

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

REVISION APPLICATION NO. 180 OF 2022

*(Arising from an Award issued on 29/4/2022 by Hon. Kiangi, N, Arbitrator, in Labour dispute No.
CMA/DSM/ILA/141/21/91/21 at Ilala)*

DOREEN EPAPHRADITO MASSAMU APPLICANT

VERSUS

YETU MICROFINANCE BANK PLC RESPONDENT

JUDGMENT

*Date of last order: 24/11/2022
Date of Judgment: 13/12/2022*

B. E. K. Mganga, J.

On 11th May 2018, respondent employed the applicant as credit officer for unspecified period. In the said unspecified contract, parties agreed that applicant will be paid TZS 600,000/= as monthly salary and TZS 39,000/= as weekly transport cost. From the date of entering into employment relation to the mid of January 2019, the parties peacefully enjoyed their employment relationship. It was only on 18th January 2018 when employment relationship between the parties turned into bitter because respondent served applicant with a warning letter on ground that

she did not meet targets. The situation did not end there. On 4th August 2020, respondent served applicant with a letter requiring the latter to go on leave without pay from 12th August 2020 and required to report back in office on 2nd January 2021. It is undisputed fact that Applicant went on leave without pay and thereafter filed a dispute before the Commission for Mediation and Arbitration henceforth CMA claiming to be paid salary for 6 months she was ordered to go on leave without pay. It is said that applicant reported back in office on 12th January 2021 as she was ordered by the respondent, but at that time, the dispute she filed at CMA was still pending. It is alleged that upon her report back to office from the said leave without pay, respondent did not give access to the applicant to enter into office and perform duties. Is further alleged that respondent directed applicant to withdraw the dispute she filed at CMA as a condition to be given access to office and to be assigned duties. It was also alleged that applicant did not succumb to the pressure of the respondent hence she refused to withdraw the dispute and further that respondent continued not pay her salary.

It is said that applicant felt that respondent made employment intolerable, as a result, on 3rd February 2021, she served respondent with a

letter complaining that the latter has made her employment unbearable for being denied salary and access to office. It is said that despite the said letter, nothing changed. On 22nd February 2022, applicant served respondent with a resignation letter allegedly that respondent made employment intolerable. Having resigned, on 24th February 2021, applicant filed Labour dispute No. CMA/DSM/ILA/141/21/91/21 at CMA complaining that respondent constructively terminated her employment. In the Referral Form(CMA F1), applicant indicated that she was claiming to be paid TZS 10,286,076/= . It is said that, the arbitrator issued an award in favour of the applicant in the dispute she filed at CMA claiming to be paid six months' salary she was ordered by the respondent to go on leave without pay.

Having heard evidence and submissions of the parties in the dispute relating to constructive termination, the subject of this application, on 29th April 2022, Hon. Kiangi, N, Arbitrator, issued an award dismissing the dispute filed by the applicant on ground that respondent did not make employment intolerable hence not entitled to terminal benefits. In the same award, the arbitrator found that applicant was not paid salary for

January 2021 and 22 days worked for February 2021. Based on those findings, arbitrator awarded applicant to be paid TZS 1,071,428/= only.

Applicant was aggrieved by the said award hence this application for revision. In her affidavit in support of this application, applicant raised two grounds namely:-

- 1. That, arbitrator erred in law and fact in holding that applicant did not prove that respondent made employment intolerable while there was both oral and documentary evidence in proof thereof.*
- 2. That, arbitrator erred in law and fact in rejecting to admit into evidence emails without justifiable reasons.*

In resisting the application, respondent filed the counter affidavit sworn by Samweli Gikaro Wambura, her principal officer.

When the application was called on for hearing, Mr. Edward Simkoko from TASIWU, a Trade Union, appeared and argued for and on behalf of the applicant while Frank Kirian, Advocate appeared and argued for and on behalf of the respondent.

Arguing the 1st ground, Simkoko submitted that arbitrator erred not to hold that respondent made employment intolerable leading to resignation. He went on that; respondent ordered the applicant to go on leave without pay for six months as per exhibit P4. He added that, while under leave without pay, applicant filed Dispute No.

