

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**LABOUR DIVISION**  
**AT BUKOBA**  
**LABOUR REVISION NO. 03 OF 2022**  
**BETWEEN**

**ANASTAZIUS MTAHYA.....APPLICANT**

**AND**

**STEVEN ACADEMY CO. LTD.....RESPONDENT**

**JUDGMENT**

**Date of Last Order: 24/08/2022**

**Date of Judgment: 02/09/2022**

**A. E MWIPOPO, J**

Anastazius Mtahya was employed by Steven Academy Co. Ltd in 2017 as Accounts clerk. The employment relationship between them was good for almost four years. Applicant asserted that in the year 2020 he was not paid the salary for May, June and November. When he claimed for the said salary arrears he was told to remain at home and to come back on 30.03.2021 to take his salary arrears. He visited the office on 30.03.2021 where he was paid the salary for November, 2020 and he signed in the payroll. He said that there after he was not paid anything or be called to continue with the work.

The applicant decided to refer a labour dispute to the Commission for Mediation and Arbitration at Bukoba (CMA) and it was registered as CMA/BMC/16/2021/10/2021/ARB. The Commission unsuccessfully mediated the

parties before proceeded with arbitration. After hearing the evidence from both parties, the CMA delivered its award on 04.03.2022. In the said award the CMA found that the applicant was not terminated by the respondent and it dismissed the labour dispute. The applicant was not satisfied with the decision and he filed the present revision.

The application is instituted by Notice of Application, Chamber Summons and the Affidavit in support of the application. The respondent opposed the application and filed Notice of Opposition and Counter Affidavit. In the applicant's Chamber Summons, the applicant is praying for the orders of the Court in the following terms:-

- 1. That, the Honourable Court be pleased to set aside arbitration award which was improperly procured.*
- 2. Any other relief(s) the Court deems just and equitable to grant.*

On the hearing date both parties were present in person and both had legal representation. The Applicant was represented by Mr. Sicarius Bukagire, advocate, whereas the Respondent was represented by Ms. Gisela Maluka, advocate.

The counsel for the applicant submitted in support of the revision and he said that in the CMA Form No. 1 the applicant prayed for remedies for unfair termination but in the arbitration the arbitrator shifted the burden of proof to the applicant. The arbitrator based his decision on the evidence of the employer that the employer through a letter asked all employee to bring original academic certificate for the purpose of verifying them and after such order the applicant

absconded from work. There is no proof that the applicant absconded from employment or that the applicant was served with the letter requesting to submit to the employer the academic certificate. The said letter from the employer is the basis for the holding in the arbitration award that the applicant absconded from employment. The employer alleged that the said letter was served to the applicant through court broker, but this proves that the said evidence is concocted as it is impossible for an employee who has been in employment for almost 4 years to be served with a letter by the employer through a court broker.

The counsel further said that there is a contradiction on the position which the applicant was employed. The applicant applied for the post of clerk, but the respondent said that the applicant was a treasurer and also said the applicant was a teacher. As a result, the applicant was working without any written contract and was given different works as there was no job description. The confusion affected the commission in deciding whether there was unfair termination or not.

He added that the arbitrator erred not to consider the evidence of the applicant that the employer told him to stay at home until his salaries, which he was claiming, had not been paid. It was the duty of the respondent as employer to prove that termination was fair and in the evidence on record the employer failed to prove so. The evidence of DW6 is not sufficient to prove that DW6 and the applicant were served with the letter asking them to submit the academic certificate which was relied upon by the CMA in its decision as the proof that the applicant absconded from work.

In her response, the counsel for the respondent said that the applicant terminated himself from work after he decided to abscond from work. The applicant alleged before the CMA that he was terminated after he claimed to the employer for salary arrears for the month of May, June and September, 2020, but this is not true. The respondent is the company which has several activities including the school. DW1 testified that on 12.03.2021 a letter - Exhibit P1 was written to employees including those from account office and the employer used court broker to serve all employee. The court broker after serving the latter to the employees he swear an affidavit before advocate Bukagire who is the counsel for the applicant and the said affidavit was handled to the employer. There is no dispute that other employees from the accounts office were served with employers latter asking them to submit academic certificates. The absence of dispatch book does not mean that the applicant was not served with a latter to submit academic certificate. The respondent proved the service of the said letter through affidavit of court broker. The applicant, instead of submitting the academic certificate he filed labour dispute before the CMA alleging that he was unfairly terminated.

The counsel for the respondent further said that applicant's called as witness motorcycle rider (bodaboda) who testified that the applicant told him that he has no money to pay him as he was not paid salaries for the month of January, February and March 2021. This evidence contravene his testimony and it show that the applicant is not telling to truth. The issue before the CMA was whether

the applicant was terminated from employment. The respondent submission is that the applicant was not terminated but he absconded himself from employment.

In his brief rejoinder, the counsel for the applicant said that the fact that the applicant claimed for payment of four months and only one month salary was paid proved that what was stated by the applicant that he was asked to stay home until he will be called to receive his salaries.

From the submissions, the Court is called upon to determine the following issues:-

1. Whether the applicant employment was terminated by the respondent.
2. If the answer to the 1<sup>st</sup> issue is affirmative, whether the reason and procedure for termination was valid and fair.
3. What remedies are entitled to both parties.

