

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DARES SALAAM

REVISION NO. 267 OF 2021

(Originating from labour dispute No. CMA/DSM/ILA/856/2020 from the Commission for Mediation and arbitration of Dar es Salaam)

BETWEEN

NGARIBA OMARI NGARIBA..... APPLICANT

VERSUS

RAWASI SECURITY LIMITED.....RESPONDENT

JUDGMENT

K.T.R Mteule, J

16 August 2022 and 30th August 2022

The Applicant filed this Application under Section 91(1) (a), (b), 91(2) (a), (b), 91 (4) (a) (b), 94(1) (b)i) of the Employment and Labour Relation Act, Cap 366 R.E. 2019 and Rule 24(1) and (2)(a), (b), (c), (d), (e),(f), (3) (a), (b), (c), (d), 11 and 28(1) (a), (b), (c), (e) of the Labour Court Rules, G.N No. 107 of 2007. The application is seeking for this Court to revise quash and set aside the award issued by Commission for Mediation and Arbitration of Dar es salaam Ilala in Labour Dispute No. CMA/DSM/ILA/856/2020 by Hon. Mbena, Arbitrator.

The Application is supported by Applicant's affidavit, in which the following grounds of Application have been raised: -

- (i) Whether or not the Honourable Arbitrator was proper to disregard the Applicant's evidence adduced and exhibits so tendered during hearing.
- (ii) Whether or not the Honourable Arbitrator erred in law and fact by holding that the Applicant terminated himself.

The brief facts of the matter are that the Applicant was employed by the Respondent as a security guard from 5th May 2018 at a monthly salary of TZS 130,000 per month. A theft occurred in the Respondent work premises where the Applicant was implicated. He was arrested, detained and charged with criminal offence concerning the incident. He was convicted by the Primary Court and sentenced to community service with payment of TZS 3,000,000.

On Appeal in the District Court, the Applicant was acquitted hence wrote to the Respondent requesting to return back to work. The arrest took place on 4 February 2020 and the Appeal in the district court acquitted him on 29th September 2020 while the letter to request reinstatement was written on 12th October 2020 which is about 6 months where the Applicant was not in office. In his affidavit, the Applicant stated that he was told by the police not to go to the office as he may interfere with the investigation.

Feeling that he was unfairly terminated, the Respondent filed a complaint in the **Labour Dispute No. CMA/DSM/ILA/856/2020** in the the Commission for Mediation and arbitration of Dar es Salaam (CMA) claiming unfair termination and payment of 24 months compensation and notice in lieu of termination, one month leave payment, twelve months unpaid salaries and certificate of service.

The arbitrator found no sufficient evidence to prove that the Applicant was terminated from the work and dismissed the Application. Being dissatisfied with the decision, the Applicant lodged this revision application challenging the CMA award.

The Application was heard by a way of written submissions where the Applicant was represented by a personal representative Mr. Sadock George Mkunzi while the Respondent is under the representation of Mr. Titus Aron Advocate from Team Attorneys.

In his submission, Mr. Sadock submitted that the ruling and award of Hon. Arbitrator delivered on 28th May 2021 shows that the Applicant was unfairly terminated by the Respondent. It is Mr. Sadock's submission that the Hon. Arbitrator erred in law and fact to hold that the Applicant terminated himself without considering the evidence adduced by DW1 who testified that the Applicant was terminated by the

Respondent. He cited page 6 paragraph 1 of the award to indicate the said evidence.

According to Mr. Sadock, the Arbitrator ignored the evidence of DW1 which indicates that the Applicant was under police custody from 4th February 2020 with prohibition to go to the workplace while on bail where he could destroy investigation.

According to Mr. Sadock, the Applicant's termination was unfair both substantive and procedural for the Respondent failed to follow the proper procedures during suspension since the Applicant was required to be suspended on full remuneration in accordance with **Rule 27(1) of the Employment and Labour Relations (Code of Good Practice) G.N No.42/2007** which provides that;

"Where there are serious allegations of misconduct or incapacity, an employer may suspend employee on full remuneration whilst the allegations are investigated and pending further action."

Citing section 37 (5) of the Employment and Labour Relation Act, Cap 366 R.E 2019 read together with **Rule 27(5) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42/2007**, Mr. Sadock is of the view that this provision prohibits the Respondent from terminating the Applicant who has been charged with

a criminal offence until final determination by the Court and any appeal thereto.

In his view, the Hon. Arbitrator failed to analyse the evidence adduced by the Applicant and based on the evidence adduced by DW1 and DW2 which was supporting the Applicant's evidences. Mr. Sadock is suggesting for the court to consider the absence of the Applicant as a suspension where all his salaries ought to have been paid.

In response to the Applicant's submissions, the Respondent the Respondent's Counsel Mr. Titus Aron refuted any prove that the Applicant was ever terminated by the Respondent. He challenged the allegation that he was prohibited by the police and the respondent to go back to work since the same was not raised in the CMA. In his view, the arbitrator properly analysed the evidence of the parties and found the Applicants allegation about termination not proved. He disputed the fact that the Applicant was ever suspended by the Respondent. The Respondent cited the case of **Asanterabi Mkonyi versus Tanesco** (Civil Appeal No 53 of 2019) Court of Appeal of Tanzania page 5 and the case **Iman Moris Mziranzinza versus I Can go on Plus Company Limited** (Revision No. 364 of 2019 page 9).

The Applicant's representative filed a rejoinder which is considered in this Judgment.

Having considered the submissions of the parties, the epicentre of the dispute is whether the Applicant was terminated from the employment.

The arbitrator found no evidence of termination. Although the Applicant's representative insists that there is sufficient evidence to prove termination, I could not find one. Even in his affidavit, the Applicant sworn that while under police custody, the police prohibited him from entering the work premise before the completion of investigation. But the same affidavit shows that by 25th February, investigation had already completed but no statement as to why he did not resume to work thereafter. It was on this ground the arbitrator considered the applicant's absence from work as an abscondence and self-termination.

I have the same view, the applicant's absence constituted abscondence and there is a good number of case laws which treats abscondence as a self-termination. One of the cases is the one cited by the Respondent's counsel, the case of **Asanterabi versus Tanesco**, Civil Appeal No 53, CAT (unreported).

Having been no evidence of termination, the arbitrator was correct in dismissing the application since what was sought in the CMA could only be awarded upon finding a termination which is unfair. From the foregoing, I see no reason to differ with the arbitrator's findings. Equally this application for revision is dismissed for want of merit.



KATARINA REVOCATI MTEULE

JUDGE

30/08/2022



Labour Court