CMA/DSM/ILA/755/20/396 claiming her six months salaries. He submitted further that, on 19th November 2021, arbitrator issued an award in favour of the applicant ordering respondent to pay the said six months' salary. Simkoko submitted further that, after six months without payment, applicant reported at work but respondent refused to pay her salary. Due to that failure to pay salary, applicant wrote a letter(exhibit P6) notifying respondent her intention to resign and in fact, she resigned on 22nd February 2022 as per resignation letter(exhibit P7). He went on that, in the award, the arbitrator found that respondent was not paid salary, which is why, she ordered applicant be paid salary. Simkoko submitted that, by an email, applicant was denied access to office and that, on 04th August 2020, applicant was removed from health insurance benefits. Simkoko cited the case of ***Kobil Tanzania Ltd V. Fabrice Ezaovi***, Civil Appeal No. 134 of 2017 (unreported) to support his submissions that respondent made employment intolerable hence constructive termination.

On the 2nd ground, Mr. Simkoko submitted that arbitrator erred for not admitting emails as exhibits in favour of the applicant despite the fact that all requirements for admission of the said emails as exhibit were met. Simkoko concluded his submissions by praying that CMA award be quashed

and set aside and order respondent to pay applicant a total of TZS 10,286,076/=being payment for 12 months compensation, leave, severance and notice.

Opposing the application, Mr. Kirian, learned advocate for the respondent, submitted on the 1st ground that, it is not disputed that applicant was ordered to go on leave without pay due to Covid 19 from 18th August 2020 to 02nd January 2021. He added that, a mere fact that applicant was ordered to go on leave without pay was not a sufficient ground for resignation. In his submissions, he conceded that due to nonpayment of salary, applicant filed a dispute at CMA. Counsel for the respondent was quick to submit that, in the said dispute, applicant did not complain that employer has made employment intolerable. Counsel for the respondent submitted further that, the arbitrator issued an award that applicant was entitled to be paid salary even if she was on leave. He added that, the said award was issued after applicant has resigned and that applicant filed execution application which was settled.

It was submissions of Mr. Kirian, learned counsel for the respondent that, applicant resumed at work on 02nd January 2021 and that, she filed the dispute at CMA on 24th February 2021. He went on that, the arbitrator

awarded applicant to be paid one month salary and 22 days. Counsel for the respondent also submitted that applicant resigned on 22nd February 2021. In his submissions, counsel for the respondent conceded that applicant was not paid salary for January 2021. Counsel for the respondent was quick to submit that Respondent did not pay applicant salary for January 2021 because a dispute was pending at CMA wherein applicant was claiming to be paid salary for the time she was on leave without pay. He added that, applicant was only not paid salary for one month and that, that did not amount to intolerable. Mr. Kirian submitted further that, applicant did not exhaust local remedies and that she was supposed to disclose in her letter, the name of the person who made employment intolerable for the employer to act. Counsel went on that, in her resignation letter, applicant complained against past events that were being handled by CMA and not issues after resumption of Office.

Mr. Kirian submitted further that, on 19th January 2021, applicant attended a training that ended on 23rd January 2022. He added that, applicant's resignation letter is dated 03rd February 2021 after she has just arrived from training. Counsel for the respondent submitted further that, it was not known whether, the complained of matters happened during

training or at work. He added that, respondent had good intention, which is why, she paid applicant TZS 30,000/= per day while attending training. Counsel for the respondent submitted that **Kobil's case**(supra) cannot apply because circumstances in the application at hand did not amount to intolerable. Counsel for the respondent cited the case of **JHPIEGO V. Odilia Massawe**, Revision No. 210 of 2021, HC (unreported) to support his submission that for the court to hold that there was constructive termination, employment must be intolerable. He added that applicant did not give respondent a room to rectify the situation that applicant found intolerable.

Responding to the 2nd ground, counsel for the respondent submitted that, the alleged email (i) was not authored by the applicant, (ii) was not directed to her and (iii) that she was not the custodian of the said email. Counsel submitted further that; applicant did not comply with the provisions of the Electronic Transaction Act No. 15 of 2015. He concluded his submissions praying that the application be dismissed for want of merit.

In rejoinder submissions, Mr. Simkoko reiterated his submissions in chief and added that, upon resumption at work, applicant was not paid her six months salaries.

