IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 119 OF 2022

ELIZABETH MASANDEKO ..... 1ST APPLICANT

ANTONY CHARLES NJAU ..... 2ND APPLICANT

MOSES SEVERIN ..... 3RD APPLICANT

VERSUS

CARGO DELIVERY FREIGHTERS LIMITED ..... RESPONDENT

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

(Makanyaga, Arbitrator)

Dated 14th March, 2020

in

REF: CMA/DSM/ILA/125/21/92/21

JUDGEMENT

27th October & 15th November, 2022

Rwizile, J

The applicants have asked this Court to call for records of the Commission for Mediation and Arbitration (CMA) and revise its award dated 14th March 2020.

Facts that paved way to this application can be stated that; the applicants were employed by the respondent on permanent terms. From February, 2020 the respondent failed to pay their salaries. They referred their

dispute to the labour office. The compliance order was issued which directed the respondent to pay their salary arrears.

On 01st July, 2020 they attended a staff meeting. They were informed that the company was facing financial difficulties, where some of its businesses were closed. They were promised to be paid salary arrears and other entitlements. They were also told not to go to work until called. Afterwards, they were paid salary arrears of February to June, 2020. The salaries not paid were from July 2020 to January, 2021. On 20th January, 2021, they were issued with letters of termination due to absenteeism from June, 2020 to 18th January, 2021.

Being aggrieved by termination, the applicants referred the matter to the CMA claiming for arrears of salaries, other terminal benefits and 12 months compensation. Finding it without merit, their dispute was dismissed by the CMA, hence this application.

The application is supported by the affidavit that advanced the following grounds for revision;

i. *Whether the arbitrator erred in law and facts to dismiss the complaint on ground that the complainants failed to prove the claim as per CMA F1 in disregard of the issues framed.*

ii. *Whether the arbitrator erred in law and in fact in holding that the complaint (dispute) before her was not about the unfairness of the termination.*

iii. *Whether the arbitrator erred in law and facts in holding that the complainants did not adduce sufficient evidence to prove their case.*

The hearing proceeded by way of written submissions. The respondent was represented by Mr. Roman Selasini Lamwai learned Advocate.

On the first ground, the applicants submitted that their termination was constructive and was both substantively and procedurally unfair. They stated that they adduced their evidence based on the issue raised as per rule 25(1)(a)(i) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007.

The applicants submitted further that, they were terminated on grounds of absenteeism. In their view, it was the legal duty of the respondent to prove whether termination was fair. In the applicants' view, termination procedure was not followed since they were not afforded with time to be heard before their termination. The applicants had the opinion, that termination was unfair. The case of **Rwaichi John Mosha v Haven Manase Mtui**, Revision No. 77 of 2012 HC (unreported) was referred.

Regarding the second issue, the applicants submitted that the arbitrator erred in law and fact in holding that the dispute was not about unfair termination as part B of CMAF1 shows.

On the third issue, they submitted that section 39 of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] places the duty to the employer to prove if termination was fair. It was state further that the respondent did not adduce any evidence to prove that she had reason to terminate them. The applicants prayed, the application be granted.

In reply, Mr. Lamwai submitted that the applicants' dispute is shown in CMAF1 to be constructive termination. In his opinion, the said dispute was against circumstances provided for under rule 7(1) of Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.

He stated that the applicants had to prove that they resigned from employment which amounted to constructive termination. To support his point, he cited the case of **Kobil Tanzania Limited v Fabrice Ezaovi**, Civil Appeal No. 134 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

According to Mr. Lamwai, parties are bound by their pleadings. It was his submission that the applicants did not allege unfair termination as the

nature of the dispute. It cannot be raised at this stage. He stated further that the case of **Rwaichi John Mosha v Haven Manase Mtui**, Revision No. 77 of 2012 (unreported) held that unfair termination unlike constructive termination each has its own standard of proof. He then prayed, the application be dismissed.

Arguing on second and third issues Mr. Lamwai reiterated what was submitted in the first issue.

In a rejoinder, the applicants reiterated what was submitted in chief. They then stated that the disputable issues proposed by the respondents were about unfair termination.

