

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 806 OF 2019

BETWEEN

ALLY ABBAS PEMBE APPLICANT

VERSUS

BHOGAL ESTATE LTD RESPONDENT

JUDGMENT

Date of last Order: 28/06/2021

Date of Judgment: 08/07/2021

M.MNYUKWA J,

The applicant ALLY ABBASI PEMBE filed the present application seeking to revise and set aside the award delivered on 13th September, 2019 and arbitration proceedings issued by the Commission for Mediation and Arbitration (herein to be referred to as CMA) in labour dispute No. CMA/DSM/TEM/41/2018. The application is made under the provisions of Section 91(2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, Rule 24(1), 24(2),(a),(b),(c),(d),(e) and (f) and Rule 24(3)(a),(b),(c),(d) and 28(1),(c),(d)&(e) of the Labour Court Rules, 2007 GN No. 106 of 2007.



The application was supported by the affidavit of ALLY ABBAS PEMBE while the respondent one RAJINDER KAUR BHOGAL challenged the application through his counter affidavit.

The background of the dispute may be summarized as hereunder, the applicant was employed on oral contract by the respondent as a driver since 7st August 2009. That on 29th September 2014 the applicant received a letter from the respondent ordered him to vacate from the company's house situated on industrial area for being alleged to have stolen company's money. The alleged theft was reported to the police and later on he was suspended from work without being given any notice. That on 20th October 2017 when attending family matter he received a call from the respondent terminating him from employment. He referred the dispute to CMA on the ground of unfair termination. The arbitration was conducted between both parties and on 13th September 2019, an arbitral award was issued in favor of the respondent on the reason that there was no proof of termination. Being aggrieved with the CMA's Award, the applicant filed the present application to revise and set aside the award dated 13th September 2019. At the hearing of the application, Mr. Jackson Mhando, a personal



representative appeared for the applicant while Mr. Thomas Chubwa, learned counsel represented the respondent.

At the CMA four issues were agreed by the parties for determination

- (i) Whether the complainant was terminated by the respondent
- (ii) Whether there were sufficient reasons for termination
- (iii) Whether the procedure for termination was followed
- (iv) What reliefs are entitled to both parties

Arbitrator in determining on the issues raised he adjudged that the applicant was not terminated by the respondent. Being dissatisfied with the decision of the CMA, he filed revision application on the following legal issues

- (i) That the arbitrator erred in law and in fact in issuing the award upon the application which was not the matter in the Arbitration stage
- (ii) That the arbitrator erred in law and in fact in disregarding the requirements of suspension which should be done by the



respondent to the applicant pending to the criminal case at
Chang'ombe police station

During the hearing Mr. Jackson Mhando submitted that the applicant was a driver employed by the respondent by oral contract on 7th August 2009. His employment was unfairly terminated on 20th October 2017 without following the procedure. Before termination, the respondent ordered the applicant to vacate from the company's house situated on industrial area for being alleged to have stolen company's money.

Mr. Jackson Mhando went on to state that, the applicant vacated from the company's house though he was not afforded an opportunity to be heard on that allegation. Thereafter he was arrested and sent to Chang'ombe police station where he was kept in custody for six days. He added that on 4th October 2014 the applicant resumed at his duty station but the respondent refused to give him work until his matter is disposed at police station. Therefore he was suspended without being given a letter to that effect.

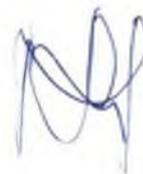
He further submitted that on 20th October 2017 the applicant received a call to terminate him from employment without being paid any terminal benefits. He referred the matter to the CMA for unfair termination and



prayed before the CMA that the respondent to be ordered to pay the applicant one month salary in lieu of notice of termination, severance pay, leave and arrears of his salary from September 2014 up to October 2017, compensation of 12 months' remuneration. This makes a total of 17,750,000.

Arguing on the first issue as it appears in paragraph 9 of the applicant's affidavit Mr. Jackson Mhando submitted that the arbitrator erred in law and in fact in issuing the award on application which was not the matter in the arbitration stage. He submitted that according to section 86(7) (b) (i) of the Employment and Labour Relations Act, Cap 366 R.E 2019 the arbitrator misdirected himself since CMA Form No 1 was used to file labour dispute and not application. He argued that if it was the application the proper form is CMA Form No 2.

On the second issue the applicant's personal representative submitted that since the applicant was alleged to have committed an offence of theft, he deserved to be suspended as per Regulation 27(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42/2007 (herein referred as GN 42/2007). He submitted that the employer was duty bound to suspend the applicant pending police investigation. To support his



argument the applicant personal representative referred the case of Chai Bora Limited vs Allan Telly Mtukula, Labour Revision No 38 of 2017, Arusha (unreported) in which the court held that respondent was duty bound to give the applicant suspension letter.

He went further to submit that, arbitrator did not take into consideration Exhibit P1 which ordered the applicant to vacate from the company's house. The applicant's personal representative pray before the court the decision of the CMA to be revised, set aside and the applicant's application be considered.

Responding to the applicant's submissions, the respondent counsel submitted that the applicant was not suspended from work as alleged because he was not given suspension letter. He added that the law is very clear in GN 42/2007 under Rule 27(2) which provides that the employee suspended shall be given a written letter of suspension setting out the reason for suspension and any terms of suspension.

He submitted that the applicant did not appear in his duty station since 2014 when the alleged theft was reported to the police and accepted to pay the stolen money. He also averred that in the year 2017 he filed a labour dispute at CMA alleging unfair termination. He added that the



applicant did not tender any evidence at CMA to prove that he was terminated by the respondent. He support his argument by referring to section 112 of the Law of Evidence Act, Cap 6 R.E 2019 which provides that the burden of proof lies to the one who is alleging. Therefore, the applicant should adduce evidence to prove that he was terminated by the respondent.

