IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 460 OF 2020

(Originating from Labour Dispute No. CMA/DSM/TEM/106/2019)

BETWEEN

CHARLES MGENDI..... APPLICANT

VERSUS

ZAM ZAM ROAD HAULAGE LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2021

Date of Judgment: 12/11/2021

I. Arufani, J.

The applicant filed the present application in this court to challenge the decision made by the Commission for Mediation and Arbitration (hereinafter referred as the CMA) dated 16th July, 2019. The CMA dismissed the applicant's application for condonation after seeing the applicant had failed to convince it that he was delayed by good cause. The application is supported by the affidavit of the applicant which was challenged by the counter affidavit affirmed by Zainab Soud Mohammed, respondent's Human Resource officer.

It is on record that the applicant was employed by the respondent as a Security Guard on 30th October, 2011. He worked with the respondent until 11th January, 2018 when they decided to terminate their employment contract on mutual agreement. Thereafter, the applicant decided to file an application for condonation before the CMA for him to be allowed to file his claims of overtime and working on public holiday allowances out of time. After the application being dismissed the applicant was aggrieved by the decision of the CMA and filed the present application in this court praying the court to revise and set aside the decision of the CMA.

Submitting in support of the application, the applicant contended that the delay was just for a few days not as interpreted by the mediator. He argued that, he was employed by the respondent on 30th October, 2011 and worked until 11th January, 2018 when his contract was terminated. He said all that time he was not paid either overtime or worked public holidays allowances. He said he became aware of the said rights on 5th October, 2018 after being served with a copy of a written employment contract which he had sought from the respondent for long time as evidence by a letter dated 16th March, 2012.

It was submitted further by the applicant that, on 8th November, 2018 he decided to claim for his right from the respondent but he was not paid. He said he continued with negotiation with the respondent even after termination of his employment on 11th January, 2018 but it proved futile. He stated that, thereafter he decided to knock the CMA's doors on 22nd February, 2019 which is a delay of 11 months from when he was terminated from his employment. The applicant stated further that, the date of 16th March, 2012 appearing in the CMA F1 to be the date when the dispute arose, was misinterpreted by the mediator. He said that date shows when the respondent started to deprive his right by not paying him his overtime and public holiday allowances. He said the dispute started after termination of his employment when the respondent denied to pay him his claims. The applicant prayed the application be granted.

In his response, the counsel for the respondent, Ashery K. Stanley prayed to adopt their counter affidavit to form part of his submission. He submitted that, the claims of overtime and public holidays worked is not a creature of the employment contract rather it's a creature of the law. He stated that, the said claims is provided

under sections 19(5) and 25 of the Employment and Labour Relations Act and submitted that, the applicant's claim that he became aware of his rights upon being supplied with the employment contract on 5th October, 2018 has no basis.

He went on arguing that, the applicant's reasons for the delay are that, the respondent deliberately refused to supply him with the employment contract and the respondent's failure to pay him his claim despite the written demand. He suggested that, if the court will find the first cause is sufficient for the delay, still the applicant did not act expeditiously as he filed the application before the CMA on 22nd February, 2019 which was after the elapse of four months from the date of being given his contract of employment. He stated that shows the applicant failed to act diligently and in good faith to pursue for his claims. He cited in his submission the case of **Sebastian Ndaula v. Grace Rwamafa (Legal Personal representative of Joshwa Rwamafa)**, Civil Application No. 04 of 2014 (unreported) to support his submission.

Regarding the ground of failure by the employer to pay the applicant his claims despite the written demand, the counsel for the respondent submitted that, the same lacks merit as it took the

applicant 63 days from the date of receiving his contract of employment to the date of writing the demand letter to claim for the overtime and public holidays. He also cited in his submission the case of **Leons Barongo v. Sayona Drinks Ltd.**, Rev. No. 182 of 2012 (unreported). In addition to that he cited in his submission the case of **Philipo Katembo Gwandumi v. Tanzania Forest Service Agent & 2 Others,** Revision No. 891 of 2019 (unreported) where it was stated that, in an application for extension of time the applicant is required to adduce sufficient grounds for the delay.

It was submitted further by the counsel for the respondent that, granting condonation is the discretion of the Commission as per Rule 31 of GN. No. 64 of 2007. He submitted that, the applicant ought to have adduced sufficient reasons to be condoned. He stated that, the mediator at page 5 of the impugned ruling, concisely gave the reason as to why she declined to grant condonation to the applicant. He stated the CMA properly exercised its jurisdiction by dismissing the applicant's application basing on Guidelines provided under Rules 11 (3) (a), (b), (c) (d) and (e) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007. He prayed that, as the

applicant has failed to account for each day of the delay the application be dismissed for want of merit.