After perusal of the grounds for revision, I find it suitable to determine *if there was termination*

In my determination, I have to say, there is no dispute that the applicants were employees of the respondent on a permanent contract. On proving whether constructive termination occurred, the applicants stated that they were told to remain at home until when invited to work by the respondent. But when waiting, they received termination letters on ground of absenteeism.

The learned counsel for the respondent stated that constructive termination did not happen because the applicants failed to prove so. Constructive termination is provided under rule 7(1) of G.N. No. 42 of 2007 where it is stated that: -

> *"Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination."*

Based on the law, constructive termination occurs due to the acts an employer leading the employee to resign. In the case of Kobil **Tanzania Limited v Fabrice Ezaovi** at pages 20 and 21, it was held that: -

> *"... in order to answer whether there was constructive dismissal in this matter, we need to answer the questions as posed in Katavi Resort (supra) and Girango Security Group (supra). These are:*
>
> *1) Did the employee intend the employment relationship to end?*
>
> *2) Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?*
>
> *3) Did the employer create an intolerable situation?*
>
> *4) Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*

5) Was the termination of the employment contract the only reasonable option open to the employee"

According to exhibit E3 which is the compliance order dated 29th June, 2020, it shows what the respondents were to be paid. Those were unpaid remuneration (arrears) and were to be given employment contracts.

The applicants' evidence show, they were paid their arrears but they were never supplied with the employment contracts. It was their evidence that later, they were called and given letters of termination due to absenteeism. The respondent on the other side, stated that the applicants were nowhere to be found, that is why they were not supplied with employment contracts. Section 39 of the Employment and Labour Relations provides the duty to prove fairness of termination is on the employer.

The respondent in this case, did not prove how they were searched for and could not be found. It is tragic, at the time of termination, they were easily found and given termination letters due to absenteeism. The question is how did he find them for termination and not to supply them with employment contracts. It is an established fact that absenteeism to be a good ground for termination, the employee has to have absconded for atleast five days. In terms of exhibits E4, A3 and M3 they were

absent from June, 2020 to 18th January, 2021, this is more than 6 months. The respondent did not tender any evidence to prove her efforts to look for them and/or to initiate the proceedings for terminating them.

Section 37 of the Employment and Labour Relations Act provides that for termination to be fair, the employer must have valid reasons and should follow the procedure. I hesitate to hold that such evidence was procured by the respondent.

Exhibit E3, among others directed that the applicants be given employment contracts. Then until termination, they were not given any contracts. This tells a lot, that the respondent had his motive to serve. There is no way the applicants who had a compliance order could sit on it at home until terminated by the respondent. I therefore do not agree that the applicants were terminated for the reasons stated by the respondent. I fault the finding of the CMA and therefore quash the award and set aside all orders therefrom.

In terms of reliefs, since termination was unfair the applicants to be compensated of 12 months salaries. It should be based on exhibit E3, the monthly payment being TZS. 200,000.00. They also should be paid notice, leave, unpaid salary for January, 2021 and severance pay: -

1. Elizabeth Masandeko

Compensation 12 months * 200,000 =	2,400,000.00
Notice	200,000.00
Leave	200,000.00
Unpaid Salary (January)	200,000.00
Severance Pay	807,692.31
Total	**3,807,692.31**

2. Antony Charles Njau

Compensation 12 months * 200,000 =	2,400,000.00
Notice	200,000.00
Leave	200,000.00
Unpaid Salary (January)	200,000.00
Severance Pay	861,538.46
Total	**3,861,538.46**

3. Moses Severin

Compensation 12 months * 200,000 =	2,400,000.00
Notice	200,000.00
Leave	200,000.00
Unpaid Salary (January)	200,000.00
Severance Pay	861,538.46
Total	**3,861,538.46**

In total therefore, the respondent has to pay a total sum of TZS. 11,530,769.23. This being a labour matter, each party has to bear own costs.

X _____

Signed by: A.K.RWIZILE

A. K. Rwizile

JUDGE

15.11.2022