

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 19 OF 2022

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

*(Kiangi: Arbitrator) dated 11th September 2020 in Labour Dispute No.
CMA/DSM/ILA/190/2021/81//2021)*

ANDREW JAMES NSUBISI.....APPLICANT

VERSUS

KUEHNE NAGEL LIMITED.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

31st October 2022 & 4th November 2022

In this Application for revision, the Applicant aggrieved by the award of the Commission for Mediation and Arbitration of Dar es Salaam Ilala [herein after to be referred to as CMA] is moving this court under **Sections 91(1)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i)** of the Employment and Labour Relations Act No. 6 [CAP 366 R.E 2019]; Rules 24(1),(2)(a)(b)(c)(d)(e)(f),(3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, G.N No. 106 of 2007 and any other enabling provisions of the law, praying for the following orders:-

1. That, this Honorable Court be pleased to call for the record of the CMA proceedings and award issued on 30th November 2021. By Hon. Lucia Chrisantus Chacha, Arbitrator.
2. That this Honourable Court be pleased to make any other order that that may appear to be just in the circumstances of the case.

At this point I find worth, to offer a brief sequence of facts leading to this application which is extracted from CMA record, applicant's affidavit counter and the respondent's counter affidavit. The applicant was employed by the respondent as a Customer Service Officer. On 10th May 2021 he was retrenched after being served with the letter of termination issued on 29th April 2021 for the reasons of financial constraints and structural changes in operating the respondent's business. Being dissatisfied with the employer's decision, on 21st June 2021 the applicant referred the matter to the Commission. At the CMA the matter was decided not in his favour after being dismissed on preliminary objection that asserted that the matter was time barred. The applicant herein being aggrieved with the ruling preferred this application for revision.

Along with the Chamber summons supporting the application, the affidavit of the applicants was filed, in which after elucidating the

chronological events leading to this application, the applicant alleged that after the termination letter being issued to him, he resumed to work under Human Resource directives, on such basis he is of the view that he was still employed, till 24th May 2021 when he was restricted to have an access to the work place.

In his affidavit, the applicants advanced two legal issues of revision as stated as follows: -

- a) Whether the dispute was referred to the Commission for Mediation and Arbitration out of time.
- b) Whether the arbitrator was right in dismissing the matter for the reason of being time barred.

In this application parties enjoyed legal services. The applicant was represented by Mr. Madaraka Ngwije, Personal Representative, whereas the Respondent was represented by Mr. Timon Vitalis, Advocate. The Court ordered for the hearing of the matter to proceed by a way of written submissions following the parties' prayer. I thank both parties for complying with the Court's schedule.

Arguing in support of the application regarding reason, Mr. Madaraka submitted that after receiving the termination letter on **10th May 2021** the applicant knew that his employment was terminated improperly. He

added that the Managing Director ordered the applicant to be back to work/job on **13/5/2021** and continue with his position as normal as a Customer Services Officer. To substantiate this assertion, Mr. Madaraka referred to **annexures K4, K6 and K7** working reports after being back from home.

Mr. Madaraka submitted that the applicant continued with his employment in the capacity of Customer Service Officer till **23rd May 2021** when the applicant was told by the HR manager that he should go to the Accountant Officer on **24th May 2021** for his terminal benefit relating to his termination as per annexure K8 (terminal benefit) which shows payment dates.

He added that on **21st June 2021** the applicant filed a labour dispute at the CMA as per annexure A1, which is the CMA Form No.1. According to the applicant the counting of days to ascertain limitation is confined within the days from when he left the office after being reinstated which was **24th May 2021**. Counting from this day of **24th May 2021 to 21 June 2021** when the CMA Form No 1 was received in the CMA, it is within 30 days, which is within allowable time to lodge the application and therefore the matter was not time barred.

As to why the CMA Form No.1 was filled by the applicant that he was terminated on **23/6/2021** instead of **23/5/2021**, Mr. Madaraka submitted that it was a typing error as indicated in the CMA Form No. 1 at page No. 55 and annexure A calculation of claim, shows that the applicant was terminated on **23/5/2021** and not on **23/6/2021** which was written improperly on page 53 of the CMA F1.

Oposing the application on whether the dispute was referred to the Commission for Mediation and Arbitration out of time Mr. Timon made reference to **Rule 10 (1)** read together with **Rule 4 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 [G.N No. 64 of 2007]**, and submitted that the time limit for referring a dispute of unfair termination to CMA is 30 days counted from the date of the alleged unfair termination or the date the employer made a final decision to terminate or uphold the decision to terminate. He is of the view that since the applicant was served with a termination letter on **10th May 2021**, the period of limitation began to reckon on **11th May 2021**. He added that by filing the complaint on **23rd June 2021** there was a delay of 43 days.

