THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 494 OF 2020

BETWEEN

NOEL MTONDO NYAMBI..... APPLICANT

VERSUS

V. PRODUCT ..... RESPONDENT

JUDGMENT

Last order 09/9/2021
Judgment on 20/10/2021

B.E.K Mganga,J

Applicant was an employee of the respondent since 5th July 2009 to 25th February 2020 the day he was informed by the Disciplinary hearing Committee after hearing his defence, that he has been terminated and further that, he had five days within which to file an appeal. Applicant did not prefer an appeal instead, he referred Labour dispute No. CMA/DSM/ILA/212/2020 to the Commission for Mediation and Arbitration henceforth CMA. Applicant served the respondent with Referral of a Dispute to the Commission for mediation and Arbitration hereinafter referred to as CMA F.1 claiming to be paid unpaid salary, terminal benefit and compensation for unfair termination. In the said CMA F.1, applicant indicated that the dispute arose on 25th February 2020. On the date

applicant served the respondent with the said CMA F.1, he was also served with termination letter with reasons that he has absconded from work. When the parties appeared before arbitrator, the respondent raised a preliminary objection that applicant referred a dispute to CMA prematurely. On 10th July 2020, Fungo E.J Arbitrator, delivered a ruling upholding the preliminary objection and directed that applicant should follow the procedure. On 14th July 2020 applicant filed another CMA F.1 and Application for Condonation of a Late Referral of Dispute to the Commission for Mediation and Arbitration Form (CMA F.2) attached with his affidavit. In the said CMA F.2, applicant indicated that he was late for 80 days. Respondent filed a counter affidavit resisting the application for condonation on the ground that applicant was negligent and that he failed to advance grounds for delay. On 22nd October 2020, Joshua Mwaisengela, Arbitrator delivered a ruling and dismissed the application for condonation on ground that applicant failed to adduce good grounds or cause for the delay by 112 days.

Being aggrieved by refusal to grant condonation, applicant filed this revision application. The notice of application is supported by an affidavit of the applicant. In his affidavit, applicant deponed that arbitrator erred in computing the days of delay and further in holding that there was no good

cause for the delay. The respondent opposed the application and filed a counter affidavit sworn by Nehemiah Munga, her Human Resources Manager.

When the application was called for hearing, Mr. Edward Simkoko, from TASIWU, a trade Union, appeared and argued for and on behalf of the applicant while Mr. Nehemiah Munga, the Human Resources Manager, appeared and argued for and on behalf of the respondent.

In arguing the application on behalf of the applicant, Mr. Simkoko submitted that the arbitrator erred in law and fact in holding that the applicant was out of time for 112 days. Simkoko submitted that the ruling that applicant filed application prematurely was delivered on 10th July 2020 and not 25th February 2020. That Arbitrator confused these dates because applicant was terminated on 25th February 2020. On 14th July 2020 applicant filed another dispute but the arbitrator in his ruling held that applicant was out of time for 112 days. He submitted that arbitrator made wrong calculations of the delay as made a wrong conclusion. Mr. Simkoko cited the Court of Appeal decision in the case of ***Barclays Bank Tanzania Limited Vs. Tanzania Pharmaceutical Industries and 3 others Civil application No. 62/16 of 2018*** (unreported) that extension of time is

discretion, but the court has to consider the days of delay, efforts taken, illegality, if any, that should be apparent on the face of record.

Mr. Simkoko went on that, the dispute between the parties arose on 23rd February 2020 when the applicant was terminated. On the same date, applicant referred the dispute at CMA. The respondent raised a Preliminary objection on point of law that Applicant referred the dispute at CMA prematurely before being issued with termination letter. Simkoko submitted further that applicant was issued with termination letter on 6th March 2020 after he has filed the dispute.

Mr. Simkoko challenging the arbitrator when he held in his ruling that no sufficient grounds or reasons for delay was adduced, submitted that there were sufficient reasons for delay. He submitted that, the delay was caused by the respondent who did not issue termination letter on termination day. That, applicant refiled another dispute four (4) days after delivery of the ruling that he filed the dispute before being issued with termination letter. He insisted that, this was reasonable time. Mr. Simkoko prayed the application be granted in order to afford parties right to approach CMA where the respondent will be required to prove reasons for termination. But, if the application will be dismissed, applicant will have no

place to be heard as to why he was terminated. He concluded that, dismissal of this application will cause injustice to the applicant.

Resisting the application, Mr. Munga, submitted that arbitrator didn't err because on 25th February 2020 a disciplinary hearing was held in presence of the applicant whereby a decision for termination was reached. That applicant was given five (5) days within which to appeal to the Director of the Respondent. But quickly applicant ran to CMA on the same day, in violation of Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007 to file a dispute instead of appealing. Mr. Munga went on that five days within which to appeal ended on 2nd March 2020 and that applicant was issued with termination letter on 23rd March 2020 on the date he served the respondent with CMA F.1.

