IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 178 OF 2019

BETWEEN

IRENE JULIUS KAKUBEBE ..... APPLICANT

VERSUS

FEM SECURITY SERVICES COMPANY ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

Labour Dispute No. CMA/DSM/ILA/R.1367/17/120 ("The Dispute") in which the applicant herein was the complainant, is the subject matter of this Revision Application. At the Commission for Mediation and Arbitration ("the CMA"), the applicant lodged the dispute whereby she was complaining about unfair termination by the respondent herein ("the employer"). The dispute was decided in favour of the respondent. The unsatisfied applicant has lodged this revision moving this court to call the records and proceedings of the CMA in the dispute and set aside the award dated 30/01/2019, the grounds for setting aside is on what the applicant termed as *"Madame H.H. Msina entered a very shallow decision in her award without any order, for the*

good end of justice that fact left the dispute unresolved". The application was lodged by a notice of application and Chamber Summons which is supported by an affidavit of the applicant dated 22nd February, 2019. In the said Affidavit, the legal issues that the applicant claimed to have emanated from the material facts were:

1. Whether the Honourable CMA had no jurisdiction to entertain justice in the matter before it.
2. Whether the dispute was pre-maturely referred before the CMA
3. Whether there is still any valid employment between the parties
4. Whether the decision of the Honourable Commission on its award had reached a good end of justice as lacks any order if the applicant is still on duty or terminated her employment as it is a shallow award.

The reliefs sought therein were for this court to investigate the records and award of the CMA on its correctness, propriety and legality so that the court may reverse the award.

In determination of this revision, first let me narrate the brief background of the matter. As per the gathered facts and evidence, the parties entered into an employment contract on the 13/07/2016, the applicant herein was the employee, employed as a security guard and the respondent was the employer. The contract was for unspecified period of time and the monthly salary was Tshs. 190,000/-. The agreement was that

the applicant will work for 12 hours, eight of which will be the normal hours under the Employment and Labour Relations Act, Cap. 366 R.E 2019 ('The ELRA') and the 4 hours were to be paid as extra hours.

According to the applicant, the respondent/employer forced them to work for 6 extra hours which totalled to 18 hours without paying them any overtime payment. She also alleged that while battling against this act, on the 02/12/2017 the employer verbally terminated her. She made efforts to resolve the matter through different forums including Tanzania Union for Private Security Guards ("TUPSE") and the Labour Officer but all in vain. That is why the applicant unsuccessfully referred the matter to the CMA hence this Revision.

In this court, the respondent was duly served and filed a notice of opposition, on the 11/05/2021, they were represented by one Saulo Kusakala, learned advocate claiming that he was representing the respondent. He then disappeared for the three consecutive days that the matter was scheduled before a judge, these dated were 22/07/2021, 23/08/2021. Thereafter the court ordered substituted service. The respondent was also absent on 14/09/2021. On 28/09/2021 this file was re-assigned to me following a special backlog clearance session. To my surprise

on the 07/10/2021 Mr. Kusakala lodged a notice to withdraw himself from services of the respondent. Since all efforts to serve the respondent were taken and they entered appearance through an advocate, and didn't turn up after his withdrawal from services, this application proceeded ex-parte of the respondent.

In determination of this application, I will combine the first and second legal issues together. The applicant challenged whether the Honourable CMA had no jurisdiction to entertain justice in the matter before it and whether the dispute was pre-maturely referred before the CMA. The reason why the two issues are combined is because they are related, if we determine that the dispute was pre-maturely referred to the commission due to absence of termination, then the CMA would automatically lack jurisdiction to entertain the matter.

It is undisputed that under Section 37 of the ELRA, the employer has a duty to prove that the termination of employment was fair. Therefore in order to determine whether the termination was fair, the courts/tribunals have to see whether there was a termination (be it actual or constructive) and if so, whether the reasons for termination were lawful. I have gone through the CMA Form No. 1 which was filled by the applicant herein, then complainant,

while filling part 3 of the Form which is concerned with the "Nature of the Dispute" the applicant ticked a box which said Termination of Employment. It is therefore undisputed that at the CMA, the applicant lodged a dispute challenging her termination of employment. In due course of hearing at the CMA, while making their defence, the respondent established the fact that the applicant was never terminated from employment, she was rather suspended and instead of showing cause, she directly went to the CMA, which is why the CMA determined that the dispute was prematurely lodged at the CMA. Since termination was in dispute, the onus of proving that there was a termination shifted to the employee. She was therefore duty bound to prove that there was termination, whether actual or constructive, before determining whether that termination was fair.

During hearing at the CMA, the applicant alleged to have been terminated orally. She therefore had no any letter to prove the termination, however, she alleged to have been terminated at the parade, of which she should have at least brought one witness to add weight to her testimony. The applicant further alleged to have involved the Trade Union TUPSE in her case but in vain. Again she showed no proof to that, she only alleged that the letter sent to TUPSE was with her "representative", but it was never brought

to court. This implied that there was a document to that effect but she could not bring it while the document itself would have been the proper proof.

The respondent's witness testified that the applicant was not terminated and that the applicant still held all the office tools. This evidence was not shaken during cross examination. Therefore on balance of probabilities, the applicant's evidence did not prove any termination, rather the respondent's evidence established that the applicant was never terminated from employment. She hurried to the CMA after suspension forgetting that the CMA is a creature of the statute, The Labour Institutions Act, Cap 360 RE 2019 whereby a party can only seek remedies there on the happening of certain condition. It is a not a market whereby a person can walk in and out at the time she pleases whether or not she is buying any goods.

Having made those findings on the two issues, I am in agreement with the CMA that since the applicant had not been terminated from employment by the time she lodged her dispute, and she claimed unfair termination, there was no cause of action of unfair termination against the employee. The dispute was pre-maturely filed and as correctly determined by the CMA, she had no jurisdiction to determine the matter.

It should be borne in mind that although the welfare of the employee is of paramount importance in labour law, the employers also have business to run, profit to make and are accountable to many set of regulations set by different authorities. Therefore while we are protecting the welfare of the employee, we should also bear in mind that the employee is striving to maximise profit in order to sustain in their respective markets which eventually creates employment opportunities to the employees. In that aspect, the Employees also have a duty to play in the development of any employer in return for a salary, their conduct and behaviour is therefore crucial for the wellbeing of the employer.

As courts, we should also strive to strike a balance between the welfare of the employee without ignoring the fact that the employer also has a right to fair trials. The employees must not, in any way, take advantage of the presence of the Labour Courts as a means to blackmail or disobey their employers. The balance must be maintained. Hence in cases like the one at hand, the applicant cannot just run to the CMA on a mere punishment of suspension and attempt to act like a victim of unfair termination; she has to prove that there was such a termination which turned out to be unfair.

of revision. After all, it is the applicant who alleges to have been terminated orally, then if she failed to prove it, how would she want the status of employment be determined? She should know better of what exists between her and the respondent and why she approached the CMA in the first place.

After all, the issue should have been an issue of evidence and since that question was never raised as the applicant was greed for numbers, she cannot come here as a second thought and start begging for mercy of the court to determine the status of her employment. She approached the CMA claiming about unfair termination and that was what the parties were bound to prove. Since she could not prove termination in the first place, the CMA declared, a position which I uphold, that the matter was pre-maturely filed at the CMA. She did not question the status as she was more inclined to allege that she was unfairly terminated. The two issues are therefore dismissed.

Having made the above findings, I see no reason to interfere with the award of the CMA. The Revision before me lacks merits and it is hereby dismissed.

Dated at Dar-es-salaam this 13th day of October, 2021

S.M. MAGHIMBI
JUDGE