IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 378 OF 2020

(Originating from Labour Dispute No. CMA/DSM/ILA/406/900/266)

BETWEEN

TUSIIME HOLDINGS (T) LTD.....APPLICANT

VERSUS

MARIA CHOROBI..... 1ST RESPONDENT

ALLEN ISAYA..... 2ND RESPONDENT

JUDGMENT

Date of Last Order: 15/15/2021

Date of Judgment: 25/01/2022

I. ARUFANI, J.

The respondents herein were employed by the applicant on different dates as teachers on fixed term contracts. The first Respondent started her contract of employment with the applicant on January, 2008 and the last contract was for two (2) years commencing from 10th May, 2018 and intended to end on 10th May, 2020. The second respondent was employed under a fixed contract of one (1) year from 2016 and his last contract was ending on August, 2019.

On 22nd March, 2019 the second respondent wrote to the applicant a letter of resigning from his employment on ground that the working condition was intolerable and the first respondent wrote to the applicant a letter of resignation from her employment on 1st April, 2019 basing on the same ground. On 20th May, 2019 the respondents filed a labour dispute before the Commission for Mediation and Arbitration at Dar es Salaam Zone (hereinafter referred as the CMA) which was registered as CMA/DSM/ILALA/406/900/266 claiming for various reliefs basing on constructive termination of their employment by the applicant.

The CMA determined the matter in favour of the respondents and while the first respondent was awarded the sum of TZS 21,240,000/= being compensation for remaining salaries of twelve (12) months, one month salary in lieu of notice and general damages, the second respondent was awarded the sum of TZS 14,800,000/= being compensation for remaining salaries of four months, one month salary in lieu of notice and general damages. The applicant was dissatisfied by the award and filed the present application in this court seeking for the CMA award to be revised and set aside.

The award was challenged by the applicant basing on eight grounds listed under paragraph 4 of the supplementary affidavit deposed by Albert Eustadi Katagira filed in the court to support the application. In challenging the application, the respondent's filed in the court their supplementary counter affidavits. Hearing of the application was conducted by way of written submission. While the applicant was under service of Advocate Stella Modest Rweikiza, the respondents were served by Advocate Edward Kikuli.

The counsel for the applicant argued in relation to the 1st ground of revision that, the CMA erred in law to entertain a dispute which was time barred. She argued that the first respondent resigned from her employment on 1st April, 2019 and the second Respondent resigned from his employment on 22nd March, 2019 and the dispute was filed before the CMA on 20th May, 2019. She stated that was 50 days from the date the first respondent wrote to the applicant her letter of resigning from her employment and 59 days from the date the second respondent wrote to the applicant his letter of resigning from his employment.

The counsel for the applicant submitted that, the dispute was filed in the court out of thirty (30) days provided under Rule 10 (1) of

the Labour Institution (Mediation and Arbitration) GN. No. 64 of 2007 and without condonation of time. To strengthen her argument, the counsel for the applicant cited in her submission the cases of **Tanzania One Mining Ltd. v. Andre Venter**, Revision No. 276 of 2009 and **Shaban Abilah Okala V. Mohamed Idd Mkuro Transport**, Labour Revision No. 10 of 2019 where it was stated that, limitation is not a procedural issue but a statutory requirement.

She argued in relation to the 2nd ground that the arbitrator erred in law by causing the applicant to be the first person to testify, while due to the nature of the termination being constructive, the respondents were the one who were supposed to prove the alleged intolerable working condition that resulted into termination of their employment. She supported her argument with Rule 7 (3) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007.

She argued that, it is a cardinal principle of the law as provided under section 110 (1) and (2) read together with section 111 of the Evidence Act, Cap 6 R.E 2019 that, he who alleges must prove. She referred the court to the case of **Kobil Tanzania Ltd. V. Fabrice Ezaovi**, Civil Appeal No. 134 of 2017 where when citing with

approval the case of **HC Heat Exchanges (Pty) Limited v. Victor J.L. De Araujo & 2 others**, Case No. JR155/16 it was stated that, the onus to prove the existence of intolerability rests squarely upon the shoulder of the employee. It was further submitted by the counsel for the applicant that the arbitrator erred in law by shifting a burden to the applicant to start giving evidence while the applicant was to rebut the respondents evidence on the intolerable environment of their working condition.