Given the nature of the application, the court has found the issue for determination in the present application is whether the applicant had good cause to warrant the grant of condonation. The law governing limitation of time for referring a dispute to the CMA is the Labour Institution (Mediation and Arbitration) Rules GN. 64 of 2007 (GN. 64 of 2007), specifically Rule 10 (1), (2) of the cited law which provides that:-

> *"Rule 10 (1) 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.*
>
> ***(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute aroused."*** [Emphasis added].

Basing on the wording of the above cited provision of the law and the nature of the claims of the applicant, it is clear that the applicant's claims were supposed to be filed at the CMA within sixty (60) days from the date when the cause of action arose. The court

has found the CMA F1 shows the applicant stated therein that, the cause of action arose on 16th March, 2012 and the dispute was referred to the CMA on 25th February, 2019 which is a delay of about 2190 days.

The law under Rule 31 of Labour Institution (Mediation and Arbitration) GN. 64 of 2007 gives power to the CMA to condone an application for extension of time, once the applicant has advanced good cause for such a delay. The Rule provides that:-

> *"The Commission may condone any failure to comply with the time frame in these rules on good cause."*

In the matter at hand, the reason advanced by the applicant for his delay is that, he was not aware of his rights as the respondent failed to supply him with a written contract of employment. He averred that from the date he was employed he was issued with the said contract on 5th October, 2018. It is undisputed fact that the parties engaged into the employment contract from 2011 notwithstanding the fact that the applicant had not being supplied with the written contract of employment. This court is of the view that, each party to a contract is presumed to be aware of the terms

and conditions of the contract before its commencement so is the applicant.

Again, as stated by the respondent's counsel, payment of overtime and worked public holidays are the statutory rights of an employee. It is presumed that every employee is aware of his rights prescribed by the laws. Therefore, the applicant's allegation that he was not aware of his rights until when he was supplied with the contract of employment lacks merit. It is a settled law that ignorance of law is not an excuse, thus the applicant ought to have been aware of his right and claimed for the same when he executed the said duties in overtime and on public holidays.

The applicant also alleged that the delay was caused by the respondent's delay to pay him despite of a demand letter dated 8th November, 2018. He also stated that there was negotiation between them even after termination of the contract. There is no any proof from the applicant that there was such a negotiation which was taking place between them. Moreover, it is a law that, negotiation cannot stand as a sufficient cause for granting extension of time to file an application out of time. (See the case of **Leons Barongo v. Sayona Drinks Ltd.** (supra) .

It is a principle of law that, in any application for extension of time, the applicant must account for each day of the delay. There are various court decisions insisting on counting for each day of the delay in an application for extension of time. In the case of **Said Ramadhani Vs. Geita Gold Mining Ltd., Misc. Application No. 29 of 2013** (unreported) it was held that:

> *"In deciding the aspect of extension of time the applicant is expected to account cause for delay of every date that passes beyond the prescribed period".*

In this application, it is crystal clear that the applicant's claims emerged on 16th March 2012 when the respondent failed to pay the applicant his overtime and worked public holidays allowances. It is not as argued by the applicant that, cause of action arose after termination of the contract on 11th January, 2018. From 16th March 2012 to the date of referring the dispute to the CMA it is about 2190 days. It is apparent that the applicant failed to account for each day of the delay as required by the law. Even if this court would have believed the cause of action arose upon termination of his employment, still the applicant had failed to account on what transpired on the 11 months from the date of termination of the

contract of employment to the date of filing the dispute before the CMA. In consideration of the circumstance of this matter, it is apparent that the applicant failed to act diligently in pursuing for his claims. The position of the law as stated in the case of **Dr. Ally Shabhay Vs. Tanga Bohora Jamaat** [1997] TLR 305 is that, those who comes to court, must show great diligence and avoid any unnecessary delay.

Therefore, since the applicant failed to account for each day of the delay, the court finds no need to fault the decision made by the mediator that the applicant had no good cause for his delay. In the upshot the application is hereby dismissed in its entirety for being devoid of merit. It is so ordered.

Dated at Dar es Salaam this 12th day of November, 2021.

I. Arufani

JUDGE

12/11/2021

Court: Judgment delivered today 12th day of November, 2021 in the presence of the Applicant in person and in the presence of Mr. Ashery Stanley, Learned Advocate for the Respondent. Right of appeal is fully explained.

I. Arufani
JUDGE
12/11/2021