Mr. Munga submitted further that on 25th February2020, applicant signed a disciplinary hearing form in which he was informed that he has been terminated with effect from that day. Mr. Munga was of the view that applicant was not terminated on 25th February 2020 but on 23rd March 2020 on the date he served the respondent with CMA F.1 and also served with termination letter dated 6th March 2020. Mr. Munga submitted that in the termination letter, it is clear that, applicant absconded from work for

more than five days. He insisted that, applicant filed the dispute prior the final decision of the employer contrary to Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007. Mr. Munga went on to submit that applicant was negligent in filing the dispute at CMA as he did so without observing the law. He concluded that if the application will be granted, respondent will be prejudiced as she had incurred cost to attend this application and she will continue to incur more cost.

In rejoinder, Mr. Simkoko submitted that respondent had ill motive because in the disciplinary hearing Committee, she indicated that applicant has been terminated, but at CMA, she raised a preliminary objection that applicant has not been terminated. He argued that respondent used another trick to issue a termination letter based on abscondment while she knew that she had terminated him prior to issuance of termination letter.

I have considered submissions of the parties and carefully examined the CMA file and find that it is undisputed that on 25th February 2020 a disciplinary hearing was conducted in presence of the applicant. In the said disciplinary hearing, the Committee reached a decision to terminate the applicant and gave him five days within which to appeal to the director. Mr. Munga for the respondent, initially submitted that applicant was terminated

on 25th February 2020 but later on submitted that he was terminate on 23rd March 2020 when he was served with termination letter dated 6th March 2020 for abscondment. This is what raised the issue that has confronted the parties and the two arbitrators as to when the applicant was terminated from employment.

It is my considered view that, the 1st arbitrator erred both in law and fact in holding that the applicant referred the dispute prematurely. The same error was committed by the 2nd arbitrator who held that applicant failed to adduce sufficient ground or reasons for delay and that applicant was out of time for 112 days. My reason is not far and is straight. A decision for termination was communicated to the applicant on 25th February 2020. This is the date of termination of his employment. The disciplinary hearing form is clear on this. Applicant was supposed to appeal against termination decision that was communicated to him by the Disciplinary hearing committee whereas the employer had two options to allow the appeal or dismiss it. Nothing was brought to the court to show that respondent, after being informed by the disciplinary hearing committee that, they found applicant guilty of the charges and communicated to him (applicant) that he has to be terminated, on his discretion, reversed that decision. In fact, that is not the case at hand.

Therefore, the argument that termination of the applicant was on 23rd March 2020 when he was served with termination letter dated 6th March 2020 is not correct. I am therefore of the strong view, that applicant referred the dispute not prematurely as it was held by the 1st arbitrator. The argument by Mr. Munga that applicant filed the said dispute in violation of Rule 10(1) of GN. No. 64 of 2007 in my view, is, but with due respect, a misdirection. The said Rule is clear and it reads:-

> *"10(1) Disputes about the fairness of a (sic) 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.***"

From the quoted rule, it is my considered opinion that the date of termination is the date a decision of termination was made and communicated to the applicant by the disciplinary hearing committee. In alternative, is the date the employer made a final decision to terminate or upheld the decision to terminate, after an employee has appealed. In the application at hand, applicant did not appeal. The said Rule, does not provide that an employee who opt to refer a dispute to CMA without first appealing cannot be heard. The interpretation given on the said rule by CMA, in my view, was a misdirection.

The argument by Mr. Munga for the respondent that applicant referred the dispute to CMA on 25th February 2020 in violation of Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007, is also a great misdirection as the said Rule has nothing to do with filing the dispute by the applicant. The said rule is on fairness of the procedure by the employer on disciplinary hearing and not procedure to be followed by an employee before referring the dispute to CMA.

Mr. Munga for the respondent submitted that applicant was terminated due to abscondment as indicated in the termination letter dated 6th March 2020. I have noted, without going in detail in this application as I am not called to finally determine the dispute between the parties, that this is dissimilar with what is in the disciplinary hearing. I am therefore in agreement with Mr. Simkoko that reasons for termination of the applicant can only be explained by the respondent if this application is granted as it appears to be uncertain. Argument that respondent has incurred cost and will incur cost by calling witness hence injustice to her side, is baseless for two reasons. One applicant also has incurred cost in prosecuting this application, and two, the costs the parties has incurred cannot be

compared with the rights to be heard and to know reasons for the decision reached by the respondent on termination of the applicant.

For the foregoing, I allow the application and set aside the two ruling below and order that the dispute between the applicant and the respondent be heard without delay by another arbitrator.

It is so ordered.

B.E.K. Mganga
JUDGE
20/10/2021

Labour Court Tz.