The counsel for the applicant jointly submitted on the 3rd, 4th, 5th, 7th, 12th and 13th to the effect that, the law under Rule 7 (1) of GN. No. 42 of 2007 defines constructive termination to be where the employer made an employment intolerable which may result to resignation of the employee. She stated that, the circumstances which may justify constructive termination are provided under Rule 7 (2) of the GN. No. 42 of 2007 to include sexual harassment and if the employee has been unfairly dealt with, provided the employee has utilized available mechanisms to deal with the grievances unless there are good reason for not doing so.

She referred the court to the case of **Kobil Tanzania Ltd. v. Fabrice Ezaovi** (supra) which provides for the question to be asked

in order to prove constructive termination. She submitted that, in his evaluation the arbitrator failed to weigh, consider and evaluate properly the evidence as adduced by the parties. She further submitted that, under that circumstance the arbitrator erred to award the respondents compensation of salaries of the remaining period of a contract.

Regarding the 6th ground it was submitted by the counsel for the applicant that, the arbitrator erred in law and fact by finding that, the applicant breached the employment contract while there was no such claim from the applicant and the same was not proved by the respondents. As for the 8th, 9th and 10th grounds of revision the counsel for the applicant argued that, it is a trite law that for general damages to be awarded it must be pleaded and proved. She submitted that, in the present application the general damages were neither pleaded by the respondent nor proved by them, hence the award of general damages of Tshs. 10,000,000/= to each respondent were improperly procured.

She argued in relation to the 11th ground of revision that, the award of salaries for the remaining period of contract and general damages was excessive. She submitted the same is not justified

compensation as it enriches the respondent contrary to the general rules of awarding compensation. At the end she prayed the court to grant the application.

In response to the submission by the counsel for the applicant, the counsel for the respondents stated in relation to the first ground of revision that, the dispute was timely filed before the CMA, hence the ground is misconceived. He argued that, as reflected at page 2 of the award, on 22nd March, 2019 and 1st April, 2021 the respondents respectively wrote their letters of intention to resign due to the intolerable working conditions. He stated that, on 6th April, 2019 the applicant replied the said letters by denying the allegation. He further submitted that, the letters written to the respondents by the applicant shows until 25th April, 2019 the respondents were still working for the applicant and the respondents filed their dispute before the CMA on 20th May, 2019 which was within the time prescribed by the law.

The counsel for the respondents submitted further that, even if it will be taken the dispute was time barred, but by invoking Rule 4 (1) and (2) of the Labour Institution (Meditation and Arbitration) Rules GN. No. 67 of 2007 which provides for exclusion of the first date and the last date, then the dispute was filed in the CMA within

the time as required by the law. To strengthen his submission, he referred the court to the case of **Barclays Bank (T) Ltd. v. Jacob Muro**, Civil Appeal No. 357/2019.

As regard to the 2nd ground, it was submitted for the respondents that, the law under Section 39 of Employment and Labour Relations Act, Cap 300 RE 2019 rest the burden to prove fairness of termination to the employer. He further submitted that the employee who has been constructively terminated can claim for unfair termination, except those on probation as stated in the case of **David Nzaligo v. National Microfinance Bank**, Civil Appeal No. 61/2016. Since the respondent referred the dispute of constructive termination to the CMA claiming to have been unfairly terminated then, the CMA was correct to allow the applicant to start giving his testimony as required by the law.

He argued in relation to the 3rd and 4th grounds that, the respondent's termination was a last resort basing on the circumstances that, the first respondent wrote a letter to the applicant on 16th May, 2018 complaining about deduction of his salary and mode of payment of his salary which resulted into loss of his social security benefits but that letter was never replied by the

applicant. The same applied to the second respondent who wrote his letter to the applicant but it was never responded.

