

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 55 OF 2020

BETWEEN

THE REGISTERED TRUSTEES

OF CHAMAZI ISLAMIC CENTRE..... APPLICANT

AND

IBRAHIM ISACK RWEGOSHORA..... RESPONDENT

JUDGMENT

Date of Last Order: 14/04/2021

Date of Judgment: 25/06/2021

A. E. MWIPOPO, J.

This is revision application against the Award of Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/TEM/99/19/67/19 which was delivered on 30/12/2019 by Hon. Kokusuma, L., Arbitrator. The Registered Trustees of Chamazi Islamic Centre, the Applicant herein, is applying to this Court for an order in the following terms: -

1. That, this Court be pleased to call for records of the proceedings in the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/TEM/99/67/19 between Ibrahim Isack Rwegoshora and the Registered Trustees of Chamazi Islamic Centre and

Chamazi Islamic Seminary so as to satisfy as to the legality, correctness and propriety of the same.

2. That, this Court be pleased to revise the Order made therein by Hon. Kokusima, L., dated 30th December 2019, and set aside.
3. Any other relief (s) this Court may deem fit and just to grant.

The facts of the case briefly could be stated that the Respondent namely Ibrahim Isack Rwegoshora was employed by the Applicant as a teacher for a two years contract on 2nd February, 2016. The Contract of employment expired on 02nd February, 2018, but after the expiry of the contract he continued to work with the Applicant until on 11th February 2019 when he resigned because the working condition was not favourable. The Respondent referred the dispute for unfair termination constructively in the CMA on the 18th February, 2019 where the CMA decided the matter in his favors. Dissatisfied with the CMA's award the Applicant filed the present application for revision.

The application is accompanied with Chamber Summons and is supported by the Affidavit sworn by Ally Hamis Njuki, Applicant's Principal Officer. The Applicant's Affidavit contains three proposed legal issues for determination. These legal issues are as follows;

- i. That, whether it was correct for the Arbitrator to arrive into the findings that the Respondent was constructively terminated for the alleged Applicant's refusal to pay salaries.
- ii. That, whether it was proper and correct for the trial Arbitrator to disregard the weight of the evidence of the Applicant's witness in respect of Respondent run off from the employment.
- iii. That, whether Rule 6(2), (3) and 6(4) of the Employment and Labour Relation Act, 2004 was properly applied by the Arbitrator in the interpretation of Exhibit R3.

During the hearing of the application, the applicant was represented by Mr. Mashaka Ngole, Advocate, whereas the Respondent was represented by Mr. Msegu N. Msegu, Advocate. Hearing of the application proceeded by way of written submissions.

Submitting in support of application, the Applicant Counsel submitted together the first issue and second legal issue. The Counsel averred that it is a trite law under the provisions of rules 10(2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 that the dispute other than the dispute on termination of employment shall be referred to the commission within sixty days period from the date which dispute arose. He stated that the salary arrears claimed by the Respondent before the

Commission was supposed to be claimed on the same month which it was not paid and not after the expiration of the contract of employment as in this dispute. The Respondent was awarded by the Commission Tshs. 17,120,000 for unpaid salaries for the months ranging between June 2017 and February 2019. The record shows that the dispute was referred to the CMA on 18th February 2019. The computation of the date from which the employer defaulted to make payment of each salary, except for the salary of January and February 2019, to the date when the matter was filed at CMA shows that the dispute was referred to the Commission after sixty days has elapsed as provided by the law.

The Counsel submitted that the CMA's award would have been properly arrived only if, prior to the determination of the dispute on unpaid salaries, the dispute has been condoned as per rule 11 (1) and (2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. Since the dispute was instituted in the Commission out of time, then the Commission has no jurisdiction to determine it. He argued that the CMA had no jurisdiction to determine the claims for unpaid salaries worth Tshs. 17,120,000.

It was further submitted by the Applicant's Counsel that it is on record in a testimonial evidence of PW1 that the Respondent was employed on two years contract which expired on the 02nd February 2018

and the contract was automatically renewed to another two years period which were supposed to end on February 2020. Prior to an expiration of the renewed two years contract, the Respondent absconded from working from the 11th February 2019. The Respondent argument that he was constructively terminated is misconceived on the ground that the letter issued to the Applicant by the Respondent - Exhibit R3 was a final letter and not a notice of terminating his employment as required by the law. He added that the Respondent's letter which was issued on the 11th February 2019 terminated the employment without claiming for the payment of his salaries. On such basis, the Counsel is of the view that the Respondent would have been constructively terminated if prior to that notice the Respondent claimed for the payment of his salaries and gave time to the Applicant to remedy the situation before the notice of termination of employment was issued on the 11th February 2019.

