

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 109 OF 2020

PRAISEGLORY KILEO..... APPLICANT

VERSUS

EARTHWAYS LOGISTICS LTD RESPONDENT

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

(Amos: Arbitrator)

Dated 7th September 2018.

in

REF: CMA/DSM/TEM/28/2017/41/2017

JUDGEMENT

28th February & 31st March 2022

Rwizile J

This application is for Revision. It emanates from the decision of the Commission for Mediation and Arbitration (CMA). It is on record that parties have been locked into this litigation since 2017. The applicant was employed by the respondent as the clearing and forwarding officer. Sometimes at the end of 2016, their employment relationship did not appeal. The applicant alleges was terminated by design since she was given leave and when on leave, she was notified by co-worker that her post had been filled by some other person.

The applicant then filed a dispute at the CMA, claiming for benefits due to unfair termination. After full hearing, the CMA found that there was no termination proved but ordered the respondent to pay the applicant the sum of 400,000/= being salary arrears. She was aggrieved by the decision, hence this application.

She advanced five issues for determination by this court. At the oral hearing before this court, Mr. David Andindile advocated for the applicant, and argued the following three issues;

- i. Whether the honourable arbitrator erred in law and fact by holding that the applicant contradicted herself on where she got information of her termination.*
- ii. Whether the honourable arbitrator erred in law and facts for not considering the evidence as a whole*
- iii. Whether the arbitrator erred in law and fact not resolving the date of employment of the applicant.*

Submitting on the first issue, it was argued that the Commission was not right in holding that the applicant failed to produce evidence on how he got information about the respondent employing another person to take her position. He said, the evidence was not properly recorded.

He argued that if evidence was recorded in totality, then crucial issues were not considered by the arbitrator. In his view, there is no reason why the applicant was given the so-called voluntary leave. He said this kind of leave does not exist in law. Further he argued that since the information that led to her absence at the work place was obtained from Hussein, he could have been called to testify. The learned counsel sought support in the case of **Hemed Said vs M Mohamed** [1984] TLR 114. In his view, since he did not call him to testify, negative inference must be drawn against the respondent. He further said, the evidence of both Dw1 and Dw2 are in conflict on material issues.

When arguing the second point, it was pointed out that leave terms are governed by section 29(1) of the Employment and Labour Relations Act (ELRA). He said, leave must be paid, whether maternity or otherwise. The applicant, he insisted was not paid and that she has never taken any leave and so never paid for it. He was of the view that the applicant is therefore entitled to terminal benefits as section 44(1) (a) to (e) of ELRA clearly states.

On the last issue, it was stated that the arbitrator did not rule out as to when the applicant was employed since it was in dispute. In his view, it is the duty of the employer to keep records of the employees as under

section 15(a) to (h) of ELRA. This, he added, has not been proved since the employer is cast with this duty. Therefore, the learned counsel concluded that, the applicant was employed in 2013 as she testified. He prayed, the application be granted.

On party of the respondent, who was represented by Mr. Deogratius Mbasu, it was submitted that, the applicant was employed in 2015. It was his submission that D1 shows the respondent was founded in 2016 and so there was no employment before that year.

As to the second issue, it was submitted that leave should be pleaded and proved and it the employee cast with that duty to prove which was not discharged. He argued, the applicant did not prove she had taken maternity leave. The learned advocate further submitted that the evidence of Dw1 and Dw2 did conflict and if there was any such a conflict, it did not go to the root of the matter. What is clear, he said, is that their evidence showed the applicant was not terminated but rather walked from her employment and never came back. He was of the view that the respondent's evidence measured at the balance of probability is heavier than that of the applicant and so this application has to fail.

Having examined the submissions of the parties, it is clear to me that even though the application is pegged on four argued issues, they can all be

determined together in two issues; *whether the applicant was terminated and if yes, then was termination fair? And to what reliefs are the parties entitled?*

The commission was clear that the applicant was not terminated. To be able to appreciate if this finding is correct, the evidence of the parties clearly shows. To begin with, is the evidence of Frank Minja (Dw1). He told the Commission that the applicant was employed on 15th December 2015 as clearing and forwarding officer. It is not therefore in dispute that the applicant was employed by the respondent. Since there is no written contract, it is therefore with no doubt that there was an oral one. Dw1 was clear in his evidence that at the end of 2016, the applicant was given 'permission' (*ruhusa ya hiari*). This was done after the applicant failed to perform her duties as she used to, and for being late at work place. As she left the office, she never came back only to be called at the Commission for this case.