He conclude his submission by stating that the dispute contended by the applicant ended at the police station after the parties had agreed to settle. Finally he prayed the applicant's application to be dismissed and to uphold the decision of CMA.

In rejoinder. The applicant's personal representative submitted that he was given a letter by the respondent to vacate from company's house on the allegation that he had committed an offence of theft. He insisted that Exh. P1 show that there was a case before a police and not a dispute. The police investigated the matter and because the applicant was not guilty of the offence he was not sent to court. He therefore pray this court to revise and set the CMA's award.



Having heard and considered the submissions of both parties and carefully considered the evidence on record, the issues to be considered by this Court which are;

- i) Whether the applicant was suspended and terminated by the respondent
- ii) Whether there were sufficient reasons for termination
- iii) Whether the procedure for termination was followed
- iv) What reliefs are entitled to both parties

I have noted the applicant's first ground of revision that the arbitrator erred in law and in fact in issuing the award upon the application which was not the matter in the arbitration stage. I have keenly gone through the record and it is revealed that, in the impugned award the arbitrator confined himself into the matters referred by the parties only. Upon going through the court record I find the application before the CMA was properly initiated through CMA Form No 1 and 2. Therefore, such ground lacks merit.

On the first issue on whether the applicant was suspended and terminated by the respondent, the respondent denied to have terminated the applicant from employment. He averred that the respondent abscond



from employment after being alleged to have committed an offence of theft. In the case at hand the applicant alleged to have been suspended and later on terminated from employment. His testimony at the CMA shows that he was neither given a suspension letter nor a termination letter. The only letter which was given is the letter to vacate a company's house which is not disputed by the respondent. The letter dated 29th September 2014 had the title **"NOTISI YA SIKU TATU YA KUHAMA ENEO LA KIWANDA CHAMANZI."** The substantial part of the notice reads as follows

Kutokana na matataizo yaliyojitokeza ya wewe kudaiwa pesa na kampuni katika mazingira ya wizi, kampuni haiwezi tena kuendelea kukuachia ukiishi katika eneo la kiwanda. Kwa sababu hiyo utatikwa kuondoka eneo la kiwanda ndani ya siku tatu kuanzia tarehe 30/9/2014 hadi tarehe 2/10/2014 siku ya Alhamisi. Unapoondoka unatakiwa kuacha mali za kampuni hapo hapo kiwandani mfano freezer mbili n.k"

The question to be asked in the present case is whether the above notice suffice to allege that the applicant was terminated from employment? Having looking at the notice to vacate the house, there is no



any statement which shows that the applicant was terminated from employment. Apart from the notice, the only evidence which available in the record to show that the applicant was terminated is the testimony of the applicant. His testimony was challenged in the cross examination and is full of contradiction. For example in the CMA proceedings at page 21 the applicant (PWI) testified that he was given termination letter. The conversations at the CMA reads as follows

S: Lini uliachishwa kazi?

J: 20/10/2017

S: Uliachishwa kwa kosa gani

J: Sikuambiwa

S: Utaratibu gani ulitumika kukuachisha kazi

J: Walinipa barua

Moreover, at page 22 of the CMA which was a cross examination, the conversation reads as follows

S: Uliachishwa kazi lini

J: ?/4/2014



S: Ulipewa barua ya kusimamishwa kazi

J: Sikupewa

S: Lini uliachiswa kazi?

J: 20/10/2017

S: Ulipewa barua ya kuachishwa kazi?

J: Sikupewa

Apparently, it shows that there is a contradictory statement between the applicant's testimony and the oral submissions of the personal representative of the applicant. While Ex P1 shows that he was supposed to vacate from the company's house between 30th September 2014 and 2nd October 2014 his testimony at CMA as shown above indicates that he was suspended sometimes on April 2014. There was no evidence at all whether oral or written which shows that at April 2014 there was a dispute between him and the applicant which resulted either to be suspended or terminated.

Since the applicant is the one who alleged to have been suspended and later on terminated, he is duty bound to prove his allegation. As it was



rightly submitted by the respondent counsel that it is a trite law in the Law of Evidence that the one who alleges must prove his allegation.

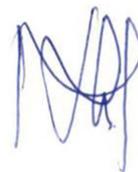
Section 41(3) of the Employment and Labour Relations Act, Cap. 366, R.E 2019 provides the following

41(3) Notice of termination shall be in writing, stating

- i. The reasons for termination*
- ii. The date on which the notice is given.*

In the case at hand the applicant adduced that he was orally terminated by receiving a call from respondent. Therefore he is duty bound to prove the same. In the case of **Said Selemani and 13 Others vs. A-One Product and Buttlers Ltd**, Revision No. 890 of 2018 (High Court Labour Division at Dar es Salaam), Muruke, J, among other issues in determining whether the respondent did terminate the complaint's contract as alleged, she restated the provisions of section 60 (2) (a) of the Labour Institutions Act, No. 7 of 2004, which provides as follows;

- a) The person who alleges that a right or protection conferred by any labour law, has been contravened shall prove the facts of the conduct*



to constitute the contravention unless the provisions of subsection (1)(b) apply.

Muruke, J, went further to state that:

'It is the complainants who have alleged for unfair termination before CMA, and in terms of section 60(2)(a), it is the complainants who have the burden of proof of their allegations.....'

In the case at hand, it is clear that the respondent failed to prove termination of his employment contract by the respondent.

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

In the final result since it is found that the applicant was not terminated from employment as rightly decided by the Arbitrator, I find the present application has no merit. Thus, the CMA Award is hereby upheld.

It is so ordered.



M. MNYUKWA

JUDGE

06/07/2021