He submitted that, it is because of the above stated reason the respondents on 1st April, 2019 and 22nd March, 2019 wrote their letters to inform the applicant about their intention to resign from their employment because of the intolerable working condition. He stated that, there was also discrimination of the respondents as other employees were prohibited by the applicant not to talk and corporate with them, as testified by the 1st respondent that she was informed by Jackline and James. He submitted that, basing on the stated intolerable working conditions the respondents were constructively terminated.

It was submitted for the respondents in relation to the 5th ground that, there was no any proof tendered by the applicant to substantiate that the deductions were for PAYE and NSSF. It is a principle of law that unjustifiable reduction of salaries is one of the intolerable working conditions and it amounts to constructive termination. To bolster his argument the counsel for the respondents cited the case of **Vietel Tanzania Ltd. V. Edmund Kabonge,** Revision No. 816 of 2018. He added that, even if the deductions were

in accordance with clause 4 of their employment contract, the same could have started from the beginning of the contract and not after the lapse of many years.

As regards to the 7th, 8th, 9th, 10th and 11th grounds of revision it was submitted for the respondents that, since constructive termination was proved by the respondents then the arbitrator was correct to award them the salaries of the remaining period as provided in the case of **Good Samaritan V. Joseph Robert Savari Munthu**, Revision No. 165 of 2011. He argued that, the arbitrator was right to award the respondents compensation for the general damages of Tshs. 10,000,000/=. He stated that, the Arbitrator has discretion to award more compensation after taking into consideration all factors and circumstances of the case and supported his point by citing the case of **Pangea Minerals Ltd V. Gwandu Majali,** Civil Appeal No. 504 of 2020.

To conclude his submission the Counsel for the respondents submitted that, it is a principle of law in civil cases that, one with heavy evidence must win the case. This principle was established in the case of **Hemed Said v. Mohamed Mbilu**, [1984] TLR, 113 where it was held that, under the law both parties cannot tie as the

person with heavier evidence than the other, is the one who must win the case. He submitted that, in this case the arbitrator considered the evidence tendered by the parties, and decided in favour of the respondents as the evidence was heavier than the applicant's evidence. Basing on the above stated reasons the counsel for the respondents prayed the application be dismissed. In rejoinder the counsel for the applicant reiterated what she argued in her submission in chief.

Having carefully considered the submissions from both sides and after going through the record of the matter as well as the laws governing the matter the court has found it is proper to determine this application by dealing with the grounds of revision seriatim as argued by the counsel for the parties. Starting with the first ground which states the matter referred to the CMA was time barred the court has found that, the said ground was vehemently disputed by the counsel for the respondents who argued the dispute was timely filed in the CMA. The court has found the law governing limitation of time for referring dispute to the CMA is GN. No. 64 of 2007 which its

Rule 10 (1) and (2) provides as follows:-

> *"Rule 10. - (1) Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.*
> *(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute arose".*

The court has found the respondents alleged their employment was constructively terminated by the applicant. That means they were challenging fairness of the reason caused them to terminate their employment which is an intolerable working condition. Under that circumstances the provision of the law which was supposed to govern limitation of time for filing the respondents' dispute before the CMA is Rule 10 (1) of the GN. No. 64 of 2007 quoted hereinabove which states the dispute of that nature was supposed to be filed at the CMA within thirty days from the date of termination of their employment.

The court has found the CMA F1 which is in the record of the matter shows the respondents stated thereon that, their dispute arose on 1st May, 2019 and the dispute was filed in the CMA on 20th

May, 2019. On the other hand, the applicant's counsel maintained that, the dispute arose on 22nd March, 2019 and 1st April, 2019 when the respondents wrote their respective letters of resigning from their employment. That means the issues to determine in this ground is when exactly the dispute arose and whether the dispute was filed in the CMA within or out of the time prescribed by the law.

