IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 429 OF 2020

VICTORIA SERVICES STATION LTD..... APPLICANT

VERSUS

MARY MICHAEL KIDA .....RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Kinondoni)

(Massay : Arbitrator)

dated 25th September 2020

in

REF: NO. CMA/DSM/KIN/926/18/327

JUDGEMENT

15th February & 9th March 2022

Rwizile J.

In this application, the applicant is urging the court to examine and set aside the decision of the Commission for Mediation and Arbitration (The Commission) in labour dispute No. CMA/DSM/KIN/926/18/327 delivered on 25th September, 2020.

The application has it that the respondent was employed by the applicant as a pump attendant in 2011. She worked until 10th August 2018 when she officially resigned from employment. She was paid her

dues on 13th August 2018. On 14th August 2018, she wrote a demand notice to the applicant claiming compensation for unfair termination. She filed a dispute at the Commission. After the trial, the award was in favour of the respondent. Dissatisfied with the findings of the commission, the applicant filed this application. In the affidavit sworn by Lameck Harold Matemba principal officer of the applicant, five issues were raised in the following terms;

i. *Whether it was just and fair for the arbitrator to raise Suo Moto the issue of constructive termination and base his decision therefrom without calling upon the parties to address him on the issue.*

ii. *Whether it was lawful for the arbitrator to admit secondary evidence as exhibit without notice and base his finding upon the same.*

iii. *Whether the award issued was proper and competent according to the law.*

iv. *Whether it was just and fair for the arbitrator to confirm that there was constructive termination without any proof.*

v. *Whether it was just and fair for the arbitrator to grant 60 months' salary compensation without advancing any reason.*

The application was argued by way of written submissions. Before this court the applicant was represented by Mr. Francis M. Mwita, learned Advocate whereas Mr. Alex Kaaya, learned Advocate was for the respondent.

Mr. Mwita, submitted that the arbitrator erred by considering the allegations of the respondent without corroborating evidence. That it was only hearsay and rumours. He said further, the rumours were that the respondent had sexual relationship with the boss. He submitted that, it was alleged, she had bewitched the boss and that she was the cause of miscarriage of many female staff. It was said, the respondent was seen as a problem at the office and hence she decided to resign from employment. This was construed by the commission that life was made intolerable leading to resignation.

The learned counsel submitted that the arbitrator relied on the evidence which were not corroborated by documents. He stated that constructive termination was based on allegation of assault, harassment and gun threats. He stated further that, these allegations are very serious but were not reported to any police station as no proof has been brought at

the Commission. But still, the arbitrator confirmed that there were intolerable working conditions for the respondent.

Mr. Mwita further stated that the respondent after receiving her terminal benefits wrote a demand notice. This proves that she did not go to the police station to report as the demand note was for negotiation of TZS. 614,625,000.00 which were claimed as compensation. In the view of Mr. Mwita this proves that there was no constructive termination. So, for him the award is a nullity.

He continued to submit, that the arbitrator raised the issue of constructive termination suo moto without inviting parties to address the same. Also, it was added that at the hearing, the respondent was the one who commenced the proceedings. He emphasized that it was against Rule 24(3) of the Labour Institution (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007.

It was the view of Mr. Mwita that parties were not given right to be heard contrary to Rule 7(3) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. To support his point, he cited the case of **M/S Flycatcher Safaris Ltd v. Hon. Ministry for Lands Settlements Development and Another**, Civil Appeal No.

142 of 2017 (CAT) Arusha (unreported). This, he concluded renders the proceeding fatal for denying parties right to be heard.

Further, on the other point Mr. Mwita stated that the arbitrator awarded terminal benefits due to constructive termination when admitting the letter as evidence. The said latter was hand written by the respondent, basing on hearsay. In his view, its admission was unjustifiable.

Mr. Mwita stated as well that the award is supposed to be based on exhibits and arguments of the parties. By the arbitrator formulating his own reasoning, the award is not proper and according to the law. He prays for the court to peruse the evidence tendered.

The learned counsel was clear as well that the arbitrator acted beyond his powers by awarding the respondent of TZS 15,000,000.00, without testing the criminality attached to it. He was of the view that, the arbitrator had no jurisdiction to hear the matter as they are offences provided under the Penal Code (CAP. 16 R.E. 2019).

