IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 24 OF 2020

(Originating from Labour Dispute No. CMA/DSM/ILA/992/18/574)

BETWEEN

JOSEPH MBAROUK MMBAGA.....APPLICANT

VERSUS

COASTAL TRAVELS LIMITED.....RESPONDENT

JUDGMENT

Date of last Order: 31/08/2021

Date of Judgment: 22/10/2021

I. ARUFANI, J.

Joseph Mbarouk Mmbaga, the applicant herein filed the present application in this court to challenge the award issued by the Commission for Mediation and Arbitration (herein after referred as the CMA) in Labour Dispute Number CMA/DSM/ILA/992/18/574 dated 3rd January, 2020. The application is made under section 91 (1) (a), 91 (2) (b) and (c), 94 (1) (b) of the Employment and Labour Relations Act of 2004 (hereinafter referred as the ELRA) and Rule 24 (1), (2) (a), (b), (c), (d), (e), (f), (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 (herein after referred as the Rules). The application is supported by

an affidavit sworn by the applicant and is opposed by the respondent through the counter affidavit sworn by Thomas John, the respondent's Human Resources Manager.

The brief background of the application is to the effect that, the applicant was employed in 2005 by the respondent as a Chief Network Planning Officer. His contract of employment was renewable in every two years and the last contract commenced on 1st January, 2018 and expected to come to an end on 30th December, 2019. It was alleged that, on 3rd July, 2018 the applicant through Mr. Zohayr Mohamed conducted an alcoholic test to their employees and the applicant was found with alcoholic test of 0.04 mg per ml which was beyond the company's policy tolerance of 0.02 mg per ml.

The said alcoholic test result caused the respondent to suspend the applicant from his employment from 5th July, 2018 to 15th July, 2018. However, on 13th July, 2018 the respondent extended the applicant's suspension duration to 30th July, 2018. On 15th July, 2018 the applicant wrote a resignation letter to the respondent intimating that, 31st July, 2018 will be his last day of working in the respondent's company. On 1st August, 2018 the applicant's suspension period was further extended up to 15th August, 2018.

The applicant stated that, despite the stated extension of period of his suspension from the work but the respondent never conducted disciplinary hearing against him and he was not paid his salary of August, 2018. The applicant stated that, the stated situation of being denied the salary of August, 2018 caused him to find his employment environment was no longer tolerable. On 24th September, 2018 the applicant decided to knock the door of the CMA claiming to have been constructively terminated from his employment by the respondent from 30th August, 2018 when he was not paid his monthly salary of August, 2018.

The CMA dismissed the applicant's dispute on the ground that it was filed in the CMA out of time prescribed by the law. Upon being aggrieved by the dismissal of his dispute the applicant filed in this court the present application urging the court to revise the award of the CMA basing on ten grounds deposed at paragraph ten of the affidavit supporting the application. The application was disposed of by way of written submission and both parties were represented in the matter by advocates. While Mr. Issac Nassor Tasinga represented the applicant, the respondent was represented by Ms. Samah Salah.

After going through the submission filed in the court by the counsel for the parties the court has found that, as rightly stated in the submission of the respondent the submission of the applicant is incorporating issues which were not determined by the CMA. The court has found while the CMA award was issued basing on limitation of time upon which the applicant was required to lodge his dispute before the CMA but the submission of the applicant is going beyond that issue.

It is covering even the reliefs which the applicant was seeking to be granted by the CMA while the CMA never made any decision in relation to the reliefs sought by the applicant. That being the position of the matter the court will confine itself in the arguments and submissions purporting to answer the issue of whether the CMA erred in deciding the dispute filed in it by the applicant was time barred.

The counsel for the applicant stated in his submission that on 15th July, 2018 the applicant wrote a letter to the respondent showing his wilfully resignation from his employment with effect from 31st July, 2018. However, the respondent did not make any reply to the resignation letter and instead of that the respondent extended the period of suspending the applicant from his employment up to 15th

August, 2018. He submitted that, by extending the suspension period, it showed the respondent retained the applicant in his employment. Hence the applicant was still the respondent's employee up to 30th August, 2018 when the applicant resigned from the work on ground of constructive termination after being denied his salary of August, 2018.

