IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 34 OF 2019

BETWEEN

FABCAST SCHOOLS..... APPLICANT

VERSUS

AGNES MATHEW HAPE..... RESPONDENT

JUDGMENT

Date of Last Order: 18/11/2020

Date of Mention: 26/02/2021

Z. G. Muruke, J.

Respondent, Agnes Mathew, was employed by applicant as primary school teacher on contractual basis since 1st January, 2013. Last contract was from 1st January, 2018 to 31st December, 2018. While the contract is still subsisting, respondent requested for maternity leave from 1st March, 2018 to 1st May, 2018. Her letter was not responded by school administration, despite Head Teacher recommendations. Without permission respondent proceeded with her leave for 84 days. While on leave, she was called by head teacher that, her leave has been refused for lack of Doctors report to prove that, she was pregnant and that she was due for delivery. Respondent proceeded with her leave until elapse of her maternity leave (84 days). On her return, she was not being given any work. She continued until 24th August, 2018, when she was told that she is not wanted at applicant premises. All this time, from 1st March to August, 2018, she was not paid salary, she then filed dispute at

CMA Kibaha on 31st August, 2018 claiming for:-

(i) Salaries from 1st March - 30th August,
(ii) Maternity leave pay
(iii) Repatriation costs,
(iv) Terminal benefits for 5 years
(v) 12 months' salary for unfair termination.

Upon hearing, CMA ordered respondent to be paid as follows:-

(i) Six months' salary from March to August, 2018 1,200,00/=
(ii) 2,400,000 being salary for 24 months being damage for unfair termination.
(iii) One month salary in lieu of annual leave.
(iv) 269,230 Tshs. being terminal benefit for 5 years
(v) 200,000 Tshs. in lieu of notice
(vi) 330,000 Tshs. as cost of transporting her language from Kibaha to Singida.

The award dissatisfied applicant, hence present revision, raising following issue for determination:

(i) Whether respondent absconded from work place for 6 months.
(ii) Whether applicant terminated respondent.
(iii) Whether the award of transport costs was justified.
(iv) Whether compensation of 2,400,000 being respondent 2 years' salary was justified while the contract was for one year.

Hearing was by way of written submission. Applicant counsel submitted on issue number one and two that; For the employee to enjoy the right of maternity leave, must give the employer three months' notice, attached with medical certificate. These conditions are provided under Section 33(1) of the Employment and Labour Relations Act, No. 6 of 2004. In her testimony, respondent did not tender any medical report contrary to requirement of the

law. The law is coached in a mandatory manner, it is not an option at all. The respondent just left the job, in other words the respondent absconded from job and later came with the reason that she was on maternity leave. Thus, is the respondent who absconded from job but the applicant never terminated the respondent. Through proceedings there is no evidence that shows how the applicant terminated the respondent. It is on record that, the respondent absconded from job, she stayed for sometimes, and later on applicant was served with the summons. Suffice to say that the trial commission did not act properly, the award be quashed and set aside, insisted applicant counsel.

On ground three the trial arbitrator erred in law and fact for ordering payment of Tshs. 330,000/= being transport costs while in fact there was no evidence to prove the said transport costs. It is the duty of the party to prove the case before the court. This duty is provided for in Section 110 (1) and (2) of the Evidence Act Cap 6 R.E 2002 of the laws of Tanzania to the effect that it is the duty of the person to prove his case before a court of law. It underlines the principle that he who alleges must prove. Trial commission awarded the respondent Tshs. 330,000/= as transport costs without any proof.

On ground four it was submitted that trial arbitrator erred in law and fact for ordering compensation for unfair termination amounting to Tshs. 2,400,000/= while in fact, the law requires compensation of the remaining months if the contract is on annual basis. It is the principle of labour laws that, in the contract of specific period, in case the commission finds that the employee was unfairly terminated, then the employee will be paid compensation of the remaining months, but it should not exceed 12 months.

It is very unfortunately the trial arbitrator proceeded to grant the Tshs. 2,400,000/=, complained applicant counsel.

Despite order dated 18th November to 2020 requiring respondent to file submission on by 4th December, 2020, same was not filed as ordered. After several adjournment, respondent changed her representation, in which Shafii Ahmed appeared on 11st February, 2021, holding brief of Muhindi Said and requested extension of one week time to file submission. Court granted extension. Submission was filed as requested and ordered. Respondent representative, submitted in brief and generally that arbitrator found that procedure was not followed as reflected at page 18 to 24 of the award that;

> "Kuhusiana na utaratibu uliofuatwa wakati wa kusitisha ajira ambao hakuwa sawa."

It was insisted that respondent was not given opportunity to give evidence, there was no disciplinary hearing, she was not even given right of representation. Mr. Muhindi Said, respondent personal representative argued that court should consider two issues namely.

One; Whether or not applicant is entitled to maternity leave.

Two; Whether the applicant has been legally terminated or not.

Respondent representative argued the court to find that applicant unfairly terminated respondent, thus award delivered on 24th December, 2018 should be allowed to be executed.

Having heard both parties in their submission, it is worth revisiting Section 331 & 2 of employment and Labour Relations Act, Act No. 6/2004

that provides as follows:-

> 33(1) an employee shall give notice to the employer of her intention to take maternity leave at least 3 months before the expected date of birth and such notice shall be supported by a medical certificate.
>
> (2) An employee may commence maternity leave
>
> (a) At any time from four weeks before the expected date of confinement;
>
> (b) On an earlier date if a medical practitioner certificate that it is necessary for the employee's health or that of her unborn child.

As clearly stipulated above, notice of three months is required. More so, medical certificate is mandatory. The word used is shall means mandatory. When respondent signed contract for one year, on 1st January, 2018, it was the period that, she was to notify her employer that, she will be expecting to have her new born. Exhibit P2 is a letter from respondent Agnes M. Hape to Headmaster of the applicant. Same is dated 8th February, 2018, in which leave sought is from 1st March, 2018, being 21 days before commencement of the maternity leave. Assuming without believing that notice of 21 day issued is satisfactory, which is not the case, yet there is no medical certificate attached. Thus, exhibit P2 did not comply with requirement of the law that wanted 90 days notice. Equally exhibit P3 respondent leave form, dated first March, 2018 is not accompanied by medical certificate as required by Section 33(1) of Employment and Labour Relations Act, Act No. 6 of 2004.

It is trite law that he who alleges is the one responsible to prove his allegations as it was held in ***Abdul – Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita [2006] TLR 420***. Further, the provisions of Section 110 (2) of the Evidence Act [Cap 6.R.E 2019] required that whoever desires

any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. As a general rule in labour matters, the burden of proof lies with the employer to prove on the balance of probabilities as per Rule 9 (3) employment and Labour Relations (Code of Good Practice) GN 42/2007.

Applicant discharged this duty sufficiently, by adducing evidence that the respondent was not terminated from employment rather he absconded from work for three months. Even these facts were not cross - examined upon. Furthermore, respondent did not state who terminated her and whether that person has the authority to terminate.

Since it is the respondent who alleges to have been terminated from employment, while throughout the hearing of the matter it was proved that the applicant did not terminate the employment of the respondent the respondent's contention that she was terminated remains a mere allegation not supported by any evidence. Further, the position of the law is clear that under this circumstance it was the respondent (employee) who had a duty to establish that there was termination. In ***C.R.J Construction Co. (T) Ltd. Vs. Maneno Ndalije & another Revision No. 205 of 2015 High Court (Labour Division) at Dar es Salaam (unreported***) on page 7 the court held that:

> *"Looking at the evidence in the record I find the respondent's contention remains to be a mere allegation not supported by any evidence there is no evidence which proves that the respondents were terminated from employment and the applicant denies to have terminated them, I find the respondents had the duty to establish*

termination by evidence. This is the position of the law as provided under S.112 of the law of Evidence Act [Cap 6 R.E 2002]."

Since the respondent did not avail the arbitrator with requisite evidence of the termination of his employment contract as required by law, it is clear that applicant never terminated respondent employment contract. To the contrary, it is apparent that the respondent materially breached the contract of employment by absconding from work for a period of three months without any notice or explanation from his superiors as to his continued absence from work.

Rationale behind three months' notice is for the school to be able to continue with activities as scheduled and abide to school curriculum. Looking at Exhibit P3 tendered by respondent, it lacks authentic on account of clarity, as shown below;- On a place written **type of work** it is written **Joseph Ndunguru**. On name that **Gido Joseph** has accepted to take over respondent work, signature is not there to signify consent. To this court, exhibit P3 raises doubts on it's authenticity. More so, leave sought by respondent, did not follow procedure laid down by Section 33(1) of the Employment and Labour Relations Act, Act No. 6 of 2004. Respondent on her opening statement at CMA admitted that, she did neither give notice within 90 days nor did she tendered medical certificate to justify request for maternity leave.

It was expected that letter exhibit **P1** be respondent by the Head Master of the applicant, following head teacher forwarding the same for approval. There is no evidence to proves, that respondent leave request was approved. By proceeding on leave without approval, amounts to absconding

from employment. In employer and employee relationship rules and law applicable has to be adhered, to avoid chaos on industrial relations.

From the content of exhibit P2 and P3 tendered by respondent herself, it is crystal clear that she absented herself from work for more than 5 days without permission from her employer, thus she cannot be said to have been terminated by applicant. There is nothing like constructive termination as claimed by respondent, who received her salary until February, 2018. Ground number one has been answered in the affirmative that respondent absconded, while ground number two has been answered in the negative that, respondent was not terminated, by applicant.

Having found that respondent absconded from her employment as she was not allowed to proceed on leave by her employer, then, CMA award was not properly issued.

(i) She absented herself for six months thus, cannot benefit from her own wrongs. Amount of 1,200,000 granted being salaries for 6 months is quashed and set aside.

(ii) Amount of 2,400,000 being salary for 24 moths being damage for unfair termination cannot be uphold, because, there was no unfair termination, instead respondent absented herself from employment same is quashed and set aside.

(iii) Amount of 200,000 in lieu of notice is not justified as there is no unfair termination, thus quashed and set aside.

