IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LABOUR REVISION NO. 11 OF 2020

(C/O Rukwa Labour Dispute No. RK/CMA/49/2019)

(Ngaruka O. W. Arbitrator)

SERVICE HEALTH AND DEVELOPMENT FOR

PEOPLE LIVING POSITIVELY WITH HIV/AIDS

(SHDEPHA + SUMBAWANGA) ..... APPLICANT

VERSUS

PETER KULAS MWIMANZI ..... 1st RESPONDENT

IBRAHIM JUMA MTORO ..... 2nd RESPONDENT

JUDGMENT

Date: 04/11/2021 & 06/12/2021

Nkwabi, J.:

In the Commission for Mediation and Arbitration for Rukwa region, the applicant for this revision was ordered in an award, to pay the respondents a total of T.shs. 28,720,000/= within 30 days from the date of the award. For each of the respondent, the applicant, ought to be paid for:

1. Payment in lieu of notices at T.shs 600,000/=.
2. Unpaid salary for 6 months at T.shs 3,600,000/=.

3. Severance pay at per section 44(I)(e) of the Employment and Labour Relations Act.
4. Leave pays at T.shs 2,400,000/=.
5. Payment for unlawful termination of employment at T.shs. 7,200,000/= for 12 months.
6. Certificate of service.

The award in those terms, afflicted the applicant as a result, she filed this revision application, stressing, firstly, that the Arbitrator based the decision on improper contracts of employment. Secondly, that the respondents were not terminated from their employment rather it is the respondents who stopped showing up at the office and thirdly, the award was improperly procured for there was failure of proper examination of the evidence available in the case file. Those grounds, prompted the applicant to pray this court to revise the award and set aside the said award.

In the affidavit of Albogasti Sivonike, the Human Resources Officer of the applicant, the applicant averred that she is a registered non-profit organization. The respondents were her employees since April 2016 on

yearly term contract of employment basis commencing October, 2016 based on the donor grant policy and her employment regulations.

In September, 2019 she issued a notice to respondents for the respondents to show their intention to continue with their employment, for next financial year which would commence October 2019, as per her usual practice.

Both respondents lodged their intentional letters for continuation with employment, then lodged a labour dispute with the Commission for Mediation and Arbitration. She disputed to have given the respondents a two-year contract of employment as that was contrary to her policy.

The applicant deponed too that the respondents were aggrieved with the termination hence referred the matter to the CMA where the respondents got an improper award since the respondents were fairly terminated by the applicant. The applicant drew two issues for this court's consideration:

1. Whether the CMA was justified to base its decision on two yearly contract of employment contrary to the employment policy of the applicant.

2. Whether the CMA was justified in holding that the applicant substantially and procedurally unfairly terminated the respondents.

Respondents resisted the revision application with fierce force that they could unleash in their counter affidavit. It suffices to say that what they averred is that they were each employed in a two-yearly employment contract. They received termination letter on 03/10/2019 when they were on duty following foiled discussion on 01/10/2019 whereupon, the applicant announced job opportunities for their positions.

They further averred that the award of CMA was properly procured for they were unfairly terminated from their employment. They earnestly prayed this court to dismiss the revision application.

In her submission in chief, the applicant vigorously contended on the first issue that the applicant is fully funded by its donor, American Agency, which provides fund on yearly basis subject to the performance of the organization. Basing on that the applicant developed a recruiting system on yearly basis.

The contract employment of the respondents ended 30th September 2019. The respondents applied for renewal, but the applicant was dragged to CMA while waiting for the respondents to report. The respondents absconded work which is a serious misconduct sufficient to terminate employment citing **Item 9 (1) of the Employment and Labour Relations Act (Code of Good practice) GN. No. 42 of 2007.**

In disapproval submission, the respondents argued vibrantly that they had, each of them, a two-year employment contract which would expire in 2020 and the applicant failed to bring the material witnesses to testify hance the court was entitled to draw an adverse inference.

They put forward that through the letter dated 04/09/2019 the applicant terminated their employment on ground that there was insufficient fund from the donor and that the contract period had expired. They concluded by saying that the applicant failed to prove the first issue on the balance of probabilities.

I agree, the CMA was confronted with two contracts, one was a two-year term employment contract for each of the respondents and one year term employment contract for each respondent. I endorse the argument that, the Honourable arbitrator was justified in drawing an adverse inference in the circumstances for failure by the applicant to bring the material witness(s) as rightly pointed by the respondents. The employment policy too was not tendered in the CMA without any justification making any court of law to accord adverse inference to the effect that there was no such employment policy.