After going through the evidence adduced before the CMA the court has found it is not disputed that, the first respondent wrote a letter to the applicant on 1st April, 2019 requesting to resign from her employment and prayed her request to be answered within seven days from the date of that letter. The second respondent wrote his letter to the applicant on 22nd March, 2019 request for the same prayer of resigning from his employment.

The court has found it is also not disputed that the applicant replied the said letters, on 6th April, 2019 and apart from denying the allegation of intolerable working condition of work raised by the respondents, he also advised the respondents that, if they wanted to resign from their employment, they should abide to clause 8.1 of their contract of employment. The mentioned clause of the contract of employment of the parties provides that, if a party to the contract

want to terminate the contract, he should give the other side one month notice or made one month payment in lieu of notice.

The record of the matter reveals that, no notice of terminating the contract was given by the respondents as advised by the applicant. To the contract on 23rd April, 2019 the respondents through A & D Law Attorneys wrote a demand note to the applicant, demanding to be paid compensation by the applicant for being forced by the applicant to terminate their employment.

On 29th April, 2019 the applicant replied the respondents' counsel's demand letter and apart from denying the claims of the respondents in toto but the applicant stated they were not against the respondents' intention of taking legal action against them. The record of the matter shows further that, on 10th May, 2019 the applicant wrote another letter to the respondents demanding them to give explanation as to why they had not attended the work from 25th April, 2019 to the date of the letter.

That being undisputed facts of the matter the court has found it is proper to have a look on what is provided under Rule 6 (1) of the GN. No. 42 of 2007 which governs resignation of employees working

under fixed term contract like the respondents. The cited provision of the law states as follows:-

> *"Rule 6-(1) Where an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employer the employee may lawfully terminate the contract before the expiry of the fixed term by getting the employer to agree to an early termination."*

The court has found the wording of the above quoted provision of the law is very plain that, an employee who is working under a fixed term contract he may resign if the employer breaches the contract. If the employer has not breached the contract the employee may also lawfully terminate his employment by agreeing with his employer for early termination of his employment. As the respondents alleged the applicant breached their fixed term contract through deduction of their salary and failure to pay them their full salaries through their bank accounts which affected their social security benefits the court has found the respondents had a right under the above quoted rule to resign from their employment without being required to agree with the applicant for early termination of their contract.

The above finding caused the court to come to the view that, the cause of action of the claims of the respondents is supposed to be counted it arose on 1st April, 2019 for the first respondent and on 22nd March, 2019 for the second respondent when they wrote their letters of resigning from their employment as argued by the counsel for the applicant. If it will be taken the cause of action was required to arise from when the respondent's letters of resignation were replied by the applicant the court has found that, limitation of time for their claims was required to start counting from 6th April, 2019 when the applicant replied their letters of resignation.

The court has tried to consider the argument by the counsel for the respondents and what is stated in the CMA F1 that the cause of action arose on 1st May, 2019 but failed to get the basis of that assertion as to why it was stated the cause of action arose on 1st May, 2019. To the contrary the court has found the cause of action is supposed to be taken it arose on the date when the respondents wrote their letters of resigning from their employment or from the date when their letters were replied by the applicant. Therefore, counting from when the respondents wrote their letters of resigning from their employment or from when the applicant replied their letters

it is crystal clear that the dispute filed in the CMA on 20th May, 2019 was out of thirty days provided under Rule 10 (1) of the GN. No. 64 of 2007.

The court has considered the argument by the counsel for the respondents about the principle of exclusion and inclusion of the days provided under Rule 4 (1) and (2) of the GN. No. 67 of 2007 but find that, even if the said principle is applied in the present application, it does not establish the matters filed before the CMA by the respondents were within the time prescribed by the law. The court has found that, as stated hereinabove the matter was filed at the CMA out of time and the case of Barclays Bank (T) Ltd. (supra) cannot assist the respondents to establish the matter was filed at the CMA within the time as argued by the respondents' counsel.

