

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 528 OF 2020

NELLY INVESTMENT CO. LTD.....APPLICANT

VERSUS

OSCA MSUNGU..... 1st RESPONDENT

RAJABU MCHAPWAYA 2nd RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ilala)

(Ng'washi, L: Arbitrator)

Dated 30th October, 2020

in

REF: CMA/DSM/ILA/R.371/16/165

JUDGEMENT

1st & 17th March 2022

Rwizile J.

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA). It is challenging the award of the commission. It is filed by the chamber summons supported by an affidavit of Ramadhan Mdim a Principal Legal Officer.

In fact, the respondents were employed by the applicant as technicians, doing wiring and welding activities. They were employed on oral contracts. Whereas the 2nd respondent was employed on 17th August

2007, the 1st respondent was employed on 1st January 2010. Their employment however ended sometimes in 2012.

The respondents filed a dispute with the CMA claiming for unfair termination. The applicant was condemned to have unfairly terminated them and was ordered to pay compensation of 12 months salaries and other dues.

The applicant not satisfied by the decision of the commission, has now filed this application. She has advanced five grounds for determination. Victoria Mgonja of AAR Attorneys who represented the applicant abandoned the 1st and 2nd grounds, but argued the 3rd and 4th. She also did not argue the 5th one as well, even though she did not declare to have it also abandoned the same. The following are the issues;

- i. That, whether it is legally correct for the honourable arbitrator to consider the dispute was preferred by the complainant challenging unfair termination contrary to section 38(1) of the Employment and Labour Relations Act Number 6 of 2004.*
- ii. That, the arbitrator erred in law and fact by taking into consideration matter not in dispute for termination.*

- iii. That, the arbitrator error in law and fact by decided that the respondent was terminated by the applicant while the respondents absconded.*
- iv. That, whether it was proper for the honourable arbitrator to grant 12 months remuneration without regarding that respondent absconded from work.*
- v. That, arbitrator erred in law and fact by awarding the respondent claims which were out of time*

The issue that was argued first is whether the respondents were terminated. While she noted that the duty to prove fairness of termination lies on the employer under section 39 of the Employment and Labour Relations Act, she argued that termination must be done by the employer. In this matter she argued, the respondents were not terminated. She said, the CMA blindly relied on the evidence of Pw1, as denied by Dw1 and not corroborated by Pw2. She said, the respondents were not terminated. They absconded from their work and the applicant only heard from them through the Commission.

The second point argued is compensation of 12 months remuneration for unfair termination. In her view, section 40 of the ELRA, provides for payment of not less than 12 months upon a finding of unfair termination.

The learned advocate was of the view that since the respondents were not terminated, then the CMA was not justified to order such a compensation. She said so because there was no termination but the respondents absconded from duty. She therefore asked this court to set aside the award.

Nehemia Munga is the Personal Representative, he represented the respondents. He was of the submission that the applicant has the duty to prove termination was fair as per section 39 of the ELRA. He submitted that since the applicant failed to prove abscondment, the CMA was justified to arrive at the finding it did. He said, termination was made verbally and it was stated in CMAF1. Mr. Munga further submitted that section 37(1) (2), section 39 of the ELRA, read with Rule 9 (1) and 5 (perhaps of the Code of Good Practice, GN No. 42 of 2007), be applied. The application, he added has to be dismissed.

From the submission of the parties, the central issue for determination is *whether the respondents were terminated*. Termination of employment in law is the process that can be commenced by either party to the contract for or of employment. Whoever initiates the process therefore is cast with the duty to prove so. The law is clear that if termination occurs at the

instance of the employer, in terms of section 39 is cast with the duty to prove fairness of termination.

In the matter at hand, the applicant's evidence is that the respondents were not terminated. They absconded from duty for a long period of time. They have said, they were verbally terminated. First there is no dispute that the respondents were employees of the applicant. There is also evidence showing that few days before the alleged termination or abscondment, there was theft incidence at the work premises.

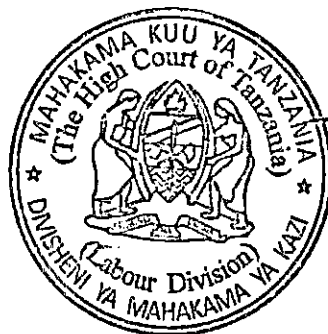
The applicant is under the law required to keep employees' records. This means in my view, it is the employer, and in this matter, the applicant has to prove that the respondents were not terminated. The reasons for so hold is apparent. *First*, the respondents were in need of employment and could not have left the duty station without any conflict with their employer. *Second*, the applicant keeps the records of the employees who attend the duties and has means to monitor that in daily basis. This is important for production. It would sound absurd if the employee does not report on duty and yet no action is taken. *Third*, the applicant was cast with duty to take action against the absconding person, because it is abscondment from duty for 5 days that merits termination. *Fourth*, the applicant had to call evidence to show the action taken, efforts employed

to prove that an employee is absent. She was duty bound to procure evidence to prove the respondents absconded.

For the foregoing, it is clear to me that the applicant did not discharge her duty of proof. The ground therefore fails.

The other ground is on whether it was proper to pay 12 months remuneration. It has been held that the respondents were unfairly terminated. It goes without saying therefore that section 40 of the ELRA plays its role in terms of what to be paid. There is therefore no need to deal with this point at length because payment of damages for unfair termination provides for at least 12 months payment on top of other dues. The applicant has therefore no point in faulting the award on this party.

The CMA awarded 12 months remuneration as compensation, one month notice, gratuity for 2 years, un paid leave for 2 years and a certificate of service. I see nothing to fault. Having said what I have said, I dismiss this application. I make no order as to costs.




A.K. Rwizile

JUDGE

17.03.2022