Commencing with the first issue, the applicant asserted that he was terminated from employment by the respondent. The reason for saying he was terminated from employment by the respondent is that the respondent told him to stay home until he is paid all money he was claiming for his salary arrears. After staying home for some time without being paid his salary arrears or being called back to work he knew he was terminated and he referred a labour dispute in the Commission. In response, the respondent said that the applicant absconded from work from 12.03.2021 and they did not see him until the respondent appeared in the CMA after being summoned.

The Employment and Labour Relations Act, Cap. 366 R.E. 2019 provides in section 36 the meaning of termination of employment of an employee. The section reads as follows hereunder:-

*" 36. For purpose of this Sub-Part –*

*a) "termination of employment" includes -*

*i. a lawful termination of employment under the common law;*

*ii. a termination by an employee because the employer made continued employment intolerable for the employee; and*

*iii. a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;*

*iv. a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave;*

*v. a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re employ one or more of them."*

From above cited section, termination of employment contains meaning provided in the above cited section. The absenteeism of the employee from work as it was alleged by the respondent is not among the meaning of the termination of employment provided by the law.

The applicant testified before the CMA that he was employed by the respondent on April, 2017. On 23.03.2021 he did write a letter to the respondent claiming for salary arrears for the month of May, June, September and November, 2020 making the total salary arrears at Tshs. 800,000/= . He said that the owner

of the school (DW1) asked him to go home and come back on 30.03.2021 and when he reported on the respective date he was paid a salary for November, 2020 and he signed in the payroll. He added that until he was testifying on 10.02.2022 he was not paid his salary arrears for three months.

Looking at this testimony by the applicant there is nothing which shows that the respondent terminated the applicant's employment. The applicant said it was on 23.03.2021 when he claimed for his 4 months' salary arrears to the employer and he was promised to be paid by 30.03.2021. But on the promised date he was paid one month salary and he was told that the remaining salaries will be paid when the employer have it. There is no evidence whatsoever to show that the respondent told him the he was no longer employed. In the submission by the counsel for the applicant he said that the applicant referred the dispute to the CMA after long time passed without being paid his salary arrears and without being told to go back to work. However, in the applicant testimony he did not say that the respondent asked him to stay home until the respondent have his whole salary arrears. There is no evidence showing that the respondent asked him to stay at home until he was called to report back to work.

I perused the CMA Form No. 1 available in the record and it show that the applicant referred the dispute to the CMA on 03.04.2021. This is just 4 days from 30.03.2021 the date which the applicant said in his testimony that he was paid one month salary arrears for November, 2020. This evidence is conflicting the applicant's submission that he referred the dispute to the CMA after long time

passed without being paid his salary arrears. In the said CMA Form No. 1 the applicant asserted that the dispute arose in 23.03.2021 when the respondent was reluctant to pay his salary arrears despite several reminders. But, in his testimony the applicant said he reminded the respondent to pay his salary through a letter on 23.03.2021 and on 30.03.2021 he was paid one month salary arrears. Thus, the applicant's evidence is contradictory and there is no evidence to prove that the applicant sent several reminders for payment of his salary arrears to the respondent or that the respondent terminated him from the employment.

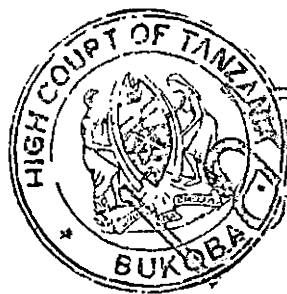
The counsel for the applicant said that the CMA shifted the burden of proof to the applicant in the dispute for unfair termination, despite the fact that in the CMA Form No. 1 the applicant stated that the dispute is for unfair termination. But, in his testimony the respondent denied to terminate applicant's employment. This means the issue before the CMA was not over fairness of termination of the applicant's employment, but rather whether the applicant was terminated from employment by the respondent or not. In this issue, the applicant being the one who assert that he was terminated from employment by the respondent he was the one with the duty to prove the facts he want the CMA to believe. For that reason it was upon the applicant to prove that he was terminated by the respondent from employment. This is in accordance with section 110 (1) (2) and 111 of the Evidence Act, Cap. 6 R.E 2019.

As I stated above herein, there is no evidence whatsoever to prove that the applicant's employment was terminated by respondent. What the applicant has



said in his testimony at lengthy is that the respondent has not paid is salary arrears. The applicant went to the CMA to lodge a dispute for unfair termination instead of his claims for salary arrears. The CMA properly held in its award that there was no termination of the applicant's employment according to the law. The similar position was stated by this Court in the case of **Fey Stambuli vs. Rudys Hotel**, Revision No. 570 of 2016, High Court Labour Division at Dar Es Salaam, (unreported). Thus, I find that the answer to the first issue is negative. As the answer to the first issue is negative, there is no need to determine the remaining issues.

Therefore, I find that the application for revision has no merits and it is hereby dismissed accordingly. This being a labour matter, each party shall take care of its own cost.



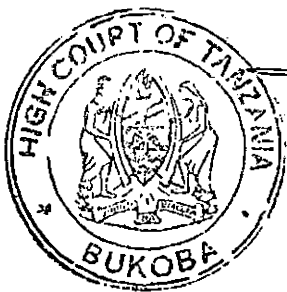
*[Handwritten signature of A. E. Mwipopo]*

**A. E. Mwipopo**

**Judge**

**02/09/2022**

**Court:** The judgment was delivered today in the presence of the applicant and the counsel for the respondent.



*[Handwritten signature of A. E. Mwipopo]*

**A. E. Mwipopo**

**Judge**

**02/09/2022**