(iv) Amount of 330,000 as costs of transporting language from Kibaha to Singida, is not justified, not backed up by evidence, thus quashed and set aside.

(v) Amount of 269,230 being terminal benefit to be paid by applicant. If not paid by respective social security fund if any.

(vi) One month salary in lieu of annual leave is also unjustified. Leave pay is after 12 month. Respondent only worked for 2 months from January to February 2018. Leave pay is after completion of 12 month contract in terms of paragraph 10 of employment contract between applicant and respondent dated 01/01/2018 that provides as follows:-

"The employee is entitled to 28 consecutive days paid leave during each leave aged. These days shall be inclusive of any public holidays failing within the leave period. A leave cycle for the purpose of annual leave means a period of 12 months consecutive employment from the commencement date of employment or completion of the last leave cycle."

The wording of the provision above speak clearly. Respondent worked only for 2 months. Thus not entitled to leave pay, the amount of one month salary being leave pay is quashed and set aside.

Before winding up, I have noted serious issues to be discussed by this court as found on the court records.

One: Applicant contract with respondent does not show respondent address. Address intended to show where respondent is recruited for the purpose of repatriation if any. This is not proper. It is designed to evade repatriation costs incase contract came to an end or in case of dispute like the present one. Parties to the employment contract should be keen when signing a contract. Equally employer should be honest not to put clause that takes employee rights technically.

Two: Director of Fab cast schools Mr. Joseph J. Runyoro, in his defense filed on 24th October, 2018 **titled Maelezo ya utetezi** at paragraph 2 he spoke serious discriminatory words on women when he said.

Mdai (Mwajiriwa) amekua na tabia ya kutofika mara kwa mara, na kutoa taarifa mara baada ya kurudi kazini. Hata hivyo kitendo cha kuomba likizo ya uzazi bila kufuata sharia kulisababisha ofisi ione kuwa ni ***kawaida ya wafanyakazi wanawake kuacha kazi baada ya kupokea mshahara.*** *Ikumbukwe mwisho wa mwezi wa kwanza* ***wafanyakazi wa kike watatu*** *(rafiki zake)* ***waliacha kazi kwa kuaga Mwalimu Mkuu baada ya kupokea mshahara wa mwezi.*** *Ofisi iliridhika kuwa mdai anamakusudi ya kuacha kazi baada ya kuamisha mtoto wake wa primary na kuacha deni la shule la TZS 85,000/=.*

The above words were spoken negligently by Director of applicant. This is not proper, It is geared at Discriminating woman at work. I believe both women teachers they were not employed because they were women, but rather teachers. Once they commit any misconduct, they do so as any other employee and not as women.

Three:- Respondent first contract dated 1st January, 2013 salary was 200,000 Tshs. After five years in a contract dated 1st January, 2018 to 31st December, 2018 salary was still the same. This is not right. The amount of 200,000 Tshs. remained for 5 years without even light increment. Despite being a private institutions salary cannot be static for five years.

Four: According to defense raised at CMA by Director Fabcast Schools, titled maelezo ya utetezi at paragraph 5.8 raised counter claim to the respondent, as follows.

(i) Areas of school fees Tshs. 85,000 for respondent child

(ii) Areas of rent of the room respondent was using at Fabcast school to the June of 100,000 Tshs per months until respondent removal all her belongings from the room.

Of interesting here is rent rate for one room used by respondent at school premises. Issue of house is not reflected in contract. Assuming it is reflected. The amount of 100,000 per room is imaginable at Kibaha area located outside the city of Dar es Salaam. Respondent salary not disputed is 200,000. Then half of the salary is to be returned to the employer as rent per month. Issue of rent not only not part of the contract, but employer is making teachers at school work for him for almost for free. The little salary of 200,000 per months is to law. Yet half of it i.e. 100,000 be returned to employer as house rent for one room it is astonishing. It is high time employer recognize teachers contribution to the school, society and country at large. Very low salary to the teachers in private schools not only discourage teachers but it is dangerous for the student whom their parents have high expectations as they pay school fees, contrary to public school.

Five: Most employee, just sign contract because of pressing need (**Njaa kali**) without reading in details each clause of a **contract**. Failure to do so, they are exposed to high risk of loosing not only their job but, their dues in case of dispute.

Six: Employee Association should design standard contract for each group of employee, including Teachers working in private sector. They pay contribution to organization for them to be represented not only in case of

dispute, but also in the formation of contract to avoid disputes. This is the duty of Employees associations. They should not only pocket workers contributions, but should be pro-active to guide them in their contract formations.

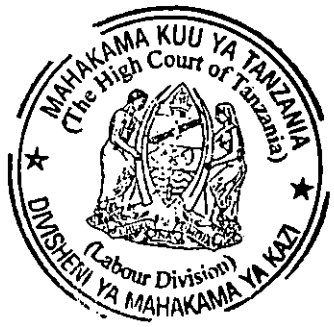
In totality, Revision application allowed to the extent shown.

Z.G. Muruke

JUDGE

26/02/2021

Judgment delivered in presence of Noel Sanga for the applicant and Muhidini Said, respondent personal representative.



Z.G.Muruke

JUDGE

26/02/2021