

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

REVISION APPLICATION NO. 306 OF 2021

(Originating from the award issued by Kayugwa, H, Arbitrator dated 20th June 2021 in Labour dispute No.

CMA/DSM/TEM/184/2020 at Temeke)

BETWEEN

MOHAMED HANIF DEBWE APPLICANT

AND

GALCO LIMITEDRESPONDENT

JUDGMENT

Date of last order: 28/03/2022
Date of judgment: 22/4/2022

B. E. K. Mganga, J.

This is an application for revision filed by Mohamed Hanif Debwe who entered employment relationship with the respondent on 1st September 2014 as driver, but his employment was terminated on 5th April 2020. It is alleged that on 16th October 2020 respondent arrested the applicant and sent him to police where he remained in custody for ten days allegedly for having stolen TZS 1,458,000/= property of the respondent. It is further

alleged by the applicant that respondent refused to pay salary from November 2018 to March 2019 amounting to TZS 5,400,000/=. It said that due to that nonpayment of salary, applicant resigned as that amounted to constructive termination. After resignation, on 16th April 2020, applicant filed Labour dispute No. CMA/DSM/ TEM/184/2020 before the Commission for Mediation and Arbitration henceforth CMA at Temeke claiming to be paid a total amount of TZS 40,664,615/=. Being out of time, applicant also filed an application for condonation.

Having heard evidence of both sides, on 20th June 2021, Hon. Kayugwa, H, arbitrator, issued an award dismissing claims of the applicant that there was no constructive termination of employment of the applicant, rather, applicant created environment for termination of his employment due to loss of fuel tank and failure to return money paid to him for his journey to DRC, a journey he did not go. Aggrieved by the award, applicant filed this revision application on four grounds namely: -

- 1. That the Honourable arbitrator erred in law and fact in holding that applicant refused to appear in the disciplinary Committee without considering that the respondent abandoned itself on 30th October 2018 and proceeded with the allegation of theft of TZS 1,458,000/= illegally.*
- 2. That the Honourable arbitrator erred in law and fact in granting disciplinary proceedings made by the respondent on theft allegation of TZS 1,458,000/= while the same matter was under police investigation.*

- 3. That the honourable arbitrator erred in law and fact for failure to consider that the respondent withheld applicant's salary from October 2018 up to March 2019.*
- 4. That honourable arbitrator erred in law ad fact in not recording properly the testimony and the documentary evidence tendered by the applicant upon the defamation made by the respondent.*

Respondent resisted the application by filing the counter affidavit of Peter Tryphone, her principal officer.

When the application was called for hearing, Mr. Jackson Mhando, Personal Representative, appeared and argued for and on behalf of the applicant, while the respondent was represented by Davis Kato, Advocate.

Arguing in favour of the application, Mr. Mhando submitted that, the arbitrator erred in holding that applicant refused to attend the disciplinary hearing. He argued that applicant was employed on 1st September 2014 on permanent terms, but he was terminated on 5th April 2019 after resignation because respondent made employment intolerable. Mr. Mhando submitted that, on 16th October 2018 respondent arrested the applicant alleging that he stole TZS 1,458,000/= while the said money was paid to applicant by the respondent for his trip to the Democratic Republic of Congo. He went on that; no meeting of Disciplinary hearing was conducted by the respondent. It was argued by Mr. Mhando that, if at all applicant did not

appear to the disciplinary committee as was alleged, the respondent had option to proceed in terms of Rule 13(6) of GN. No. 42 of 2007 to issue a report. He went on that; this explains why there is no disciplinary hearing committee recommendation report. Mr. Mhando submitted that applicant resigned because he was not paid salary from October 2018 to March 2019 and that arbitrator erred to hold that the claims by the applicant are not proved while applicant was claiming to be paid salary from October 2018 to March, 2019.

Mr. Mhando submitted that further that, the arbitrator erred for not properly record testimony and documentary evidence tendered by the applicant relating to defamation. He argued that the arbitrator did not record the notice showing that applicant has stolen money that is property of the respondent. he argued that, the said notice was received as Exhibit D3 but the arbitrator did not consider it in the award.

Responding to submissions made on behalf of the applicant, Mr. Kato, advocate for the respondent, submitted that it is not true that employer made employment of the applicant intolerable. It is also not true that it was alleged that applicant stole the alleged amount. There is no evidence showing that applicant was arrested or sent to Police for the alleged theft. He argued that applicant was paid the said money as travel

allowances and not for fuel. Counsel went on that it was noted before applicant had commenced his travel to DRC that he had a pending disciplinary issue, as a result, he was ordered to refund the money. Mr. Kato argued that applicant was required to attend disciplinary hearing but disappeared from office and came back on 4th December 2018 and that the last appearance of the applicant in office was on 6th October 2018. Mr. Kato, counsel for the respondent submitted that evidence of the parties was considered at CMA.

In rejoinder, Mr. Mhando, for the applicant submitted that it is not true that the last date of applicant to appear in office was on 6th October 2018 because on 9th October 2018 applicant attended the disciplinary hearing that was adjourned on several dates. That, on 7th November 2018 respondent required applicant to give explanation in relation to TZS 1,458,000/= that he was given. Mr. Mhando reiterated that applicant was entitled to salary payment from October 2018 to March 2019.

I have examined the claim by the applicant as shown in the Form referring the dispute to CMA hereinafter referred to CMA F1, and find that he was complaining that there was unfair termination due to failure of the respondent to pay him salary. In short, applicant was pleading that there was constructive termination. In order an employee to succeed that there

was constructive termination, he is required to prove three requirements namely (i) the employee must have terminated the contract of employment, (ii) the reason for termination of the contract must be that continued employment has become intolerable for the employee and (iii) it must have been the employee's employer who had made continued employment intolerable. These conditions are cumulative and must be present for it to be said that constructive termination has been established. If one of them is missing, then, constructive termination is not established as it was held by the Court of Appeal in the case of ***Kobil Tanzania Limited v. Fabrice Ezaovi, Civil Appeal No. Appeal No. 134 of 2017*** (unreported) quoting with approval a South African case of ***Solid Doors (Pty) Ltd v. Commissioner Theron and Others***, (2004) 25 ID 2337 (LAC).

The issue is whether, applicant proved by evidence that there was constructive termination. Without demure, I hold in the negative. In his evidence, Mohamed Hanif (PW1), the applicant, testified that in one of his trips, he lost a reserve tank and caused 250 liters deficit and that he asked for and was given reserve fuel. He testified also that when he returned to Dar se Salaam, he was served with a notice to attend the disciplinary hearing but the same was adjourned several times. He testified also that

he was given TZS 1,458,000/= for his journey to DRC but he was told not to go but he failed to refund the money on demand. I have carefully examined evidence of PW1 and find that he did not state that his resignation was caused by failure of the respondent to pay him salary. What PW1 testified is that he resigned on 5th April 2020 without giving reasons for resignation. Admittedly, in his evidence, PW1 testified that since 10th August 2018 to the date of giving evidence i.e., 17th October 2020 he was not paid salary but he did not explain whether this was the reason for his resignation and whether the respondent was unwilling to pay him salary. The submission by Mr. Mhando that applicant resigned because he was not paid salary from October 2018 to March 2019 is not supported by evidence on record. I therefore find that the criticism that arbitrator erred for failure to consider that respondent withheld applicant's salary as unjustified. Applicant did not state as to whether he demanded to be paid salary and whether he was attending at office.

On the other hand, Peter T. Lutina (DW1) testified that the last date applicant appeared in office was on 7th November 2018 and thereafter disappeared. In my view, with that evidence of DW1, the claim by applicant that respondent failed to pay his salary lacks legs to stand. It was not expected for the respondent to pay salary to the person who is not

attending at work. The evidence of DW1 was not shaken on cross examination.

I have examined the CMA record and find that submissions by Mr. Mhando that on 16th October 2018 respondent arrested the applicant alleging that he stole TZS 1,458,000/= and the contents in the applicant's affidavit that he was detained at police for ten days is not supported by evidence PW1 gave at CMA. As such, I find those allegations as afterthought.

Arbitrator is further criticized for failure to record properly the testimony and the documentary evidence of the applicant. On this, arbitrator is being criticized that he did not record the notice showing that applicant has stolen money that is property of the respondent. This complaint cannot detain my mind because court records are presumed to be authentic. This is the position taken by the Court of Appeal in the case of ***North Mara Gold Mine Limited v. Khalid Salum, Civil Appeal No. 463 of 2020***, CAT (unreported) wherein the Court of Appeal quoted its earlier decision in the case of ***Halfan Sudi v. Abieza Chichili [1998] T. L. R. 527*** at page 529 where it stated that:-

" We entirely agree with our learned brother, MZAVA, JA and the authorities relied on which are loud and clear that, "A court record is a serious

document. It should not be lightly impeached. There is always presumption that a court record accurately represents what happened".

That said and done, I find that this complaint also lacks merit. For the foregoing and in the upshot, I hereby dismiss this application for being devoid of merit.

Dated at Dar es Salaam this 22nd April 2022.



B.E.K. Mganga
JUDGE

Judgment delivered today 22nd April 2022 in the presence of Mr. Jackson Mhando, personal representative for the applicant and Mr. Davis Kato, Advocate, for the respondent.



B.E.K. Mganga
JUDGE