On his part, the Respondent's Counsel opposed to the Applicant submission. He submitted that in the course of his submission in chief the Applicant's Counsel adopted a new issue of time limit which was neither pleaded in the Affidavit of Ally Hamisi Njuki nor appeared in record during the hearing of the case before the Commission for Mediation and Arbitration (CMA). The dispute arose on 21st January, 2019 when the Respondent issued a letter - Exhibit R2 explaining the hardship he is facing.

The dispute was referred to Commission on 15th February, 2019, just 24 days after the dispute arose. The nature of dispute is the termination of employment as stated in the CMA F.1 Before the Respondent served the Applicant with a letter to claim for his salary arrears dated 21st January, 2019 - Exhibit R2 the parties were in good relationship. This is supported by a letter of appointment to be Discipline Master - Exhibit R4, letter of appointment to be a Head of Unit - Exhibit R7, Teacher's Profile - Exhibit R6, and the list of Salary arrears dated 21st January, 2019. On 11th February, 2019 the Respondent resigned from employment as he was in unfavourable working condition.

Further, the Respondent Counsel averred that the Applicant have never filed any preliminary objection on the point of law before CMA to raise the issue of time limit. In the CMA Form No.1 there are no claims mentioning salaries for June 2017 and February 2019. The issue of time limitation was just a mere afterthought which does not prejudice anyhow or cause miscarriage of justice to the Applicants.

The Counsel was of the view that there was continuous breach of contract for a period from June 2017 to February, 2019 for non-Payment of Respondent's Salary. It is a principle of law that where there is a continued breach of contract or wrong doing the time starts to run a fresh from the last breach. Rule 10(1) and (2) of the Labour Institution (Mediation and

Arbitrator) Rules, G.N. No. 64 of 2007 does not covers the situation where there is a continuing breach of contract of employment. Where labour laws and rules do not capture the situation recourse is given to other laws. Section 7 of the Law of Limitation Act, Cap 89, R.E 2002, covers the circumstances of our case. The section provides that where there is a continuing breach of contract or a continuing wrong independent of contract fresh period of limitation shall begin to run at every moment of the time during which the breach continues. He is of the view that in this matter the cause of action arouses in June 2017 and the time started to run a fresh from the last breach of contract of employment. To support his stand, he cited the case of **Yaaguib Ismail Enzron v. Mbaraka Bawaziri Filling Station**, Labour Revision No. 33 of 2018, High Court Labour Division, at Dar Es Salaam, (Unreported).

It was further submitted by the Respondent that the Court has gone through the claims of the applicant as indicated in CMA F1, and find that there was some entitlement which were not paid including transferring allowance and salary of 16 months. In such circumstance the trial arbitrator decision cannot be faulted for awarding salary arrears from June 2017 to February, 2019.

Regarding the Applicant's submission that the Respondent absconded from work, the Respondent Counsel submitted that the allegation was not

given weight and lacks legal stand as the same was not proved. The Respondent issued a letter on 21st January, 2019 to claim for his salary as per Exhibit R2 and on 11th February, 2019 he resigned as per Exhibit R3. The Applicant had sufficient time to remedy the situation.

From the rival submissions, I'm going to determine each of the issues as submitted by the parties.

Commencing with determination of the issue whether the Respondent was constructively terminated, the Applicant was of the view that the Arbitrator misconceived the issue. The reason is that the Respondent was supposed to give notice to the Applicant and not a resignation letter - Exhibit R3 which terminated the employment without claiming for the payment of his salaries. In his response, the Respondent was of the view that the Applicant had sufficient time to remedy the situation after he was served with letter from Respondent – Exhibit R2 requesting for the payment of his salary arrears and informing him the hardship he was facing.

In determination whether the respondent was constructively terminated, the relevant provision is Rule 7 of the Employment and Labour Relations (Code of Good Practices) Rules, G.N. No. 42 of 2007. The rule provides as follows, I quote:

- "7(1) Where an employer makes an employment, intolerable which may result to the resignation of the employee, that resignation amounts 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-*
- (a) Sexual harassment or the failure to protect an employee from sexual harassment and;*
 - (b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.*
- (3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer."*

This Court in the case of **Girango Security Group V. Rajabu Masudi Nzige**, Revision No 164 of 2013, High Court Labour Division, at Dar Es Salaam, (unreported), held that, I quote:

"Constructive termination takes place where an employee terminates the employment or agrees to terminate but this termination or agreement was prompted or caused by the conduct of the employer. The fact that the employee was caused to terminate his employment as a result of an employer's actions means that the termination was at the initiative of the employer."