The counsel for the applicant argued that the arbitrator misdirected herself as she held that, the wilful resignation does not need acceptance by the employer. It is his stance that, the position of the law as provided under Rule 6(1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 is very clear that any wilful resignation by an employee must be accepted by the employer. He contended that, it was not proper for the arbitrator to disregard what is provided in our law cited herein above and relied on the case of **Silhali Mafika V. Sout African Broadcasting Corporation Ltd.**, Case No. J 1700/08 from another jurisdiction to dismiss the dispute of the applicant.

It was submitted further by the counsel for the applicant that, the arbitrator failed to identify the date when the applicant's cause of action arose. He stated the arbitrator was supposed to count the days

from 30th August, 2018 when the applicant decided to quit the job after being denied the salary of August, 2018 and told by the employer to leave the work premises. He submitted that, if the arbitrator would have counted the days from 1st September, 2018 to 24th September, 2018 when the dispute was filed in the CMA, she would have not arrived to a conclusion that the dispute filed in the CMA by the applicant was time barred.

He submitted further that, there was misrepresentation that resignation made by the applicant was confirmed by the employer. He argued that, Exhibit D7 which is a letter written by the respondent to reject revocation of the resignation of the applicant from his employment is an afterthought as the same is dated 10th September, 2018 while the applicant had already terminated his employment. The counsel for the applicant insisted that the arbitrator failed to distinguish the applicant's wilful resignation of 31st July, 2018 and constructive termination of 30th August, 2018 when the cause of action arose.

He argued that, the fact that the respondent retained the applicant in their employment up to 15th August, 2018 without taking any action, she cannot deny the fact that the applicant was still their

employee up to 30th August, 2018. He submitted that, as the applicant filed the dispute at the CMA on 24th September, 2018 it cannot be said the dispute was time barred. Counsel for the applicant prays the court to revise the award of the CMA and grant the applicant the reliefs prayed in the CMA F1.

Responding to the applicant's counsel submission, the counsel for the respondent argued that, the applicant's counsel misinterpreted the law relating to resignation of an employee. She submitted that, once a resignation letter has been issued, the same has effect of terminating the employment contract when the notice becomes effective. She argued that, Rule 6(1) of GN. No. 42 of 2007 does not state resignation is only effective when it is accepted by the employer. To support her argument the counsel for the respondent cited in their submission the case of **Sihlali Mafika** (supra).

She argued that, the applicant failed to prove the alleged extension of suspension. She submitted that, from the record of the matter it is clear that resignation was effective from 31st July, 2018 and following his resignation the applicant was paid his terminal benefits on 6th August, 2018. She stated the respondent received the applicant's resignation letter on early August, 2018 while the

applicant had already been served with a letter for extension of his period of suspension. She submitted that, the arbitrator was correct in finding the cause of action arose on 31st July, 2018 which was the effective date for resignation of the applicant.

The counsel for the respondent argued that, the law under Rule 10 of the Labour Institutions (Mediational and Arbitration) Rules GN. No. 64 of 2007 provides that, all disputes relating to fairness of termination of employment of an employee is required to be referred to the CMA within thirty (30) days from the date of termination or employer's final decisions to terminate employment of an employee was made. She stated that, the CMA F1 shows the CMA received the applicant's dispute on 18th September, 2018 which was after passing 49 Days from the date of his resignation which was 31st July, 2018. She argued that, as stated in the case of **Hector Sequeira v. Serengeti Breweries Ltd.** (2011-2012) LCCD, consequences of filing a dispute in the CMA out of time is dismissal.

She submitted that, the arbitrator correctly applied the case of **Sihlali Mafika** (supra) as Tanzania is part of the common law jurisdiction and courts are allowed to use the common law precedents where the laws are in *parimateria* to our laws. To bolster

her arguments, she referred the court to the case of **Antonia Zakaria Wambura v. R,** Misc. Economic Cause No. 01 of 2018 where it was stated that, statutes which are in *parimateria* and which have the same effect must be construed similarly. At the end the counsel for the respondent prays the application be dismissed for lack of merit.

In his rejoinder, the counsel for the applicant reiterated his submission in chief. He further distinguished all the cases cited by the respondent in their submission. He asserted that, the cited cases are not applicable in the circumstances of the present case and submitted that it is not proper for the court to rely on the same.