It is therefore apparent from his evidence that the applicant was not in duty for the period not known. His efforts to trace her did not bear fruits. He admitted to have not paid her November salary and some arrears the sum of TZS 300,000.00. Saul Samuel, testified as Dw2.

His evidence in material terms states that he was employed in 2015 before the applicant was employed. Like Dw1, he too, states that the applicant was not terminated instead, she walked away and never came back to officer.

Looking at his statements closely one finds clear that there was a conflict between the applicant and the respondent.

Dw1 said he permitted her to leave the officer due to failure to perform her duties and for late coming to work. Dw2 on his party says, she had developed a bad language to customers and was not in good terms with fellow employees. According to him, the applicant left the office and never came back, while Dw1 said she permitted her to leave the office. In my considered view there is conflict of evidence as submitted by the applicant's counsel.

To answer the first issue therefore, it is clear to me that in this, the respondent is not cast with the duty to prove that there was fair termination. In the circumstances of this case the employer is also cast with the duty to prove that she did not terminate her.

Based on her evidence, the applicant told the commission that she was told by the director to go home for unspecified period. She was informed

after two weeks that her job was taken by someone else. This happened after she had a conflict with Dw2. It is from this evidence that this court has the view that there was a conflict between the two competing sides and there is a great possibility that the applicant was terminated. In the absence of clear evidence as to why the applicant left the office and in the event the evidence of Dw1 and Dw2 comes into conflict, I am of the firm view that the applicant was terminated.

Having so answered the issue, it is important to note that there is no need to deal with whether or not termination was fair. In the obtaining circumstances, termination done in the design stated cannot, in any way be fair. Therefore, the applicant was unfairly terminated.

Before going to last issue, it is important to first examine the dispute of the when the applicant was employed and the amount of salary paid per month.

It is the law as submitted that the employer under section 15 of ELRA, is cast with the duty to keep records of the employees. By construction therefore, it was the respondent cast with the onus of proving when the applicant was employed and the amount of remuneration she earned. The applicant claimed was being paid the salary of TZS 310,000.00 per month

while the respondent claimed she was paid TZS 250,000.00 plus 30,000/ for food. Therefore, there is a dispute on the terms of the contract.

To resolve this point, it will be taken that the applicant has a good case against the respondent. Under section 15(6) of ELRA, the respondent had the duty to prove the terms of the agreement. There is no proof whatsoever that has been tendered to prove she was not only employed in 2015 but also how much she was earning per month. It follows therefore that in the absence of written proof as to the terms of the employment, this court takes it that the respondent did not discharge her duty. I agree with the applicant's submission therefore that the applicant was employed in 2013.

It was submitted by the respondent's counsel that the company was established in 2016 and so could not have employed the applicant before that time. This point is not backed by evidence. Dw1 told the court that the respondent company was registered on 9th May 2012, but it started its operations in 2016. This, in my view may not be true. When cross-examined Dw1 told the Commission that the same was in operation in 2016 and was just dormant from 2012. The only reason tendered was that they got a SUMMTRA certificate in 2016. The operations started on 28th January 2016. But at the same time, Dw2 says the applicant was

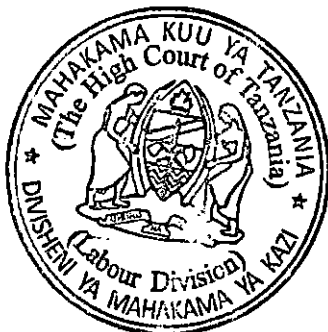
employed on 15th December 2015, that means days before the company started operations. I do not think, this evidence is plausible.

I therefore hold that the applicant was employed in 2013 as she alleged and was paid the salary of TZS 310,000.00 per month. I therefore allow the application.

Lastly, since it has been held that the applicant was terminated and it was unfair termination, she is therefore entitled to the following reliefs;

- i. Under section 40 (1) (c) of ELRA, she is to be paid 12 months remuneration. Her monthly salary is fixed at TZS 310,000.00 per month
- ii. One month's notice and
- iii. Certificate of service.

The applicant did not prove anything in terms of annual and maternity leave. It is the law that such claims should not only be pleaded, but also be proved, the same cannot be awarded. The application is allowed without costs.



A.K. Rwizile

JUDGE

31.03.2022