I have examined the CMA record and considered submissions made on behalf of the parties and wish to dispose this application by starting with the 2nd ground. It was submitted by Simkoko for the applicant that all requirements of admitting an email as electronic evidence was duly complied with but the arbitrator refused to admit it. On the other hand, Mr. Kirian, learned counsel for the respondent, submitted that requirements of the law were not complied with, hence the email was properly rejected because applicant was neither the author, addressee nor custodian. I have carefully examined evidence of Doreen Epaphradito Massamu (PW1), the applicant and find that no foundation was laid by the applicant for the said email to be admitted. Prior to the prayer to admit the said email into evidence as exhibit, PW1 did not state as to how she came into possession of the said email. As it was correctly submitted by counsel for the respondent, applicant is neither the author, addressee nor custodian. As I have pointed out, applicant did not explain as to how she came into possession of the said email though the message therein is that; the author prevented applicant access to office. In those circumstances, it cannot be said that applicant was competent to tender the said email though it was relevant in the question in issue. It was open to the applicant to call

another witness who was competent to tender it as evidence. That said, I am of the view that criticism against the arbitrator for rejecting the said email is unjustifiable. I therefore dismiss that ground for being unmerited.

It was submitted by Simkoko on behalf of the applicant that respondent made employment of the applicant intolerable. On the other hand, counsel for the respondent submitted that applicant did not prove that respondent made employment intolerable. I have examined evidence of the parties and I unreservedly hold that respondent made employment of the applicant intolerable. That conclusion is supported by unshaken evidence of the applicant(PW1) as explained hereunder.

In her evidence, Doreen Epaphradito Massamu(PW1) testified that her employment with respondent commenced on 11th May 2018 when she secured employment from the respondent for unspecified period. In her evidence, PW1 testified that in the said unspecified period of employment she was employed as credit officer with monthly salary of TZS 600,000/= and TZS 39,000/= as allowance as evidenced by employment offer letter (exhibit P1). PW1 testified further that, on 2nd July 2020, she signed performance contract (exhibit P3) in which she was required to improve her performance. That, on 4th August 2020, she was served with notice of

leave without pay (exhibit P4) commencing on 12th August 2020 ending on 2nd January 2021. PW1 testified further that on 2nd January 2021, she reported at headquarters to resume work and that she was directed by Joyceline Kobero(DW3), the Human Resources officer to write a letter that she had reported and that she complied as evidenced by exhibit P5. She went on that, on 4th January 2021 she reported at her duty station but was not assigned duties and that on the same day, her supervisor received message from the Human Resources officer(DW3) that s/he should not accept applicant because her position was filled by a newly recruited employee.

It was further evidence of PW1 that from 21st January 2021 to 23rd January 2021 she attended training with other participants who were paid TZS 30,000/= per day for 3 days but she was not paid. That, after training, she was directed to report at respondent's Headquarters of which she obeyed but she was given a condition by Joyceline Kobero (DW3), the Human Resources Officer, that in order to keep her employment, she should withdraw the dispute she filed at CMA claiming salaries for 6 months. She went on that she was thereafter required to report at her duty station and obeyed but her supervisor refused to allow her access to office

on ground that the Human Resources (DW3) sent an email to her supervisor to that effect. PW1 testified further that, she felt that respondent had made her employment intolerable, as a result, on 3rd February 2021 she wrote a letter to the respondent (exhibit P6) complaining that denial of salary for six months and denial of access to office made employment intolerable but respondent insisted that she was not permitted to enter into office. In her evidence, PW1 also testified that she worked with the respondent for two years and 3 months. She concluded her evidence in chief praying to be paid TZS 7,200,000/= being 12 months' salary, TZS 323,076/= being severance pay, TZS 273,000/= being allowances, TZS 1,200,000/= being salaries for January and February 2021, TZS 90,000/= allowance for attending training all amounting to TZS 10,286,076/=.

While under cross examination, PW1 testified that during Covid 19 pandemic, she was served with a warning letter(exhibit D4) because she failed to meet targets and gave justification that there were no many customers. She mentioned Joyceline Kobero(DW3) as the person who directed her to withdraw the dispute at CMA relating to nonpayment of

salary for six months. She further testified that the said dispute was decided in her favour by Hon. Faraja, arbitrator.

On the other hand, Kassim Fadhili Juma (DW1) testified in chief that from 2018 to 2019, applicant performed poorly, as a result, she was served with a warning letter(exhibit D3). While under cross examination, DW1 admitted that employment contract (exhibit D2) does not provide, as a condition, that upon failure to meet the target, applicant will be required to go on leave without pay. He admitted further that, a punishment for failure to meet target is not leave without pay. DW1 testified further that, he doesn't know how applicant survived without being paid salary for 6 months.