Secondly, one cannot claim to have insufficient fund and terminate some employees and at the same time advertise job vacancies in the same positions. With respect, no court would accept such untenable ground. The first issue has to be answered in the affirmative. That disposes the first issue.

I turn to discuss the last issue which is whether the CMA was justified in holding that the applicant substantially and procedurally unfairly terminated the respondents. Submitting on the 2nd issue, the applicant argues that after

submitting notice of intention to renew their contracts, the respondents disappeared from work for more than twenty days without permission which itself constitutes abscond form work. She cited **Amina Ramadhan v. Staywell Apartment Limited, Revision No. 461 of 2016** (HC):

> *"Absenteeism stands here as a valid reason to terminate the applicant as the applicant was failed to provide sufficient evidence."*

She then faulted the Arbitrator for holding that the applicant terminated the respondents from employment without a valid reason. She argued, failure by the respondents to report at work place led to their contract to expire automatically. The applicant did not terminate the respondents but they absconded from work on their own accord which is sufficient for the employer to prove on balance of probabilities citing **Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) GN. 42/2007**:

> *"... the burden of proof lies with the employer but it is sufficient for employer to prove reason on balance of probabilities ..."*

She then stressed; the respondents were not entitled to any relief they were awarded as they absconded from employment. The respondents were not terminated but absconded from work. The applicant did nothing in respect of the respondent's absenteeism. The applicant did receive any complaints from the respondents which might necessitate for the applicant to conduct a disciplinary hearing as per Labour laws. Hence, to her, the award was wrongly issued to the detriment of the applicant.

I subscribe to the assertions of the respondents that the claim made by the applicant that the respondents absconded from work for more than 21 days without permission does not feature anywhere, neither in the affidavit of the applicant nor the evidence in the record of the trial CMA. That argument therefore cannot be given weight by this court. Admittedly, this court cannot accept new evidence at this stage either. The respondents argued and I quote, *"Again, the applicant had the burden to prove that we absconded for 21 days and prove that the reason for termination was valid and that he adhered to the procedure during termination."* I readily accept the argument contented by the respondents. The applicant was duty bound to prove the

absenteeism of the respondent, but failed to do so. The termination from employment therefore was unfair.

If it is accepted as the evidence of the applicant through her witness DW1 *at page 10 of the typed proceedings the witness had these to say: " ... sababu kubwa ya kuondolewa kazini ni donors ameondoa kifungu bajeti imepungua."* In contrast DW6 Albogast testified that, *"Walalamikaji hawakufukuzwa kazi bali waliamua kuacha wenyewe kazi kinyume na kipengele cha terminal of contract kama iliyo katika mikataba yao, bila taarifa yoyote Zaidi ya kupata WITO wa kuja CMA ..."* I further agree with the contention of the respondents that the applicant failed to prove that she abided by the rules on natural justice. No disciplinary hearing was conducted, or at least, the applicant did not prove that she held one.

It suffices to observe here that the case of **Amina Ramadhani (Supra)** is quite distinguishable to the case at hand as in the case of Amina, there was a procedure of termination, which started with a letter *(barua ya kusudio kusitisha ajira yako kwa utoro kazini),* with a direction to bring a defence, followed by a suspension process. But in the case at hand, nothing of the

nature was conducted hence, the complaint by the applicant does not hold water. The applicant cannot, therefore, flout the law and get away with it.

In the CMA, the alleged absenteeism, alleged by DW6, too was not proved since, no attendance register or a certified true copy of the same was tendered in the CMA. The learned trail Arbitrator cannot be faulted on the analysis of the evidence. In my view, he properly analyzed the evidence that was brought before the Commission for Mediation and Arbitration. I uphold the award delivered by the CMA.

Consequently, the application for revision is dismissed. I make no order as to costs as this is a labour matter.

It is so ordered.

DATED at **SUMBAWANGA** this 6th day of December, 2021

HIGH COURT OF TANZANIA
SUMBAWANGA ZONE

J. F. Nkwabi,

JUDGE

Court: Judgment delivered in chambers this 6th day of December, 2021 in the presence of the applicant in person and the Respondents in person both via video conference.

J.F. Nkwabi
JUDGE

Court: Right of appeal is explained.

J.F. Nkwabi
JUDGE
06/12/2021