In the application at hand, the evidence available in record shows that Respondent did write a letter dated 21st January, 2019 – Exhibit R2 requesting for the Applicant to pay him Tshs. 9,594,695/= being salary arrears from 2017 to December, 2018. The Respondent stated in the letter that failure to pay for his salary arrears on time has made his life to be difficulty due to debts and will result for his failure to report to work since

he will have no bus fare. The Applicant did not respond to Respondent letter and on 11th February, 2019 the Respondent resigned from employment as per resignation letter – Exhibit R3 for the reason that he was not paid his salary arrears and he could not report to work since he has no bus fare. There is no evidence from the Applicant to prove that the Respondent was paid his salaries or was enabled to attend to work or even to remedy the hardship which was encountered by the Respondent. The Applicant witness namely Nasibu Hussein Mrisho – DW1 said nothing in his testimony before the Commission concerning Respondent's claims for unpaid salaries. Thus, there is no evidence to counter the Respondent testimony that he was not paid salary from June, 2017 until he resigned on February, 2019. This evidence from the Respondent was sufficient to prove that the working condition was intolerable and as a result the resignation of the Respondent is legally regarded as termination of employment by the employer. Thus, I find that the Arbitrator rightly held that the Respondent was constructively terminated by the Applicant.

After the Commission did find that the Respondent was constructively terminated, it awarded him to be paid Tshs. 17,120,000/= being the salary arrears from June, 2017 up to February, 2019 for the rate of monthly salary of Tshs. 856,000/= and Tshs. 10,272,000/= being 12 months' salary remaining in his contract of employment as compensation for unfair

termination. The Applicant submitted that the salary arrears claimed by the Respondent before the Commission was supposed to be claimed on the same month which it was not paid. He is of the view that the Commission erred to award it to the Respondent as it had no jurisdiction to award salary arrears which are out of 60 days limit. In contest, the Respondent argued that there was continuous breach of contract as a result the Commission rightly awarded the Respondent payment of the unpaid salaries.

I'm of the same position with the Applicant that the Arbitrator erred to award the Respondent with payment of salary arrears from June, 2017 to November, 2018. The reason is that the Respondent was supposed to claim for the same in the CMA Form No. 1 and the dispute of unpaid salaries has to be referred to the Commission within 60 days from the date the dispute arose as per rule 10(2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. The Respondent argument that section 7 of the Law of Limitation Act, Cap 89, R.E 2002 covers the circumstances of this matter has no basis. The evidence available does not prove that the dispute between the Applicant and the Respondent over the salary arrears was continuous. There is no proof that the Applicant had requested to be paid his salary arrears each month. Where the Labour laws provides for the procedure to be followed, there is no need to resort to

another law for interpretation. Therefore, I find that the Arbitrator erred to award the Respondent with payment of salary arrears from June, 2017 to November, 2018 and I hereby set aside the award of Tshs. 17,120,000/= and substitute for unpaid salary of two months of December, 2018 and January, 2019 which falls within 60 days from the date the dispute was referred to the Commission.

Concerning the payment for the remaining months of the employment contract, I agree with the Arbitrator that the direct, foreseeable and reasonable consequence of the Applicant act of unfairly terminating the Respondent's employment is the loss of salaries for the remaining period of the employment contract as it was held in the case of **Good Samaritan V. Joseph Robert Savari Munthu**, Revision No. 165 of 2011, High Court Labour Division, at Dar Es Salaam, (unreported). Thus, the Applicant has to pay to the Respondent salaries for 12 months remaining in his employment contract as compensation for unfair termination.

The Arbitrator calculated the Respondent's monthly salary at Tshs. 856,000/=. The Respondent testified that his monthly salary was Tshs. 856,000/=. In contest, the Applicant witness – DW1 testified that the Respondent monthly salary was Tshs. 500,000/=. The Respondent Application for annual leave – Exhibit R9 dated 13th June, 2018 shows that

the Respondent salary by June, 2018 was Tshs. 605,000/=. Since section 3 (b) (III) of the employment contract – Exhibit R1 shows that the Respondent monthly salary will be increased by 10% at the beginning of the academic year, it means by January, 2019 his salary increased by 10% to 665,500/=. Thus, the Respondent last salary was supposed to be 665,500/= and the calculation on the payment of the Respondent compensation and salary arrears for December, 2018 and January, 2019 has to be calculated on this salary.

Therefore, the Applicant has to pay a sum of Tshs. 9,317,000/= being 12 months' salary compensation for unfair termination and salary arrears for the month of December, 2018 and January, 2019. The Revision Application is allowed to the extent discussed herein. The Commission award is hereby set aside. Each party to bear his own cost of the suit.



A. E. MWIPOPO
JUDGE
25/06/2021