The court has also considered the further argument by the counsel for the respondents that the respondents were still in the employment of the applicant up to 25th April, 2019 as stated in the letter written by the applicant on 10th May, 2019 but find that cannot be used to establish the dispute was filed in the CMA within the time prescribed by the law. The court has come to the above finding after

seeing the cause of action used by the respondent in their dispute is constructive termination of their employment.

As provided under Rule 7 (1) of the GN. No. 42 of 2007, constructive termination arose where the employer makes an employee to resign from the employment because of intolerable condition of work. That being the position of the matter the court has found that, resignation of an employee from his or her employment is required to be counted from when he or she presented his or her letter of resignation to his or her employer and if he or she has stated a specific date of his or her resignation in the letter, the specified date will be the effective date of termination of the employment. That means the effective date of resignation of the respondents from their employment with the applicant was 6th April, 2019 when the applicant replied their letters.

As a matter of procedure, the CMA had a duty before entertaining the dispute to assess itself as if it has jurisdiction to entertain the matter or not. As from when the applicant replied the respondents' letters of resignation up to when the dispute was filed at the CMA the prescribed time had already passed the respondents were required to apply for condonation of time to file their dispute at

the CMA out of time, but that was never done in the present matter. Therefore, this court is of the considered view that CMA had no jurisdiction to entertain the matter which was time bared. As a result, the court has found the first ground that the CMA erred in entertaining the dispute filed therein out of time is meritorious and deserve to be upheld.

Although the above finding would have been enough to dispose of the matter but the court has found it is pertinent to continue to determine the second ground of revision which states the arbitrator erred in causing the applicant to start adducing their evidence instead of starting with the respondents who were supposed to establish that, they were really forced to terminate their employment. The court has found as stated earlier in this judgment it is not disputed that the respondents resigned from their employment as exhibited by their letters dated 1st April, 2019 and 22nd March, 2019 respectively.

As rightly argued by the counsel for the applicant Rule 7 (3) of the GN. No. 42 of 2007 states clearly 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. The position of the law as stated in number

of cases including the case of **Kobil Tanzania Limited** (supra) cited in the submission of the counsel for the applicant is very clear that, the onus to prove termination of employment by employee was due to intolerable working condition at the place of work is casted on the shoulder of the employee.

Since the respondents were the one terminated their employment on allegation of intolerable condition at the place of work caused by the applicant the respondents were required to start adducing their evidence to prove the allegation and thereafter the applicant would have been required to disprove what was said by the respondents. To the contrary the court has found in the instant application the hearing of the matter at the CMA went vice versa as the applicant was caused to start to adduce their evidence to disprove the allegation of the respondents before the respondents proved their alleged which is like putting a cart before the horse.

The court has considered the argument by the counsel for the respondent that the CMA was right to start with hearing of the evidence of the applicant because section 39 of the ELRA requires the employer to prove termination of contract of an employee was fair both substantively and procedurally but find as stated in the case

Kobil Tanzania Limited (supra) the duty to prove constructive termination is casted on the shoulder of an employee and not on the shoulder of an employer. In the premises the court has found the proceedings of the CMA is irregular as it was conducted contrary to the required procedure.

As the first and second grounds of revision have been found are meritorious the court has found there is no need of belabouring to deal with the rest of the grounds of revision. In the upshot the application filed in this court by the applicant is hereby granted. The whole proceedings of the CMA are hereby nullified for being irregular and the impugned award issued by the CMA is accordingly quashed and set aside as the CMA had no jurisdiction to entertain the dispute which was filed before it out of time and without an order of condonation of time. It is so ordered.

Dated at Dar es Salaam this 25th day of January, 2022.

I. Arufani

JUDGE

25/01/2022

Court: Judgment delivered today 25th day of January, 2022 in the presence of Ms. Stella Rweikiza, Advocate for the Applicant and in the presence of Mr. Godfrey Ngassa, Advocate holding brief of Mr. Edward Kikuli, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

25/01/2022