Having carefully considered the rival submission from both sides and after going through the record of the matter and the law applicable in the present application the court has found that, as rightly argued by the counsel for the respondent the law governing limitation of time for referring disputes relating to fairness of termination of employment of an employee before the CMA is the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of

2007 which its Rule 10 (1) read as follows:-

> *"'Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate."*

The language of the above quoted Rule is plain and do not require any interpretation. It states clearly that the disputes about fairness of termination of employment of an employee must be referred to the CMA within 30 days from the date of termination of employment of an employee or from the date that the employer made a final decision to terminate or uphold the decision to terminate. The centre of dispute of the parties in the present application is when the cause of action which gave birth to the dispute filed in the CMA by the applicant arose. Is it on 31st July, 2018 when the applicant stated in his letter of resignation would have been his last working day with the respondent or on 30th August, 2018 when the applicant alleged his employment was constructively terminated by the respondent after the respondent denied to pay him the salary of August, 2018?

The court has gone through the CMA F1 filed in the CMA by the applicant and find the applicant filed his dispute in the CMA on 24th

September, 2018. The court has also found the applicant avers in the CMA F1 that, his dispute before the CMA is based on constructive termination which arose on 31st August, 2018 and not his resignation intended to become effective on 31st July, 2018. The court has found that, as the impugned award was issued basing on letter of resignation written by the applicant to the respondent it is proper to have a look on what is provided under Rule 6 (1) of the GN. No. 42 of 2007 which governs resignation of an employee from his employment.

The court finds proper to have a look on the said provision of the law as the counsel for the applicant based his argument on that provision of the law to suggest that, limitation of time for the applicant's dispute was not required to be counted from the date stated in his letter of resignation as the date of termination of his employment but from when his employment was constructively terminated after the respondent denied to pay him the salary of August, 2018. The cited provision of the law states as follows:-

> *"Rule 6-(1) Where an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employer the employee may lawfully terminate the contract*

before the expiry of the fixed term by getting the employer to agree to an early termination."

The court has found the wording of the above quoted provision of the law is very plain that, an employee who is working under a fixed term contract may resign if the employer breaches the contract. If the employer has not breached the contract the employee may also lawfully terminate his employment by agreeing with his employer for early termination of his employment.

The court has failed to see anywhere in the quoted provision of the law stated resignation of an employee must be accepted by the employer to make it effective as argued by the counsel for the applicant. It is the view of this court that, the proper interpretation of what is required to make resignation lawful where the employer has not materially breached the contract is for the employee to agree with the employer for early termination of his fixed term contract of employment.

That being the position of the law the court has found there is no dispute that the applicant in the present matter was working with the respondent under a fixed term contract which was supposed to last from 1st January, 2018 to 31st December, 2019. It is also not dispute

that on 15th July, 2018 the applicant wrote a letter to the respondent intimating his intention to resign from his employment with effect from 31st July, 2018.

As it is not stated in the record of the matter the respondent had breached the terms of contract of employment of the applicant it is crystal clear that, as provided in the above cited provision of the law the applicant was required to agree with the respondent for early termination of his employment to make termination of his employment lawful. However, the court has found that, as rightly argued by the counsel for the respondent the cited provision of the law does not state how and when the said agreement by the employer is supposed to be made to make termination of employment of an employee who is on fixed term contract like the applicant to be lawful.

The court has found it is true that there is no express agreement made by the respondent to the resignation of the applicant before the date indicated by the applicant would have been his last date of working with the respondent to make the resignation lawful. However, the court has found that, there is evidence in the record of the CMA (exhibit D6) showing the applicant was paid his

terminal benefit by the respondent on 6th August, 2018 and the applicant received the said payment.

If the applicant was paid his terminal benefit on the stated date, it is crystal clear that his resignation was impliedly agreed by the respondent that is why he was paid his terminal benefits. Under that circumstances it cannot be said the applicant would have continued to be paid salary of August, 2018 while he had already resigned from his employment so as to establish termination of his employment was required to be counted from 30th August, 2018 when is argued is the date of termination of his employment after being denied the salary of August, 2018.

The court has considered the argument by the counsel for the applicant that as the respondent extended suspension period of the applicant from his employment from 1st August, 2018 to 15th August, 2018, then the respondent continued to retain the applicant in his employment until when the applicant was denied his salary of August, 2018 and decided to terminate his employment on 30th August, 2018 basing on ground of constructive termination but failed to see any merit in the said argument.