In opposing, Mr. Kaaya submitted that, the commission granted constructive termination to the respondent due to unfair acts done to her by the applicant. He argued the duty of this court is to examine if there is sufficient reasons that justify the respondent's allegations. Mr.

Kaaya continued to state that, what was alleged was also proved at the hearing. In the view of Mr. Kaaya, the person mentioned to do such acts did not appear to refute the same before the Commission. That person, he added, made the respondent's employment intolerable and unbearable and so constitutes constructive termination.

Mr. Kaaya further argued that, constructive termination was an issue pleaded in CMA Form No. 1. The allegations that the applicant was denied a right to be heard does not hold. He then stated that, the award in the eyes of law was properly obtained. That the evidence was adduced before the commission by both parties. He therefore said, the requirement of Rule 27(1)(2)(3)(a)(b)(c)(d)(e) and (f) of GN No. 65 of 2007, were complied with.

The learned advocate stated that by the arbitrator granting 36 months of compensation, is a matter of discretion. In support, he cited the case of **Anna Mbakile v DED Geita**, Labour Revision No. 113 of 2019, HC Mwanza (unreported), and Rule 7(1) of the Code of Good Practice G.N. No. 42 of 2007, which provides: -

> *"(1) Where the employer makes an employment intolerable which may result to the resignation of the employee, that resignation amounts to forced resignation or constructive termination"*

The counsel held the firm view that acts done by the employer fall under Labour Laws and not Penal Code.

Finally, the learned Advocate stated that the respondent will be prejudice if application is granted. He added that, the award was procured following all requirements of the Labour Laws. The arbitrator had full jurisdiction to entertain the matter. He therefore prays for this court to dismiss the entire revision for being devoid of merit.

In a rejoinder, Mr. Mwita submitted that the CMA Form No. 1 does not disclose the alleged accused person, rather the employer who is the applicant. That exhibit P2 is not mentioned in the award. That, exhibits D1 and D4 even though they were admitted but were not considered in the award. Further, he stated that the case of **Anna Mbakile** (supra) is the decision of the High Court hence not binding on this court. He prayed for the application to be allowed.

After considering the parties submissions, records of the Commission, exhibits as well as the relevant law, I find the court is called upon to determine, grounds raised are in the following issues; *whether there was a constructive termination* and *to what reliefs are the parties entitled.*

Before determining the main issue, I have to comment that, it is the duty of the employer to prove that termination was fair in accordance with section 37 of the Employment and Labour Relations Act and Rule 24(3) of G.N. No. 67 of 2007.

To start dealing with the main issue as I have shown before. Having gone through the award, parties' submission and proceedings of the Commission, it is important to note that the award based on the evidence that there were physical assaults made by the director of the applicant. By interpretation, constructive termination was stated in the evidence of the parties. It is not true that it was an issue that was raised in the award. To fortify this finding, the commission held, that since there physical assaults and the person accused was not called to refute it, then it was not controverted. The extract at page 6-7 of the award reads as follows: -

> *"The respondent director who was accused of physically assaulting the complainant however never appeared before this Commission to contradict the complainant's version. No reason was set forth as to why the said director could not appear before this commission. It follows therefore the complainant narrations of being physically assaulted and harassed was never effectively disputed by the*

respondent. On the evidence on record which has been taken with caution by this Commission I am inclined to accept that the complainant was physically assaulted harassed being verbally abused the circumstance which warrant forced resignation/summary termination of employment within the meaning alluded under Rule 6(4) and 7(1) of the code of Good Practice as the respondent created intolerable working condition to the complainant."

The learned advocate for the respondent, stated that the unfair acts alleged done to his client were as follows: -

i. *That there were rumours circulating that she was having sexual relation with the boss*

ii. *That she must have bewitched the boss as she is from Tanga region*

iii. *That the staff were told by the pastor that, their miscarriages were caused by her*

iv. *That she was assaulted physically and was undressed*

v. *That she was told that she will be terminated*

vi. *That the boss took a gun and pointed to her head, threatening to kill her*

To him, those were the intolerable conditions as stated by the respondent, the court found it was better to see also the intolerable conditions provided by law. These are: -

"Rule 7(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-

(a) Sexual harassment or the failure to protect an employee from sexual harassment and;

