IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 365 OF 2021

EVERINE MABALA ..... APPLICANT

VERSUS

TURU SECURITY GUARD LIMITED..... RESPONDENT

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

(Kokusima: Arbitrator)

dated 6th August, 2021

in

REF: CMA/DSM/ILA/895/20/448/20

JUDGEMENT

23rd February & 06th April 2022

Rwizile J

The applicant has petitioned this court for revision of the decision of the Commission for Mediation and Arbitration (CMA). It has been filed by the chamber summons supported by the affidavit of the applicant stating grounds for which this application is founded.

It has been gathered that the applicant was employed by the respondent on 24th February 2014 as a security guard for a one-year contract. It was at considerable wage of TZS 120,000.00 salary per month. The contracts

were renewable on agreement. On 21st May 2020 another one-year contract was entered to end on 20th May 2021.

One month after signing the new contract, the applicant faced health problems which needed her employer's support.

The respondent denied her that offer. On 12th June 2020 due to her illness and due to the fact that sick leave was not granted the applicant resigned. Believing that was constructive termination, she instituted a labour dispute at the CMA, claiming for unfair termination. The arbitrator decided that the applicant willingly resigned and was entitled to be paid the salary not paid by the respondent. Again, being aggrieved by the decision of the CMA, she has now preferred this application on the following grounds;

i. *Whether the honourable arbitrator considered evidence and documents tendered, before reaching its award.*
ii. *Whether it was proper for the arbitrator in holding that the applicant resigned and did not keep under consideration that on medical grounds and the respondent did not discharge its duty to the applicant on the account of the employment of the applicant which turned to be intolerable the fact that forced the applicant to resignation.*

iii. *Whether it was proper for the arbitrator in not observing a long service of the applicant from the year 2014 to 2020 and denied the right of annual leave, sick leave, severance pay, the remaining time in the contract which was 11 months' salary and certificate of service.*

The hearing was done orally. Mr. Hamza Sulemani Rajabu, a Personal Representative appeared for the applicant, whereas for the respondent appeared Mr. Isaack Zake learned Advocate.

Mr. Hamza submitted that the contract was from 21st May 2020 to end on 20th May 2021. He submitted further that the applicant had been in other contracts for years. He continued to state that the applicant got sick and was not given sick leave. It was his argument further that, she decided to resign because the situation was made intolerable. To support his argument, he cited the case of **Pangea Minerals Limited vs Gwandu Majali**, Civil Appeal No. 504 of 2020, Court of Appeal at Shinyanga, at page 17-18, where constructive termination was discussed. He therefore asked this court to grant this application.

Mr. Zake appeared for the respondent and submitted that the applicant based his arguments only in the employment contract. In the view of the learned counsel, the commission was right as in CMAF1, the claim was for

payment of two months' salary. The learned advocate added that what has been brought here is a new claim. He asked this court to apply the case of **National Bank of Commerce (NBC) v Maria Singano**, Revision No. 489 of 2020, at page 16, where this court held that, parties cannot bring issues at such a stage.

Mr. Zake continued to submit that Rule 6(1) of Code of Good Practice, G.N. No. 42 of 2007 deals with resigning but on agreement. In his view, the applicant was right in what she did hence no constructive termination as per Rule 7 of G.N No. 42 of 2007.

In a rejoinder Mr. Hamza submitted that the severance was not paid. The applicant was constructively terminated due to sickness. The applicant resigned because of difficult conditions placed by her employer due to sickness.

Having heard both submissions, it is clear to me that the pertinent issue for determination is *whether the applicant was constructively terminated, then to what reliefs was she entitled.*

In determining this point, it is clear that the applicant was the employee of the respondent, as per exhibit A1. In our law, constructive termination

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is defined under Rule 7(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 in the terms as hereunder: -

> *"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."*

In my view, rule 7 is coached in plain language. It does not need, I think, deep construction. Plainly, for constructive termination to merit, there must be a contract of employment, the same has to be terminated by the employee under the circumstances created by the employer in such a way and in such a manner as to leave the employee with only one option of resigning. This finding renders support in the South African case of **Solid Doors (Pty) Ltd v Commissioner Theron and Others** (2004) 25 ILJ 2337 (LAC) at Para, 28, it was observed: -

> *"...there are three requirements for constructive dismissal to be established. The first is that the employees must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be*

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present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established..."