Mr. Timon submitted that the termination letter shows that the respondent was paid salary for the month up to 23rd May 2021 in

addition to one Month's salary in lieu of notice of termination and other terminal dues. According to him going to work up to 23rd May 2021 does not prove that the employment was terminated on 23rd May 2021, but only proving that the employee was paid salary up to 23 May, 2021 and was required to work for the respondent up to that date. He further added that the period of limitation prescribed under the **rule 10 (1) of G.N. 64 of 2007** started from the date the notice of termination was served to the applicant and not the date the employee stopped going to the workplace. Supporting his assertion he cited the case of **Nyanza Road Works Limited v. Giovanni Guidon**, Civil Appeal No. 75 of 2020 the Court of Appeal held that:-

'It follows thus that since the CMA ruled that the cause of action arose on 13/05/2014, the respondent was, in terms of rule 10 (1) of the G.N No. 64 of 2007 required up to 13/06/2014 to refer the dispute of CMA'

On whether the proper remedy was to dismiss or strike out the complaint Mr. Timon submitted that the period of limitation prescribed under the **Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN 64 OF 2207)** is, by virtue of **Section 46** of the Law of Limitation Act [Cap 89 R.E 2019] part of the limitation

period prescribed under schedule to the Law of Limitation Act. He added that according to **Section 3 (1)** of the Law of Limitation Act, an action which is time barred is liable to be dismissed and not struck out. According to him, since the complaint was referred to the CMA after the expiry of 30 days period of limitation prescribed under the Law of Limitation Act, the arbitrator rightly dismissed the complaint under **Section 3 (1)** of the Law of Limitation Act. He thus prayed for the application to be dismissed.

Guided by the submissions made by both parties, the applicant's affidavit, the Respondent counter affidavit and CMA record, I draw up one issue for determination which is **whether the applicant have provided sufficient ground for this Court to revise the CMA award.** In approaching the above issue, the grounds identified in the affidavit will be considered one after another. From two grounds of revision raised by the applicant I drew up one issue as to **whether the preliminary objection raised by the respondent at CMA had merit.** In answering this issue, I seek guidance from the provision of **Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) G.N No. 64 of 2007** pursuant to which, disputes in the CMA should be filed within 30 days from the date the employer made final decision to terminate the employment of an employee.

From the parties' submissions, it is not disputed that after receiving the letter of termination on 10th May 2021, the applicant was orally called back to work where he continued working for the respondent until 24th May 2021 when he was paid his terminal benefits. The center of dispute is when should the computation of time begins.

The provision of **Rule 10 (1)** will stand to guide the answer to the debate. For clarity, I will produce the Rule;-

"10 – (1) Dispute about the fairness of termination of an employee's employment must be referred to the Commission within thirty days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate."

From the above provision, 30 days should count from 3 alternate situations which are:

- 1. the date of termination or*
- 2. the date the employer made a final decision to terminate or*
- 3. the date the employer upholds the decision to terminate*

In my view, the first alternative in this matter could not apply because it is not disputed that the applicant was recalled going back to work immediately after receiving the letter of termination. In my view, the act

of allowing the employee to continue with work for a paid period indicates that the final decision to terminate was not reached. The return of the applicant must have reasonable created expectation that the termination letter was no longer effective. The applicant could not have filed the dispute because there was no dispute as he was reinstated. In my view, the final decision came when the applicant was told to vacate the office when he was paid his terminal benefits which is 24th May 2021. This is the date when time reckoned.

Counting the days from 24th May to 21st June 2021, there are 29 days which is within the time limit.

The arbitrator based his decision on the finding that the final decision to terminate the applicant was made on 29th April 2021 and communicated to the applicant on 10th May 2021. She counted the time from 10th May 2021. In my view, the decision of 29th April was not final as the applicant was reinstated and allowed to continue with work. The final decision is the one which caused the applicant's exit from the employment. In my view, the arbitrator erred.

From the above reasoning, it is my finding that the dispute in the CMA was not time barred. As such, the application has merit, and it is allowed. I hereby revise and set aside the decision of the CMA in Labour

Dispute No. CMA/DSM/ILA/190/2021/81//2021 and remit the record back to the CMA and order the matter to proceed with hearing on merits before another arbitrator. It is so ordered.

Dated at Dar es salaam this 4th Day of November 2022



KATARINA REVOCATI MTEULE

JUDGE

4/11/2022