The court has arrived to the above finding after seeing the applicant did not state in his evidence and it is not even stated in the submission of his counsel as to when he served his resignation letter to the respondent. To the contrary the court has found DW1 said in his testimony that, the respondent was served with the applicant's letter of resignation on early August, 2018. He testified further that, when the respondent was served with the applicant's resignation letter the respondent had already issued to the applicant the letter of extending his suspension from 1st August, 2018 to 15th August, 2018.

The court finds that, if when the respondent was extending suspension of the applicant from his work had not been served with the applicant's resignation letter it cannot be said the suspension issued by the respondent was intended to retain the applicant in his employment while he had already issued his letter of resigning from work with effect from 31st July, 2018. The court has arrived to the above finding after seeing DW1 stated in his testimony that, after the respondent being served with the resignation letter of the applicant, the respondent prepared the applicant's terminal benefits which were paid and received by the applicant on 6th August, 2018.

That make the court to find that, if the respondent had an intention of continuing to retain the applicant in his employment, he would have not paid him his terminal benefits before expiration of the extended period of suspension. It is the view of this court that, the payment of terminal benefits to the applicant showed the respondent had agreed with the applicant's intention of resigning from his employment with effect from 31st July, 2018 as intimated in his letter of resignation.

The court has considered the argument by the counsel for the applicant that the arbitrator erred in applying foreign decision given in the case of **Silhali Mafika** (supra) to find the applicant's dispute was out of time and abandoned our local law provided under Rule 6 (1) of the GN. No. 64 of 2007 which requires resignation of an employee to be accepted by the employer. The court has found the counsel for the applicant has misinterpreted the position of the law stated in the cited case and the position of the law provided in the above cited provision of the law.

The court has come to the above finding after seeing that, as stated earlier in this judgment the cited provision of the law does not mean if the employer has not shown he has agreed to the early

termination of fixed terms contract of employment, then an employee cannot terminate his contract of employment. To the view of this court that provision of the law shows if the employer has not agreed to the early termination of the contract of employment, the termination will not be lawful and its consequences is to disentitle the employee to get some of rights which he would have been entitled if his contract of employment was lawfully terminated.

It does not mean the employee will be forced to continue with employment as to do so it will be as rightly argued by the counsel for the respondent going contrary to section 6 (1) of the ELRA which prohibits forced labour. In the premises the court has found the arbitrator did not error in relaying in the foreign interpretation made in the case of **Sihlali Mafika** (supra) which states that, it is not necessary for the employer to accept any resignation that is intended by an employee to make it absolute and the employer cannot refuse to accept resignation of an employee or decline to act on it. To the view of this court the said decision is not contravening what is provided in the above cited provision of our law.

As for the argument by the counsel for the applicant that limitation of time for the applicant to lodge his dispute before the

CMA was supposed to be counted from 1st September, 2018 when the applicant terminated his contract of employment on ground of constructive termination as he was denied the salary of August, 2018 the court has found is untenable. The court has arrived to that finding after seeing that, as his clear intention to resign from his work with effect from 31st July, 2018 was agreed by the respondent when he was paid his terminal benefit on 6th August, 2018 and accepted the same, he cannot turn around and say he was still in his employment while he had already been paid his terminal benefits and received the same.

In totality of all what I have stated hereinabove the court has found the arbitrator was right in finding the right of the applicant to claim for any right from the respondent accrued from 31st July, 2018 when he resigned from his employment and not from 30th August, 2018 as argued by his counsel. Now counting from 31st July, 2018 or even from 6th August, 2018 when he was paid his terminal benefits to 24th September, 2018 when he lodged his dispute before the CMA it is crystal clear that the applicant was out of thirty days provided under Rule 10 (1) of the GN. No. 64 of 2007.

That caused the court to find there is no any error committed by the arbitrator in issuing the award basing on the ground of the dispute to be out of time which the applicant is urging the court to revise. Consequently, the impugned award of the CMA is hereby not revised and the application is dismissed in its entirety for being devoid of merit. It is so ordered.

Dated at Dar es Salaam this 22nd day of October, 2021.

I. Arufani

JUDGE

22/10/2021

Court:

Judgment delivered today 22nd day of October, 2021 in the presence of Ms. Airine Ruchaki, Advocate for the respondent and in the absence of the applicant whose counsel is well aware that the matter is coming today for Judgment.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

I. Arufani

JUDGE

22/10/2021