It is apparent that the test stated above has to be proved by clear and convincing evidence from both sides. My health perusal in the record, does not reveal that there is clear and such convincing evidence brought by the applicant. On review, the evidence available is pegged in two documents, namely exhibit T-1 a letter by the applicant expressing her resignation due to ill-health, and exhibit A2, a letter in the same subject from her employer, the respondent to the pension funds. The same was for payment of her contributions upon resignation. Exhibit A2 in its terms states;

"YAH: KUACHA KAZI

Husika na somo hapo juu.

Mimi Evelyne Mabala Felix kutokana na kuzorota kwa afya hata nikashindwa kutimiza wajibu wa kazi za kapuni. Leo tarehe 11.06.2020 nimeamua kuacha kazi ili nijitizamie afya yangu. Nashukuru kwa ushirikiano wenu kipindi nilipokuwa kazini.

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Wako katika ujenzi wa taifa.

E.F.M"

Whereas exhibit A2 states: -

"YAH: KUACHA KAZI

Tafadhali husika na kichwa cha Habari hapo juu.

Mtwajwa hapo juu aliyekuwa mfanyakazi wetu kwa nafasi ya ulinzi tangu mwaka 2014. Ameacha kazi kwa ridhaa yake mwenye kutokana na matatizo ya kiafya yanayomsumbua kiasi cha kushindwa kutimiza wajibu wake kazini. Hivyo basi kuanzia tarehe 12/06/2020 hatokuwa mfanyakazi wetu tena. Hivyo basi tunaomba asaidiwe kupata akiba yake ya NSSF.

Kampuni inakutakia mapumziko mema."

Based on the terms of exhibit T-1, which are self-explanatory, the applicant simply resigned. There are no signs of complaining that she was forced to do so. Resignation is one among forms of termination of employment as provided for under Rule 6(1) of G.N. No. 42 of 2007 provides: -

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"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 of Appeal, in the case of **Kobil Tanzania Limited v Fabrice Ezaovi**, Civil Appeal No. 134 of 2017, CAT at Dar es Salaam, held in line with constructive termination that;

"...to recap, we find that the respondent's act of resignation was not of last resort. He did not prove any conditions that made the employment unbearable. He did not exhaust the dispute resolution mechanism at his disposal. His resignation was out of the blue, so to speak ... Constructive dismissal was not proved..."

It follows from the decision above that the applicant ought to prove that her resignation was done as the last resort and after having exhausted all possible remedies with her employer. She willingly resigned due to her deteriorating health conditions. In my considered opinion, I find no reason to fault the decision of the Commission in material substance.

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The applicant, as submitted by the respondent's counsel applied before the Commission for payment of two months unpaid salary, severance pay and four months unpaid NSSF. The commission ordered a payment of TZS 200,000.00 being one month's salary and 20 days worked in the month of June. It is therefore convincing to hold in line with her prayers in the CMF1. I do not think the commission has done wrong anyway to pay her for the work done in the month she resigned. As to severance pay, this is an issue to be determined as the law dictates. Section 42 of the Employment and labour Relations Act (ELRA) provides for the same to be paid upon fulfilling two conditions namely, completion of 12 months of continued service and the employer then terminates the contract. Since termination of the contract was not done by the employer, I hold, he is not bound to pay the same. Lastly, NSSF are claims not an employment dispute. I do not think, it falls in the jurisdiction of the commission to adjudicate. Having said all the above, I hold that the applicant has no good case. It is therefore safe to dismiss it with no order as to costs.

A. K. Rwizile

JUDGE

06.04.2022