

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

**REVISION APPLICATION NO. 332 OF 2021**

*(Originating from an award issued on 26<sup>th</sup> August 2021 by Hon. Mbena, Arbitrator, in Labour dispute  
No. CMA/DSM/UBG/89/2020/74 at Ubungo)*

**BETWEEN**

**MASHAKA LUMATO .....APPLICANT**

**AND**

**ABOUD BUS SERVICE LIMITED.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 29/03/2022  
Date of Judgment: 10/05/2022*

**B. E. K. Mganga, J.**

On 5<sup>th</sup> August 2020, Mr. Mashaka Lumato, the herein applicant, filed Labour dispute No. CMA/DSM/UBG/89/2020/74 before the Commission for Mediation and Arbitration hereinafter referred to as CMA claiming to be paid TZS 42,267,690/= on ground that respondent made employment intolerable leading to his resignation on 31<sup>st</sup> July 2020. At CMA, it was alleged by the applicant that, he entered employment relationship with the respondent in 2000 and continued with their employment relationship until when the respondent made employment

intolerable. It was further alleged by the applicant that for the period from March 2020 to July 2020, respondent refused to pay him salary making employment intolerable leading to resignation. On the other hand, at CMA, respondent contended that there was no employment relationship between the two but agency relationship.

On 26<sup>th</sup> August 2021, Hon. Mbena, M. S, Arbitrator, having heard evidence of both sides issued an award holding that applicant was an employee of the respondent but that respondent did not make employment intolerable. The arbitrator dismissed claims by the applicant but awarded him to be paid TZS 900,000/= being two months' salary arrears and one month salary as annual leave.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit in support of the application, applicant raised four issues namely: -

- i. Whether or not the applicant wrote to the respondent a letter demanding unpaid salaries and impending intolerable employment conditions forcing him to resort to constructive termination.*

- ii. Whether applicant complied with requirements of Rule 7(1), (2) (3) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007.*
- iii. Whether applicant is entitled to all claims stated in the CMA F1.*
- iv. To what reliefs are the parties entitled to.*

On the other part, Mr. Evarist Ngalunda, the respondent's Principal officer, filed a counter affidavit opposing the application.

When the application was called for orders, by consent, parties agreed to argue it by way of written submissions.

Submitting in support of the application, Mr. Joseph Assenga, advocate, submitted that in CMA F1, applicant pleaded that he was constructively terminated and that he complied with the provisions of Rule 7 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. Counsel for the applicant relied on exhibit P.4 namely, a letter that applicant served to the respondent demanding to be paid his salary short of which he will resigned because he cannot continue working without being paid salary. It was submitted by counsel for the applicant that in the said letter, applicant claimed for unpaid salaries from March 2020 to July 2020. Failure by the respondent to pay

applicant salary for several months was unfairly treatment that created intolerable conditions which forced applicant to resort to forced resignation. He added that, respondent was not ready to negotiate with the applicant that is why, he declined to receive the said letter as per exhibit P.5. To strengthen his submission, Mr. Assenga cited the case of ***Pangea Minerals Ltd vs, Ng'wandu Majali, Civil Appeal No. 504/2020, CAT*** (unreported) and the case of ***Kobil Tanzania Ltd v. Fabrice Ezovi, Civil Appeal No. 134/2017, CAT*** (unreported) and went on that there was constructive termination. Counsel for the applicant submitted further that, applicant used internal mechanisms but proved failure because respondent was not ready even to accept a letter from courier.

Mr. Asenga submitted that, according to the evidence on record, applicant was constructively terminated both substantively and procedurally. Counsel submitted that, applicant is entitled to relief stated under Sections 40 and 44 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019]. To bolster his argument, he referred the court to the case of ***Magnus K. Lauren v.***

**Tanzania Breweries Ltd, Civil Appeal No. 25/2018** and prayed CMA's award be revised and set aside.

In response, Robert Rutaihwa, Advocate for the respondent, submitted that applicant was not an employee of the respondent rather, he was an agent. Counsel for the respondent went on that, applicant was just paid on commission basis and not salary. In the same written submission, counsel for the respondent submitted that, the oral contract between the parties was terminated orally by the respondent through his Principal Officer one Majid Abood because applicant's service was no longer needed as testified by DW1.

Counsel for the respondent submitted further in the alternative that, if the court finds that applicant was an employee of the respondent, then, the dispute was time barred since applicant was verbally terminated in May 2020 or 11<sup>th</sup> June 2020. Counsel for the respondent cited the cases of **NBC Limited & Another v. Bruno Vitus Swalo, Civil Appeal No. 331 of 2019**, CAT (unreported) and **Hezron M. Machiya v. Tanzania Union of Industrial and Commercial Workers & Another, Civil Appeal No. 79 of 2001**, CAT (unreported).

Regarding the issue of compliance with Rule 7(1) (2) and (3) of GN. No. 42 of 2007 (supra), Mr. Rutaiwa submitted that, applicant did not meet the requirement of the law. Counsel for the respondent went on that, there was no constructive termination because applicant was terminated by the respondent. Counsel for the respondent submitted further that applicant was duty bound to prove that all internal mechanism to resolve the dispute failed. Counsel argued that ***Pangea's case*** (supra) and ***Ezoavi's case*** (supra) cases are not applicable in the circumstances of this application.

In rejoinder, counsel for the applicant had nothing new to add to his submissions in chief.

Having considered evidence on the CMA record and submissions of the parties, I have opted to start with the jurisdictional issue relating to limitation of time raised by counsel for the respondent in his written submissions. It was submitted on behalf of the respondent that applicant was verbally terminated in May 2020 or 11<sup>th</sup> June 2020. This cannot detain my mind. There is no evidence on record tendered on behalf of the respondent showing that applicant was verbally terminated in May 2020 or on 11<sup>th</sup> June 2020. I have read the evidence of Evarist Ngalunda

(DW1), the only witness who testified on behalf of the respondent and find that he did not state in his evidence that applicant was verbally terminated in any of the alleged months. In fact, what was submitted by counsel for the respondent allegedly being evidence of DW1 is not reflected in evidence of the said DW1 in the CMA record. I therefore hold that the dispute was filed within time and heard properly by the Arbitrator.

In his evidence in chief, DW1 testified that applicant was not an employee of the respondent, rather, he was an agent. While under cross examination, DW1 admitted that he had no evidence to prove that applicant was an agent. DW1 admitted further that, he is the one who wrote and signed a warning letter (exh. P3) that was served to the applicant showing that he (applicant) was performing poorly and required applicant to improve his performance. DW1 also admitted that exhibit P3 shows that applicant was an employee and not an agent. It is my view that, the arbitrator was right to hold that applicant was an employee of the respondent.

In his evidence, Mr. Mashaka Lumato, the applicant, testified *inter-alia* that, he started employment relationship with the respondent in

2000 and that the last time he received his salary from the respondent was in February 2020. He (PW1) testified that; his last salary was TZS 300,000/=. The evidence of the applicant was not shaken during cross examination. His evidence was corroborated by evidence of Shaba Salehe (PW2) who is also a former employee of the respondent that applicant was an employee of the respondent. The evidence by PW1 that respondent stopped to pay him salary from March to July 2020 was not contradicted by any other evidence or shaken during cross examination. That being the position, I conclude that respondent willfully refused to pay salary to the applicant, making employment of the applicant intolerable and that applicant had no option other than to resign. His resignation amounted to constructive termination as it was held in ***Ezoavi's case*** (supra). I therefore hold that applicant was unfairly terminated.

In the CMA F1, applicant was claiming to be paid compensation and terminal benefits amounting to TZS. 42,267,690/=. Since applicant's salary was TZS 300,000/= and he was unfairly terminated, he is entitled to be paid (i) TZS 3,600,000/= being 12 months' salary compensation for unfair termination, (ii) TZS



300,000/= being one month salary in lieu of notice, (iii) TZS 300,000/= being annual leave pay and (iv) TZS 807,692.31 being severance pay. In total, applicant is entitled to be paid Five Million Seven Thousand Ninety-Two Tanzanian Shillings Thirty-One Cents (TZS 5,007,092.31) only.

Dated at Dar es Salaam this 10<sup>th</sup> May 2022.



B.E.K. Mganga  
**JUDGE**

Judgment delivered on this 10<sup>th</sup> May 2022 in Chambers in the presence of Mr. Joseph Assenga, advocate for the applicant and Mr. Mahfudhu Mbagwa, Advocate for the respondent.



B.E.K. Mganga  
**JUDGE**