(b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

In this matter the court has determined that, the testimony of the respondent and the exhibit P2 are at variance. As the testimony stated that she was physically assaulted. While the exhibit shows that the respondent instituted the said case of assault by being pursued by blood pressure. This means what was stated by the respondent were all just allegations. This is based on exhibit P2 which states: -

"Mimi Mary M. Kida niliyekuwa mfanyakazi wa Victoria filling station makao makuu ambaye nilimfungulia kesi ndugu Elisamehe Matemba. Mimi Mary Kida nikiwa na akili timamu bila ya kushurutishwa na mtu yoyote na kwamba kwa mwandiko wangu nakiri kuandika kwamba nilifungua kesi hiyo police yenye namba KJKI/RB/7079/08 kwa makosa nilishinikizwa kufungua kesi hiyo na shinikizo la moyo kwasababu ya fastration ya moyo kwa kile kilichokuwa kimetokea ila sasa nimetambua Boss Elisamehe amenilea mimi miaka yote nilipokuwa kazini kama mtoto wake na pia kama mkristo niliyeokoka nimeona niachane kabisa na hivi vitu nimemsamehe na pia ninaomba radhi kwa ndugu na Boss Elisamehe Matemba maana ni kama baba yangu maana hata vikombe vikikaa Pamoja havina budi kugongana kwahiyo sitaendelea na kesi ya mchungaji Dominic wala ya Boss Elisamehe. Nimeandika mbele ya mashahidi ndugu engineer Stanley Kitundu na ndugu Tamimu Mwedium."

Not only that, there is also exhibit D1 (Ombi La Kuacha Kazi) dated 10/8/2018 which states: -

"Husika na kichwa cha Habari cha hapo juu. Mimi Mary mfanyakazi wa victoria Service Station ninaomba kuacha kazi katika kampuni

yako kwasababu za matatizo ya kiafya pia napenda kutanguliza shukrani zangu za dhati kwako Boss kwa kunikubali katika kipindi chote nilichoweza kuwa mfanyakazi wako ninaomba msamaha kwa makosa yote yaliyowahi kujitokeza. Wako mtiifu katika ujenzi wa taifa."

From the foregoing, I agree with the learned advocate for the applicant that the allegations were not proved or corroborated by exhibit P2, which proves otherwise. Exhibit D1 shows it all, that respondent quit the job for health reasons and not for the physical assault as was testified. For that matter, I found this ground to have merit as constructive termination is not proved.

To prove constructive termination, it was the respondent who was cast with the duty to do so. In the case of **Kobil Tanzania Limited v Fabrice Ezaovi,** Civil Appeal No. 134 of 2017 Court of Appeal of Tanzania at Dar es Salaam) that: -

"The onus to prove the existence of intolerability rests squarely upon the shoulders of the employee party. The subjective view of the employee is of no consequence in discharging this onus, as the enquiry to establish whether intolerability exists is always an objective one."

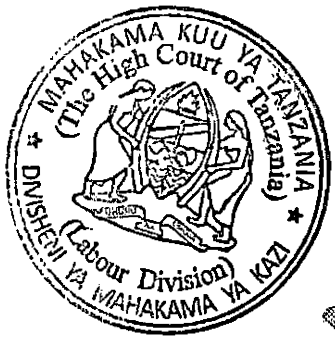
Further, it is also the fact that the wording of the letter of resignation should point out irresistibly to the reasons in that connection. The respondent showed, she was resigning for reasons connected with her health. Otherwise, she had to call evidence to prove she was forced to write the letter in the manner that reflects so.

Again, in the case of **Kobil Tanzania Limited** (supra), more circumstances where constructive termination may occur, were restated thus: -

> *"To recap, we find that the respondent's act of resignation was not one of the last resorts. He did not prove any condition 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, and did not disclose the reason for taking course. His employer, though Mr. Segman was ready to discuss the matter with the respondent but the latter did not give the former the opportunity to remedy the situation. His resignation was thus tendered while there was still room for solving the problem without resignation. Constructive dismissal was not proved."*

From the foregoing, it is important therefore to answer the first point in the negative that there was no evidence proving the respondent was forced to resign by making the working conditions intolerable.

On the last issue on the part of reliefs, as it has been found that, there was no constructive termination. I find nothing to award to the respondent. This application for revision is allowed. CMA award is quashed and set aside. No order as to costs.



A.K. Rwizile

JUDGE

09.03.2022