case of **Amina Ramadhani Vs. Staywell Apartments Limited, (Revision No.461 of 2016) [2018] TZLC 18; (13 April 2018)** where it was held on page 12:

"Therefore from what I gathered on the records it is the applicant who was to substantiate her absence from work in view of Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state inter alia:"

He further cited the holding of the court in the same case where the Honorable Judge held:

"GN 42/2007 Item 9 of the Employment and Labour Relations (Code of Good Practice) offences which may constitute serious misconduct and leading termination.

(i) "Absence from work without permission or without acceptable reasons for more than five working days".

He concluded that the decision of the CMA was illegal and erroneous decision when the arbitrator held that the dispute was prematurely filed because the applicant absconded from work and no any legal measures taken as the respondent was waiting until he may come back and was not proved at all. He prayed that the application be allowed by quashing and setting aside the award of the CMA and make necessary orders to meet the ends of justice and any other orders the court may deem appropriate and equitable to grant.

In reply, Mr. Brashi submitted that the decision of the CMA is very clear and the respondent still insist that the applicant was not terminated from his employment but for reason best known to himself he absconded himself from attending to his work. That the evidence given to CMA is found at page 2 of the decision of the Arbitrator whereby the respondent herein who is the employer denied to terminate the applicants from work and stated that the applicant absconded himself from work in September, 2018.

He pointed out that as per the court records, the applicant, through his Advocates, wrote the letter to the Respondent alleging that the applicant's employment was terminated in September, 2018 hence he was entitled to terminal benefits (EXD1). In that letter, among the wording thereon, under paragraph 3 reads as follows:-

"That, sometimes in September 2018 for reasons best known to yourself you terminated our client's employment unfairly with neither notice nor reasons. You further stopped his salaries and associated employment rights including overtime leave not taken and so on."

He then referred the court to the CMA F.1 presented at the CMA whereby the applicant is alleging that his employment was terminated on 7th January, 2019. He argued that in a situation like that, it is clear that the alleged termination by the applicant was not proved. Citing the provisions of Section 39 of the ELRA which requires the employer to prove that the termination is fair in any proceedings concerning unfair termination of an employment by an employer, Mr. Brashi submitted that in this case, the respondent denied to have terminated the applicant's employment contract. He argued that in such a case, the respondent had nothing to prove because there was no termination hence the burden shifted from the employer (respondent) to the applicant to prove that his employment was really terminated. That at the CMA, the applicant totally failed to prove as to which correct date between September, 2019 and 7th January, 2019 he was terminated. That in the absence of the letter of termination and/or corroborating evidence in support of the applicant's allegations, it goes

without saying that the applicant's employment had never been terminated by the applicant but he absconded from work.

In his testimony, the applicant alleged that as from the end of August, 2018 he was not paid salary and the respondent gave evidence that the applicant would not be paid without attending at work. That being a case, the testimony of the respondent and Exhibit D1 carries weight against the applicant in the balance of probability.

On the argument by the counsel for the applicant that if the applicant really absconded in the end of August, 2018 the respondent was duty bound to call the applicant and conduct disciplinary hearing; Mr. Brashi submitted that the answer to this is in the evidence of DW1 that respondent could not call for a person whose whereabouts was unknown or at large. That on cross examination, as recorded in the award at page 3 of the 3rd paragraph the DW1 stated as follows:-

"Kwamba hakuchukua hatua za kinidhamu kwa kuwa hakuwa na kosa na kwa asili ya kazi za hotelini wafanyakazi huondoka kufanya kazi kwingine na kurudi."

He pointed out that this is a further statement to confirm that the applicant's employment was not terminated by the respondent.

On the cited case of **Amina Ramadhani vs. Staywell Apartment Limited**, Mr. Brashi argued that the same is distinguishable with the scenario of our case at hand because the element found in Amina's case are that the applicant (Amina) was absent for more than 5 days from work and a letter terminating her employment was sent to her and she was required to present her defence to disprove the allegation but she failed to do so. Therefore Hon. Nyerere, J (as she then was) stated the burden of proof lies to the applicant (Amina) to disprove that her absenteeism was caused by sufficient reason which she failed to prove. That in our case, the applicant alleges to have been terminated from work, and there is no termination letter. As the respondent deny to have terminated his employment, then it can not be stated that the case at hand has any connection with the case of Amina as cited by the applicant.

On the applicant's argument that by the time this matters was referred to the CMA the element under section 61(a)(e)(f) and (g) of LIA were not in existence, his reply was that the employer did not terminate the applicant from work. The fact that the applicant absconded from work denied himself automatically the element founded in section 61(a)(e)(f) and (g) and if this court have a chance to read the employer's evidence, it was stated clearly that he did not terminate the applicant's employment. He submitted further

that it was the duty of the applicant to appear to the employer and explain his absence at work and respondent would consider his reasons of absence. He hence submitted that the conclusion of the CMA that the matter was prematurely filed was correct and that there is nothing to fault to the findings of the CMA as the applicant's allegation were paged on wrong premises.

Mr. Brashi submitted further that assuming that the findings of the CMA was wrong, there also another room for this court to look at the matter under the provisions of Rule 28(1)(e) of the Rules which empowers this Honourable court to revise the proceedings and make such other order as it deems fit. That the court has powers to consider that the matter was not premature but still the applicant's claims were not proved to entitle him a decree. That this line of argument is in line with what was submitted above in which he clearly stated that the applicant's allegations was not proved.

Lastly, Mr. Brashi pointed out that this applicant is getting another controversial issue which the court need to consider. That it is on record that in the referral form CMA F1, the applicant is alleging that the applicant's salary per month was Tshs. 220,000/-. However, in Exhibit D1, a letter of the applicant through his advocate stated that the Salary was Tshs. 180,000/-. On the basis of the ancient Latin maxim stating "he who comes at equity should possess a clean hand", he argued that the issue of telling

the truth is a call of meeting the good end of justice. That looking at what is contained in Exhibit D1, the contents of CMA F1 and the testimony of the applicant, the court will learn that the applicant is seeking to obtain judgment by fraud while it has been stated in repeating by this court and the court of appeal that fraud vitiates everything. He concluded by praying that the application be dismissed for want of merits. The applicant did not make any rejoinder submissions.

Having considered the submission of parties and the records of the CMA, as I have initially stated, I have only one main issue to determine, whether the matter was prematurely filed at the CMA in relation to the allegation of unfair termination of the applicant by the respondent.

As argued by Mr. Brashi, the applicant has failed to prove that he was terminated from employment. His story just jumps for a difference of four months. First he alleges that in September 2018 he found out that the employer had not deposited his salary in full, only half of it was deposited. He went and asked his boss about it and was asked to be patient and in October no salary was deposited. When he asked the respondent he told him that he was not satisfied with his (applicant's) performance and that he will pay him all his dues and was asked to continue with work and it was not until January that he found no salary. It is at this point that the applicant

alleged to have been orally terminated by the employer and is when he approached the CMA.

On the other hand, the respondent alleges that the applicant absconded from work and he met him in January when the applicant came to serve him with summons. But at the same time the employer said he could not conduct disciplinary proceedings because the applicant was nowhere to be seen.

In the opening statement, the respondent alleged that the respondent absconded from work from January 06th 2019, when asked this in cross examination he alleged that to be a typo error, but he testified that the applicant absconded since September, 2018. As per the cited "Item 9 of the Employment and Labour Relations (Code of Good Practice) GN 42/2007, offences which may constitute serious misconduct and leading termination include absence from work without permission or without acceptable reasons for more than five working days. Therefore whatever it is, the applicant could not prove that he was working until January 2019 when he lodged the matter at the CMA. He could have as well called a colleague to show that he was attending work for all the period that he was not paid his salary to justify that he was unfairly terminated. In the absence of proof that he was working

till then, it is safe to conclude that the applicant absconded from work for all those months hence his employment terminated under the above cited Code.

However, before I proceed to make any findings in this case, there is evidence of the respondent that has caught my attention. He (DW1) alleged that he could not terminate the applicant because he was nowhere to be seen. Much as I agree with the respondent and the CMA that the applicant could not prove termination, still the respondent did not prove that he had paid the applicant his salaries that were due to at least the month of September when he disappeared. The applicant had complained that the respondent stopped paying his salary in August and they were in negotiations till January when he approached the CMA. The respondent did not adduce any evidence to show that the applicant was paid his salary for at least the months of September and August. Since the applicant was his employee, and it is undisputed that the employer/employee relationship has ceased to exist, then the applicant is entitled to be paid his salaries for the months he had worked before he absconded, that is the month of August and September, 2018. Since the undisputed salary was Tshs. 180,000/- per month, the applicant is entitled to be paid and the respondent shall pay the applicant a total sum of Tshs. 360,000/- as salary due for the month of August and September 2018.

As for the remaining part of the dispute, as correctly held by the CMA, the applicant could not prove any termination in order to conclude that it was fair or unfair hence the CMA could not proceed to make determination or award any compensation therein on ground of unfair termination. The finding of the CMA is proper and legally found hence the remaining part of the application is hereby dismissed. The respondent is however liable to pay the applicant a total sum of Tshs. 360,000/- as salary arrears for the months of August and September, 2018.

Dated at Dar es Salaam this 06th day of December, 2021.

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S.M. MAGHIMBI

JUDGE