In a contradictory way, Samwel Gikaro Wambura(DW2) testified that employees including applicant were sent on leave with pay due to the effects of Covid 19 pandemic that led to the decline of customers hence economic hardship. He went on that, respondent cut off expenditures including nonpayment of allowances, phone, faire, and tendered Financial Statement as exhibit D4. While under cross examination, DW2 testified that employees who failed to meet targets were sent on leave without pay.

Therefore, according to DW2, applicant was sent on leave without pay due to poor performance.

On her side, Joyceline Kobero (DW3), a lawyer of the respondent, who, initially worked as Human Resources officer, simply tendered resignation letter written by the applicant and had no much to say against applicant. But, while under cross examination, she testified that supervisor of the employee who fails to meet target is required to discuss with the employee and plan how to improve performance. DW3 admitted that on her part, she cannot manage to run her life for 6 months' without salary and went on that she doesn't know if respondent made employment of the applicant intolerable.

It is my view that, from the facts of this application, it is undisputed that applicant was not paid salary for six months' and was denied access to office by the respondent after six months' leave without pay, made employment of the applicant intolerable. Admission by DW1, DW2 and DW3 that it is difficult to run personal life without being paid salary for six months, in my view, brings home and dry the provisions of rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and section 36(a)(ii) of the Employment and Labour Relations

Act [Cap.366 R.E 2019] and what was held by the Court of Appeal and this court in the case of *Kobil Tanzania Limited vs Fabrice Ezaovi*, Civil Appeal No.134 of 2017 [2021] TZCA 477, *Mrisho Omary & Another vs Raheem Nathoo*, Civil Appeal No. 354 of 2019 [2022] TZCA 215, *Tanzania Cigarette Company Limited vs Hassan Marua*, Civil Appeal No.17 of 2018 [2019] TZCA 569, *HJF Medical Research Inc vs Mergitu Ebba*, Rev. Appl No.257 of 2021 [2022] TZHCLD 82 that respondent made employment of the applicant intolerable leading to resignation of the applicant hence constructive termination. It is a cardinal principle that whatever we don't want to be done unto us, we should not do to others or we should not unnecessarily force other people to carry the luggage that we cannot accept to carry. From the evidence of the respondent namely DW1, DW2 and DW3 testified that they cannot manage to run their personal life without difficulty without being salary for six months. That evidence, in my view, was an admission that applicant was in hard situation meaning that employer made her employment intolerable. It is my further opinion that denial of access of failure to be allowed to perform duties was an indication that respondent was creating environment for the applicant to give up and leave employment. worse

enough, respondent forced applicant to withdraw the dispute she filed at CMA to claim payment of her salaries but she was ready to fight till the last drop of her blood.

It is my further opinion that, having formed an opinion to terminate the applicant, respondent came up with the idea of poor performing and unpaid leave. Unfortunately, whoever gave that advice to the respondent was wrong because it cannot serve the intended purpose. I am of that opinion because respondent did not comply with the conditions set out under the provisions of Rule 15(1), 17(1)(a), (b), (c), (d), (e), (2) and (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 relating to fairness of reason based on poor performance. It was not proved by the respondent that she applied reasonable standard to measure performance of the applicant and further that applicant was given an opportunity to improve performance. More so, respondent did not comply with the provisions of Rule 18(1), (2), (3), (4), 5(a) and (b), (6), (7), (8) and (9) of GN. No. 42 of 2007 (supra) relating to fairness of procedure for termination of an employee based on poor performance. It cannot be said that ordering applicant to go on leave without pay was intended to improve her performance. The question is,

how could have applicant improved performance without working? The reason that applicant failed to reach targets which is why she was ordered to on leave for six months' without pay of itself is contrary to the law because that is a punishment and not the way to improve performance of the employee.

For the foregoing, I allow the application, quash, and set aside the CMA award. I further hold that applicant is entitled to be paid total of TZS 10,286,076/=being payment for 12 months compensation, leave, severance and notice.

Dated in Dar es Salaam on this 13th December 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 13th December 2022 in chambers in the presence of Edward Simkoko, from TASIWU, a trade Union, for the Applicant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE