

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

REVISION APPLICATION NO. 495 OF 2021

*(Arising from Arbitral Award issued on 27/8/2021 by Hon. Fungo E.J, arbitrator in Labour Complaint
No. CMA/DSM/ILA/103/21 at Ilala)*

BETWEEN

ZAKIA SAID MASISSA APPLICANT

AND

SHAABAN ROBERT SECONDARY SCHOOL RESPONDENT

JUDGMENT

*Date of last order: 16/06/2022
Date of Judgment: 27/06/2022*

B. E. K. Mganga, J.

On 1st January 2020 Applicant entered a one-year fixed contract of employment with the Respondent to hold the post of Librarian. The said fixed term contract was expiring on 31st December 2020. It was alleged by the Applicant that on 20th November 2020 Respondent unfairly terminated her employment. On 12th May 2021, Applicant filed Labour Complaint No. CMA/DSM/ILA/103/21 before the Commission for

Mediation and Arbitration henceforth CMA at Ilala alleging that reasons for termination of her employment was not communicated to her and that fair procedures of termination of her employment were not adhered to. Being out of time, Applicant also filed an application for condonation (CMA F2) supported by her an affidavit she affirmed on the same date before Alfred David Shanyangi. In her affidavit, Applicant deponed that the moment she received termination letter on 20th November 2020, she fell sick and became unconscious. That, due to that, she looked for tradition treatment from various Afro-chemistry healers for a long time without getting hope of recovery and finally she was neither able to make rational decisions nor moving from one point to the other. She deponed further that she recovered on 3rd May 2021.

On 28th May 2021, the Respondent filed a counter affidavit affirmed by Mussa Lilombo, her member of Governance Board. In the said counter affidavit, Mr. Lilombo deponed that the one-year fixed term contract of the Applicant came to an end automatically on 31st December 2020 and that, there was no termination and attached the said fixed term contract to that effect. He deponed further that on 20th November 2020, Applicant was served with a non-renewal notice. That,

on various dates, Applicant and her counsel, wrote a letter demanding to be paid TZS437,038.12 that were deducted from her salary as tax (P.A.Y.E) and that Applicant and her counsel were making follow up to the office of the Respondent. He attached the letter with those claims.

On 1st July 2021, Applicant filed a supplementary affidavit stating that, prior to termination of her employment, she encountered a series of critical human challenges that affected her psychologically and lost focus and dealing of life. She stated further that, on 10th November 2020 her beloved son Bushra Kibwana Mganga died in the fire accident that occurred at their home burning their house to the ground. That, termination of her employment on 20th November 2020, ten days after death of her child, made her to be technically totally baffled, suffered mental disorder and that her whole body was burning, full of psychological ding-dong unable to do anything. In the same affidavit, she stated that, she approached Mohamed Jafari Kinawilo a renown local medical doctor at Mlandizi for treatment. She attached her affidavit to prove death of her son and the affidavit of the said Mohamed Jafari Kinawilo. Respondent responded by filing a supplementary counter affidavit.

After hearing submissions of both sides, on 27th August 2021, Hon. Fungo E.J, Arbitrator, delivered a ruling dismissing the application for condonation that Applicant failed to adduced cause for the delay and that there was no proof that she was sick.

Aggrieved by the said ruling, Applicant filed this application imploring the court to revise it. In support of the Notice of Application, Applicant filed the affidavit sworn by Ferdinand Makore, her learned Advocate. The affidavit in support of the application raised the following grounds: -

- a) That, Honourable arbitrator erred in law and facts in holding that the applicant did not produce Medical Certificate to prove her case. While in proof of sickness to those who did not attend to hospital but attended to local medica doctors, proof of affidavit is sufficient according to the law.*
- b) That, Honourable arbitrator erred in law and facts in holding that the applicant has no overwhelming chances of winning the case. Yet the matter at hand was an application for condonation and not otherwise.*
- c) Failed to consider the death of the applicant's son together with electricity incidence which lead to house exhaustion while the proof of the same was given through an affidavit of death which also indicated the cause of death.*

In opposing the application, Respondent filed the counter affidavit affirmed by Mussa Rashidi Lilombo.

On the date of hearing the application, Applicant was represented by Mr. Ferdinand Makore, Advocate, while the Respondent was represented by Mussa Rashid Lilombo, her director.

Mr. Makore, learned counsel for the Applicant argued ground (a) and (c) together submitting that the arbitrator erred in law and facts in holding that Applicant did not produce medical certificate to prove her case and that arbitrator failed to consider death of the Applicant's son together with electricity incident. He submitted further that, Applicant did not file medical certificate and the arbitrator based on that failure to dismiss the application for condonation. He went on that the Arbitrator noted that the Applicant accounted for the delay but that failed to produce medical certificate. He insisted that Applicant fell unconsciousness i.e., Insane but was not treated at a registered hospital rather, she was treated by a traditional doctor. Counsel submitted further that Applicant fell sick on 07th December 2021 and that the cause of action arose on 20th November 2020. Mr. Makore submitted further that, Applicant became psychological sick and was treated by a traditional doctor, which is why, she failed to produce medical report but attached an affidavit of the traditional doctor to that effect. Counsel for

the Applicant submitted further that Applicant's house was burnt on 10th November 2020 leading to death of her child. Counsel went on that no burial permit was attached but only affidavit of the Applicant. Counsel for the Applicant cited the case of ***Abdallah Ngenya v. Amina Luluba***, Misc. Civil Application No. 546 of 2017 HC (unreported) to support his submission that an affidavit of a traditional doctor is a sufficient proof that a person was treated by a traditional doctor.

Mr. Makore submitted further that the arbitrator erred to hold that applicant had no overwhelming chance of success because in so holding, the Arbitrator determined the application prematurely. In his submissions, counsel for the Applicant conceded that under Rule 11(3)(c) of the Labour Institutions (Mediation and arbitration) Rules, GN. No. 64 of 2007 the Arbitrator is supposed to consider *inter-alia* prosperity of success of the reliefs prayed in the dispute. Mr. Makore, counsel for the Applicant maintained that there were good grounds for the delay and prayed that the application be granted.

Mr. Lilombo for the respondent submitted that, on 20th November 2020 Applicant was not terminated, rather, was served with a notice of non-renewal of the contract because the contract was ending on 31st

December 2020. He submitted further that Applicant worked up to the end of contract and was paid her salary.

Mr. Lilombo went to submit that, Applicant failed to account for the delay from 20th November 2020 to 07th December 2020. He submitted further that in paragraph 13 of the supplementary affidavit Applicant stated that she fell sick on 07th January 2021 and was discharged on 07th April 2021, but She failed also to account for each day of the delay from 07th April 2021 to 12th May 2021 when she filed the dispute. On failure to account for each day of delay, Mr. Lilombo cited the case of ***Julius Francis Kessy & 2 Others v. Tanzania Commission for Science and Technology***, Civil Appl. No. 59/17 of 2018 and ***Joseph Paul Kyauka Njau & Another v. Emanuel Paul Kyauka Njau & Another***, Civil Appl. No. 7/05 of 2016 CAT (unreported) to bolster his point that Applicant was supposed to account each day of the delay.

Mr. Lilombo submitted further that, on 09th April 2021, Mr. Makore, Advocate for the applicant wrote a letter praying Applicant to be refunded money deducted as tax (P.A.Y.E) and that there was exchange of letters explaining why the money cannot be repaid. He went on that,

there are no reasons advanced as to why applicant failed to file the dispute in time. He cited the case of ***Charles Mkoloma v. The Minister for Labour & 3 Others***, Civil Application No. 59 of 2003, CAT (unreported) imploring the court to reject the claim of sickness advanced by the Applicant.

On the 2nd ground, Mr. Lilombo submitted that, the arbitrator did not error because possibility of success was raised by the Applicant. He concluded by praying the application be dismissed.

In rejoinder, Mr. Makore, learned counsel for the Applicant reiterated his submissions in chief and submitted further that the contract of the Applicant was coming to an end on 31st December 2020 and that Applicant fell sick on 07th December 2020. He however conceded that sickness of the Applicant did not affect end of contract. Counsel insisted that after discharge, Applicant took time to seek legal advice and that Applicant accounted for the delay.

I have carefully examined the affidavit and counter affidavit that were filed at CMA in support and opposition of the application for condonation, affidavit and counter affidavit submitted in support and opposition of this revision application and submissions made thereto and

find that the main reason that was advanced by the Applicant for the delay is sickness. Before I decide whether there was good cause for the delay or not, I find it opportune to state that in an application for condonation like any application for extension of time, judicial officers are called to exercise their judicial discretion either to grant the application or not. That discretion must be exercised judiciously as it was held by the Court of Appeal in case of ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil Application No. 12 of 2015*** (unreported) wherein the Court of Appeal held: -

*"An application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court **based on what is fair, under the circumstances and guided by the rules and principles of law ..."***

It is a trite law that in any application for extension of time the applicant must adduce sufficient cause for the delay and must account for each day of the delay. In fact, there are a litany of cases to that effect, some of them are ***Julius's case, (supra), Joseph's case (supra)*** cited on behalf of the respondent, ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young***

Women's Christian Association of Tanzania, Civil Application No.2 of 2010 (unreported) and ***Bushiri Hassan v. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007(unreported)to mention but a few. In ***Mashayo's case*** (supra) the Court of Appeal held that: -

"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

In the matter at hand, Applicant filed a complaint at CMA alleging that she was unfairly terminated. In terms of Rule 10(1) of the Labour Institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007 a complaint relating to fairness of termination must be filed within 30 days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate. In the application at hand, Applicant indicated in both CMA F1 and CMA F.2 the cause of action arose on 20th November 2020 but filed the complaint before CMA on 12th May 2021, having delayed for more than five (5) months.

In her affidavit and supplementary affidavit filed at CMA, Applicant gave two reasons for the delay namely (i) death of her child after her house was burnt down by fire and that (ii) she was unconsciously sick.

In my view, death of Applicant's child and fire incidence at her home has nothing to do with the delay of filing the complaint at CMA. I am of that view because, in her affidavit, Applicant deponed that fire incidence that led to death of her child occurred on 10th November 2020 before the alleged termination of her employment. I therefore reject that ground.

On the second reason, Applicant stated that the moment she received termination letter on 20th November 2020 she fell sick and became unconscious, technically totally baffled, suffered mental disorder and that her whole body was burning, full of psychological ding-dong unable to do anything. In the same affidavit she stated that she approached Mohamed Jafari Kinawilo a renown local medical doctor at Mlandizi for treatment. In his affidavit, Mohamed Jafari Kinawilo attached to the supplementary affidavit filed by the Applicant on 12th May 2021, he stated in part that: -

*"2. That, on 7th day of December, 2020 I received the serious patient one Zakia Said Masisa, **crying and unconscious** who was suffering from unknown disease, whom I spent almost five months for her treatment and she finally got hope of recovery on 7th April, 2021.*

3. that, on the same material day of 7th April, 2021, I discharged my patient and accompanied (sic) her a number of local medicines for her further treatment."

It is my view that in his affidavit, Mr. Mohamed Jafari Kinawilo gave implausible story and exhibited an intention to lie. I am of that conclusion because in no way a person who is unconscious can be crying. Not only Mr. Kinawilo but also, in her affidavit, Applicant did the same when she stated that she fell sick unconscious but with that unconsciousness she went to see Mr. Kinawilo for treatment. Applicant did not state that she was taken to Mr. Kinawilo but she went to Mr. Kinawilo. The issue is how did she manage to go to Mr. Kinawilo while she was unconscious. This is unbelievable. In my view, a person with a "mental disorder" as Applicant stated she cannot present herself before someone for treatment. Again, Applicant deponed that she was full of psychological ding-dong unable to do anything. The two affidavits are evidence that Applicant relied upon to prove the cause for the delay. In that case, both the Applicant and Mohamed Jafar Kinawilo were witnesses. The arbitrator disbelieved that evidence which is why the application for condonation was dismissed. Guided by the holding of the Court of Appeal in the case of ***Patrick s/o Sanga v. The Republic***, Criminal Appeal No. 213 of 2008, (unreported) I find that their evidence were full of exaggeration than real facts and were intended to lie. In fact, in ***Sanga's case*** (supra, the Court of Appeal held that: -

"...To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc...".

Apart from improbable evidence given in the affidavits filed at CMA in support of the application, Applicant did not account for each day of the 35 days of the delay from 7th April 2021, the day she alleged she was discharged by the said Mohamed Jafar Kinawilo, the traditional doctor to 12th May 2021, when she filed the complaint and an application for condonation. This alone was sufficient reason for the Arbitrator to dismiss the application.

It was submitted by counsel for the Applicant that the Arbitrator erred to hold that Applicant had no overwhelming chance of success because in so holding, the Arbitrator determined the application prematurely. In my view, that ground is also bound to fail, as conceded by counsel for the Applicant that under Rule 11(3)(c) of the Labour Institutions (Mediation and arbitration) Rules, GN. No. 64 of 2007 the Arbitrator is supposed to consider *inter-alia* prosperity of success of the

reliefs prayed in the dispute. I see nothing improper for the arbitrator to hold that there was no possibility of the Applicant to succeed in the intended complaint considering the circumstances of this application and further that counsel for the Applicant invited the arbitrator to grant the application on ground that there was overwhelming chance of success.

For all what I have stated hereinabove, I uphold the CMA ruling and dismiss this application for being devoid of merit.

Dated at Dar es Salaam this 27th June 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 27th day of June 2022 in the presence of Mussa Lilombo, Director of the Respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE